

FMLA Amended to Expand Military Based Leave

The FMLA became effective August 5, 1993, and required covered employers to grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of several reasons. The reasons include the following: the birth and care of the employee's newborn child; the placement with the employee of a child for adoption or foster care; the care of an immediate family member (spouse, child, or parent) with a serious health condition; or a serious health condition of the employee rendering him/her unable to work. To be eligible for FMLA benefits, an employee must have worked for a covered employer for a total of 12 months and have worked at least 1,250 hours for that employer over the previous 12 months. The 12 months of employment need not be consecutive. However, employment periods prior to a break in service of seven years or more need not be counted unless the break resulted from the employee's fulfillment of his or her National Guard or Reserve military obligation (as protected under the Uniformed Services Employment and Reemployment Rights Act), or a written agreement exists concerning the employer's intention to rehire the employee after the break in service.

In addition to being required to allow eligible employees to take FMLA leave, a covered employer is required to maintain group health insurance coverage for the employee on FMLA leave whenever such insurance was provided before the leave was taken. The insurance must be maintained on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave. Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

On January 28, 2008, Congress expanded the FMLA to allow eligible employees of covered employers to take FMLA qualifying leave "[b]ecause of any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) 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." Such leave has been termed "*qualifying exigency leave*." Defense Authorization Act for FY 2008 ("NDAA"), Section 585(a). The NDAA also provided that "an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a [single] 12-month period to care for the service member." Such leave has been termed "*military caregiver leave*." The Department of Labor regulations implementing qualifying exigency leave and military caregiver leave became effective on January 16, 2009.

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (the "Act"). The Act amends the FMLA to expand the coverage of the two new types of leave. It does this by expanding *qualifying exigency leave* to cover those serving on active duty in any regular component of the Armed Forces who are deployed in a foreign country. Secondly, it expands *military caregiver leave* to include those

undergoing treatment for, or recuperating from, a serious injury or illness incurred in the line of duty while on active duty. As amended, the Act also allows eligible employees to take leave to care for any former member of the Armed Forces, National Guard or Reserves during the first five years following his or her discharge from military service if the veteran is undergoing treatment for, or is recuperating from, a serious injury or illness incurred in the line of duty while on active duty. The Act also expands the definition of “serious injury or illness” for military caregiver leave to include injuries and illnesses that are “aggravated by” active duty service. These changes are effective immediately. Supervisors should keep in mind that there are now two sets of cumulative changes regarding FMLA leave based upon military service.