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Labor & Employment

Alert

Family And Medical Leave Act: Military Leave

BY ADRIAN MOORE-PLEASANT

In January of 2008, President Bush signed into law amendments to the Family and Medical Leave Act (FMLA) that authorize two new forms of military leave. The first form is called qualifying exigency leave and its provisions go into effect on Jan. 16, 2009. The second form is called military caregiver leave and its provisions are currently effective. The Department of Labor (DOL) issued its proposed regulations in the spring of this year and its final regulations last month. This article explains the substantive provisions of the final regulations.

A. Qualifying Exigency Leave

Under the National Defense Authorization Act of 2008 (NDAA), eligible employees of covered employers are allowed to take up to 12 workweeks of unpaid FMLA leave in a 12-month period "because of any qualifying exigency." The people who qualify for this exigency leave are the spouse, son, daughter or parent of a covered military member who is called to active duty in the Armed Forces in support of a contingency operation. 29 U.S.C. 2612(a)(1)(E).

1. Covered Military Member

The Department of Labor's final regulations clarify that this leave entitlement applies only when a current member of the National Guard or Reserves is called to active duty by the federal government. It does not apply to members of the Regular Armed Forces, who are normally on active duty, nor to state calls to service unless authorized by the president. 29 C.F.R. 825.126.

2. Eligible Employees

In order to be eligible for qualifying exigency leave, an employee must have been: 1) employed by the employer for at least 12 months; 2) employed by the employer for at least 1,250 hours of service during the 12 months preceding the leave; and 3) be employed at a worksite where the employer employs at least 50 employees within 75 miles of the worksite. 29 U.S.C. 2611(2).

3. Qualifying Exigencies

The DOL's final regulations provide eight exclusive categories of situations that meet the definition of a qualifying exigency.

continued



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This information is provided as an educational service and is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

a. Short-Notice Deployment

The first qualifying category is a short-notice deployment. In this situation, an eligible employee may take time off from work to address any issues that arise from the fact that a covered military member (spouse, son, daughter or parent) in the National Guard or Reserves is notified of an impending call or order to active duty in support of a contingency operation seven or fewer calendar days prior to the deployment. Leave can be taken for this purpose for a period of seven calendar days beginning on the date that a covered military member is notified of an impending call or order to active duty in support of a contingency operation.

b. Military Events and Related Activities

The second qualifying category is military events and related activities. These situations include time to attend any official ceremony, program or event sponsored by the military that is related to the active duty or call to active duty status of a covered military member. In addition, an eligible employee may take time off to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member.

c. Childcare And School Activities

The third qualifying category is childcare and school activities. There are four potential situations in this category. First, an eligible employee may take time off to arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement. Second, an eligible employee may take time off to provide childcare on an urgent, immediate need basis, but not on a routine, regular, or everyday basis. Third, an eligible employee may take time off to enroll a child in or transfer a child to a new school or day care facility. Fourth, an eligi-

ble employee may take time off to attend meetings with staff at school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or a meeting with school counselors. In all four cases, the child must be a biological, adopted, foster child, stepchild or a legal ward of a covered military member, or a child for whom a covered military member stands in *loco parentis*, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability that exists at the time that FMLA leave is to commence.

d. Financial and Legal Arrangements

The fourth qualifying category is financial and legal arrangements. These situations include an opportunity for an eligible employee to make or update financial or legal arrangements to address the covered military member's absence. They also include the opportunity to act as the covered military member's representative before a federal, state or local agency for purposes of obtaining, arranging, or appealing military service benefits.

e. Counseling

The fifth qualifying category is counseling. This situation entitles an eligible employee to take time off from work to attend counseling for himself/herself, a covered military member, or the child of a covered military member provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.

f. Rest and Recuperation

The sixth category is rest and recuperation. This category entitles an eligible employee to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment.

g. Post-Deployment Activities

The seventh category is post-deployment activity. This category entitles an eligible employee to attend arrival ceremonies, reintegration briefings, and any other official ceremony or program sponsored by the military for 90 days following the termination of the covered military member's active duty status.

h. Catch All

The eighth category is a catch-all. It entitles an eligible employee to address other events which are not listed but arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave.

4. Documentation

In order to document the reason that an eligible employee is requesting qualifying exigency leave, the employer should provide the employee with DOL form WH384. This form requires the employee to establish a covered familial relationship, to document the period of the covered military member's active duty service, to articulate a qualifying reason for leave, to anticipate the amount of leave that will be needed, and to identify any third-party witnesses. This form is recommended to confirm that the employee falls into a qualifying category.

