



Legal Alert: FMLA's Military Leave Provisions Expanded

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On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (the "NDAA"), which, among other things, expands the scope of the provisions of the Family and Medical Leave Act (FMLA) pertaining to leave for qualifying exigencies and military caregiver leave. Specifically, the NDAA now permits family members of active duty service members to take leave for a qualifying exigency. Previously, only family members of National Guard and Reservists called to active duty in support of a contingency operation were permitted to take leave for a qualifying exigency. The NDAA also extends the scope of military caregiver leave to families of certain veterans, who previously were not covered by the provision. It also permits military caregiver leave for serious injuries or illnesses that are the result of pre-existing conditions that were aggravated by service while on active duty.

Background:

The FMLA permits eligible employees to take a total of twelve weeks of job-protected leave during a twelve-month period due to the employee's or a family member's serious health condition, or the birth, adoption, or placement of a child for adoption or foster care. Eligible employees are those who have been employed for at least twelve months (not necessarily consecutive months), have worked for at least 1,250 hours during the twelve-month period immediately preceding the leave of absence, and work in an office or worksite at which fifty or more employees are employed.

In 2008, Congress amended the FMLA to permit eligible family members of service members in the National Guard and Reserves to take leave for a qualifying exigency related to the call to active duty of the service member. The Secretary of Labor has defined a qualifying exigency as leave taken by a family member: (1) to deal with issues arising from the service member's short-notice deployment; (2) to attend official military ceremonies, programs, or events; (3) to attend to certain childcare and school activities; (4) to address financial or legal matters arising as a result of the service member's absence while on active duty; (5) to attend counseling for the family member or service member arising from the service member's active duty or call to active duty; (6) to spend time with service members who return on short-term temporary rest and recuperation leave during a period of deployment; (7) to attend certain post-deployment activities; and (8) for "additional activities" that arise out of a service member's active duty or call to active duty.

Congress also amended the FMLA to permit eligible family members to take up to 26 weeks of leave to care for a member of the regular Armed Forces,

National Guard or Reserves with a "serious injury or illness" incurred in the line of duty on active duty for which the service member is (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list.

NDAAs Revisions to Qualifying Exigency Leave:

The NDAA amends the FMLA to provide leave for a qualifying exigency for covered family members of regular Armed Forces service members deployed to a foreign country as well as members of a reserve component of the Armed Forces deployed to a foreign country under a call or order to active duty under a provision of law referred to in 10 USC § 101(a)(13)(B). According to Senator Christopher Dodd, one of the Senate bill's sponsors, this provision is intended to extend eligibility for exigency leave to covered family members of those deployed in a foreign country and not only in support of a contingency operation. Additionally, Senator Dodd stated that it was not the intent of the initial legislation to limit exigency leave to family members of National Guard and Reserve members. Accordingly, the legislation extends exigency leave to covered family members of active duty service members who are deployed to a foreign country.

NDAAs Revisions Military Caregiver Leave Provisions:

- ***Pre-existing Conditions Now Covered:*** The NDAA amends the definition of serious injury or illness to include pre-existing conditions that were aggravated by service in the line of duty while on active duty as well as those incurred in the line of duty while on active duty.

- ***Family Members of Veterans Now Covered:*** The NDAA also amends the military caregiver leave provisions to include family members of a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the five-year period preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

- ***Definition of Serious Injury or Illness for Veterans:*** The NDAA defines serious injury or illness for such veterans to mean a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the service member in the line of duty on active duty in the Armed Forces (or a pre-existing condition that was aggravated by service in line of duty on active duty) and that manifested itself before or after the member became a veteran.

Employers' Bottom Line:

The NDAA does not contain an effective date, thus it was effective immediately. Employers covered by the FMLA should ensure that their FMLA policies and procedures are in compliance with the new provisions. The Department of Labor likely will issue additional regulations to address the new provisions. We will keep you updated as more information becomes available.

If you have any questions regarding these provisions or other labor or employment related questions, please contact the Ford & Harrison attorney with whom you usually work.