

FMLA Servicemember Leave Provisions Expanded

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Last week, President Obama signed into law the Department of Defense Authorization Conference Report (DoD Authorization Law), P.L. No. 111-84, which, among other things, amends the Family and Medical Leave Act (FMLA) to do the following:

- Expand the FMLA's military caregiver leave entitlement to include veterans, who were not covered under existing law
- Expand the exigency leave entitlement to include family members of the regular Armed Forces, who were not entitled to exigency leave under existing law
- Extend the availability of military caregiver leave where a preexisting serious injury or illness is aggravated by active duty service

These changes, which are likely effective immediately, will require employers to again review and revise their FMLA policies and practices and ultimately may expand the number of employees who qualify for military family leave.

Summary of Key Provisions

The FMLA was amended in January 2008 to provide two types of military family leave for FMLA-eligible employees:

1. "Exigency leave," a 12-week entitlement for eligible family members of National Guard and Reserves servicemembers to deal with exigencies related to a call to active duty
2. "Military caregiver leave," a 26-week entitlement for eligible family members to care for seriously ill or injured servicemembers of the regular Armed Forces, National Guard, and Reserves

Perceiving gaps in the original law, Sen. Christopher Dodd (D-Conn.) (one of the original sponsors of the FMLA back in 1993) and Rep. Lynn Woolsey (D-Calif.) introduced the "Supporting Military Families Act of 2009" (H.R. 3403, S. 1543), to expand the universe of those eligible for both types of military family leave. Congress incorporated this bill into the final DoD Authorization Law.

The new law makes three significant changes to the FMLA going forward:

- ***Expanding Caregiver Entitlement to Families of Recent Veterans***

The FMLA currently requires that employers allow eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. Until now, a covered servicemember, for purposes of this leave entitlement, was limited to a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness incurred in the line of duty while on active duty. The military caregiver provisions did not extend to family members of veterans, and illnesses such as posttraumatic stress disorder may not have been covered in certain circumstances where the illness did not manifest itself until after separation from service.

Section 565 of the DoD Authorization Law amends the FMLA by redefining “covered servicemember” to include veterans with serious injury or illness. More specifically, for purposes of this leave entitlement, a veteran will be a “covered servicemember” under the FMLA if:

1. He or she is undergoing medical treatment, recuperation, or therapy for a serious injury or illness that was incurred by or aggravated while on active duty in the Armed Forces, whether or not the illness or injury manifested itself before or after the member became a veteran; **and**
2. He or she was a member of the Armed Forces, National Guard, or Reserves at any time during the **five-year period before** he or she began the treatment, recuperation, or therapy.

This change should bring conditions such as posttraumatic stress disorder under FMLA protection, and may raise a number of issues for employers trying to determine whether a particular condition (such as Gulf War syndrome) relates back to a servicemember’s time in active duty.

- ***Aggravation of Injuries***

Existing law allows military caregiver leave only for serious illnesses or injuries incurred while on active duty. The DoD Authorization Law includes in the definition of serious health condition any injury or illness that “existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty,” suggesting that, for example, a servicemember who enters the service with a minor back problem will be entitled to leave if he or she aggravates that back problem while in the line of duty.

- ***Expanding Exigency Leave to Include Regular Armed Forces***

The FMLA does not currently permit family members of the regular Armed Forces to take “exigency leave.”

An eligible employee’s spouse, son, daughter, or parent must be on active duty or called to active duty status by the National Guard or Reserves, or as a retired member of the regular Armed Forces or Reserves in support of a contingency operation. Qualifying exigencies include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending counseling sessions, and attending postdeployment reintegration briefings. Section 565 of the DoD Authorization Law amends the FMLA by allowing covered family members to take “exigency leave” for exigencies occurring “during the deployment of the member with the Armed Forces to a foreign country.” The law does not define “exigency” for members of the regular Armed Forces, but we anticipate that the Department of Labor will

incorporate existing regulations in this regard.

Conclusion

The DoD Authorization Law does not include an effective date, which likely means that it is effective immediately. Employers that are covered by the FMLA will need to (1) notify employees of the changes and (2) revise their policies and procedures to ensure that they are in compliance with these new requirements as soon as possible.

It is important to note that this law omits references to “contingency operations.” Accordingly, employers should be mindful that these changes are designed to last beyond the country’s existing operations in Iraq and Afghanistan.

If you would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Nina G. Stillman 312.234.1150 nstillman@morganlewis.com

Dallas

Ann Marie Painter 214.466.4121 annmarie.painter@morganlewis.com

Irvine

Barbara J. Miller 949.399.7107 barbara.miller@morganlewis.com

Palo Alto

Carol Freeman 650.843.7520 cfreeman@morganlewis.com

Philadelphia

Michael J. Ossip 215.963.5761 mossip@morganlewis.com

Washington, D.C.

Corrie Fischel Conway 202.739.5081 cconway@morganlewis.com

Howard M. Radzely 202.739.5996 hradzely@morganlewis.com

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