5. Notice

The type of notice that an employee must provide to take exigency leave depends upon whether the need for leave is foreseeable. If the need for leave is foreseeable, then the employee's notice must be "reasonable and practicable." 29 U.S.C. 2612(e)(3). The DOL's regulations interpret that phrase to mean "as soon as practicable." 29 C.F.R. 825.302(a). Normally, this means that notice must be given the same day or the next business day, but the test is circumstantial. 29 C.F.R. 825.302(b). If the need for leave is not

foreseeable, employees will have to provide notice of leave at the time that they seek to take leave.

B. Military Caregiver Leave

The NDAA also provides that an eligible employee who is the spouse, son, daughter or parent or next-of-kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a single 12 month period to care for a service member with a serious injury or illness. 29 U.S.C. 2612(a)(3)-(4).

1. Eligible Employees

In order to be eligible for military caregiver leave, an employee must have been: 1) employed by the employer for at least 12 months; 2) employed by the employer for at least 1,250 hours of service during the 12 months preceding the leave; and 3) be employed at a worksite where the employer employs at least 50 employees within 75 miles of the worksite. 29 U.S.C. 2611(2).

2. Covered Family Members

Under the final regulations, a son or daughter of a covered military member is defined broadly as a child of "any age." There is no limitation or restriction that the child is under the age of 18. The parent of a covered military member is defined to exclude parents "in law." A covered military member can designate in writing the individual he or she wishes to be "next of kin." In the absence of a written designation, the term next of kin refers to the covered military member's nearest blood relative. The order of priority for determining the nearest blood relative is: (1) relatives granted legal custody; (2) brothers and sisters; (3) grandparents; (4) aunts and uncles; and (5) first cousins. Family members within the same level of blood relationship are all next of kin and may take leave simultaneously or consecutively.



3. Covered Military Members

A covered military member must be a current member of the Armed Forces who sustained a serious injury or illness in the line of active duty that caused him or her to be placed on the temporary disability retired list. 29 C.F.R. 825.127. The covered military member must be undergoing medical treatment, recuperation, therapy or be in outpatient status. Former members of the Armed Forces and members on the permanent disability list do not qualify for military caregiver leave.

4. Serious Injury or Illness

A serious injury or illness is not the same thing as a serious health condition. Under the DOL's final rules, a serious injury or illness is defined as an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

5. Medical Certification Forms

The DOL published a new form to assist employers in deciding whether an employee qualifies to take military caregiver leave. On form WH385, the employee must identify the covered servicemember, state whether the servicemember is employed in the military, state whether the servicemember is on the temporary disability retired list, describe the care to be provided, and the expected duration of leave. Then, a specified health care provider must verify the covered servicemember's medical status and certify the covered servicemember's need for care by a family member. This medical portion of the form may be completed by a specified health care provider from the Department of Defense (DOD), Veteran's Affairs (VA), DOD Tricare, DOD non-network Tricare, or DOD authorized representative.

In addition, the final regulations authorize employers to require employees to provide confirmation of a covered family relationship. The confirmation may take the form of a statement of family relationship and

reasonable supporting documentation. This documentation may take the form of a birth certificate or other court document establishing that the employee has a qualifying familial relationship to the servicemember. Once the employer inspects the original document, it must be returned to the employee.

6. Single 12-Month Period

Military caregiver leave entitles an eligible employee to take up to 26 workweeks of leave during a "single 12 month period" to care for an injured servicemember. Many people thought that the word "single" meant that an eligible employee could take military caregiver leave only once per lifetime. But, the final regulations clarify that an eligible employee may take military caregiver leave anytime that a covered military member suffers a qualifying injury, as long as the employee has available time remaining.

As a result, an employee with a military family is entitled to take military caregiver leave an indefinite number of times. However, no more than 26 workweeks of leave may be taken within a single 12-month period. The 12-month period begins on the first date that the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method selected by the employer to determine the employee's 12 workweeks of entitlement for other FMLA qualifying reasons. An eligible employee who does not take all 26 weeks within 12 months forfeits the remainder.

7. Interaction of the FMLA and Military Caregiver Leave

There is some potential overlap between military caregiver leave and the entitlement to take leave to care for a close family member with a serious health condition. The final regulations clarify that if military caregiver leave would also qualify as family leave to care for a serious health condition, no dual designation may be allowed. Instead, the leave must be designated first as military caregiver leave.

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C. Legal Assistance

As a result of these significant changes in the law, companies should update their FMLA policies, posters and notices, develop FMLA guidelines or procedures, update certification forms or template letters, and train Human Resource employees and supervisors. For assistance with these legal matters, please contact attorney Adrian Moore-Pleasant at 919.981.4082.

For more information on this topic and other matters pertaining to labor and employment law, please contact issue author Adrian Moore-Pleasant or any member of the Williams Mullen Labor & Employment Team.

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