



**Course Handout Materials for:
"FMLA Intermittent Leave: New Tools to Combat Abuse"
Presented by Linda Hollinshead**


**Military Family Leave Provisions of the FMLA:
New Leave Entitlement, Process and Developments**
prepared for
Pennsylvania Bar Institute
prepared by
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LEGAL BACKGROUND
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Legal Background
1. January 28, 2008 - National Defense Authorization Act for FY 2008

- Adds two new categories of events qualifying for FMLA leave
 - qualifying exigency leave
 - military caregiver leave (covered servicemember)
- Regulations not yet issued
 - Military caregiver leave went into effect
 - Employers encouraged to provide qualifying exigency leave

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Legal Background

2. January 16, 2009 - Final FMLA regulations
3. October 28, 2009 - National Defense Authorization Act for FY 2010
 - Amended military family leave provisions
 - Amendments went into effect immediately
 - Regulations implementing amendments not yet issued

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ELIGIBILITY FOR MILITARY FAMILY LEAVE

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Eligibility for Military Family Leave

1. Covered Employers
 - Same standard as for other categories of FMLA leave

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Eligibility for Military Family Leave

2. Eligible Employees

- Same eligibility requirements
 - 12 months (need not be consecutive)
 - 1250 hours within 12 month period immediately preceding leave
 - Work at worksite where 50 or more employees work for the covered employer within 75 miles of worksite

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QUALIFYING EXIGENCY LEAVE

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Qualifying Exigency Leave

1. Types of Qualifying Exigencies

- Short-Notice Deployment
- Military Events and Related Activities
- Childcare and School Activities
- Financial and Legal Arrangements

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Qualifying Exigency Leave

1. Types of Qualifying Exigencies (*con't*)

- Counseling
- Rest and Recuperation
- Post-Deployment Activities
- Additional Activities

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Qualifying Exigency Leave

2. Key Definitions

- "Son or Daughter"
 - Eligible employee's biological, adopted or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or a call to active duty, and who is **of any age**

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Qualifying Exigency Leave

2. Key Definitions

- "Covered Active Duty"
 - Prior to NDAA for 2010
 - With respect to a member of the National Guard or Reserves, duty under a call or order to active duty (or notification of an impending call or order to active duty) in support of a "contingency operation"
 - Not available for employees with family members who were active members of the Armed Forces.
 - Applies to Federal call to active duty

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Qualifying Exigency Leave

2. Key Definitions

- "Covered Active Duty" (*con't*)
 - NDAA for FY 2010
 - Expands definition to apply to a qualifying exigency related to the deployment of a son, daughter or parent who is a member of a regular component of the Armed Forces
 - Not limited to "contingency operations"; Now, coverage is related to deployment to any foreign country

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Qualifying Exigency Leave

3. Amount of Leave

- Up to 12 workweeks within 12 month FMLA leave year

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Qualifying Exigency Leave

4. Calculation of Leave

- 12 month FMLA leave year
 - Calendar year
 - Anniversary date
 - 12 month period measured forward from the first FMLA leave taken
 - Rolling 12 month period measured backward

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Qualifying Exigency Leave

4. Calculation of Leave (con't)

- Within the designated 12 month FMLA leave year:
 - May take all 12 workweeks of FMLA leave for one or more qualifying exigencies;
 - May take a total combined 12 workweeks of leave for qualifying exigencies and/or other FMLA-qualifying circumstances

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Qualifying Exigency Leave

4. Calculation of Leave (con't)

- May be taken on an intermittent leave or a reduced leave schedule basis

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Qualifying Exigency Leave

5. Employee Notice Obligations

- Timing of Notice
 - Where need for leave is foreseeable
 - Provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable
 - Employee not required to provide at least 30 days advance notice

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Qualifying Exigency Leave

5. Employee Notice Obligations

- Timing of Notice (con't)
 - When need for FMLA leave is not foreseeable
 - Provide notice to his or her employer "as soon as practicable"
 - » Within time prescribed by the employer's usual and customary notice requirements (e.g. call-in procedures), absent unusual circumstances.

