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New Regulations Under the Family and Medical Leave Act for the Military

Recently, for a variety of reasons, a great deal of legislative and regulatory action has been taken to address a myriad of topics related to labor and employment. Legislation—such as the Employee Free Choice Act and the Employment Non-Discrimination Act—has been, or is likely to be, introduced and debated in both houses of Congress. These bills are by no means the only examples of such potential legislation.¹ In addition, in January 2009, new compre-

hensive regulations interpreting and applying the provisions of the Family and Medical Leave Act of 1993 (FMLA), crafted by the Department of Labor, went into effect. These new regulations redefined and clarified vast swaths of law applicable to employers and employees nationwide.² This column focuses on relatively small but increasingly significant portions of the recent legislative and regulatory alterations to the FMLA: those addressing leave to care for an injured servicemember and leave in connection with a family member's call to active duty in the National Guard or Reserves.

With more than 135,000 U.S. troops stationed in Iraq in March 2009,³ roughly 25,000 in Afghanistan,⁴ and more on the way,⁵ it is no wonder that an increasing amount of attention is being paid to issues affecting members of the military and their families. Because nearly 34,000 of the troops stationed in Iraq and Afghanistan have been injured in the line

of duty, it is even less surprising that the country is focusing intently on issues relating to those injured soldiers and their families.⁶ In fact, even though these portions of the recent changes to the

FMLA appear to be relatively minimal—at least in comparison with the scope of the other changes—they affect an increasingly large segment of the population. The Air National Guard alone has more than 100,000 members, and it is

only one of the seven groups constituting the Reserve components of the U.S. military.⁷

The magnitude of the provisions discussed in this column truly comes into focus when one considers that they affect not just the servicemembers them-

selves but their entire families as well. Accordingly, it is important for both employers and employees to understand these new provisions of the FMLA as well as the new regulations promulgated by the Department of Labor that interpret and apply them.

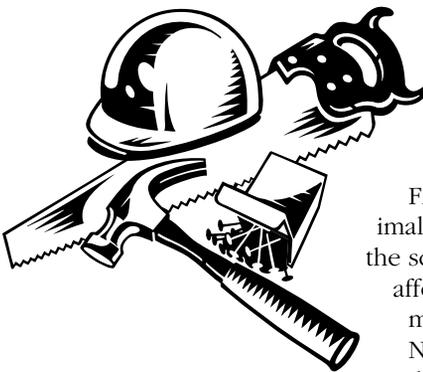
In general, the FMLA requires employers to provide employees with up to 12 weeks of unpaid leave per year to take care of the employee's serious health condition or that of the employee's family members, or for the employee to care for a newly born, adopted, or fostered child. In order for an employee to be eligible for leave under the FMLA (1) his or her employer must have 50 or more employees within a 75 mile radius of the employee's workplace; (2) the employee must have been employed by the employer for at least 12 months (although those 12 months need not have been consecutive); and (3) the employee must have worked at least 1,250 hours for the employer in the 12 months immediately preceding the request for leave. An employee requesting leave must give the employer adequate notice of the necessary leave and can be required to submit medical certification of the serious health condition for which leave is being taken. In addition, the employer is required to notify the employee as to both his or her eligibility for FMLA leave and whether it is designating the leave as FMLA leave, and the employer must reinstate the employee to his or her original position or a position that is substantially equivalent in all material respects when the employee is physically capable of returning to work.⁸

Leave to Care for an Injured Servicemember

As amended, the Family and Medical Leave Act now provides that "An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period."⁹

According to the applicable regulation, a "covered servicemember" is defined as

[A] current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or



illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise on the temporary disability retired list.¹⁰

A serious injury or illness means “an injury or illness ... that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.”¹¹ Accordingly, instead of the traditional 12 weeks of FMLA leave, the spouse, son, daughter, or next of kin of a servicemember injured in the line of duty on active duty may take up to 26 weeks of leave under the FMLA to care for that servicemember.

This leave for caring for a servicemember differs from traditional FMLA leave in a variety of other aspects as well. First, this 26-week allotment is not measured according to the employer’s normal FMLA leave year. The “single 12-month period” described in the amended statute “begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember”; a new “single 12-month period” applies “on a per-covered-servicemember, per-injury basis,” which means that “an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious illness or injury.”¹²

Under these provisions, an eligible employee’s leave entitlement also affects his or her entitlement to traditional leave as well, because as total entitlement for the “single 12-month period” is no more than 26 weeks.¹³ Accordingly, if an eligible employee has used 20 weeks of his or her 26-week entitlement to care for a covered servicemember, only six weeks of the allotted 12 weeks of traditional FMLA leave remain for use in that particular 12-month period. In addition, for purposes of leave to care for an injured servicemember, the definitions of “son” and “daughter” traditionally used by the FMLA have been altered to accommodate situations in which adult children are either the injured servicemember or the family members who must care for a parent who is an injured servicemember.¹⁴

