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On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) (NDAA). The NDAA includes provisions that expand the two types of military-related leave that became available under the Family and Medical Leave Act (FMLA) in January 2008: “qualifying exigency” leave and military caregiver leave. The expanded leaves are effective upon signing by the President, and employers must update their FMLA policies to reflect the new leave

Congress Adds Additional Family Military Leave Entitlements to the FMLA

By Mark T. Phillis

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) (NDAA). The NDAA includes provisions that expand the two types of military-related leave that became available under the Family and Medical Leave Act (FMLA) in January 2008: “qualifying exigency” leave and military caregiver leave. Although this portion of the NDAA does not have an effective date, according to the staff of the Subcommittee on Military Personnel of the House Armed Services Committee, the NDAA took effect when President Obama signed it.

“Qualifying Exigency” Leave for Families of Active Duty Members of the Armed Forces

Under the FMLA, eligible employees may take leave for a “qualifying exigency” arising out of a spouse’s, child’s or parent’s active duty or call to active duty as a member of the Reserves or National Guard in support of a “contingency operation” declared by the U.S. Secretary of Defense, the President, or Congress. Employees are entitled to take up to 12 workweeks of unpaid leave in any rolling 12-month period under this provision. Now, “qualifying exigency” leave is available to eligible families of members of the National Guard and Reserves, as well as to eligible families of any member of the Armed Forces. This leave is restricted to situations where the member of the National Guard, Reserves or Armed Forces is on active duty in a foreign country or is called to active duty in a foreign country.

The U.S. Department of Labor (DOL) defines a “qualifying exigency” to include things such as preparing for a short-notice deployment, arranging for child care, making or updating financial or legal arrangements, attending counseling, resting and recuperating, post-deployment activities, and similar activities. For a detailed discussion of all of the military leave provisions of the FMLA, including the DOL’s definition of a “qualifying exigency,” see Littler’s November 2008 ASAP, “Department of Labor Clarifies FMLA Amendments Related to Service Member Care and Other Military-Related Exigencies.”

Military Caregiver Leave for Veterans and for Aggravated Illnesses or Injuries

Under the military caregiver provisions of the FMLA, eligible family members may take leave to care for a current member of the Armed Forces, National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in out-patient status, or is on the temporary disability retired list for serious injury or illness. An eligible employee may take a combined total of 26 workweeks of military caregiver leave in a single 12-month period that begins on the date the employee first uses the leave and ends 12 months later.

The NDAA extends the entitlement to military caregiver leave to the families of veterans. Congress incorporated the definition of “veteran” that is used by the Department of Veterans Affairs: “[A] person who served in the active military, Naval, or Air Service, and who was discharged or released therefrom under conditions other than dishonorable.”

Congress also expanded the definition of “serious injury or illness” for purposes of the military caregiver provisions of the FMLA. It now is defined as:

an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (*or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces*), and that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating. (emphasis added).

Since veterans, by definition, do not have a current “office, grade, rank, or rating,” this requirement is replaced with the simple requirement that it be a “qualifying (as defined by the Secretary of Labor) injury or illness” that “manifested itself before or after the member became a veteran.” Although there currently is no definition of “qualifying,” employers are required to provide their leave now.

The entitlement to take military caregiver leave for the care of veterans extends only to family members of veterans when the veteran was a member of the Armed Forces at some point in the five years preceding the date on which the veteran undergoes the medical treatment or receives the therapy that necessitates the leave.

Recommendations

Employers will need to update their existing FMLA policies and ensure that employees are aware that they may be entitled to additional leave. Even though these amendments slightly reduce the benefits available to eligible families of member of the National Guard and Reserves, since they extend additional benefits to the families of members of the active duty Armed Forces, and, for the first time, extend benefits to the families of seriously injured or ill veterans, employers should expect that more employees will be entitled to leave. It is anticipated that the DOL will revise its required FMLA notice and its FMLA regulations to implement these new provisions.

Since, in a little-noticed provision,¹ the FMLA regulations now require that employers include all of the information in the DOL’s notice in their handbook, employers should take this opportunity to ensure that their current FMLA policy is compliant and watch for the release of a revised notice.

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¹ See 29 C.F.R. § 825.300(a)(4).