

Employer Compliance Alert



“Meeting employee needs is a challenge. Meeting the government’s is critical.”



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CONGRESS EXTENDS MILITARY FAMILY LEAVE COVERAGE

In the 2010 National Defense Authorization Act (NDAA), which was signed by President Obama on October 28, 2009, Congress expanded the military-related family and medical leave that it created in the 2008 NDAA. The expansion became effective upon the President's signature. This new legislation means the Family Medical Leave Act regulations that became effective earlier this year are already outdated with respect to military-related FMLA leave.

Caregiver Leave Expansion

The FMLA permits up to 26 weeks of leave for an eligible employee who is the spouse, son or daughter, parent or next of kin of a service member in the Regular Armed Forces, National Guard or Reserves to care for such a service member who has incurred a serious injury or illness in the line of duty while on active duty. Prior to the most recent amendments, this generally meant that treatment for, recuperation from, or therapy for the serious injury or illness had to commence while the service member was still a member of the military (or on the temporary disability retired list) in order for the family member to take FMLA leave to care for the service member. In other words, if an injury or illness did not manifest itself until *after* the individual was discharged from the military (e.g., post-traumatic stress disorder), a family member would not have been able to take FMLA caregiver leave to care for the individual.

The above limitation has now been modified. Under the new rules, the serious injury or illness still needs to be incurred while the service member is in the military, but treatment, recuperation and/or therapy for it can now begin as late as five years after the service member's discharge from the military. For example, if a service member is discharged from the military on November 1, 2009 (after serving in Iraq), and begins treatment for service-related PTSD two years later, a covered family member will be able to take FMLA leave at that time to care for the service member. Moreover, the definition of "serious injury or illness" is also expanded to cover not only an injury or illness incurred by the service member in the line of duty on active duty, but also an injury or illness that existed before the beginning of the service member's active duty that was aggravated by service in the line of duty on active duty. The eligible employee is still limited to a total of 26 weeks of leave related to the service member within a single 12 month period beginning with the first use of the leave.

Qualifying Exigency Leave Expansion

Under the original version of the FMLA military leave provisions, as implemented through the FMLA regulations earlier this year, eligible employees may take leave for a "qualifying exigency" arising from a spouse's, child's or parent's active duty or call to active duty as a member of the Reserves or National Guard in support of a "contingency operation" declared by the Secretary of Defense, the President, or Congress. This leave entitlement is up to 12 work weeks of unpaid leave in the employer's normally designated 12 month period (when combined with all other FMLA leave except FMLA caregiver leave).

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The original provisions did not provide "exigency" leave related to active duty members of the Armed Forces on a theory that such active duty members and their families are always to be prepared for an assignment overseas. The 2010 NDAA discards this theory and extends coverage to eligible family members of: (1) any member of the Regular Armed Forces who is deployed to a foreign country (regardless of the nature of the service performed in that foreign country and regardless of whether it is in support of a contingency operation); and (2) any member of the Reserves or National Guard who is on federal active duty in a foreign country or is called to federal active duty in a foreign country, provided that such active duty is in support of a contingency operation.

The "qualifying exigencies" have not changed and include: short notice deployment, military events, arranging for child care, arranging financial or legal matters, attending counseling, assisting with the military member's rest and recuperation, post-deployment activities, and similar activities as agreed upon by the employer and employee.

Practice Tips

The expansion of caregiver leave and exigency leave clearly will increase the potential number of employees who may be entitled to take such leave. Employers should consider several steps to comply with the recent changes in the law.

- ▶ Update FMLA policies with respect to military leave.
- ▶ Monitor the Department of Labor for the anticipated poster revisions, notice revisions, form revisions, and regulatory revisions. In the meantime, consider posting a notice next to the current DOL poster briefly explaining the changes.
- ▶ Train personnel responsible for leaves and attendance concerning the changes.
- ▶ Educate supervisors of the basics of the changes to enable them to identify situations that should be brought to the attention of personnel responsible for leave administration.

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