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Qualifying Exigency Leave

5. Employee Notice Obligations (con't)

- Content of Notice
 - Employee not required to specifically assert his or her rights under FMLA or even specifically mention "FMLA"
 - Must provide "sufficient information" in order to enable the employer to reasonably determine whether the FMLA may apply to an employee's particular leave request

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Qualifying Exigency Leave

6. Employer Notice Obligations

- Eligibility Notice and Rights and Responsibilities Notice
 - Provide both within five business days of receiving "sufficient information," absent extenuating circumstances
 - Rights and Responsibilities Notice
 - Indicate certification requirement; consequences of the employee failing to provide a complete and sufficient certification

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Qualifying Exigency Leave

6. Employer Notice Obligations (*con't*)

- Designation Notice
 - Provide within five business days of receipt of a complete and sufficient certification, absent extenuating circumstances

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Qualifying Exigency Leave

7. Certification Procedures

- General Certification Procedures
 - Require copy of the covered military member's active duty orders or other military issued documentation and dates of active duty service
 - Require a sufficient certification (Form WH-384)
 - Generally provided within 15 days
 - No second or third opinions

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Qualifying Exigency Leave

7. Certification Procedures (*con't*)

- General Certification Procedures (*con't*)
 - No recertification in connection with a request for qualifying exigency leave.
 - If qualifying exigency involves meeting with a third party
 - May directly contact third party to verify eligible employee's attendance at that meeting
 - May contact DOD to verify active duty or call to active duty

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Qualifying Exigency Leave

7. Certification Procedures (*con't*)

- Required Information in Certification
 - Type of qualifying exigency; supporting documentation
 - Approximate date on which the qualifying exigency commenced, or is expected to commence
 - For continuous leave requests, the beginning and end dates of the absence for a qualifying exigency

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Qualifying Exigency Leave

7. Certification Procedures (*con't*)

- Required Information in Certification (*con't*)
 - For intermittent or reduce leave requests, an estimate of the frequency and duration of the qualifying exigency
 - Where the qualifying exigency involves a third party, contact information for the individual or entity with whom the eligible employee is meeting and a brief description of the purpose of the meeting

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Qualifying Exigency Leave

7. Certification Procedures (*con't*)

- Note - DOL's regulations not yet updated to reflect NDAA 2010

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LEAVE TO CARE FOR A COVERED SERVICEMEMBER

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Covered Servicemember Leave

1. Qualifying Event:

- To care for a covered servicemember with a serious illness or injury where the employee is the spouse, son, daughter, parent or "next of kin" of the covered servicemember.

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Covered Servicemember Leave

2. Key Definitions

- "Covered Servicemember"
 - Prior to NDAA for 2010
 - 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 on outpatient status, or is otherwise on the temporary disability retired list and who has a serious illness or injury

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Covered Servicemember Leave

2. Key Definitions

- "Covered Servicemember" (*con't*)
 - NDAA for 2010
 - Includes 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 the National Guard and Reserves, at any time during the 5 year period preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy

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Covered Servicemember Leave

2. Key Definitions

- "Serious Illness or Injury"
 - Prior to NDAA for 2010
 - An injury or illness of the covered servicemember incurred in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating

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Covered Servicemember Leave

2. Key Definitions

- "Serious Illness or Injury" (*con't*)
 - NDAA for 2010
 - Includes aggravation of injury or illness incurred prior to active duty
 - For veterans, also encompasses aggravation of injury or illness incurred prior to active duty, and that manifested itself either before or after the covered servicemember became a veteran.

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Covered Servicemember Leave

2. Key Definitions (*con't*)

- "Next of Kin"
 - The nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority:
 - Blood relatives who have been granted legal custody of the servicemember by court decree/statutory provisions
 - Brothers and sisters
 - Grandparents
 - Aunts and uncles
 - First cousins
 - Unless other designated in writing

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Covered Servicemember Leave

3. Amount of Leave

- Up to 26 workweeks within a specifically designated 12 month FMLA leave year

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Covered Servicemember Leave

4. Calculation of Leave

- 12 month FMLA leave year
 - Measured forward from the first time an employee takes FMLA leave for this purpose

