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The Ohio Military Family Leave Act became effective on July 2, 2010. Ohio employers are advised to familiarize themselves with this new law, which resembles – but is not identical to – the FMLA’s provisions for qualifying exigency leave and military caregiver leave.

Ohio Employers Have Their Marching Orders – The Ohio Military Family Leave Act Is in Effect

By Lisa A. Orlando

With little fanfare, Ohio’s Military Family Leave Act became effective on July 2, 2010. This Act applies to both public and private employers with 50 or more employees and allows eligible employees to take up to 10 days or 80 hours, whichever is less, of unpaid leave when a family member who is a member of the uniformed services is called to active duty or is injured, wounded or hospitalized while serving on active duty. According to testimony offered by state representative Peter Ujvagi:

As deployment nears, military families require time together, both to strengthen family bonds and ensure an orderly transition as they take on new roles. This family bonding is just as necessary when a member of active duty is injured. The stress of both these times increases if employed family members have limited or non-existent opportunities to miss work . . . Ten days of unpaid leave for ensuring that military families have enough time to make the transition to their new status is not too much to ask in return for their defense of our country. . . Denying military families this most vital time together during a period of extreme stress would be a failure [of protecting those who make sacrifices for our country].

The following is an overview of the Ohio Military Family Leave Act (OMFLA) and its application, including its similarities to and differences from the military caregiver and military qualifying exigency provisions of the federal Family and Medical Leave Act (FMLA). The OMFLA is codified at Ohio Revised Code Chapter 5906.

What requirements must an employee meet to be eligible for leave under the OMFLA?

To be eligible for leave under the OMFLA, an employee must: (1) be employed by an employer with 50 or more employees; (2) have been employed by that employer for at least 12 consecutive months; and (3) have worked at least 1,250 hours for that employer in the 12 months immediately preceding commencement of the leave.

Although these eligibility requirements appear to be almost identical to the FMLA's eligibility criteria, there are some subtle, yet important, differences. First, both the FMLA and OMFLA require that the employee be employed for at least 12 months. The OMFLA requires that this 12-month period of employment must be *consecutive*, whereas, the FMLA, on the other hand, specifically states that the 12 months an employee must have been employed by the employer need not be consecutive months. Next, although both the OMFLA and FMLA require that the employee work for an employer with 50 or more employees, the OMFLA is more expansive insofar as it does not have the FMLA's additional requirement that the employee work in a location where there are 50 or more employees within a 75-mile radius.

As a practical matter, the nuances between the eligibility criteria of the FMLA and OMFLA may result in situations where an employee who is not eligible for military caregiver or qualifying exigency leave under the FMLA is nevertheless entitled to leave under the OMFLA. Ohio employers must note these differences and separately assess an employee's eligibility for leave under the criteria of the FMLA and under the criteria of the OMFLA.

Under what circumstances is an eligible employee entitled to take leave under the OMFLA?

Under OMFLA, an eligible employee may take leave if his or her parent, spouse, child or other person over whom he or she has legal custody is a member of the uniformed services and is either: (1) called into active duty for a period longer than 30 days; or (2) is injured, wounded or hospitalized while serving on active duty.

Compared to the sort of qualifying events triggering leave under the military caregiver and military qualifying exigency provisions of the FMLA, the triggering events under the OMFLA are more broadly defined. For instance, qualifying exigency leave under the FMLA is only available when the employee's covered family member is called to active duty in a *foreign country* as a member of the Armed Forces (including the National Guard and Military Reserves). Leave under the OMFLA, on the other hand, is triggered if an eligible employee's family member is a member of the Armed Forces or the Ohio organized militia and is called to full-time active duty, regardless of the location of such duty. With regard to military caregiver leave, the FMLA requires that the employee's covered family member is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the military's temporary disability retired list, for a "serious injury or illness" incurred in the line of duty while on active duty. The OMFLA is not as restrictive and does not require a "serious injury or illness." Again, these distinctions between the FMLA and the OMFLA could potentially result in situations where the OMFLA applies even though the FMLA does not.

