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The New FMLA Regulations (Part II): What's New for Military Families and Employers?

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As noted last week, the Department of Labor recently issued new regulations which significantly revise the Family Medical Leave Act ("FMLA"). As amended by Section 585 of the National Defense Authorization Act 2008 ("NDAA"), the new FMLA regulations now provide two types of military family leave for FMLA-eligible employees: (1) up to 12 workweeks of leave for any "qualifying exigency" arising out of the active duty or call to active duty of a spouse, child, or parent; and (2) up to 26 workweeks of leave to care for a member of the Armed Forces, including a National Guard or a Reserve member who is undergoing medical treatment for a serious injury or illness. The regulations implementing the military family leave entitlements became effective on January 16, 2009.

FMLA Leave Because of a Qualifying Exigency

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Under Section 825.126 of the NDAA, eligible employees may take FMLA leave while a spouse, child, or parent is on active duty or is called to active duty status in support of a contingency operation. The new regulations broadly specify the following as qualifying exigencies:

1. Short-notice deployment, which is seven or less days of notice.
2. Military events and related activities, such as official ceremonies and programs, or to attend family support or assistance programs.
3. Certain childcare and school activities, such as arranging for non-routine, immediate child-related needs, enrolling or transferring a child to a different school or daycare facility. This also refers to attendance at certain school meetings if the meeting is necessary due to the active duty or call to active duty of the military member.
4. Financial and legal arrangements to protect the military member's interests while on active duty.
5. Counseling that is provided by someone other than a healthcare provider for the employee, the military member, or for the child of the military member.
6. Rest and recuperation, to visit with a military member who is on short-term, temporary, rest and recuperation leave during his or her period of deployment.
7. Certain post-deployment activities, such as arrival ceremonies, reintegration briefings and events or programs sponsored by the military for a period of 90 days following termination of the military member's active duty status, and to address issues arising out of the death of a military member while on active duty status.
8. Additional activities, including any other events that the employer and employee agree is a qualifying exigency.

It should be noted that families of military members in the Regular Armed Forces are not eligible for qualifying exigency leave. The new military family leave entitlements are extended to family members of the National Guard and Reserves, and certain retired military members only. An employee may take up to 12 workweeks of FMLA leave for qualifying exigencies during the 12-month period established by the employer for FMLA leave. Additionally, qualifying exigency leave may be taken on an intermittent or reduced schedule.

Military Caregiver Leave

Under Section 825.127 of the NDAA, a covered employer must give an eligible employee up to 26 workweeks of leave during a "single 12-month period," to care for a military member who received a serious injury or illness in the line of duty while on active duty. A covered military member is a current member of the Armed Forces including a member of the National Guard and Reserves, who is receiving the type of medical attention described in the beginning paragraph. Former members of the Armed Forces, National Guard and Reserves, and members on the permanent

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disability retired list are not covered. The "single 12-month period" for leave begins on the first day the employee takes leave to care for the seriously injured military member and ends 12 months later, regardless of when the employer establishes the 12-month period for other types of FMLA leave.

An eligible employee must be the spouse, son, daughter, parent, or next of kin of the covered military member. "Next of kin" is defined as the military member's nearest blood relative, other than the military member's spouse, child, or parent. The regulations establish an order of priority in determining who the military member's next of kin is as follows:

1. Blood relatives who have been granted legal custody of the military member by court order or statutory provisions
2. Brothers and sisters
3. Grandparents
4. Aunts and uncles
5. First cousins, unless the military member has designated in writing another blood relative for purposes of military leave under the FMLA.

The regulations also provide that when no such designation is made and multiple family members exist at the same level of relationship to the covered military member, all such family members "shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously." Thus, where the military member is without a spouse, children or parents, numerous relatives may all take leave to provide care.

Additionally, a military caregiver can take FMLA leave for more than one seriously injured military member, or more than once for the same military member, if the military member has a subsequent serious injury or illness. For example, a military caregiver may take 26 workweeks of leave in a single 12-month period to care for one military member and take another 26 workweeks in a different single 12-month period to care for another military member. Similarly, if the same military member is subsequently injured after being returned to active duty, a military caregiver is allowed to take 26 workweeks in a different single 12 month period. This is allowed because the regulations view the military caregiver leave provision as a "per-servicemember, per-injury entitlement."

Certification Requirements

The U.S. Department of Labor's Wage and Hour Division has provided two forms (WH-384 and WH-385) which employers may require employees to submit for certification purposes. Employers, particularly human resources professionals who are routinely engaged in FMLA matters, should become thoroughly familiar with the new military leave regulations and forms.

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