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Technical Bulletins: President Signs Law Amending the Family and Medical Leave Act (2010)

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March 11, 2010

PRESIDENT SIGNS LAW AMENDING THE FAMILY AND MEDICAL LEAVE ACT

Bonnie Jones, Human Resource Consultant

For the first time since its adoption in 1993, the Family and Medical Leave Act (FMLA) has been amended. The revision provides two new entitlements for military personnel and their families and comes as a result of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Public Law 110-181).

The expansion of FMLA as provided by the NDAA more than doubles the amount of protected leave some veteran families are entitled to under the act. Under the new regulations, eligible employees may be entitled to take up to 26 weeks of unpaid leave to care for an injured servicemember and up to 12 weeks of unpaid leave for “any qualified exigency” if a spouse, son, daughter or parent service member is called up for active duty or is on active duty. While the term “qualifying exigency” was not defined in the original amendment, it has since been clarified by providing examples for what exigency leave can be used.

QUALIFIED EXIGENCY LEAVE

Exigency leave is available to immediate family members of and relates to a call or order to active duty by members of the Reserve, National Guard and certain retired members of the Reserve and regular armed forces. It does not apply to family members of the regular armed forces on active duty status.

The servicemember must be a spouse, son, daughter or parent of the employee requesting leave.

Qualifying exigency leave may be used for:

- Short-notice deployment (defined as notice of an impending call or order to active duty within seven days of the date of deployment).
- Military events and related activities, such as informational briefings, family assistance programs or official ceremonies and events.
- Childcare and school activities, including arranging alternative childcare, caring for children on an immediate, urgent basis and attending school functions.
- Managing financial and legal arrangements, such as executing powers of attorney, obtaining military identification cards or estate planning.
- Rest and recuperation (that is, to spend time with a military family member who is on short-term rest and recuperation leave) and post-deployment activities, including arrival ceremonies, reintegration events and issues relating to the death of a military family member.

Since its inception, FMLA regulations have required employers to offer eligible employees up to 12 weeks of unpaid, job-protected leave due to the birth or adoption of a child; to care for a child, parent or spouse who has a serious health condition; or when an employee has a serious illness. The expansion to the law allows eligible military family members to now take family and medical leave to deal with any qualifying event or “exigency” as defined in the new regulations. NDAA amends the FMLA by adding two new reasons an employee may request job-protected leave from his or her employer.

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SERVICEMEMBER LEAVE

Under the revised law, military caregivers may be permitted to take up to a combined total of 26 weeks of unpaid leave during a single 12-month period to take care of a child, parent, spouse or next of kin who sustains an injury during active military service when that injury results in the servicemember being unable to perform the duties of the member's office, grade, rank or rating. FMLA defines a covered servicemember 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 in outpatient status; or is otherwise on the temporary disability retired list for a serious illness or injury.

The employee requesting leave must be a spouse, son, daughter, parent or next of kin.

Unlike other types of FML, the age limits on servicemember leave are different. For covered servicemember leave, an eligible employee may take leave if he or she is the "son or daughter of a covered servicemember," which is defined as the covered servicemember's biological, adopted or foster child, stepchild, legal ward or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

The new law was effective January 28, 2008, and requires the Department of Labor (DOL) to review the National Defense Authorization Act for FY 2008 (Section 585) and to issue final regulations on the changes to the FMLA. Specifically, the DOL will attempt to better define the designation of "any qualifying exigency" and provide guidance regarding rights and responsibilities under the revised act. In

the interim, the Department of Labor encourages employers to act in good faith and amend their leave policies to accommodate families of the armed forces.

It is important to note that the revisions to FMLA do not change the eligibility requirements or general provisions for employers and employees covered by the FMLA of 1993. Employees are still required to work at least 1,250 hours and 12 months before becoming eligible for family and medical leave. In general, employers with fewer than 50 employees are not subject to the FMLA requirements.

An eligible employee may be required to use accrued vacation leave, sick leave, personal leave or other types of leave as defined by the employer for any part of the 26-week period. The regulations do not require the employer to offer paid medical leave in any situation in which the employer would not normally provide paid leave. Requests for leave must be supported by a certificate issued by the healthcare provider of the eligible employee or of the son, daughter, spouse or parent of the employee, or the next of kin of an individual in the case of leave taken. An employer may require that an employee's request for leave related to active duty be supported by a certification. The Department of Labor is expected to address this issue when it clarifies the regulations.

For more information on changes to FMLA, visit http://www.dol.gov/whd/fmla/NDAA_fmla.htm, or contact Bonnie Jones or Richard Stokes, MTAS human resource consultants, at (615) 532-6827.

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