



MMD Legal Insider

www.cslap.org

New Family & Medical Leave Rules: Guard and Reserve Members

On January 1, 2009, sweeping new federal regulations under the Family & Medical Leave Act took effect. Already one of the most confusing and difficult federal employment laws, the new FMLA regulations include changes to major provisions of the existing rules and implement two new forms of leave under the FMLA specifically designed to aid military families and service-members. In this article, we will examine one of these new forms of leave (Qualifying Exigency Leave).

Under the new FMLA rules, an employee may take leave for a Qualifying Exigency (Q.E.) arising out of the call to active duty of another family member. Interestingly, Q.E. leave does not apply in the case of family members who are regular members of the armed services, but only to members of the Guard, Reserves or retired personnel who are called to active duty. In this instance, the District is entitled to obtain a copy of the call or order to active duty, and may contact the Department of Defense to verify the order. Leave taken due to Q.E. is counted against other leave taken under the FMLA and (unlike Military Caregiver Leave which will be much more complicated to administer) is subject to the total 12 week cap and leave year designation rules as other forms of leave under the FMLA.

Qualifying Exigency-What is it?

The new FMLA rules recognize eight different types of Q.E.'s. Some of these events are relatively

obvious, such as leave to attend military events or activities, or post-deployment activities (such as making funeral arrangements). Other recognized types of Q.E. leave include leave for childcare and school activities (including to attend meetings at school), to attend to financial or legal matters, or to participate in counseling "when the need for counseling arises from the active duty or call to active duty status of a covered military member." One issue which we already anticipate is how the District and employees will determine when a particular school meeting for which leave has been requested, for instance, actually "arises from" the family member's call or status on active duty.

Qualifying Exigency-Certification

Since leave due to a Qualifying Exigency is unrelated to any objective medical event (such as birth of a child or the development of serious health condition), confirming the nature and necessity of the need for leave does present certain challenges. And of course, in the vast majority of cases we expect our employees will use such leave conservatively and for the intended purpose. In the event any question should arise, however, the certification provisions under Q.E. leave are relatively scant.

As mentioned above, the District can request and obtain a copy of the actual order or call to active

duty of the employee's family members. The District may also require the employee to provide a statement explaining the facts about the qualifying exigency and copies of any documents which exist relating to the absence. For instance, this could include a copy of an attorney's bill for a meeting to review or revise a will. The employee may also be required to provide the date on which the Q.E. began, the start and ending dates of their anticipated absence, and the contact information of any third party when the Q.E. does involve such a meeting (for example, a counselor). The District is permitted to contact these third parties for the purpose of verifying the schedule and nature of any such third party meeting. However, no additional information may be requested of these third parties, and there is no provision for obtaining any second or third opinion as to whether any meeting or absence was truly necessary or related to a family member's call or active duty status.

The second new leave provision relates to Military Caregiver Leave, and the updated regulations also change many of the rules associated with required notices under the FMLA (both by the District and by employees), medical certification forms and communication, return to work certification, and numerous other elements of the FMLA-all of which call for the review of our FMLA policies, practices & forms.

© McLocklin, Murphy & Dishman, LLP

McLocklin, Murphy & Dishman, LLP

P.O. Box 766
Winder, Georgia 30680
(770) 867-7446

SAVE THE DATE FOR THESE UPCOMING PRESEN- TATION BY THE CENTER FOR SCHOOL LAW & POL- ICY!

- "New FMLA Rules & the Amended ADA" on January 31, 2009 at AASPA National Bootcamp Scottsdale, Arizona (see www.aaspa.org).
- "Legal and Practical Aspects of Autism" on February 18th & 19th at Macon State College.
- "Discipline and the Disabled Student" on February 26th at CSRA Resa in Dearing.
- "The New Family & Medical Leave Regulations and the Amended Americans with Disabilities Act" on March 3rd (Macon) and March 5th (Winder).
- "Reduction in Force and Age Discrimination: How to avoid lawsuits or, if you can't do that, make sure to win!" March 26th at Walton County BOE (Monroe).
- Please see www.cslap.org for additional program and registration information!

MMD Legal Insider

“New Family & Medical Leave Rules:
Qualifying Exigency”