

More Military-Related Changes To Family and Medical Leave Policy

BY STACEY V. REESE

In case you missed it, on October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647) that includes an expansion of the military caregiver leave and qualifying exigency leave provisions of the Family and Medical Leave Act (“FMLA”), both provisions of which were just added to the FMLA in 2008 by former President George W. Bush.

Expansion of the Scope for Military Caregiver Leave

The prior law regarding caregiver leave provided up to 26 weeks of leave in a “single 12 month period” to an eligible employee (a spouse, son, daughter, parent or “next of kin” of a covered servicemember) to care for a member of the Armed Forces including a member of the National Guard or Reserves whose illness or injury was incurred while on active duty. The scope now is expanded to include up to 26 weeks of leave for eligible employees caring for veterans who were members of any branch of the military including the National Guard or Reserves at any time during the five year period preceding the date of the medical treatment that triggers the need for military caregiver leave. The new law, therefore, entitles an eligible employee up to 26 weeks of leave to care for a current servicemember or veteran that is undergoing medical treatment, recuperation, or therapy for a serious illness or injury incurred in the line of duty as long as the veteran was a member of the military within five years of the date of the medical treatment, recuperation or therapy. Employers do not have the option of using the calendar-year method as they do for other types of FMLA leave and the leave is provided to the eligible employee of each covered servicemember and for each illness or injury incurred.

The new law also expands the definition of a “serious illness or injury.” For members of the Armed Forces, a serious illness or injury now means an illness or injury that either was incurred by the member in the line of duty or was pre-existing and aggravated by their duty, and that also may render the member medically unfit to perform his or her duties. As for veterans, a serious illness or injury is a “qualifying” illness or injury that either was incurred by the veteran in the line of duty or was pre-existing and aggravated by their duty, and that manifested itself before or after the member became a veteran. There is no definition of the word “qualifying” included in the amendments themselves.



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Greater Availability of Qualifying Exigency Leave

The prior version of qualifying exigency leave gave an eligible employee whose spouse, son, daughter, or parent was on active duty with the Reserves or National Guard or had been notified of an impending federal call or order to active duty in support of a contingency operation up to 12 weeks of exigency leave during the normal 12-month period established by the employer for FMLA leave. The new law expands the leave to include time off to assist a member of the regular Armed Forces and eliminates the requirement that the active duty be in support of a contingency operation. The new law, therefore, extends qualifying exigency leave to an eligible employee whose spouse, son, daughter, or parent is a member of any branch of the military and who is deployed or called to active duty in a foreign country (or has been notified of an impending call or order to covered active duty). Under the new law, the employer may still establish the 12-month period during which the exigency leave will be taken. The reasons for which an eligible employee can take qualifying exigency leave are also unchanged and such leave can be taken for: (1) short notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities agreed to by the employer and employee.