

PUBLICATION

FMLA Amended (Yet Again) To Extend Leave to Military Families

November 23, 2009

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 ("NDDA for 2010"), which again amended the FMLA by expanding the circumstances under which relatives of military service members and veterans may take FMLA leave under the Military Caregiver Leave and Qualifying Exigency Leave provisions.

By way of background, the National Defense Authorization Act for Fiscal Year 2008 ("NDDA for 2008") included the first-ever amendments to the Family and Medical Leave Act of 1993 (FMLA). The NDDA for 2008 amended the FMLA to provide two military family leave entitlements: Military Caregiver Leave (also known as Covered Servicemember Leave), and Qualifying Exigency Leave.

New Military Caregiver Leave Guidelines

Military Caregiver Leave permits an eligible employee to take up to 26 weeks of FMLA leave during a 12-month period to care for a "covered servicemember" with a "serious injury or illness" where the eligible employee is the spouse, child, parent or next of kin of the "covered servicemember." Under the NDDA for 2008, a "covered servicemember" included an active member of a reserve or regular component of the Armed Forces who was undergoing medical treatment, recuperation, or therapy; was in outpatient status; or was on the temporary disabled retired list for a serious injury or illness. "Serious injury or illness" included only those incurred in the line of duty during active duty.

Under the NDDA for 2010, a "covered servicemember" now includes a veteran, or one "who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the 5 years preceding the date on which the veteran undergoes . . . medical treatment, recuperation, or therapy." Additionally, "serious injury or illness" now includes: (1) an injury or illness incurred in the line of duty during active duty, and (2) an injury or illness that existed before the member's active duty that was aggravated by service in the line of duty. For a veteran, the "serious injury or illness" may manifest itself before or after the member becomes a veteran, thereby providing coverage for service-related injuries such as post traumatic stress disorder.

The NDDA for 2010 directs the Secretary of Labor to further define what constitutes a qualifying injury or illness of a veteran. Thus, this type of leave will not be available to veterans until the Secretary issues that definition.

New Qualified Exigency Leave Guidelines

Before the current expansion, an eligible employee could take up to 12 weeks of FMLA leave during a 12-month period for a "qualifying exigency" arising from the employee's spouse, child or parent being on active duty or call-to-active-duty status in a reserve component of the Armed Forces (i.e., Qualifying Exigency Leave was not available to eligible employees with family members who were members of a regular component of the Armed Forces). Further, exigency leave was available only when the member was called to active duty or was notified of an impending call to active duty "in support of a contingency operation." Qualified exigencies included: short-notice deployment; military events and related activities; certain childcare and related activities;

financial and legal arrangements; counseling, rest and recuperation; post-deployment activities; and any other event that the employer and employee agreed constituted a "qualifying exigency."

Under the NDDA for 2010, Qualifying Exigency Leave is now available to eligible employees with family members who are members of a reserve or regular component of the Armed Forces. Additionally, the NDDA for 2010 removes the requirement that the member be serving "in support of a contingency operation." Instead, an eligible employee may take Qualified Exigency Leave when a family member – who is a member of a reserve or regular component of the Armed Forces – is deployed to a foreign country.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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