

Date: January 27, 2010 Code: HR 2010-03
To: CSU Presidents Reference: HR 99-05; HR 2009-11,
and HR/Benefits 2005-24
From: Gail E. Brooks  Vice Chancellor
Human Resources Supersedes: HR 2008-04
Subject: New Changes to Family Medical Leave Act (FMLA) Regulations Expands Military Leave Entitlements

Overview

Audience: Human Resources Directors, Benefits Representatives, or other staff responsible for administering leaves programs

Action Items: Update Family Medical Leave forms, as appropriate

Affected Employee Groups/Units: Eligible employees

Summary

The Department of Labor released updated Family and Medical Leave Act (FMLA) regulations effective January 16, 2009. Amendments to the FMLA regulations under Section 565 of HR 2647: National Defense Authorization Act for Fiscal year 2010, were signed into law by President Obama on October 28, 2009. These amendments expanded the military provisions of FMLA specific to "qualifying exigency leave," and "military caregiver leave."

Campus designees responsible for CSU Leave Administration should review the remaining portions of this HR Policy Memorandum for additional details regarding this leave.

On October 28, 2009, President Obama signed the Fiscal Year 2010 National Defense Authorization Act (see attached Section 565 of the Act), which amended the military family leave provisions under the January 2008 National Defense Authorization Act in addition to the January 2009 Department of Labor (DOL) Family Medical Leave Act regulations.

Please note the following changes that impact Military Family Leave Rights:

Military Exigency Leave (MEL)

Under the 2008 National Defense Authorization Act, employees with family members in the regular Armed Forces were not entitled to Military Exigency Leave. This leave was limited to employees with family members in the National Guard or Reserves who were called to duty under a contingency operation. MEL leave is now expanded to include:

- An employee whose family member is a member of any branch of the military, including the National Guard or Reserves, and is deployed or called to active duty in a foreign country. The requirement that the assignment be part of a contingency operation has been removed.

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The Military Exigency Leave is a 12-workweek entitlement in a 12-month period and is counted against the CSU FML entitlement. The employee is required to exhaust appropriate leave credits prior to going on any unpaid portion of the Military Exigency Leave – CSU FML entitlement.

The following is a recap of the eight categories of exigency leave:

1. **Short Notice Deployment** – to address an issue arising from a covered military member notified of an impending call or order to active duty in support of a contingency operation seven (7) or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for seven (7) calendar days beginning on the date the covered military member is notified of such operation.
2. **Military Events and Related Activities** – to attend any official ceremony, program, or event sponsored by the military related to the active duty or call to active duty status of a covered military member. Also to attend family support assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross related to the active duty or call to active duty of a covered military member.
3. **Childcare and School Activities** – to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates such a change. This leave does not cover routine child care events but is to provide urgent and non-routine child care when the need arises because of the call to duty.
4. **Financial and Legal Arrangements** – to attend to financial or legal arrangements, such as arranging power of attorney, transferring bank accounts, obtaining military identification and addressing benefit issues related to the call-up.
5. **Counseling** – to seek counseling related to the call to duty or active duty.
6. **Rest and Recuperation (R&R) Leave for a Military Member** – Up to five (5) days of leave may be taken by an employee to spend time with a covered military member who is on R&R leave during a period of deployment. The 5 days may be taken by the employee for each period of R&R leave given to the covered military member.
7. **Post-Deployment Activities** – leave may be taken during the 90-day period following a covered military member's termination of active duty to address issues that may arise following deployment, including dealing with the death of a military member or attending arrival ceremonies and reintegration briefings.
8. **Additional Activities** – to address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

Certification for MEL

As part of the certification for MEL, the employer may require the employee to:

- Provide a copy of the covered military member's active duty orders or other documentation issued by the military, and the dates of the active duty service;
- Require that leave be supported by a certification from the employee that provides the following information:
 - Statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested;
 - The approximate date the leave will begin;
 - If the leave is for a single, continuous period of time, the beginning and end dates of the absence;
 - If the leave is for intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and
 - If the leave involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting and a brief description of the purpose of the meeting; and
- Complete the DOL form (WH-384) that meets the FMLA certification requirements.

If the employee submits a complete and sufficient certification to support his/her request for leave, the employer may not request additional information from the employee. However, if the qualifying exigency includes meeting with a third party, the employer may contact the individual/entity to verify a meeting or appointment schedule and the nature of the meeting. The employee's permission to contact the individual/entity is not required, but no additional information may be requested by the employer.

Please note there is no recertification process, and second and third opinions are not permitted.

Service Member Care Leave (SMCL)

Service Member Care Leave provides an eligible employee who is the spouse (including same sex spouses from marriage that occurred between June 4, 2008, and November 4, 2008), registered domestic partner (CSU policy), son, daughter, parent, or "next of kin" of an injured, covered service member with up to 26 workweeks of unpaid leave in a single 12 month period to care for that family member. Again, CSU policy requires the eligible employee to exhaust appropriate leave credits prior to taking unpaid leave.

