



EMPLOYMENT LAW UPDATE

DECEMBER 2009

National Defense Authorization Act of 2010 Expands Entitlements Under the FMLA

Introduction

On October 28, 2009, President Obama signed the National Defense Authorization Act of 2010 ("NDAA 2010") into law. The NDAA 2010 significantly alters employers' duties under the Family and Medical Leave Act of 1993 ("FMLA") and expands the family military leave entitlements that went into effect on January 29, 2009. All provisions of the NDAA 2010 became effective upon their enactment on October 28, 2009. Key FMLA changes to the NDAA 2010 include the following:

- members of the regular components of the armed forces are now eligible for "qualifying exigency" leave under the FMLA, like their reservist counterparts;
- family members of servicemembers are entitled to military caregiver leave for up to five years after the servicemember's military service concludes; and
- leave to care for an injured servicemember is expanded to cover existing or pre-existing conditions that were aggravated in the line of duty, rather than just injuries or illnesses that were first incurred in the line of duty.

Background

The FMLA

Former President Bill Clinton signed the FMLA into law in August 1993. The FMLA allows employees to take up to twelve weeks of unpaid leave in any one year period to care for sick family members, to care for a new child, or to recover from serious medical conditions that render employees unable to perform their jobs. Under the FMLA, employees are entitled to return to the same or substantially similar position following FMLA leave and to have all of their benefits reinstated.

Employers are only required to grant leave under the FMLA to employees who have a total of twelve months of previous service; who have worked at least 1,250 hours within the previous twelve months; and who work at a location where at least fifty employees are employed by the employer within seventy-five miles. The FMLA applies to public agencies, including state, local and federal employers, schools (both public and private), and private sector employers with fifty or more employees.

The NDAA 2008's Amendments to the FMLA

In January 2008, President Bush signed into law the first-ever amendments to the FMLA (NDAA 2008). The NDAA 2008 amended the FMLA to provide two statutory entitlements that were designed to ease the burden of military service on family members.

Under the NDAA 2008, the spouse, parent or child of members of the National Guard or Reserves could take up to 12 workweeks of leave in a single 12-month period for “qualifying exigencies” while the member was on active duty or called to active duty in support of contingency operations. Such qualifying exigencies include short-notice deployments, attending military events and related activities, organizing childcare and school activities, managing financial and legal arrangements, counseling, and attending post-deployment activities. The NDAA 2008 also amended the FMLA to permit family members of covered servicemembers and who satisfied the FMLA eligibility requirements, to take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious illness or injury incurred in the line of duty while on active duty. A “covered servicemember” was defined as a current member of the Armed Forces, including a member of the National Guard or Reserves. In addition, the revisions extended the FMLA protection to additional family members (i.e., next of kin) beyond those who may take the FMLA leave for other qualifying reasons.

NDAA of 2010

NDAA 2010 significantly expands the scope of family military leave entitlement under the 2008 provisions.

First, the NDAA 2010 makes qualifying exigency leave available for the family members of those in the Armed Services. Under the NDAA 2008, qualifying exigency leave was only available for the family members of servicemembers in the National Guard or Reserve who had been called to active duty in support of a “contingency operation.” The NDAA 2010 expands qualifying exigency leave to include “a member of a regular component of the Armed Forces . . . during the deployment of the member with the Armed Forces to a foreign country.”

Second, the NDAA 2010 expands the time during which family members can take FMLA to care for servicemembers. Under the NDAA 2008, to qualify as a “covered servicemember” for military caregiver leave, a servicemember had to be currently serving in the Armed Forces or National Guard or Reserves. The NDAA 2010 expands the definition of “covered servicemember” to include any “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 a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.” The NDAA 2010 also expands the definition of “serious injury or illness” to include injuries that existed before a servicemember or veteran’s service but that were “aggravated by service in the line of duty.” These changes are intended to allow family members to take FMLA leave to care for servicemembers whose injuries do not manifest until after their service concludes.

Practical Tips for Employers

Employers should take the following measures to ensure compliance with the NDAA 2010's changes to the FMLA:

- Update employee handbooks, and other related material, to explain the new military family leave entitlements of the FMLA and revise the FMLA entitlement notice distributed to new employees.
- Inform employees responsible for administering attendance and leave matters of the expanded family military leave entitlements.
- Instruct employees to use the DOL's form WH-384 to certify that their leave requests meet the qualifying exigency leave certification requirements.
- Instruct employees to use the DOL's form WH-385 to certify that their leave requests meet the military caregiver leave certification requirements.

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