

FMLA EXPANDED YET AGAIN

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Certainly by now, all covered employers should have revised their Family and Medical Leave Act policies to include the military-related leaves that were enacted under the National Defense Authorization Act for Fiscal Year 2008: “qualifying exigency leave” and “military caregiver leave.” These new types of leave were addressed at some length in the comprehensive revision of FMLA regulations that went into effect on January 16, 2009. See November 18, 2008 ALERT: “Family and Medical Leave Act: First Sweeping Regulatory Changes Since Its Enactment 15 Years Ago.”

Well, it is time to revise those policies yet again. On October 28, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010. That Act expands certain aspects of the FMLA military-related leaves.

QUALIFYING EXIGENCY LEAVE

Under the FMLA, an eligible employee may take up to 12 weeks of FMLA leave during the designated 12-month period because of a qualifying exigency arising out of the fact that the employee’s spouse, child, or parent is a “covered military member” on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. Qualifying exigencies include: short-notice deployment; military events and related activities; certain childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; certain post-deployment activities; and any other event that the employer and employee agree constitute a qualifying exigency.

Prior to the 2010 NDAA, an eligible employee could take qualifying exigency leave only when the employee’s spouse, child, or parent was a member of the Reserves or National Guard. Qualifying exigency leave was not available for employees with family members who were active members of the Armed Forces.

Now, under the 2010 NDAA, qualifying exigency leave has been expanded to permit an eligible employee to take FMLA leave for a qualifying exigency related to the deployment of a spouse, child, or parent who is a member of a regular component of the Armed Forces. In addition, the call to active duty or notice of an impending call or order to active duty is no longer limited to those related to “contingency operations.” Instead, covered active duty now relates to when a member of the regular or reserve components of the Armed Forces is deployed to any foreign country.

MILITARY CAREGIVER LEAVE

Under the FMLA, an eligible employee may take up to 26 workweeks of FMLA leave during the designated 12-month period (which must be measured forward from the first time an employee takes FMLA leave for this purpose) in order to care for a covered servicemember with a serious injury or illness, if the employee is the spouse, child, parent, or “next of kin” of the covered servicemember.

Prior to the 2010 NDAA, a “covered servicemember” was defined as a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy; is otherwise on outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness. A “serious injury or illness” was defined to be an injury or illness of the covered servicemember incurred in the line of duty, while on active duty, that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

Now, under the 2010 NDAA, the definition of a “covered servicemember” has been expanded to include 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 the National Guard and Reserves, at any time

during the five-year period preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy.

The 2010 NDAA directs the Secretary of Labor to define what constitutes a “qualifying injury or illness” of a veteran that would trigger the right to “military caregiver leave” for a former service member, and this type of FMLA leave will not be available until that definition is issued. However, the Act specifies that a qualifying injury or illness must either be incurred in the line of active duty or be a preexisting condition that was aggravated by military service in the line of active duty. Furthermore, it states that a qualifying injury or illness need not manifest itself until after the service member leaves the military.

EFFECTIVE DATE

These FMLA revisions do not specify an effective date. However, employers should presume that they are effective

immediately, with the exception of the provisions relating to leave to care for veterans, which require DOL regulations. And it is expected that a new FMLA poster will soon be available (and required to be posted).

FURTHER FMLA EXPANSION CONTEMPLATED

Though prospects of imminent passage are slim, it should be noted that two additional amendments to the FMLA have been proposed in Congress. One would provide that seven of the days of FMLA leave be paid. The other would require that employers pay for up to five days of paid FMLA leave in situations where the employer has ordered the employee not to work for health reasons, such as the swine flu.