



Congress Expands Military FMLA Leave

Insights
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Less than a year after the Department of Labor issued regulations implementing and clarifying new forms of military-related FMLA leave, Congress has approved measures that will substantially expand the scope of these provisions. On October 28, 2009, President Obama signed into law the 2010 National Defense Authorization Act, which among other things extends eligibility for "qualifying exigencies" and military caregiver leave to a larger population of employees. The legislation does not include an effective date, suggesting that it took effect immediately upon the President's signature.

Qualifying Exigency Leave

"Qualifying exigency leave" includes leaves for short-notice deployment, military events and related activities, financial and legal matters, child care and school activities, rest and recuperation, post-deployment activities, and additional activities agreed upon by the employer and the employee. In its prior incarnation, it was intended to help those family members with imminent leave situations and obligations where their spouse, parent or child, was called to active duty in support of a contingency operation. It was confined to family members of those in the National Guard or Reserves.

The new requirement extends that leave to a member of any regular component of the Armed Forces, and removes the requirement that it be in support of a contingency operation. It does not alter the actual leave period, which continues to provide for up to 12 weeks of FMLA leave on an annualized basis.

Military-Caregiver Leave

The FMLA already allows eligible employees to take up to 26 weeks of military "caregiver leave" in a single 12-month period to care for a service member who has a serious illness or injury that was incurred in the line of duty while on active duty. Previously, eligibility for military-caregiver leave had been confined to the family of active duty members.

The new law extends this provision to close family members of veterans who were members of the Armed Forces (including the National Guard or Reserves) at any point in time within five years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy. Consequently, the family members of our nation's veterans now enjoy the same leave rights as those afforded relatives on active duty status.

The law also revises the definition of "serious injury or illness" for active duty members and provides a slightly different definition for veterans. Both are now defined to include an injury or

illness that *existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces*. And, for veterans, the definition further adds that the injury or illness may *manifest itself before or after the member became a veteran*.

Likely Impact And Actions To Take Now

Congress's latest amendment is undoubtedly intended to substantially expand the definition of those eligible to take leave for qualifying exigencies and to provide caregiver leave – resulting in a larger percentage of the workforce that is permitted to take such leave. In the case of caregiver leave, that also means that a larger percentage of employees will be eligible for the additional 14 weeks of protected leave available to care for a close family member with veteran's status.

These amendments call for immediate steps to achieve compliance, including 1) revising your FMLA policy to include Regular Armed Forces under the scope of qualifying exigency leave and deleting references to "contingency operations;" 2) revising that same policy to provide caregiver leave for family members of veterans; and 3) informing those who administer attendance or leave matters of the broadened military leave provisions.

We anticipate that the DOL will also issue new certification forms and other FMLA-related forms to comport with the law's new definitions of those eligible to take leave and the reasons related to military caregiver leave. In the meantime, Fisher Phillips is in the process of updating its current FMLA Compliance Package in conformity with these new requirements, and an updated package will be made available free of charge to those who previously purchased one on the heels of the new regulations that took effect earlier this year.

This Legal Alert provides an overview of the requirements of a specific federal law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.