



**FMLA UPDATE
NEW REGULATIONS
NEW RULES**

James C. Hetlage

Attorney at Law

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FMLA UPDATE

- Family and Medical Leave Act
 - Adopted in 1993
 - Military Caregiver Leave Rights in 2008
 - Department of Labor issued final regulations interpreting the FMLA on November 18, 2008
Effective January 2009
 - National Defense Authorization Act for Fiscal Year 2010



IMPORTANT CHANGES FOR SCHOOL DISTRICTS

- Family Military Leave
- Eligibility Changes
- Larger Increments for Intermittent Leave
- Substitution of Compensatory Time
- Disqualification from Perfect Attendance Bonuses



IMPORTANT CHANGES FOR SCHOOL DISTRICTS

- Earlier Fitness-For-Duty Decisions
- Retroactive Designation of FMLA Leave Recognized
- New Notice and Certification Forms
- Time to Issue Leave Notices



NON-MILITARY FMLA LEAVES

- **Definitions**
- **Serious Health Condition:** The definition in the Act was clarified.
 - The “incapacity” must be for more than three full consecutive calendar days AND EITHER a) include 2 in-person visits with a healthcare provider OR b) 1 in-person visit with a healthcare provider with a regimen of continuing treatment.
 - The in-person visits to the healthcare provider must be within 7 days of the onset of the leave.
- **Chronic Condition:** To qualify for a FMLA leave for a chronic condition, the employee must continue to visit his/her healthcare provider at least twice per year. These 2 visits can be 2 days in a row.
- **Healthcare Provider:** Physicians Assistants were added as a qualifying provider.
- **Needed to Care For:** Does NOT require that the employee be the only person available to provide care. Care includes psychological care, so no actual care is required, and the employee’s mere presence for psychological comfort or reassurance alone is sufficient.



NON-MILITARY FMLA LEAVES

- Eligibility
- Calculation of the 1,250 work hours required for eligibility:
 - You do not have to count the time an employee was out on a previous leave toward the 1,250 hours calculation if the previous absence was for a different condition unless it was a National Guard or Reserve military leave (the employee was actually on leave to serve).
 - You do not have to count any service before a service break of 7 years or more UNLESS a) the break was for a National Guard or Reserve military leave or b) the employer agreed in writing to re-hire the person after the break in service.
- An employee can become eligible for FMLA while on a non-FMLA leave, at which point FMLA leave could kick in.



NON-MILITARY FMLA LEAVES

- Calculation of Leave Used
 - Minimum Increments
 - For paid leaves
 - Overtime
 - Light Duty Work



NON-MILITARY FMLA LEAVES

- Employee Notice Obligations

- Must provide at least 30 days' advance notice or as much notice as "practicable", which the new regulations indicate should be either the same day or the next business day.
- The notice can be oral/verbal UNLESS the employer's usual and customary call-in procedures require written notice/explanation.
- An employee requiring FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances.
- The first time the employee needs FMLA leave, he/she does not have to specifically refer to the FMLA.



NON-MILITARY FMLA LEAVES

- Employer Notice Obligations

- **Four mandatory notices an employer is obligated to provide:**

- General Notice of FMLA Rights.
- Eligibility Notice.
- Rights & Responsibilities Notice.
- Designation Notice.



NON-MILITARY FMLA LEAVES

- **Medical Certifications and Re-Certifications**

- **Initial Medical Certification**

- There are now two different forms being recommended by the DOL – one for the employee’s own serious health condition and the other for a family member’s serious health condition.
- The appropriate Certification Form must be provided to the employee with the Eligibility and Rights & Responsibilities Notice
- The employer must allow the employee 15 calendar days to return the completed Certification

- **Recertification**

- **Fitness-for-Duty Certification**



NON-MILITARY FMLA LEAVES

- **Intermittent Leave**

- The healthcare provider must state that it is medically necessary and must explain why.
- The employee must make a reasonable effort to schedule treatments so as not to unduly disrupt the employer’s operations.
- A new certification may be requested each leave year, and the employer may request recertification every 6 months in conjunction with an absence OR if there is a “significant change in circumstances”.
- The employer may transfer an employee on intermittent leave to another job only if the leave is foreseeable and for planned medical treatment. Transfer to another job is not permitted for unforeseeable leaves, such as an unscheduled intermittent leave for a chronic condition.



