

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE  
ATTENDANCE AND LEAVE MANUAL  
POLICY BULLETIN NO. 2010-01**

**Appendix I**

**March 2010**

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TO: Manual Recipients  
FROM: Blaine Ryan-Lynch, Director of Staffing Services  
SUBJECT: Revisions to the Recently Enacted Military Family Leave  
Provisions under the Family and Medical Leave Act

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**INTRODUCTION**

On October 28, 2009, President Obama signed into law the Fiscal Year 2010 National Defense Authorization Act. The new law includes both an expansion of and limitations to the recently enacted exigency leave benefits, and expansion of the caregiver leave provisions for eligible employees under the Family and Medical Leave Act (FMLA).

This memo provides an overview of the amendments to the FMLA. It should be noted that new regulations have not yet been promulgated by the United States Department of Labor (U.S. DOL). The information contained in this document summarizes our current understanding of the revisions to the FMLA and should be read in conjunction with Policy Bulletin 2009-01 and may be updated once new regulations or information becomes available.

Agencies are cautioned that provisions of the FMLA must be applied in the context of State leave policy, consistent with the Attendance Rules and negotiated agreements.

Agencies are required to post notices and update agency handbooks, and other written or electronic information about leave benefits to reflect the updated provisions regarding the FMLA.

Agencies should contact the Attendance and Leave Unit of this Department at 518-457-2295 if they require information when applying these revisions.

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## **REVISED MILITARY FAMILY LEAVE ENTITLEMENTS**

### **Qualifying Exigency Leave**

Eligible employees may take up to 12 weeks of FMLA leave per calendar year for a qualifying exigency because the employee's spouse, son, daughter, or parent in the Armed Forces (including the National Guard or Reserves) is on covered active duty or has been notified of an impending call or order to covered active duty. The new legislation defines covered active duty to include members of the regular Armed Forces as well as members of the Reserves and National Guard but limits the availability of qualifying exigency leave to those members who are deployed to a foreign country. Specifically, for a member of a regular component of the Armed Forces, covered active duty means duty during the deployment of the member to a foreign country. For a member of a Reserve component of the Armed Forces covered active duty means duty during deployment of the member to a foreign country under a call or order to active duty during a war or during a national emergency declared by the President or Congress.

### ***Qualifying Event***

The new legislation retains the original eight situations for which qualifying exigency leave may be taken. However, the language has been edited to incorporate reference to 'covered active duty' as follows:

1. For "short-notice deployment" where a military member is notified of an impending call or order to covered active duty seven or fewer days from the date of deployment, in which case an eligible employee may take qualifying exigency leave for a period of seven days beginning on the date when the military member is notified of the impending deployment;
2. To attend official ceremonies, events or programs sponsored by the military that are related to covered active duty or call to covered active duty of a military member, or in advance of or during deployment to attend similarly related family support or assistance programs or informational briefings sponsored or promoted by the military, military service organizations, or the Red Cross;
3. For certain childcare and school activities necessitated by covered active duty or the call to covered active duty status of a military member, including to arrange for alternative childcare, provide childcare on an urgent, emergency (but not routine, regular or everyday) basis, enroll or transfer a child in a new school or day care facility, or attend meetings with school or day care staff due to circumstances arising from the deployment of the military member;
4. To make or update financial or legal arrangements to address a military member's absence while on covered active duty, and act as the military member's representative with respect to issues involving military service benefits;

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5. To attend counseling provided by someone other than a health care provider due to covered active duty or call to covered active duty status of a military member;
6. To spend time with a military member who is on a short-term, temporary rest and recuperation leave during the period of deployment, limited to five days for each instance of rest and recuperation;
7. To attend certain post-deployment activities, such as arrival ceremonies and reintegration briefings and address issues arising from the death of a military member while on covered active duty status;
8. For additional activities arising out of a military member's covered active duty or call to covered active duty status where the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of the leave.

***Eligible Employee***

An eligible employee is one who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, or daughter of a military member who is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces. As noted above, qualifying exigency leave is now available to family members of servicemembers in the regular Armed Forces as well as the National Guard and Reserves, provided the deployment is to a foreign country.

***Documentation Provisions***

The U.S. DOL has developed form WH-384 to enable the employer to obtain sufficient information to confirm the need for qualifying exigency leave. The first time an employee requests qualifying exigency leave under a specific set of orders, the employer may also require the employee to provide a copy of the military member's active duty orders.

The U.S. DOL has not yet issued new regulations, or updated the form to reflect the amended change. Agencies are still required to use the current form but must be aware of the amendments to the FMLA as they review documentation.

If the qualifying exigency involves meeting with a third party, the form requires that the employee provide contact information for that third party and explain the nature of the meeting. The employer may contact the third party to verify the appointment schedule and nature of the meeting but no additional information can be requested.

The employer may also contact an appropriate unit of the Department of Defense to verify that a military member is on covered active duty or call to covered active duty status but no additional information can be requested.

