

Appendix A

Are You Prepared to Comply With the Changes to the Regulations to the Family and Medical Leave Act?

January 2009*

***NOTE:** This PowerPoint was prepared by the Holland & Knight LLP Labor & Employment Law Group, January 2009. It does not incorporate additional changes after that date, such as the expansion of the military leaves under the FMLA effective October 28, 2009. Please see Section I of the primary materials in regard to those October 28, 2009 changes. In addition, please note that the information provided in this PowerPoint is general information and not designed to provide legal advice. Each fact situation is different, and the laws are constantly changing. Readers are encouraged to consult with their legal counsel.

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Are You Prepared to Comply with the Changes to the Regulations to the Family and Medical Leave Act?

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Holland & Knight LLP

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FMLA COMPLIANCE UNDER THE NEW REGULATIONS

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New FMLA Regulations - General Overview

The new FMLA regulations are effective January 16, 2009.

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New FMLA Regulations - Impact on Employers

As a result of the new regulations, employers must:

- Post new FMLA notices.
- Revise existing policies and handbooks to incorporate the new regulations.
- Revise existing FMLA notices, request forms and medical certification forms.
- Provide comprehensive training to supervisors and human resources personnel.
- Respond to FMLA requests by following new procedures and using new forms.

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New FMLA Compliance Obligations - Summary

The new regulations affect:

- Enforcement standards for employer coverage and employee eligibility.
- Employer and employee notice obligations.
- The definition of a serious health condition.
- Requirements for medical certifications and fitness for duty certifications.
- Rules governing intermittent and reduced schedule leave, calculating leave entitlements, substituting paid leave for FMLA leave, and attendance and production bonuses.
- Enforcement and settlement standards of FMLA claims.

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Employer Coverage

New Rules regarding "Joint Employers":

- Employees jointly employed by two employers must be counted by both employers for FMLA purposes.
- Professional Employer Organizations are not joint employers with their clients.

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Employee Eligibility

- Clarification of the 12 month/1250 hour rule – the 12-month work period need not be consecutive.
- Eligibility determined as of the date the FMLA leave is to start.
- "Roll into" eligibility.

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Employer Notice Obligations

- General notice provisions.
- Eligibility and designation notices.
 - Form WH-381 (Eligibility Notice)
 - Form WH-382 (Designation Notice)
- Notices of rights and responsibilities.
- Employer's failure to provide notice.

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Employee Notice Obligations

- Foreseeable FMLA leave.
 - 30-day notice
 - Includes expected birth, adoption, planned medical treatment of employee or family member
- Unforeseeable FMLA leave.
 - Notice as soon as practicable
 - Employer's usual call-in procedures, absent unusual circumstances

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Definition of "Serious Health Condition"

- Three days of incapacity and subsequent medical treatment.
- Continuing treatment – chronic condition.
- Leave for treatment of substance abuse.
- Leave for birth, adoption or foster care or care for child.

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Medical Certification Requirements

- New medical certification forms.
 - WH-380-E (Certification of Health Care Provider for Employee's Serious Health Condition)
 - WH-380-F (Certification of Health Care Provider for Family Member's Serious Health Condition)
- Timing.
- Authentication and clarification of medical certification – for very limited purposes.
- Medical recertification.

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Fitness-For-Duty Certifications

- Now may require certification of ability to perform essential job functions.
- Intermittent leave certification requirements.
- Seeking clarification of fitness-for-duty certifications – for very limited purposes.

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Intermittent and Reduced Schedule Leave

- Transfer of employees to alternative positions during foreseeable intermittent or reduced schedule leave permitted.
- Calculating increments of FMLA leave for intermittent or reduced schedule leave.

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Calculating Leave Entitlements – Holidays

- When a holiday falls within the week taken as FMLA leave, the holiday has no effect: the entire week is counted toward the FMLA leave.
- If an employee takes FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA leave entitlement.

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Calculating Leave Entitlements – Overtime Hours

Regular overtime not worked during intermittent or reduced schedule leave may be counted against the employee's FMLA leave entitlement.

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Calculating Leave Entitlements – Light Duty Assignments

Time spent performing light duty work does not count toward an employee's FMLA leave entitlement.

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Substituting Accrued Paid Leave for FMLA Leave

- Notice requirements.
- Medical certifications still required.
- Substitution of paid leave when employee receives disability or workers' compensation benefits by agreement only.

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Perfect Attendance Awards and Production Bonuses

Employees on FMLA leave may be denied attendance awards and/or production bonuses *so long as* the employer treats employees on other non-FMLA absences the same way.

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Penalties for Non-Compliance

- Lost wages and benefits.
- Reinstatement.
- Interest.
- Attorney's fees.

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Waiver of FMLA Claims

In response to Court decisions prohibiting settlement of FMLA claims without Court or DOL approval, the new regulations clarify:

- Prohibition of waiver of FMLA rights applies only to *future* rights.
- FMLA claims arising out of past events or conduct may be settled *without* Court or DOL approval.

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FMLA MILITARY LEAVE AMENDMENTS As of January 16, 2009

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FMLA Military Leave Amendments

On January 28, 2008, President Bush signed into law the National Defense Authorization Act.

- Create two types of FMLA military leave.
- Up to 12 weeks of job-protected FMLA leave for employees needing time off for a "qualifying exigency" related to certain types of military service by the employee's spouse, son, daughter or parent.