NON-MILITARY FMLA LEAVES

- **Special Rules for Intermittent Leave in Schools**
 - Where a teacher who is principally employed in an instructional capacity requests intermittent FMLA leave or FMLA leave on a reduced work schedule, and where the teacher would be on FMLA leave for more than twenty percent (20%) of the total number of working days over the period during which the FMLA leave would extend, such teacher must elect either to:
 - take FMLA leave for a period or periods of a particular duration, not greater than the duration of the planned medical treatment; or
 - transfer temporarily to an available alternative position (if any) offered by the Board for which the teacher is qualified, as long as the alternate position has equivalent pay and benefits and the Board has determined that this alternate position better accommodates recurring periods of leave than the regular employment position of the teacher



NON-MILITARY FMLA LEAVES

- **Leave at the End of the School Year**
 - If a teacher begins any unpaid FMLA leave more than five (5) weeks prior to the end of a semester, the Board may require the teacher continue taking leave until the end of the semester, if:
 - the leave is of at least three (3) weeks duration, and
 - the return to employment would occur during the three (3) week period before the end of the semester.
 - If a teacher begins unpaid FMLA leave for purposes of the birth or placement of a child or in order to care for a spouse, child or parent during the period that commences five (5) weeks prior to the end of the semester, the Board may require the teacher to continue taking unpaid FMLA leave until the end of the semester, if:
 - the unpaid FMLA leave is of greater than two (2) weeks duration, and
 - the return to employment would occur during the two-week period before the end of the semester.



NON-MILITARY FMLA LEAVES

- **Leave at the End of the School Year (Cont.)**
- If a teacher begins unpaid FMLA leave because of the birth or placement of a child or in order to care for a spouse, child for a serious medical condition during the period that commences three (3) weeks prior to the end of the semester and the duration of the unpaid FMLA leave is greater than five (5) working days, the Board may require the teacher to continue to take leave until the end of the semester.
- When a teacher is required to take leave until the end of a semester and the teacher's leave entitlement under unpaid FMLA ends before the involuntary leave period is completed, the Board is required to maintain health benefits and must restore the teacher and provide other FMLA entitlements when the period of leave ends.



NON-MILITARY FMLA LEAVES

- **Substitution of Paid Leave**
 - An employer may require exhaustion of paid leave.
 - Must give the employee written notice of the requirement to use PTO or of the right to choose PTO or unpaid FMLA leave.
- But, the employer may only enforce its normal rules for use of any paid time off if the employees are given an option to use PTO during a FMLA leave. If use of PTO is mandated, the employer must follow the FMLA rules.
- Holidays. If a holiday falls within a FMLA leave week, the full week is counted as FMLA. But, if it is FMLA leave of less than a week, the holiday does not count against the employee's 12-week entitlement unless the employee would otherwise have been scheduled and expected to work on the holiday.



NON-MILITARY FMLA LEAVES

- **Miscellaneous**
- Pre-Natal Care by Non-Spouse.
The father of an unborn child who is NOT the spouse of the mother-to-be is NOT eligible for FMLA leave to provide pre-natal care to the mother-to-be.
- Perfect Attendance Bonus.
An employer does NOT have to give an employee who used FMLA leave a perfect attendance bonus as long as all other employees with similar non-FMLA leaves are treated the same. Examples: If an employee who used PTO for a non-FMLA absence is eligible for the bonus, then an employee who used PTO for a FMLA leave must also be eligible. If an employee who took a non-FMLA unpaid leave is not eligible, then an employee who took an unpaid FMLA leave may also be ineligible.
- Waiver of Rights.
An employee may waive, settle and/or release his/her FMLA rights. This should be acknowledged in writing.
- Disputes.
If an employer and employee have a dispute over FMLA, they are required to have a discussion regarding the dispute, and the discussion must be documented in writing.



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MILITARY FMLA LEAVES

- **Two Types of Military FMLA Leave**
 - **Qualifying Exigency Leave**
 - **Military Caregiver Leave**



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MILITARY FMLA LEAVES

- **Qualifying Exigency Leave**
- Definition of Leave under the 2009 FMLA Regulations.
 - Employee is spouse, parent or child (includes step and foster child, and it is a child **of any age**) of a person in the **National Guard or Reserve** (NOT regular Armed Services) and requires leave due to a qualifying exigency resulting from the family member's active **federal** (not state) military duty.
- Amendment Based on the FY 2010 National Defense Authorization Act.
 - The 2010 NDAA extends FMLA leave for qualifying exigencies to members of the Regular Armed Forces provided that the service member is deployed to a foreign country.



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MILITARY FMLA LEAVES

- There are 8 specific situations the DOL identified as qualifying exigencies. **This is an exclusive list.**
 1. Short-notice deployment (7 days or less)
 2. Military events and related activities
 3. Child care and school activities (must be non-routine and related to the call to duty)
 4. Financial and legal arrangements (must be non-routine and related to the call to duty)
 5. Non-medical counseling (if it's medical, it is regular FMLA)
 6. Rest and recuperation (up to 5 days per instance)
 7. Post-deployment activities (limited to 90 days after end of service period)
 8. Additional activities/events that arise out of the covered military duty



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MILITARY FMLA LEAVES

- Notices and Certifications
 - The same **employer** notices are required as for regular FMLA leave, and generally the same time frames apply.
 - The **employee's** notice requirement is not triggered until the employee first seeks to take the leave (NOT when they become aware of the active duty). The employee is required to give notice as soon as “reasonable and practicable”.
 - The employer may require two different certifications: (1) To certify the active duty (the employer should ask for a copy of the Active Duty Order/Notice), and (2) To certify the qualifying exigency.



