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CHANGES TO FMLA MILITARY LEAVE PROVISIONS

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (the "Act") (Pub. Law No. 111-84). Although primarily a defense spending bill, the Act includes amendments to the provisions of the Family and Medical Leave Act (FMLA) regarding qualifying exigency and covered servicemember leaves for employees who are relatives of members of the uniformed services. Summarized below are the key changes to the military leave provisions of the FMLA.

QUALIFYING EXIGENCY LEAVE

Under the current provisions of the FMLA, up to 12 weeks of qualifying exigency leave is only available to employees with a covered family member in the National Guard or reserves. The Act expands the exigency leave provisions to include employees with family members that are active-duty servicemembers deployed to a foreign country.

Specifically, the Act provides that employees with a family member who is either in a regular component of the Armed Forces or a reserve component of the Armed Forces will be entitled to leave because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on "covered active duty" (or has been notified of an impending call or order to "covered active duty").

"Covered active duty" is a newly defined term under the Act. For members of a regular component of the Armed Forces, it means duty during deployment to a foreign country; for members of a reserve unit, "covered active duty" means duty during deployment to a foreign country under a call or order to active duty.

Pursuant to the final FMLA regulations issued in 2008, qualifying exigencies include: (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 where the employer and employee agree to the leave.

COVERED SERVICEMEMBER LEAVE

Under the new law, an employee's entitlement to leave to care for a covered servicemember with a serious injury or illness has been expanded to include situations where the employee is the spouse, son, daughter, parent, or next of kin of a 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 the National Guard or Reserves)

at any time during the five-year period preceding the date of the treatment, recuperation, or therapy. In other words, the caregiver would be able to take up to 26 weeks of leave to care for a veteran who suffered a qualifying illness or injury for up to five years after he or she leaves military service.

The Act expands the definition of “serious illness or injury” to include injuries or illnesses that existed before a servicemember's active duty began and were aggravated by service in the line of duty on active duty in the Armed Forces. For veterans, a serious illness or injury is a "qualifying injury or illness" (as defined by the DOL) that was incurred in the line of duty on active duty in the Armed Forces (or that existed before the beginning of active duty and was aggravated by service in the line of duty on active duty) and that manifested itself before or after the servicemember became a veteran.

EFFECTIVE DATE

There is no effective date specified for these provisions. This generally would indicate that they are effective when signed into law.

EMPLOYER NEXT STEPS

Employers subject to the FMLA should review and update their policies and procedures to reflect the changes (e.g. the new definitions and the right to care for veterans) under the new law. The Department of Labor is expected to issue regulations regarding the expanded leave provisions and updated notices and forms.

For a copy of the Act, see Section 565 (pages 120-123) at:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf

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