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President Obama Signs New Law Expanding FMLA Coverage

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President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647) (“NDAA 2010”) on October 30, 2009. The NDAA 2010 further expands the coverage of leaves under the Family and Medical Leave Act of 1993 (“FMLA”) available to military families. Under legislation passed by Congress in 2008, the FMLA was amended to create leave protections for military-related exigencies and military caregivers. These leave protections were available only to families of servicemembers in the National Guard or Reserve branches of the Armed Forces. Through the NDAA 2010, Congress expanded the reach of these military-related leaves to families of servicemembers in a regular component of the Armed Forces. In addition, the new law provides additional rights for family members of injured veterans to take military caregiver leave.

Exigency Leave

Under the previous law, “exigency leave” provided 12 weeks of leave in a 12-month period to employees whose spouse, child, or parent was in the National Guard or Reserve branches of the Armed Forces and was on active duty or was notified of an impending call or order to active duty. The purpose of this leave is to allow such an employee to take leave to attend to qualifying exigencies related to the family member’s active duty or call to active duty. The Secretary of Labor has defined such exigencies to include time to: address issues related to a short-notice deployment; attend military events and activities related to the deployment; arrange for childcare; attend school activities; make or update financial and legal arrangements; attend counseling related to the active duty or call to active duty; spend time with a servicemember who is on short-term and temporary rest and recuperation leave; attend post-deployment activities; and address other events that arise out of the active duty or call to active duty as agreed-upon by the employer and the employee. The new law expands this leave to cover employees whose spouse, child, or parent is in a regular component of the Armed Forces and deployed to a foreign country.

Caregiver Leave

Under prior law, “caregiver leave” provided 26 weeks of leave in a single 12-month period to care for the serious injury or illness of a servicemember who is the employee’s spouse, child, parent, or next of kin. The Secretary of Labor defined “next of kin” as the nearest blood relative other than the servicemember’s spouse, parent, or child, unless the servicemember designated in writing another blood relative for purposes of this leave. This leave entitlement is applied on a per-servicemember, per-injury basis, such that an eligible employee may be entitled to take more than one 26-week period if the leave is to care for different servicemembers or the same servicemember with a subsequent serious injury or illness, provided that no more than 26 weeks may be taken in any single 12-month period.

This leave previously was available only to families of servicemembers, including those in the National Guard or Reserves. Congress has expanded this leave to cover employees who are family members caring for a veteran who was a member of the Armed Forces (reserve or regular component) at any time during the period five years preceding the date the veteran undergoes medical treatment, recuperation, or therapy for the serious injury or illness. In addition, the term "serious injury or illness" was expanded generally to cover not only an injury or illness incurred by the servicemember or veteran in the line of duty, but also an injury or illness that existed before the servicemember's or the veteran's active duty and was aggravated by service in the line of active duty. However, with respect to veterans, only certain, yet-undefined, injuries or illnesses will qualify, and the Department of Labor has been tasked with providing this definition in the implementing regulations. However defined, the injury or illness can have manifested itself either before or after the servicemember became a veteran.

Practical Pointers

Because employer action is required to comply with the new law, we recommend employers use this opportunity to reexamine their leave policies from top to bottom, including:

1. **Review and revise** FMLA policies and administrative practices to ensure they comply with the expanded military leave laws.
2. **Be prepared to react to DOL regulations** defining "qualifying injury or illness" in the case of veterans of the Armed Forces. In the meantime, employers are encouraged to use their best judgment and interpret this term broadly, with the intent to carry out the spirit of the law. Until the DOL promulgates implementing regulations regarding this term, employers may want to consult employment counsel.
3. **Plan** for the fact that some states have not adopted the FMLA's military leave laws. This means that employees are entitled to military leave under the FMLA *in addition to* leave time under some states' medical leave laws, thereby sometimes doubling the amount of leave time available to employees.
4. **Train supervisors and managers** who are decision-makers and who communicate information regarding leave laws to employees about the expansion of the military leave laws.
5. **Monitor** FMLA compliance and ensure that the expanded military leave laws are complied with.
6. **Respond to and investigate** all complaints of non-compliance with leave requirements.
7. **Protect against retaliation** an employee's attempt to exercise his or her rights under the expanded law.

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