



Labor and Employment Practice

November 2009

October 2009 FMLA Amendments Regarding Military Leave

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (the “NDAA”), which expands Family and Medical Leave Act (“FMLA”) coverage for family members of military servicepersons. The NDAA changes FMLA coverage in two key ways: (1) family members of active duty service members, not just National Guard and Reserves, now qualify for military exigency leave; and (2) the circumstances under which family members may take military caregiver leave have been expanded in several key ways.

The FMLA was first enacted in 1993 to provide job-protected leave to employees in certain circumstances. Under the first incarnation of the FMLA, employees could take up to 12 weeks of job-protected, unpaid leave in connection with the birth, adoption or foster care placement of a child or the serious health condition of the employee or certain of the employee’s family members. In 2008, Congress amended the FMLA through the National Defense Authorization Act for Fiscal Year 2008 to extend protection to family members of National Guard and Reserve members in qualifying exigencies related to a call to active duty service in support of a contingency operation and to certain family members of all Armed Forces members injured in the line of duty. “Qualifying exigencies” under the FMLA include: (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 leave; (7) post-deployment activities; and (8) other activities as agreed upon by the employer and employee. Under the military caregiver provisions, an employee who is the spouse, son, daughter, parent, or next of kin of a member of the Armed Forces, including members of the National Guard and Reserves, may take up to 26 workweeks of leave to care for the service member while he “is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is on the temporary disability retired list,” in connection with a serious injury or illness incurred in the line of duty.

The NDAA, which takes effect immediately, further expands FMLA protections related to members of the military. Now, after the enactment of the NDAA, qualifying exigency leave is available to an employee whose spouse, son, daughter or parent is a member of the regular Armed Forces – not just the National Guard or Reserves – and is deployed to a foreign country, rather than only when deployed in support of a contingency operation. Under the NDAA, military caregiver leave is available for certain relatives of veterans, not just active service members, recovering from injuries or illness incurred in the line of duty at any point in the five years preceding the date of medical treatment. The NDAA also clarifies that military caregiver leave applies to injuries and illness both incurred in the line of duty and pre-existing conditions which may have been aggravated by service in the line of duty. Further, the injury or illness need not manifest itself during the military service. Taking all of these changes together, military caregiver leave may now be available to certain family members of veterans who have been discharged for as many as five years, even if the injury or illness manifests itself and requires treatment for the first time five years after it was incurred.

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The amendments to the FMLA contained in the NDAA have no effective date, so will be effective immediately. Employers will want to promptly notify their employees of the changes to the FMLA, update existing posters and notices regarding the FMLA, and amend their policies, procedures and handbooks to incorporate the NDAA's changes. The Department of Labor has not updated the required FMLA poster to account for these newest amendments, but the January 2009 version of the poster is available here:

<http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>, and employers should post the updated FMLA poster when it becomes available.

If you require any assistance or additional information regarding these recent changes to the FMLA, please contact one of the following Labor & Employment Relations Practice Group partners listed below.

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