However, despite these differences, much of the procedure for addressing leave to care for an injured servicemember leave is substantially the same as the procedure used for traditional FMLA leave and is generally covered by the same regulatory scheme. Under these provisions, leave is still unpaid. Eligible employees are permitted to take leave intermittently, if required, although they must make “reasonable efforts” to avoid interfering with the employer’s operations. Moreover, the employer is permitted to request certification of the serious injury or illness for which the covered servicemember requires care. In fact, the U.S. Department of Labor has even provided a model form to request such certification, WH-385, available on the “Forms” section of the Department of Labor’s Web site (www.dol.gov). Many of the inquiries on this

certification form are the same as those requested of employees who wish to take traditional FMLA leave; however, an employer is expressly prohibited from requiring either recertification or a second opinion with respect to leave to care for a servicemember.¹⁵

Leave Arising from a Family Member’s Call to Active Duty

The second form of leave for a servicemember’s family member under the FMLA is established through the provision that an employee may use his or her traditional 12-week allotment of leave “[b]ecause of any qualifying exigency ... arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”¹⁶ According to the newly enacted regulations, this provision applies to members of the National Guard and the Reserves as well as retired members of the Armed Forces, rather than to members of the regular Armed Forces, and the provision allows an employee to take FMLA leave for one or more of the following categories of “qualifying exigencies”:

- *Short-notice deployment*: To address issues arising from the fact that a covered military member has been notified of an impending call to duty within seven calendar days of deployment.
- *Military events and related activities*: To attend an official ceremony, program or event sponsored by the military and related to the call to duty.
- *Childcare and school activities*: To arrange for alternative childcare, to provide childcare on an emergency basis, to enroll or transfer a child to a new school or daycare, or to attend meetings with staff at a school or daycare.
- *Financial and legal arrangements*: To make or update financial and legal arrangements to address the covered military member’s absence.
- *Counseling*: To attend counseling provided by someone other than a health care provider, provided that the need arises from the active duty or call to duty.
- *Rest and recuperation*: To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment.
- *Post-deployment activities*: To attend arrival ceremonies, reintegration briefings and events, and other official ceremony for a period of 90 days following the termination of the covered military member’s active duty status.
- *Additional activities*: To address other events arising out of the active duty status or call to duty which are agreed upon between the employer and the employee.¹⁷

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As with the first type of servicemember leave, much of the regulatory scheme is the same for this leave as it is for traditional FMLA leave for serious health conditions. However, the certification that can be required of the employee, for which the Department of Labor provides model form WH-384 (also available under the “Forms” section of the department’s Web site), may include a requirement for the employee to provide both a copy of the active duty orders to which the qualified exigency relates and a statement or description of the operative facts underlying the qualifying exigency.¹⁸ Furthermore, as long as the initial certification is complete and sufficient, the employer may not request recertification or verification.¹⁹

Conclusion

Given the increased number of American soldiers in different theaters around the world and the increased numbers of National Guard and Reserve members who have been or are being called to active duty, these additions to the Family and Medical Leave Act currently have particular relevance. The new rules and procedures tend to conform to the existing rules and regulations, but, as illustrated above, they differ sharply in some areas. Employers would be well served to familiarize themselves with these new rules in order to maximize efficiency and to create a positive environment for their military employees and their loved ones. Employees should do the same so that they can be fully informed as to the scope of their rights and can make sure that they do not make procedural errors that prejudice those rights. **TFL**

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Endnotes

¹On March 10, 2009, the EFCA was introduced into both chambers of Congress as H.R. 1409 and S. 560, respectively. The ENDA was most recently introduced in the House of Representatives on Sept. 27, 2007, as H.R. 3685.

²The National Defense Authorization Act for FY 2008 (NDAA), Public Law 110-181; 29 C.F.R. Part 825.

³Michael E. O’Hanlon and Jason H. Campbell, *Iraq Index*, Brookings Institution, Mar. 12, 2009, at www.brookings.edu/iraqindex.

⁴Jason H. Campbell and Jeremy Shapiro, *Afghanistan Index*, Brookings Institution, Mar. 24, 2009, at www.brookings.edu/iraqindex.

⁵Fredreka Schouten, *Afghanistan Plan Refocuses on Al-Qaeda*, USA Today, Mar. 29, 2009, at www.usatoday.com/news/washington/2009-03-29-obama_N.htm.

⁶*Iraq Index*, p. 16; *Afghanistan Index*, p. 7.

⁷Air National Guard Factsheet, (July 2006) (at www.af.mil/factsheets/factsheet.asp?fsID=160).

⁸29 U.S.C. § 2601 *et seq.* (2009).

⁹29 U.S.C. § 2612(a)(3).

¹⁰29 C.F.R. § 825.127(a).

¹¹29 C.F.R. § 825.127(a)(1).

¹²29 C.F.R. § 825.127(c)(1)-(2).

¹³29 C.F.R. § 825.127(c)(3).

¹⁴29 C.F.R. § 825.127(b)(1).

¹⁵29 C.F.R. § 825.310.

¹⁶29 U.S.C. § 2612(a)(1)(E).

¹⁷29 C.F.R. § 825.126(a).

¹⁸29 C.F.R. § 825.309(c).

¹⁹29 C.F.R. § 825.309(d).



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