Please note that federal law **requires** that Service Member Care Leave must begin on the first day the eligible employee takes such leave and ends 12 months from that date. As a reminder, CSU policy calculates the 12 month FML period on a forward rolling basis: the period is measured forward from the date the employee's first FML leave begins, so this requirement is consistent with CSU policy.

Eligible employees are entitled to a combined total of 26 workweeks of Service Member Care Leave and 12 weeks of leave for any other FMLA-qualifying event within a 12 month period.

Covered Service Member

The Service Member Care Leave (SMCL) provision also was enacted under the 2008 National Defense Authorization Act.

Originally, a Covered Service Member under SMCL was limited to members of the regular Armed Forces, or the National Guard or Reserves. However, the Fiscal Year 2010 National Defense Authorization Act now defines a "covered service member" as:

- A member of the Armed Forces (including a member of the National Guard or Reserves), who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or on the temporary disability retired list for a serious injury or illness ; or
- A veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy."

In addition to the definition of "covered service member," the new legislation expanded the scope of the service member's injury or illness that can trigger an employee's request for such leave. New SMCL leave provisions are as follows:

- The definition of "serious injury or illness" now includes a serious illness or injury that may have been incurred in the line of duty on active duty in the Armed Forces, or may have existed prior to the beginning of the service member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces. This language applies to both current and veteran service members.
- In addition to current service members of the regular Armed Forces, or National Guard or Reserves, the Act now allows eligible employees to take leave to care for any former member of the Armed Forces, National Guard or Reserves during the first five years following his or her discharge from military service, if the veteran is undergoing treatment for, or recuperating from, a serious injury or illness that was incurred in the line of duty while on active duty. For veterans, a serious injury or illness may manifest itself before or after the member becomes a veteran. An employee may request such leave within five (5) years of the date that the veteran undergoes covered medical treatment, recuperation or therapy.

Please note: The Covered Service Member is not required to have a "serious health condition" as currently defined in FMLA regulations, but need only have an injury or illness incurred on active military duty that renders him/her unfit to perform the duties of his/her "office, grade, rank or rating."

Next of Kin

DOL has defined "next of kin" as the service member's nearest blood relative, other than the spouse (including same sex spouse through state law or domestic partner through CSU policy), parent, son or daughter, in the following order of priority:

1. Blood relatives who have been granted legal custody of the service member by court decree or statutory provision; or
2. Brothers, sisters, grandparents, aunts, uncles and first cousins, unless the service member has specifically designated, in writing, another blood relative for purposes of this leave.

Certification for SMCL

The DOL has created an optional certification form that employers may use. The certification may be completed by a Department of Defense (DoD) healthcare provider, a Veteran Affairs healthcare provider, a DoD TRICARE authorized provider, or a DOD non-network TRICARE authorized provider.

The final regulations require employers to accept DoD provided "invitational travel orders" (IVOs) or "invitational travel authorizations" (IVAs) in lieu of the optional certification forms as such documents are provided only in the case of severe injury.

In addition, employers may need to ask the following questions to determine an employee's eligibility for military family leave under FMLA:

1. Is the leave request related to a medical condition of the employee's family member?
2. Is the employee requesting a leave to care for a military family member, or a non-military family member?
3. Is the leave request related to the injury or illness of a military family member, or does the leave request fall under "exigency leave?"
4. Is the military family member a current service member? If no, when did the military family member become a veteran?
5. Do the dates of treatment for the military family member meet the criteria of the Fiscal Year 2010 National Defense Act?

General Information

Listed below is a recap of general information regarding SMCL:

- There is no recertification process, and second and third opinions are prohibited;
- The employer is required to continue paid health benefits provided under the CSU FML policy;
- Leave may be taken on an intermittent or reduced schedule basis;
- If the leave is foreseeable, the employee must provide 30 days' prior notice or give notice as soon as practicable; and
- CSU policy provides separate leave entitlements to spouses or domestic partners employed by the CSU.

For additional information on the CSU FML policies, please refer to HR 99-05; HR 2009-11, and HR/Benefits 2005-24. This HR Letter supersedes HR 2008-04.

Please note that where CSU FML policy differs from a collective bargaining agreement (CBA), the CBA governs for that employee group.

Final Regulations, Notices and Resources

The FMLA final regulations and notices may be found at:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>.

CSU campuses should continue to use or follow the information provided in the medical certification created by the Fair Employment and Housing Commission, as referenced in HR 2009-11. The certification may be found at: <http://www.fehc.ca.gov/commission/pdf/health-provider.pdf>.

Questions may be directed to Human Resources Management at (562) 951-4411. This HR memorandum is also available on the Human Resources Management's Web site at: <http://www.calstate.edu/HRAdm/memos.shtml>.

