

AALRR Alert



First FMLA Expansion in 15 Years Provides Time Off for Military Family Members

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On January 28, 2008, President Bush signed the first significant amendments in 15 years to the federal Family and Medical Leave Act of 1993 ("FMLA"). A portion of the amendments, which expand FMLA leave eligibility under certain circumstances to family members of individuals serving in the Armed Forces, became effective January 28, 2008. The new legislation creates two new categories of FMLA leave: (a) Leave for a "qualifying exigency" during a family member's active duty; and (b) Injured servicemember family leave. These new FMLA leaves are in addition to the new military spouse leave (AB 392) in California.

These FMLA amendments, and FMLA in general, apply to employers with 50 or more employees. In order to be eligible for an FMLA leave, an employee must: (1) have worked for the covered employer for at least 12 months, (2) have at least 1,250 hours of service with that employer during the previous 12-month period, and (3) work at a worksite at which 50 or more employees are

employed by that employer within 75 miles of that worksite.

FMLA Leave for "Qualifying Exigency" During a Family Member's Active Duty

This new category of FMLA leave applies to employees who have a spouse, parent, or child who is on or has been called to active duty in the Armed Forces in support of a contingency operation. "Active duty" includes when a servicemember has been notified of an impending call or order to active duty. These employees/family members may take up to 12 weeks of FMLA leave annually when they experience a "qualifying exigency."

The phrase "qualifying exigency" is not yet defined. Therefore, an employer is not technically required to provide such leave until the Secretary of Labor issues final regulations defining the phrase. The Department of Labor ("DOL") is seeking public comment regarding this and other definitions for the new leaves. After the comment period closes

on April 11, 2008, the DOL states it will issue final regulations as soon as possible. Even though employers are not currently required to provide this leave, the DOL urges employers to make a good faith effort to comply with the new law.

The amendment to FMLA makes clear that, when an employee requests leave for a "qualifying exigency" and the necessity for the leave is foreseeable, the employee must provide the employer with "reasonable and practicable" notice. Additionally, an employer may require that a request for leave for a qualifying exigency be supported by a certification that the service member is on active duty or has been called to active duty.

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FMLA Injured Servicemember Family Leave

This new category of FMLA leave applies to employees who are the spouse, parent, child, or next of kin (defined as the “nearest blood relative”) of a servicemember who incurred a serious injury or illness on active duty in the Armed Forces. These family members may take a combined total of 26 weeks of leave to care for an injured servicemember in one 12-month period (including the standard 12-week FMLA period). An injured servicemember includes “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 injury or illness.” “Serious illness or injury” is defined as a condition that may render the servicemember “medically unfit to perform the duties of the member’s office, grade, rank, or rating.” Employees may take injured servicemember leave intermittently, but must use it up within 12 months. It is not presently clear how this 12-month period will be determined.

Pursuant to the new legislation, and specific to this type of leave, an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for any part of the 26-week period of such leave.

AB 392 -- Some California Employers Must Also Provide Military Spouse Leave

Some California employers, even if not covered by FMLA, might also be required to provide time off to military spouses.

Effective October 9, 2007, California employers with 25 or more employees must allow an employee who is a spouse of a member of the Armed Forces, National Guard, or Reserves to take up to ten (10) days of unpaid leave during a “qualified leave period.” The law is an effort to assist “the families of those troops currently serving in military conflicts in Iraq and Afghanistan.”

A “qualified employee” eligible for leave under AB 392 is defined as: 1) The spouse of a “qualified member” of the Armed Forces; 2) An individual (excluding independent contractors) who works an average of 20 hours per week; 3) An individual who provides notice “within two business days of receiving official notice that the qualified member will be on leave from deployment” of the intent to take the leave provided by the statute; and 4) An individual who submits written documentation to the employer certifying that the qualified member will be on leave from deployment during the time the leave is requested.

The statute defines a “qualified member” as a member of the Armed Forces who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the President of the United States. Members of the National Guard and

Reserves who have been deployed during a period of military conflict are also included in the definition of “qualified member.”

The “qualified leave period” means the period during which the qualified member is on leave from deployment during a period of military conflict.

Conclusion

Employers must be aware of their expanded leave obligations under FMLA and take appropriate action. This includes revising leave policies and procedures to include leave as provided in the recent FMLA amendments and AB 392. These changes to the FMLA do not alter California employers’ continuing obligations under the California Family Rights Act. While an employer is not required to provide FMLA leave to an employee during a family member’s active duty until the DOL defines “qualifying exigency,” the agency will issue a definition shortly. In addition, the DOL recently issued proposed revisions to FMLA regulations that will likely impact how employers need to administer leaves. Thus, we will keep you informed regarding any new regulations.

With these new leave laws, employers should evaluate employee leave requests carefully so they do not miss providing an employee a required leave. If you are faced with an employee’s request for leave and are not certain if that employee is eligible, please contact one of the attorneys in AALRR’s Employment Law practice group for assistance.