



Recent FMLA Amendments Regarding Military Leave

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On October 28, 2009, President Obama signed into law a Defense Department Fiscal Year 2010 authorization bill that includes an expansion of the Family and Medical Leave Act provisions related to "qualifying exigency leave" and to military caregiver leave. Prior to the October 28, 2009, amendments, the regulation emphasized that qualifying exigency leave was available only to families of members of the National Guard or Reserve or a retired member of the regular armed forces or the reserve who was called to active duty in support of a contingency operation. The entitlement did not apply to employees who had family members in the regular Armed Forces. Under the bill signed into law by President Obama on October 28, this entitlement is now extended 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.

An employee is entitled to leave under the FMLA leave for any "qualifying exigency . . . arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces." The FMLA regulations identify eight different circumstances that will qualify as an "exigency":

1. Short-term notice deployment when a covered military member is notified of an impending call to duty seven or fewer calendar days prior to the date of deployment. In such circumstances, an employee is entitled to up to seven days of leave for this purpose.
2. Military events and related activities, including official ceremonies, programs or events sponsored by the military that is related to the active duty or call to active duty status of a covered military member, to attend family support or assistance programs sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to active duty status of a covered military member.
3. Childcare and school activities, including the arrangement of alternative childcare and attendance at school meetings.
4. Financial and legal arrangements: to make or update legal arrangements for the covered military member or act as his or her representative before a government agency.
5. Counseling for oneself, for the covered military member, or for a child of the covered military member.
6. Rest and recuperation: to spend time with a covered military member who is on short-term leave during the period of deployment (up to five days for each leave).
7. Post deployment activities, including arrival ceremonies and funeral arrangements.

8. Additional activities: provided that the employer and employee agree that such activities shall qualify as an exigency.

In addition, the new law further expands entitlements under the military caregiver leave provisions of the FMLA. Under this leave provision, a "spouse, son, daughter, parent, or next of kin" is permitted to take up to 26 workweeks of unpaid leave in a single 12-month period to care for a service member who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness that was incurred in the line of duty while on active duty. Under the 2008 amendments, a "serious injury or illness" was defined as an injury or illness incurred by a covered servicemember in the line of duty on active duty that rendered the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

Under the most recent amendments, the caregiver leave entitlements now extend to family members of veterans and provide coverage for psychological injuries. Specifically, the definition of "covered servicemember" was broadened to include service members undergoing medical treatment, recuperation, or therapy for a serious injury or illness that occurred or was aggravated while on active duty. Most significantly, the illness or injury does not have to manifest itself while the service member is on active duty. The service member must simply have been a member of the armed services at any time during the five year period before treatment began. As a result, disorders such as post traumatic stress disorder and gulf war syndrome are now covered.

Importantly, the 12-month period to be used for purposes of tracking this leave entitlement begins when the employee starts using his or her leave. Therefore, the 12-month period utilized for tracking other forms of FMLA leave may not be utilized for purposes of tracking the caregiver leave entitlement. If the leave covers "covered servicemember leave" protections and protection under the regular FMLA provisions, the employer shall designate the leave as "covered servicemember leave."

The amendments to the FMLA contained in the October 2009 bill are effective immediately. Employers should 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 these changes.