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Covered Servicemember Leave

4. Calculation of Leave (*con't*)

- Within the designated 12 month FMLA leave year:
 - Eligible employee limited to a combined total of 26 workweeks for any FMLA qualifying reason - but -

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Covered Servicemember Leave

4. Calculation of Leave (*con't*)

- Within the designated 12 month FMLA leave year (*con't*):
 - Eligible for no more than 12 weeks of FMLA leave because of the following, alone or in combination with each other:
 - Birth/care of child
 - Placement of child for adoption /foster care
 - Care for the spouse, son, daughter or parent with a serious health condition
 - Employee's own serious health condition
 - Qualifying exigency

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Covered Servicemember Leave

4. Calculation of Leave (*con't*)

- Expanded 26 workweeks for caring for a covered servicemember may not be used to expand the length of time (12 workweeks) available to an employee to be taken for other FMLA-qualifying reasons

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Covered Servicemember Leave

4. Calculation of Leave (*con't*)

- May be taken on a reduced schedule or intermittent leave basis.

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Covered Servicemember Leave

5. Employee Notice Obligations

- Timing of Notice
 - Where need for leave is foreseeable
 - Provide at least 30 days advance notice for planned medical treatment
 - Where 30 days advance notice is not practicable, notice must be given as soon as practicable

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Covered Servicemember Leave

5. Employee Notice Obligations (*con't*)

- Timing of Notice (*con't*)
 - When need for FMLA leave is not foreseeable
 - Provide notice to his or her employer "as soon as practicable"
 - » Within time prescribed by the employer's usual and customary notice requirements (e.g. call-in procedures), absent unusual circumstances

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5. Employee Notice Obligations (*con't*)

- Content of Notice
 - Employee not required to specifically assert his or her rights under FMLA or even specifically mention "FMLA"
 - Must provide "sufficient information" in order to enable the employer to reasonably determine whether the FMLA may apply to an employee's particular leave request

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Covered Servicemember Leave

6. Employer Notice Obligations

- Eligibility Notice and Rights and Responsibilities Notice
 - Provide within five business days of receiving "sufficient information," absent extenuating circumstances
 - Rights and Responsibilities Notice
 - Indicate certification requirement ; consequences for failing to provide a complete and sufficient certification

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Covered Servicemember Leave

6. Employer Notice Obligations (*con't*)

- Designation Notice
 - Provide within five business days of receipt of a complete and sufficient certification, absent extenuating circumstances

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Covered Servicemember Leave

7. Certification Procedures

- General Certification Procedures
 - Require complete and sufficient certification (Form WH-385)
 - Generally provided within 15 days
 - Certification may be completed by:
 - DOD health care provider
 - VA health care provider
 - DOD TRICARE network authorized private health care provider

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- General Certification Procedures (*con't*)
 - Certification may be completed by: (*con't*)
 - DOD non-network TRICARE authorized private health care provider
 - Authorized health care provider may rely on the determinations of an authorized DOD representative
 - May seek clarification and authentication
 - No second or third opinion
 - No recertification in connection with a request for qualifying exigency leave

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- Required Information in Certification
 - Contact information for the health care provider
 - Statement as to whether the covered servicemember's injury or illness was incurred in the line of duty on active duty
 - The approximate date of the commencement of and duration of the injury or illness

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- Required Information in Certification (*con't*)
 - Description of the appropriate medical facts regarding the covered servicemember's injury or illness sufficient to support the need for leave
 - Information sufficient to support that the covered servicemember is in need of care; timing of the leave, including any time for treatment and recovery

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- Required Information in Certification (*con't*)
 - Where the employee seeks intermittent or reduced schedule leave for planned medical treatment for the covered servicemember, a statement as to whether there is a medical necessity for the care and an estimate of the treatment period

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- Required Information in Certification (*con't*)
 - Where the employee seeks intermittent or reduced schedule leave unrelated to planned medical treatment, whether there is a medical necessity for the covered servicemember to have the care and the frequency and duration of the care

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Covered Servicemember Leave

7. Certification Procedures (*con't*)

- Note - DOL's regulations not yet updated to reflect NDAA for 2010

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