

EXPANSION OF THE FMLA FOR MILITARY FAMILIES

In January 2008, the Military Expansion for Injured Servicemembers Act was signed into law as part of the Defense Department Authorization Act. The Act expands the FMLA to support families caring for injured service members. As part of the proposed regulatory changes to the FMLA, the Department of Labor has asked for public comment on how it should implement the FMLA expansion for military families.

EXPANSION #1: LEAVE TO CARE FOR A WOUNDED SERVICE MEMBER

The Amount of Leave

- **Family members (spouse, parent, son or daughter) and next of kin of a wounded service member** are entitled to **26 weeks of job protected, unpaid leave** in one 12 month period.

The Definition of Family Member

- The definition of a family member eligible for expanded FMLA leave **to care for a Wounded Service Member** is broader than the definition in the FMLA. It includes adult children and next of kin which can be siblings, grandparents, or other relatives.

Definition of Wounded Service Member

- The expanded FMLA leave is provided to care for a **Wounded Service Member** who has suffered “a serious injury or illness in the line of duty while on active duty that may render the member medically unfit to perform the duties of their office, grade, rank, or rating.” This is a different definition than the FMLA which requires a “serious health condition” for leave for oneself or an immediate family member.

EXPANSION #2: LEAVE TO HELP WITH DEPLOYMENT AND RETURN

Under this change, family members of service members are allowed to use their original 12 weeks of FMLA leave to help with “qualifying exigencies” in their family arising out of the deployment of a service member.

EMPLOYEE AND EMPLOYER ELIGIBILITY NOT CHANGED

For both new provisions, leave takers must still meet the hours worked and time on the job requirements of the FMLA. Covered employers are still only those that meet the FMLA definition of employer.

QUESTIONS FROM THE DOL NOTICE FOR LEAVE TO CARE FOR A WOUNDED SERVICE MEMBER

Should wounded service members' medical certifications come from government agencies only (the Department of Defense or Veteran's Affairs) or should they also be obtainable from private health care providers?

- Response: *Service members should be able to receive certifications from both government agencies and from private health care providers. Some service members may not live near a VA hospital and should not be forced to travel for their certification.*

Should the wounded service member have to designate one family member as the one to take leave, or should all family members who meet the definition in the statute be able to take leave?

- Response: *All family members who meet the required definition should be able to take leave. This will allow family members to take turns taking leave so that no one family member will have to do all of the caretaking alone.*

Should leave be allowed for injuries that manifest themselves after the wounded service member has left the military service?

- Response: *Yes, leave should be allowed for injuries that manifest themselves after the wounded service member has left the military service.*

Should family members be limited to solely one 26 week leave period or one 26 week leave period per injured service member?

- Response: *Family members should be allowed one 26 week leave period per injured service member. Any other rule would harm those families that have more than one military member.*

Should other FMLA provisions (substitution of paid leave, transfer of job, rules of for spouses employed by the same employer) apply to leave taken to care for a wounded service member?

- Response: *Generally, the same FMLA rules should apply. However, it may be that some rules—such as the medical certification time requirements— will be impossible to fulfill if certification is coming from a federal agency with long wait times, such as the Veteran's Administration.*

QUESTIONS FROM DOL NOTICE FOR LEAVE TO ADDRESS ISSUES FROM DEPLOYMENT

What types of issues should be covered by this leave?

- Response: *The leave should be available for family care that arises out of the deployment—both emergency situations and routine occurrences.*

Should there be a finite list of issues?

- Response: *No, there should not be a limit on the reasons leave may be taken. Some examples of when leave should be available are:*
 - *Leave for child care related situations*
 - finding daycare
 - registering for new schools
 - changing work schedule to pick up children
 - arranging summer care
 - attending school functions
 - attending counseling for children
 - attending routine medical appointments for children
 - *Leave for service member related meetings, activities or leave*
 - leave to see service member off and to meet them when they return
 - Pre- and Post-deployment briefings
 - military family and volunteer events
 - reunion and reintegration leave
 - leave while service member is on leave
 - acting as service member's representative in front of federal or state agencies in order to obtain benefits
 - counseling for self
 - attending counseling for the service member

How will a service member's family member prove that leave is being used for the purposes provided for in the regulations?

- Response: *The certification requirements on family members should be minimal. In addition to activation orders to show that deployment is planned, employers should accept simple written certification—for example a note from a school or doctor—as proof.*