GEB/mh

Attachment

SEC. 565. FAMILY AND MEDICAL LEAVE FOR FAMILY OF SERVICEMEMBERS.

(a) GENERAL REQUIREMENTS FOR LEAVE.—

(1) DEFINITION OF COVERED ACTIVE DUTY.—

(A) DEFINITION.—Section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611) is amended—

(i) by striking paragraph (14) and inserting the following:

“(14) COVERED ACTIVE DUTY.—The term ‘covered active duty’ means—

“(A) in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and

“(B) in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.”; and

(ii) by striking paragraph (15) and redesignating paragraphs (16) through (19) as paragraphs (15) through (18), respectively.

(B) LEAVE.—Section 102 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612) is amended—

(i) in subsection (a)(1)(E)—

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(I) by striking “active duty” each place it appears and inserting “covered active duty”; and

(II) by striking “in support of a contingency operation”; and

(ii) in subsection (e)(3)—

(I) in the paragraph heading, by striking “ACTIVE DUTY” and inserting “COVERED ACTIVE DUTY”;

(II) by striking “active duty” each place it appears and inserting “covered active duty”; and

(III) by striking “in support of a contingency operation”.

(C) CONFORMING AMENDMENT.—Section 103(f) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613(f)) is amended, in the subsection heading, by striking “ACTIVE DUTY” each place it appears and inserting “COVERED ACTIVE DUTY”.

(2) DEFINITION OF COVERED SERVICEMEMBER.—Paragraph

(15) of section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611) (as redesignated by paragraph (1)(A)(ii)) is amended to read as follows:

“(15) COVERED SERVICEMEMBER.—The term ‘covered servicemember’ means—

“(A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or “(B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.”.

(3) DEFINITIONS OF SERIOUS INJURY OR ILLNESS; VETERAN.—

Section 101 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611) is further amended by striking paragraph (18) (as redesignated by paragraph (1)(A)(ii)) and inserting the following:

“(18) SERIOUS INJURY OR ILLNESS.—The term ‘serious injury or illness’—

“(A) in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating; and

“(B) in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (15)(B), means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

“(19) VETERAN.—The term ‘veteran’ has the meaning given the term in section 101 of title 38, United States Code.”.

(4) TECHNICAL AMENDMENT.—Section 102(e)(2)(A) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(e)(2)(A))

is amended by striking “or parent” and inserting “parent, or covered servicemember”.

(5) REGULATIONS.—In prescribing regulations to carry out the amendments made by this subsection, the Secretary of Labor shall consult with the Secretary of Defense and the Secretary of Veterans Affairs, as applicable.

(b) LEAVE FOR CIVIL SERVICE EMPLOYEES.—

(1) EXIGENCY LEAVE FOR SERVICEMEMBERS ON COVERED ACTIVE DUTY.—

(A) DEFINITION.—Section 6381(7) of title 5, United States Code, is amended to read as follows:

“(7) the term ‘covered active duty’ means—

“(A) in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and “(B) in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code;”.

(B) LEAVE.—Section 6382 of title 5, United States Code, is amended—

(i) in subsection (a)(1), by adding at the end the following:

“(E) Because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.”;

(ii) in subsection (b)(1), by inserting after the second sentence the following: “Subject to subsection (e)(3) and section 6383(f), leave under subsection (a)(1)(E) may be taken intermittently or on a reduced leave schedule.”;

(iii) in subsection (d), by striking “or (D)” and inserting “(D), or (E)”;

(iv) in subsection (e), by adding at the end the following:

“(3) In any case in which the necessity for leave under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.”.

(C) CERTIFICATION.—Section 6383(f) of title 5, United States Code, is amended by striking “section 6382(a)(3)” and inserting “paragraph (1)(E) or (3) of section 6382(a)”.

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(2) DEFINITION OF COVERED SERVICEMEMBER.—Paragraph (8) of section 6381 of title 5, United States Code, is amended to read as follows:

“(8) the term ‘covered servicemember’ means—

“(A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or “

(B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy;”.

(3) DEFINITIONS OF SERIOUS INJURY OR ILLNESS; VETERAN.—Section 6381 of title 5, United States Code, is further amended—

(A) in paragraph (10), by striking “and” at the end; and

(B) by striking paragraph (11) and inserting the following:

“(11) the term ‘serious injury or illness’—

“(A) in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member

medically unfit to perform the duties of the member’s office, grade, rank, or rating; and

“(B) in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (8)(B), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service

in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran; and

“(12) the term ‘veteran’ has the meaning given the term in section 101 of title 38, United States Code.”.

(4) TECHNICAL AMENDMENT.—Section 6382(e)(2)(A) of title 5, United States Code, is amended by striking “or parent” and inserting “parent, or covered servicemember”.

(5) REGULATIONS.—In prescribing regulations to carry out the amendments made by this subsection, the Office of Personnel Management shall consult with the Secretary of Defense

(i) and the Secretary of Veterans Affairs, as applicable.