How much leave is an eligible employee entitled to take under the OMFLA?

Unlike the FMLA, which provides for greater periods of leave in any 12-month period, an eligible employee is entitled to take up to 10 days or 80 hours, whichever is less, of military family leave once per calendar year under the OMFLA. Also unlike the FMLA, which gives employers the option to choose from using the calendar year, any fixed 12-month leave year, a 12-month period measure forward from the employee's first day or a rolling 12-month period measured backward from the date an employee uses any FMLA leave, the OMFLA requires that employers use the regular calendar year when measuring leave entitlement. Thus, with each new calendar year, eligible employees can take leave under the OMFLA.

What are the notice requirements under the OMFLA?

An employee who needs leave under the OMFLA must notify his or her employer at least 14 days before taking the leave if the leave is being taken because a covered family member has been called to active duty in the uniformed services, or at least two days prior to taking the leave if it is because of an injury, wound or hospitalization of a covered family member while on active duty. If the covered family member's situation is critical or life threatening, the employee's notice obligations are waived.

An employer may require certification from the appropriate military authority to verify the need for leave under the OMFLA.

If the military family leave is needed because an eligible employee's family member has been called to active duty, when must the employee take the leave?

Under OMFLA, the dates on which an eligible employee may take leave for the call to active duty of a covered family member must occur no more than two weeks prior to, or one week after, the deployment date.

If an employee is eligible for leave under both the FMLA and the OMFLA for the same underlying reason, may the leave periods run concurrently with one another?

According to the OMFLA, an employee may take military family leave only if he or she does not have *any other* leave available for his or her use except sick leave or disability leave. This statutory language implies that leave under the OMFLA supplements leave under the FMLA and that the two cannot run concurrently because an employee may only take OMFLA if he or she is ineligible for FMLA leave or has already exhausted his or her FMLA leave entitlement. However, the legislative history of the OMFLA reveals that its sponsor, Peter Ujvagi, told the State Senate that the Act is intended to prohibit employees from piggybacking OMFLA leave on top of any FMLA leave allowed. Moreover, the OMFLA (and the FMLA) provide a floor, not a ceiling, and expressly permit an employer to establish more generous leave benefits than those provided by law.

Despite support for the argument that leave under the OMFLA runs concurrently with leave under the FMLA, the statutory language seems to suggest otherwise. Thus, until the legislature or the courts resolve this discrepancy, employers are advised to follow the statutory text and grant leave under the OMFLA when the employee is not eligible for FMLA leave (or any other leave offered by the employer with the exception of sick time and disability leave) or when he or she has exhausted all such available leave. In other words, leave taken under the OMFLA should not run concurrently with leave taken under the FMLA and should only be granted when the employee is not entitled to or has already used all available FMLA leave.

What rights and protections does an employee who takes OMFLA have?

Similar to the FMLA, employees are not entitled to their salary or wages while on OMFLA leave. Also like the FMLA, the OMFLA requires employers to maintain the employee's benefits during the period of time that he or she is on OMFLA leave. The employee remains responsible for his or her regular proportionate cost of those benefits while he or she is on OMFLA leave. The employee also has a right to be restored to his or her position (or a position with equivalent seniority, benefits, pay and other terms and conditions) upon completion of the OMFLA leave. Finally, employees have a right to be free from interference with their rights under the OMFLA, as well as protection from retaliation on the basis of their exercise of rights under the OMFLA.

Can an employee waive his or her rights under the OMFLA?

No. An employer cannot ask an employee to waive his or her rights under the OMFLA by agreement. Nor can an employer enter into a collective bargaining agreement or employee benefit plan that requires employees to waive their rights under the OMFLA. For any employer with a collective bargaining agreement already in effect as of the OMFLA's effective date (July 2, 1010) that provides lesser benefits than the OMFLA, the provisions of the OMFLA will apply to that employer immediately upon the expiration of the conflicting agreement.

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