MILITARY FMLA LEAVES

- Notices and Certifications (Cont.)
 - In terms of verifying and authenticating the certifications, all the employer can do is ask to see the Active Duty Order/Notice and, if applicable, contact any third party the employee is meeting with (like the counselor, accountant, lawyer, childcare provider)
 - Recertifications are NOT permitted with this type of FMLA leave.



MILITARY FMLA LEAVES

- Miscellaneous
 - The up to 12 weeks of leave can be combined with other FMLA leaves (i.e. the employee is entitled to only 12 weeks **total** of FMLA leave for regular and/or qualifying exigency leave in a 12-month period).
 - The minimum increments and overtime rules are the same for qualifying exigency leave as they are for regular FMLA leave.
 - The employer may require the use of PTO



MILITARY FMLA LEAVES

Military Caregiver Leave

- This leave is to allow an employee who is the spouse, parent, child (includes step and foster child, and it is a child of any age), or next of kin of a service member in the **Regular Armed Services, National Guard, or Reserves** to take **up to 26 weeks** of FMLA leave to care for that service member if/when he/she has incurred a serious injury or illness in the line of duty while on active duty.



MILITARY FMLA LEAVES

- Amount of Leave Time: An employee is entitled to 1 26-week leave in a single 12-month period **per service member per injury**. So, an employee can actually take an unlimited number of these 26-weeks leaves as long as each one is for a different person and/or different injury. It is measured forward from the date an employee first takes caregiver leave.
- Next of Kin: This is defined as the “nearest blood relative”. There is a priority order in the regulations. However, the service member may designate in writing who it is. If there is more than one person equal in priority, ALL those who are equal are eligible.
- Covered Service Member: A current member of the Regular Armed Forces, National Guard, or Reserves and includes those on the temporary disability retired list but NOT those on the permanent disability retired list.



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MILITARY FMLA LEAVES

Notices and Certifications:

- The same **employer** notices are required as for regular FMLA leave, and generally the same time frames apply.
- The **employee's** notice requirements are the same as required for regular FMLA leave – e.g. foreseeable vs. unforeseeable, can be oral, content, etc.
- The employer may require two different types of certification: (1) One for Certification of Military Status and (2) One to certify the service member's serious injury/illness. The DOL includes both certifications on one form.



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MILITARY FMLA LEAVES

Miscellaneous:

- The up to 26 weeks of caregiver leave can be combined with other FMLA leaves, and the **total** for all cannot exceed 26 weeks.
- Employers are not permitted to obtain second or third opinions for this type of leave
- Recertifications are not permitted with this type of FMLA leave
- The minimum increments and overtime rules are the same for caregiver leave as they are for regular FMLA leave
- The employer may require the use of PTO
- This leave can be taken as intermittent leave, and those rules for regular FMLA intermittent leave would then apply



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ADDITIONAL LEAVE UNDER FEDERAL HEALTH CARE LAW

- One of the lesser known provisions of the recently adopted Patient Protection and Affordable Care Act protects nursing mothers. Section 4207 of the Act amends Section 7 of the Fair Labor Standards Act to provide for breaks for female employees to express their milk, and requires employers to provide them with a location other than a restroom in which to do so.
- Specifically, employers are required to provide nursing mothers with reasonable breaks any time that they need to express milk for up to one year after their child's birth. The breaks need not be paid if they occur during working time. In addition, employers are required to provide nursing mothers with a place (other than a restroom) that is shielded from view and free from intrusion in which to express their milk.
- There is an exception for some smaller employers. Employers with 50 or fewer employees need not comply with the provision if its requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
- While the provision does not impact any FMLA rights, it suggests that Congress may be open to expanding leave for childcare responsibilities beyond the 12 weeks of unpaid leave provided under the FMLA to care for a newborn or newly adopted or foster child.



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COMPLIANCE STRATEGIES

- Ensure that HR Departments and individuals responsible for coordinating leaves are trained on the new regulations
- Ensure that the new FMLA policies and procedures are applied consistently
- Ensure that job descriptions are current and complete so that the employer use them constructively for fitness-for-duty exams and leave certification
- Post the current FMLA poster
- Use new FMLA leave forms, certifications and notices
- Manage leave designations carefully



Questions?

James C. Hetlage

Lashly & Baer, P.C.

Phone: (314) 621-2939

E-mail: jhetlage@lashlybaer.com

Website: www.lashlybaer.com

