

Labor & Employment Law Alert

November 4, 2009
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your workplace*

Family Military Leave under the FMLA Has Been Revised

On October 28, 2009, President Obama signed the Fiscal Year 2010 National Defense Authorization Act (NDAA) into law, which, in part, expands the Family Military Leave provisions of the Family and Medical Leave Act (FMLA).

As employers recall, in January 2008, the FMLA was revised to grant families of individuals in the military with certain leave rights. [Please see past issues - *January 2008 Legal Alert*: http://www.bairdholm.com/media/newsletter/27_LaborAlert0108.pdf and *November 2008 Legal Alert*: http://www.bairdholm.com/media/newsletter/152_LaborAlert111708.pdf on topic] Specifically, the FMLA was expanded to allow eligible employees to take a leave of absence when certain family members in the National Guard or Reserves were on (or would soon be called to) active duty and there was a “qualifying exigency,” or when certain family members suffered a serious injury or illness in the line of duty and the employee wants to care for them. The NDAA expands these rights in a variety of ways.

Qualifying Exigency Leave

Prior to the NDAA, Qualifying Exigency Leave allowed family members of National Guard and Reserve personnel on active duty to take up to 12 weeks of FMLA job-protected leave to use for “any qualifying exigency” arising

out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. Under the FMLA, and even under the NDAA, Qualifying Exigency Leave may be taken only for the following non-medical, non-routine activities: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where the employer and employee agree to the leave.

One of the previous rationales behind limiting the leave to family members in the National Guard or Reserves, was that individuals in the Armed Forces would be more prepared for deployment than those in Reservist roles. The NDAA, however, changes this. Now, families of active duty members of the Armed Forces may also take qualifying exigency leave. To be eligible, the military member must be on active duty in a foreign country or called to active duty in a foreign country. The current notification and certification requirements apply.

Military Caregiver Leave

Military Caregiver Leave, also known as Covered Servicemember Leave, grants eligible employees who are

family members of covered servicemembers the right to take up to 26 workweeks of leave in a “single 12-month period” to care for a covered servicemember with a “serious illness or injury.”

The NDAA expands this form of leave in two ways. First, it extends protection to the families of *veterans*. A “veteran” is defined as “a person who served in the active military, Naval, or Air Service, and who was discharged or released therefrom under conditions other than dishonorable.”

Second, for purposes of Military Caregiver Leave only, the NDAA extends the definition of “serious injury or illness” to mean:

an injury or illness that was incurred by the member in 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 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.

With regard to veterans, because they do not have a current “office, grade, rank, or rating,” the employee must show only that the serious injury or illness be one “that manifested itself before or after the member became a veteran.” We note, however, that the right to take military caregiver leave for the care of veterans extends only to family members of veterans when the veteran was a member of the Armed Forces at some point in the *five years* preceding the date on which the veteran undergoes the medical treatment or receives the therapy that necessitates the leave.

Next Steps

Although the NDAA does not give an effective date for these changes, various sources report that the revisions became effective when President Obama signed them last week. Consequently, employers must (once again) reevaluate their family military leave and traditional FMLA policies to incorporate these changes.

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