



Family Medical Leave Act Amended to Expand Family Military Leave

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On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647) ("NDAA"). The NDAA includes provisions that further expand the "qualifying exigency" and caregiver military leaves that were established by the January 2008 amendment to the Family and Medical Leave Act of 1993 ("FMLA"). Although this portion of the NDAA does not have an effective date, according to the staff of the Subcommittee on Military Personnel of the House Armed Services Committee, the NDAA took effect when President Obama signed it. Thus, employers should begin to comply with these new leave entitlements immediately.

"Qualifying Exigency" Leave

- **Prior Law:** As originally enacted, an employee eligible for FMLA leave could take up to 12 weeks of FMLA leave during a single 12-month period because of any "qualifying exigency"^[1] arising from the employee's spouse, son, daughter, or parent ("family members") being a member of the Reserves or National Guard on active duty or called to active duty in support of a "contingency operation" declared by the President, Congress, or the U.S. Secretary of Defense.
- **Recent Amendment:** The NDAA amends "qualifying exigency" in two ways. First, it extends the availability of the "qualifying exigency" leave to eligible families of any member of the Armed Forces. Second, this type of leave is now available to members of the Reserves, National Guard, or Armed Forces who are already on active duty in a foreign country or are deployed to a foreign country.

Military Caregiver Leave

- **Prior Law:** As originally enacted, caregiver leave of up to 26 weeks in a single 12-month period was available to an eligible employee who was the spouse, child, parent, or next of kin of a service member to care for the service member undergoing medical treatment, recuperation, or therapy, in outpatient status, or on the temporary disability retired list, for a serious injury or illness. This leave right applied **only** to members of the

Armed Forces, including the National Guard and Reserves **but not** to the family members of veterans.

- **Recent Amendment:** The NDAA extends the caregiver leave in two ways. First, it extends the caregiver leave to family members of veterans undergoing medical treatment, recuperation, or therapy for a serious injury or illness as long as the veteran was a member of the Armed Forces at any time during the period of five years preceding the date on which the veteran undergoes the relevant medical treatment, recuperation, or therapy.

Second, the term "serious injury or illness" has been expanded to include "an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces), and that may render the member medically unfit to perform the duties of the member's *office, grade, rank or rating*". However, with respect to veterans, the term "serious injury or illness" means a "qualifying" [which is to be defined by the Secretary of Labor]; injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.

Impact on California Employers

- Exigency Leave: Since the California Family Rights Act ("CFRA") does not provide military leave for "qualifying exigencies," CFRA leave is not exhausted when an employee takes FMLA leave for a qualifying exigency. However, some or all of the 10 days of unpaid leave provided pursuant to Section 395.10 of the California Military and Veterans Code to an employee who works 20 or more hours for an employer with 25 or more employees and whose spouse is a member of the Armed Forces, National Guard or Reserves, who has been deployed during a time of military conflict, may run concurrently with the exigency leave.
- Caregiver Leave: Twelve weeks of CFRA leave will be exhausted if the employee caring for the injured service member is a spouse, child, or parent of the service member. Since CFRA leave is only 12 weeks, the remaining 14 weeks of the military caregiver leave will be FMLA leave.

However, CFRA leave is not exhausted if the family member taking care of the service member is a "next of kin" (defined as the nearest blood relative of the service member) who does not fall within the aforementioned categories; i.e. grandparents, siblings etc.

Best Practices For Employers

Employers covered by the FMLA should comply with the new requirements immediately, by updating their family and medical leave policies as well as their family and medical leave request, eligibility certification, and designation forms. Employers should also communicate these changes to management and HR staff tasked with administering FMLA leaves. Employers should act in good faith when requested to provide caregiver leave for veterans pending the Department of Labor's regulations defining "qualifying" injury or illness" and consult with experienced employment law counsel. The Department of Labor will likely revise the required FMLA notice and regulations to implement these changes in the near future.

[1] "Qualifying exigencies" include time to address issues related to a short notice deployment, attend military events and related activities, arrange for childcare and attend school activities, make or update financial and legal arrangements, attend counseling related to active duty or call to active duty, spend time with a service member who is on short-term, temporary rest and recuperation leave, attend post-

deployment activities, and address other events that arise out of the active duty or call to active duty as agreed-upon by the employer and the employee.