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***Other Provisions***

Other provisions from the discussion of Qualifying Exigency Leave in Policy Bulletin 2009-01 (Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

***Amount of Leave to be Granted***

Eligible employees are entitled to up to 12 weeks of FMLA qualifying exigency leave per calendar year. Employees cannot exceed a combined total of 12 weeks of FMLA leave per calendar year for all qualifying reasons combined, excluding military caregiver leave.

Leave is available for a continuous period of time or on an intermittent or reduced schedule basis as necessary.

***Notice***

An employee's obligation to provide notice of leave due to a qualifying exigency is triggered when the employee first seeks to take such leave. Where this leave is foreseeable, eligible employees must provide notice to the employer that is reasonable and practicable.

***Use of Leave Credits***

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, an employee absent to make legal arrangements could elect to charge the absence to vacation or personal leave, but not to sick leave.

***Military Caregiver Leave***

Eligible employees may take up to 26 weeks of military caregiver leave under the FMLA in a single 12-month period to care for a covered servicemember with a serious injury or illness that was incurred in the line of duty while on active duty in the Armed Forces (including the National Guard or Reserves) or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces.

The new legislation expands the availability of military caregiver leave to include certain veterans. Specifically, the new legislation redefines the terms 'covered servicemember' and 'serious injury or illness.'

The term 'covered servicemember' means 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 that was incurred by the member in the line of duty on active

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duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces); 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 the case of a member of the Armed Forces (including a member of the National Guard or Reserves), the term 'serious injury or illness' means an injury or illness that was incurred by the member in the 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 the 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. 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 the period of 5 years preceding the date on which the veteran undergoes medical treatment, recuperation or therapy for the serious injury or illness, the term 'serious injury or illness' means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in the 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 the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

As the U.S. DOL has not yet issued new regulations regarding the amendments to the FMLA and the U.S. Secretary of Labor has not yet defined the term 'qualifying injury or illness,' agencies are encouraged to call the Attendance and Leave Unit of the NYS Department of Civil Service for guidance.

*Documentation Provisions*

The U.S. DOL has developed form WH-385, Certification for Serious Injury or Illness of Covered Servicemember, to assist the employer in obtaining documentation of the need for military caregiver leave.

Any one of the following health care providers may complete this certification:

- A United States Department of Defense (DOD) health care provider
- A United States Department of Veterans Affairs (VA) health care provider
- A DOD TRICARE network authorized private health care provider or
- A DOD non-network TRICARE authorized private health care provider.

Satisfactory medical documentation also includes "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside.

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The regulations prohibit recertification during the time period specified in the documentation, and prohibit second or third medical opinions in connection with leave requested for this purpose.

The U.S. DOL has not yet issued new regulations, or updated the form to reflect the amended changes. Agencies are still required to use the current form but must be aware of the amendments to the FMLA as they review documentation.

***Other Provisions***

Other provisions from the discussion of Military Caregiver Leave in Policy Bulletin 2009-01 (Eligible Employee, Amount of Leave to be Granted, Notice, and Use of Leave Credits) remain unchanged and are repeated below for reference.

***Eligible Employee***

An employee who meets the normal service requirements to be eligible for FMLA leave and is the spouse, parent, son, daughter, or next of kin of a covered servicemember is eligible for leave for this purpose. The regulations define next of kin of a covered servicemember as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter in the following priority: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the servicemember has specifically designated in writing another blood relative for purposes of military caregiver leave under the FMLA.

A husband and wife employed by the same employer are limited to a combined 26 week military caregiver leave in a single 12-month period per servicemember per injury.

***Amount of Leave to be Granted***

Eligible employees are entitled to up to 26 weeks of leave in a single 12-month period per covered servicemember per injury. Additional periods of up to 26 weeks of leave may be taken in subsequent 12-month periods to care for a different servicemember or to care for the same servicemember who has a subsequent serious illness or injury.

To determine the single 12-month period, the regulations require that the 12-month period must be measured forward from the date an employee's first military caregiver leave to care for the covered servicemember begins.

During the designated 12-month period, employees are limited to a combined total of 26 weeks of FMLA leave for any qualifying reason. Employees continue to be limited to 12 weeks of FMLA leave per calendar year for reasons other than to care for a covered servicemember.

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Leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition should be designated as military caregiver leave in the first instance.

Leave is available in a continuous block of time or on an intermittent or reduced schedule basis as required.

Notice

Where leave is foreseeable based on planned medical treatment for a serious injury or illness of a servicemember, the normal FMLA notice requirement of 30 days or as soon as possible applies. Where leave is unforeseen, the normal FMLA notice requirement of as soon as practicable under the facts and circumstances of the specific case applies.

Use of Leave Credits

FMLA leave is unpaid. However, employees may elect to charge appropriate leave credits during a period of FMLA leave. For example, a State employee taking military caregiver leave to provide care for her wounded son is eligible to charge up to 15 days of absence in a calendar year to family sick leave and may also elect to charge other categories of leave credits.