

# The Department of Labor's new FMLA regulations

**T**he Department of Labor last November published its “final rule” to implement the first-ever amendments to the Family Medical Leave Act (FMLA). The amendments come from the National Defense Authorization Act of 2008 and provide new military family leave entitlements. The final rule also substantially revised many other parts of the implementing regulations of the FMLA for the first time since 1995. The final rule became effective on January 16, just four days before President Bush left office.

While the new regulations provide important new entitlements to protected leave for letter carriers who have family members who serve in the Armed Forces, they also impose new burdens on employees who need leave for the already existing reasons for FMLA leave: birth, adoption, foster care placement and serious health conditions.

## Military family leave entitlements

**First, the good news: The changes have created two new categories of military family leave under the FMLA: Military Caregiver Leave and Qualifying Exigency Leave.** Letter carriers and their family members have a long and proud tradition of serving in the Armed Forces, the Reserves and the National Guard at a level much higher than the population at large. The new military family leave will provide a measure of relief to them as they sacrifice to serve our country.

**Military Caregiver Leave**—The Postal Service must grant an eligible employee who is a spouse, son, daughter, parent or next of kin of a covered service member with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a single 12-month period to care for the service member. Covered service members are current members of the Armed Forces, Guard or Reserves who are undergoing medical treatment, recuperation, therapy or are otherwise in outpatient status or on the temporary disability retired list because of a serious injury or illness. They must have incurred the injury or illness in the line of active duty and it must have ren-

dered them medically unfit to perform the duties of their office, grade, rank or rating.

The single 12-month period runs independently of the Postal Service leave year that the USPS has established for all other types of FMLA leave. It begins on the first day the employee takes leave to care for a covered service member and ends 12 months later. The new rules allow an eligible employee to take a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason during the single 12-month period as long as the employee does not take more than 12 workweeks of leave for other FMLA-qualifying reasons during this period.

**Qualifying Exigency Leave**—The Postal Service must grant an eligible employee up to 12 workweeks of unpaid leave during the 12-month calendar year leave period that the Postal Service has established for FMLA leave for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call or order to active duty. Under the new rules, qualifying exigency leave is available to family members of a military member in the National Guard or Reserves and does not extend to family members of service members in the Regular Armed Forces. Qualifying exigencies include:

- **Short notice deployment**—Eligible employees may take leave to deal with issues arising when a covered service member is notified of deployment in seven or fewer days.
- **Military events and related activities**—Eligible employees may take leave for official ceremonies, programs or events sponsored by the military, military service organizations, the American Red Cross or military family support programs related to the active duty call.
- **Childcare and school activities**—Eligible employees may take leave to arrange for alternative school or child care, to provide childcare on an urgent non-routine basis, to transfer or enroll a child in a new school and to attend meetings with school or daycare staff if these reasons for leave arise out of the covered service member's call to active duty. ▶

## New FMLA regulations, continued

- **Financial and legal arrangements**—Eligible employees may take leave to make or update financial and legal arrangements to address a covered service member's absence.
- **Counseling**—Eligible employees may take leave to attend counseling by a health care provider other than a health care provider of the employee if the need for counseling arises from the active duty or call to active duty of the covered service member.
- **Rest and recuperation**—Eligible employees may take up to five days of leave to spend time with a covered service member who is on short-term rest and recuperation leave during deployment.
- **Post-deployment activities**—Eligible employees may take leave to attend arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status and also to address issues arising from the death of a covered service member.
- **Any other event that the eligible employee and the employer agree is a qualifying exigency.**

Note that qualifying exigency leave is not an additional 12 weeks of leave but rather a new reason for an eligible employee to take FMLA leave along with the other existing reasons for FMLA leave.

### Changes to the existing FMLA rules

While the final rule does not reduce eligible workers' entitlement to FMLA leave, the new regulations have imposed additional burdens on employees that make it harder for them to use the leave. Here are some of the changes that will likely affect letter carriers:

- **The final rule has clarified the definition of "serious health condition"** cases involving continuing treatment. Such a condition must involve incapacity of more than three days plus "two visits to a health care provider" or one visit which results in a regimen of continued treatment under the health care provider's supervision. Under the final rule, the two visits must now occur within 30 days of the beginning of the incapacity and the first visit must take place within seven days of the

first day of incapacity. Notably, the health care provider—not the employee—must determine if the second visit within the 30 days is required. Another definition of serious health condition involves incapacity of more than three days plus a regimen of continuing treatment. The first visit in this instance would also have to take place within seven days of the first day of incapacity. Again, the health care provider—not the employee—must determine if the regimen of continuing treatment is required. Lastly, the final rule has defined "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year.

- **If an employee takes a full workweek of FMLA during a holiday week,** the final rule makes clear that the employee should be charged for a full week of leave against their FMLA entitlement, including the holiday. (If the employee takes leave in increments of less than a week, the holiday would not be counted against the leave entitlement.)
- **Under the previous regulations, an employee did not** have to assert their rights under the FMLA or even mention it by name when seeking leave for a FMLA-qualifying reason. Under the final rule, this applies only to when an employee seeks leave for the first time for the FMLA qualifying reason. Once FMLA leave has been granted for an employee's health condition, the employee, in making future requests for leave, must specifically reference either the qualifying reason or the need for FMLA leave.

**The NALC is currently updating *The NALC Guide to the Family and Medical Leave Act* and NALC FMLA forms to reflect the new regulations, as well as developing new forms for the two categories of military family leave. Until the new NALC forms are published, letter carriers applying for FMLA by using the current NALC forms who are told by their local managers that certain NALC forms do not meet the requirements of the new law should request that local management advise them as to what required information is missing. If you are not sure local management has a right to that information, please contact your National Business Agent for assistance.** ☒