- Takes effect on January 16, 2009

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FMLA Military Leave Amendments

- Up to 26 weeks of job-protected leave in a single 12-month period to care for a covered military servicemember with a serious injury or illness incurred in the line of duty on active duty.

- Takes effect on January 28, 2008

- The new regulations address both types of military leave.

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Qualifying Exigency Leave

An eligible employee is entitled to:

- 12 workweeks of leave during a 12-month period.
- Because of any "qualifying exigency."
- Arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

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Qualifying Exigency Leave

- For military leave purposes, "spouse," "parent," "son," and "daughter" have same meaning as for other types of FMLA leave, except that there are no age restrictions for son and daughter.
- The covered military member must be on active duty or call to active duty status as:
 - A member of the reserve components (e.g., Army National Guard, Army Reserve, Navy Reserve, etc.), or
 - A retired member of the Regular Armed Forces or Reserve.

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Qualifying Exigency Leave

- Qualifying exigency leave does not apply to military members on active duty in the regular Armed Forces.
- Active duty orders of a covered military member generally will specify if the servicemember is serving in support of a contingency operation by:
 - Citation to relevant U.S. statute, or
 - Reference to the specific name of the contingency operation.

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Qualifying Exigency Leave

Qualifying Exigency:

- Short-notice deployment.
 - To address issues that arise from military member's receipt of 7 or less days' notice of deployment.
 - Up to 7 days beginning on date of notice of deployment.
- Military events and related activities.
 - E.g., to attend official ceremonies related to the active duty or call to active duty, or to attend related family support or assistance programs.

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Qualifying Exigency Leave

- Childcare and school activities.
 - E.g., to arrange for alternative childcare, provide urgent childcare, transfer a child to a new school or day care facility.
- Financial and legal arrangements.
 - E.g., to prepare healthcare powers of attorney or wills, or transfer bank account signature authority.
- Counseling related to the active duty or call to active duty status.

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Qualifying Exigency Leave

- Rest and recuperation.
 - E.g., to spend time with the military member who is on short-term, temporary "R&R" during deployment.
- Post-deployment activities.
 - E.g., to attend arrival ceremonies or address issues related to the military member's death while on active duty status.
- Additional activities relating to active duty or call to active duty, provided employer and employee agree.

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Qualifying Exigency Leave

- Qualifying exigency leave may be taken on an intermittent or reduced leave schedule.
- Qualifying exigency leave counts toward the standard 12 weeks of FMLA leave to which eligible employees are entitled in a 12 month period.
- Employer may require leave to be supported by a certification.
 - Optional Form WH-384 (Certification of Qualifying Exigency for Military Family Leave)

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Military Caregiver Leave

- An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to up to 26 workweeks of leave during a single 12-month period to provide physical and/or psychological care for the servicemember.
- The covered servicemember:
 - Must be a current member of the Armed Forces (including the National Guard or Reserves) or a member of the Armed Forces who is on the temporary disability retired list.

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Military Caregiver Leave

- Must have serious injury or illness incurred in the line of duty on active duty, which renders him/her medically unfit to perform the duties of his/her office, grade, rank or rating.
- Must be undergoing medical treatment, recuperation or therapy, be on outpatient status, or otherwise be on the temporary disability retired list.
- Military caregiver leave is not available to care for former servicemembers or persons on the permanent disability retired list.

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Military Caregiver Leave

- "Next of kin" of covered servicemember is:
 - Blood relative designated in writing as the servicemember's nearest blood relative for purposes of military caregiver leave under the FMLA.
 - If no designation, nearest blood relative (other than spouse, parent, son or daughter) in the following order of priority:
 - Blood relatives who have been granted legal custody of servicemember by statute or court decree
 - Brothers or sisters
 - Grandparents
 - Aunts and uncles
 - First cousins

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Military Caregiver Leave

- If no designation is made and there are multiple family members with the same level of relationship to the servicemember, they all shall be considered his/her next of kin and may take leave to provide care to the servicemember, either consecutively or simultaneously.
- Definition is broader than employees eligible to take regular FMLA leave.

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Military Caregiver Leave

- Single 12-month period used to calculate military caregiver leave starts on the first day of such leave and ends 12 months later.
- Leave entitlement is to be applied on a per-covered-servicemember, per-injury basis.
 - Employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or the same servicemember with a subsequent injury or illness.
 - However, no more than 26 workweeks of leave may be taken in any single 12-month period.

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Military Caregiver Leave

- Eligible employees who take military caregiver leave are limited to a total of 26 workweeks of all types of FMLA leave during any single 12-month period.
- Employer is responsible for designating leave as FMLA-qualifying and for giving employee notice of designation.
- Where leave qualifies as both military caregiver leave and another type of FMLA leave, leave must be designated as military caregiver leave first.

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Military Caregiver Leave

- Eligible spouses working for same employer are limited to combined 26 workweeks of leave in a single 12-month period.
- Military caregiver leave may be taken on an intermittent or reduced hours basis.
- Notice and Certification Requirements:
 - Same notice standards for other foreseeable and unforeseeable FMLA leaves.

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Military Caregiver Leave

- Employer may require certification by the covered servicemember's authorized health care provider, the servicemember and the employee requesting leave.
- Optional Form WH-385 (Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave)
- Employer must accept "invitational travel orders" or "invitational travel authorizations" in lieu of Form WH-385 or employer's own certification form.

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