FMLA Leave for Military Families

Military Caregiver Leave and Qualifying Exigency Leave

In 2007, the Presidential Commission on Care for America’s Returning Wounded Warriors released a report on how to better support service members and military families. The Commission recommended amending the FMLA to provide six months’ leave to FMLA-eligible family members of seriously wounded service members. In response, the National Defense Authorization Act for Fiscal Year 2008 amended the FMLA to include two special military family leave provisions, extending FMLA coverage to families affected by a military deployment:

**Military caregiver leave**: an employee who is the parent, spouse, child, or next of kin of a current service member with a serious illness or injury incurred during active duty may take up to 26 weeks of unpaid leave to care for the service member. Military caregiver leave is limited to family members of current members of the U.S. Armed Forces, including members of the Regular Armed Forces and the National Guard and Reserves.

**Qualifying exigency leave**: an employee who is the parent, spouse, or child of a service member may take up to 12 weeks of unpaid leave for qualifying urgent matters arising from the service member’s deployment. Service members include members of the National Guard or Reserves, or certain retired members of the Regular Armed Forces and retired Reserve. Service members on active duty in the Armed Forces are not considered eligible for qualifying exigency leave.

These amendments took effect in 2009. Notably, the new FMLA provisions allow leave-taking for the families of service members, but not for the service members themselves. Military service members’ own leave for childbirth, to care for a new child or immediate family member, or for their own illness/injury is not covered under the FMLA, but is instead regulated separately by the Department of Defense. Because the legislation did not provide a definition of “qualifying exigency,” during the rulemaking process the Department of Labor (DOL) sought comments on what the definition should be. Some commentators requested that the DOL publish an exhaustive list of reasons that constitute qualifying exigencies to avoid employers having to “interrogate employees regarding the circumstances surrounding their requests for qualifying exigency leave.” On the other hand, the DOL also received comments stating that a set list of qualifying exigencies would not give employers enough flexibility, but that guidelines and examples would be more helpful. With these comments, the DOL outlined a specific and exclusive list of eight categories of qualifying exigency, as follows: (1) Short notice deployment (notice of one week or less), (2) Military events and related activities, (3) Childcare and school activities, (4) Financial and legal arrangements, (5) Counseling, (6) Rest and recuperation, (7) Post-deployment activities, (8) Additional activities agreed to by both employer and employee. The eighth category of “additional activities” was included to provide flexibility for leave under circumstances not included in the other seven categories.

These first amendments to the FMLA created a more inclusive policy that provided job protection to workers with family members who are very prone to serious illness and injury. However, several groups remained excluded by the
amendments. Veterans were not covered under military caregiver leave, and families of active duty members of the Armed Forces were not eligible for qualifying exigency leave. Given that veterans are highly health-vulnerable and that families of active duty service members must also cope with family transitions and last-minute deployment, these exclusions put these families at an inequitable disadvantage. Fortunately, in 2009 the National Defense Authorization Act for Fiscal Year 2010 further amended the FMLA’s military provisions, as follows:

**Military caregiver leave** is expanded to include leave to care for **veterans** receiving medical treatment or therapy or who are recuperating from a serious illness or injury incurred or aggravated during active duty. Family members of veterans are eligible for military caregiver leave if the veteran was a member of the Armed Forces within five years preceding the date of medical treatment. Military caregiver leave is also expanded to include **pre-existing injuries or illnesses** aggravated during active duty for all covered service members, including veterans.

**Qualifying exigency leave** is expanded to employees who are a parent, spouse, or child of a member of the **Regular Armed Forces** and modified to be available only in cases where a service member’s deployment is to a **foreign country**.

The expansion of military caregiver leave to include veterans and to include pre-existing illnesses exacerbated during active duty represents a step towards increasing the equity of the FMLA. These expansions work to include a wider population and also target the families of health-vulnerable service members or veterans.

In addition, during the rulemaking process to incorporate the new amendments into FMLA regulations, the DOL received a comment recommending that eldercare be included as a qualifying exigency. Since arranging care for elderly parents can be a pressing need when a service member is called to duty, the DOL found that this suggestion was valid and subsequently incorporated a new category to the list of qualifying exigencies—parental care—to be used when an elderly parent is incapable of self-care. This change also represents an improvement in the equity of the policy as it considers the well-being of the elderly and improves workers’ ability to care for the parents of military members.

Overall, the military amendments to the FMLA have resulted in increased eligibility for the population and improved job-protected leave rights for military families. Nevertheless, current regulations still leave some families without access to job protected leave. For example, in order to be eligible for a qualifying exigency leave, a worker must be a **qualifying family member** the spouse, child or parent of the service member. Therefore, certain family members, such as aunts, uncles or parents-in-law, are not eligible for qualifying exigency leave even in the case where they might need it; for example, if they serve as a parent (**in loco parentis**) to the child of the service member and need time off to make new child care arrangements due to the service member’s deployment. The possibility of further military family situations without FMLA coverage, as well as the **unpaid nature of FMLA leave**, underscores the need for additional improvements to the FMLA to further equitable access for all service members and their families.

Sources & notes
Congress defined family members eligible for qualifying exigency as those of service members serving under a “call or order to” active duty, but not those of service members already on active duty. In part, this distinction is justified with the logic that “In case of the Regular Armed Forces, those service members are employed by the Federal government itself as a conscious career choice and have accepted the terms and conditions of that employment. In the case of Reservists and the National Guard, those individuals may work elsewhere, but are willing to serve the Federal government if necessary and are willing to allow their lives to be disrupted by a call to active duty. They have not, however, accepted the terms and conditions of employment with the Federal government except as it may be necessary in connection with a call to active duty. It is the unexpected disruption to their lives that appears to be the focus of exigency leave.” Source: Final rule: The Family and Medical Leave Act of 1993. 73 Fed. Reg. (222), 67934 (Nov 17, 2008) (codified at 29 CFR Pt 825), p 67955.

