

Alerts and Updates

FMLA AMENDED AGAIN BY THE NATIONAL DEFENSE AUTHORIZATION ACT FOR 2010

November 2, 2009

On October 28, 2009, President Obama signed into law the [National Defense Authorization Act for Fiscal Year 2010](#), Public Law 111-84 ("NDAA for 2010"). Primarily a defense appropriations law, the NDAA contains several amendments to the family military-leave provisions of the Family and Medical Leave Act ("FMLA"). Although no specific effective date is noted in the amendments, it appears these amendments went into effect upon President Obama's signature and are the most recent in a series of changes to the FMLA.

Prior Changes to the FMLA

Previously, on January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, adding two new qualifying circumstances for which eligible employees may take FMLA leave. These two new qualifying circumstances are (1) "qualifying exigency leave" and (2) "military caregiver leave," also known as "leave to care for a covered servicemember."

On January 16, 2009, the U.S. Department of Labor's final regulations implementing the FMLA went into effect, thus providing formal guidance for the enforcement of the provisions for both qualifying exigency leave as well as military caregiver leave. The NDAA for 2010 has made further changes to these two circumstances for which FMLA leave is available.

Qualifying Exigency Leave

Under the FMLA, an eligible employee is able to take up to 12 workweeks of FMLA leave during the designated 12-month FMLA leave year when the employee's son, daughter or parent—who is a "covered military member"—is on active duty or call-to-active-duty status for one or more qualifying exigencies. Qualifying exigencies include: short-notice deployment, military events and related activities, certain childcare and related activities, financial and legal arrangements, counseling, rest and recuperation, postdeployment activities and any other event that the employer and employee agree constitute a qualifying exigency.

Prior to the passage of the NDAA for 2010, an eligible employee could take qualifying exigency leave only when his or her son, daughter or parent was a member of the Reserves or National Guard and had been called up to active duty or notified of an impending call or order to active duty in support of a "contingency operation." Qualifying exigency leave had not been available for employees with family members who were active members of the Armed Forces.

Now, under the NDAA for 2010, qualifying exigency leave has been expanded to permit an eligible employee to take FMLA leave for a qualifying exigency related to the deployment of a son, daughter or parent who is a member of a regular component of the Armed Forces. In addition, the call to active duty or notice of an impending call or order to active duty is no longer limited to those related to "contingency operations." Instead, covered active duty now relates to when a member of the regular or reserve components of the Armed Forces is deployed to any foreign country.

Covered Servicemember Leave

Under the FMLA, an eligible employee is able to take up to 26 workweeks of FMLA leave in a specifically designated 12-month FMLA leave year—measured forward from the first time an employee takes FMLA leave for this purpose—in order to care for a covered servicemember with a serious illness or injury, where the employee is the spouse, son, daughter, parent or "next of kin" of the covered servicemember.

Prior to the passage of the NDAA for 2010, a "covered servicemember" was defined as a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy; is otherwise on outpatient status; or is otherwise on the temporary disability retired list, for a serious illness or injury. A "serious injury or illness" was defined to be an injury or illness of the covered servicemember incurred in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

Now, under the NDAA for 2010, the definition of a "covered servicemember" has been expanded to include 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 and Reserves, at any time during the five-year period preceding the date on which the veteran undergoes medical treatment, recuperation or therapy.

In addition, the definition of a "serious injury or illness" has been expanded to include an injury or illness that was incurred by the covered servicemember before the member's active duty and was aggravated by service in the line of duty while on

active duty. A serious injury or illness of a veteran is further defined to encompass an injury or illness incurred in the line of duty while on active duty, or which existed prior to active duty but was aggravated by service in line of duty while on active duty, and that manifested itself either before or after the covered servicemember became a veteran.

Conclusion

In response to these specific changes to the two categories of family military leave under the FMLA, employers should update their FMLA policies as well as educate managers and supervisors of the additional circumstances under which FMLA leave may be available. In addition, revised FMLA regulations, as well as a revised FMLA poster, are anticipated.

For Further Information

If you have any questions about these amendments to the FMLA or about the FMLA in general, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.