

The FMLA Gets (Yet ANOTHER) Facelift!

Last Wednesday, October 28, 2009, President Obama signed into law [the National Defense Authorization Act for Fiscal Year 2010](#) (the "NDAA of 2010"). This law went into effect immediately upon receiving his signature.

Most of the news media's focus has been on the financial and other "support for our troops" aspects of this law. However, it has serious human resource implications as well. Specifically, one of the 4,713 sections of the NDAA of 2010 significantly amends the Family and Medical Leave Act (the "FMLA").

As most of you are aware, the FMLA was just amended at the beginning of 2008, and the regulations which further defined these amendments went into effect in November of last year.

So, just as the ink is drying on the new FMLA policies you drafted earlier this year based on the 2008 amendments, unfortunately, you are going to need to revise these policies again in light of the NDAA of 2010.

The three new amendments to the FMLA are as follows:

(1) The NDAA of 2010 expands "qualifying exigency" FMLA leave to those whose family members are in the "regular military" and who are on active duty in a foreign country or who are called to such duty (in addition to Reservists, members of the National Guard and retired members of the "regular military" who were covered by the military leave provisions of the FMLA which went into effect in 2008). Note that Reservists, members of the National Guard and retired members now also have to be called into active duty in a foreign country in order for their family members to qualify for "qualifying exigency" FMLA leave. (Thankfully, the definition of a "qualifying exigency" was not amended by the NDAA of 2010, just the scope of "who can take" this type of FMLA leave.)

(2) The NDAA also expands "injured servicemember care" FMLA leave to cover the family members (including "next of kin") of veterans. Under the 2008 FMLA amendments, an "injured servicemember" had to be a current member of the Armed Services (including the National Guard or Reserves). Under the NDAA, this is no longer the case.

For purposes of the FMLA, "veteran" is defined as "a person who served in the active military, Naval, or Air Service, and who was discharged or released from such service under conditions other than dishonorable."

(3) The NDAA also expands the general definition of a "serious illness or injury" for all military members (and veterans). The new definition is "an illness or injury which either was incurred in the line of active duty OR existed before the military member served on active duty in the Armed Forces but was aggravated by such service and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating." For veterans, since they no longer have an "office, grade, rank or rating," the "serious illness or injury" only has to meet the "incurred in the line of active duty OR existed before the military member served on active duty in the Armed Forces but was aggravated by such service" criteria. This "serious illness or injury" also can "manifest itself" either before or after the military member becomes a veteran.

In order for the spouse, child, parent or next of kin of an injured servicemember or veteran to be eligible for "injured servicemember care" FMLA leave, the injured servicemember or veteran not only has to have "incurred a serious illness or injury" (as newly defined above) but also must be "undergoing medical treatment, recuperation, or therapy; or otherwise be in outpatient status

assigned to a military medical treatment facility or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients; or (for current members of the military) otherwise be on the temporary disability retired list; or (for veterans) be undergoing such treatment, recuperation or therapy within five years of becoming a veteran." (This "undergoing medical treatment, recuperation or therapy" requirement has not changed as compared to the 2008 FMLA amendments except that the five-year time limitation was added for veterans since they were not included in the 2008 amendments.

How Does This Effect You?

From a practical standpoint, if you have "just revised" your FMLA policy, and it is included in an employee handbook which was distributed earlier this year, you do not need to put out a whole new handbook for the sole purpose of "re-revising" your FMLA policy. It is anticipated that the Department of Labor will issue a new FMLA poster (and possibly new FMLA certification forms) which you will need to begin using once these are issued. We will send out another alert to let you know when these are issued so you can download them from the Department of Labor's website and begin using them at that time.

Because all new employees and those who request FMLA leave are supposed to receive a copy of (or reference to) your current FMLA policy, you do need to go ahead and update your FMLA policy to incorporate the above-referenced changes, so that the copies of this policy you distribute to new employees and those who request FMLA leave are up to date with current law.

Those of you who currently are working on revising your employee handbooks for 2010 will need to "stop the presses" in order to revise your FMLA policy to include the new provisions described above.

We are currently in the process of assisting several clients with these revisions. If we can be of assistance to you in this area, please feel free to contact [Stacie Caraway](#) or any other member of the [Labor & Employment Practice Group](#) at Miller & Martin.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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