



president obama expands fmla rights for family members of military

MSK Client Alert

November 17, 2009

In 2008, then-President Bush signed into law amendments to the Family and Medical Leave Act (FMLA) providing additional leave benefits to family members of individuals in the Armed Forces. Specifically, the 2008 amendments provided two new types of leave: **exigency leave** and **injured servicemember leave**.

Late last month, President Obama signed into law amendments expanding employees' rights to both exigency leave and injured servicemember leave.

Changes To The Exigency Leave Provision

Under the 2008 amendments, employees eligible under the FMLA are entitled to take up to twelve weeks of leave during any twelve-month period for:

Changes To The Injured Servicemember Leave Provision

The FMLA states:

"[A]n 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." (Emphasis added.)

Until recently, **covered servicemember** meant a member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on the temporary disability retired list, for a **serious illness or injury**.

The recent amendments added certain veterans to the definition of **covered servicemember**. Specifically, the term **covered servicemember** now includes veterans who are undergoing medical treatment, recuperation, or therapy for a **serious illness or injury** and who were members of the Armed Forces (including

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the National Guard or reserves) at any time during the five-year period preceding their treatment date. Family members of a qualifying veteran can now take injured servicemember leave to care for that veteran.

In addition, the recent amendments changed the meaning of the term **serious illness or injury** used in the definition of **covered servicemember**.

For members of the Armed Forces, a **serious illness or injury** now means an illness or injury that either was incurred by the member in the line of duty or was preexisting and aggravated by their duty, and that also may render the member medically unfit to perform his or her duties.

For veterans, a **serious illness or injury** is a "qualifying" illness or injury that either was incurred by the veteran in the line of duty or was preexisting and aggravated by their duty, and that manifested itself before or after the member became a veteran. The amendments state that the Secretary of Labor shall define the word "qualifying" (no definition is included in the amendments themselves). The Department of Labor will likely revise several of its regulations to address the recent amendments.

For any assistance in complying with the FMLA generally, or these new provisions, please contact MSK's Labor Department.

"[A]ny 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**." (Emphasis added.)

Department of Labor regulations state that a "qualifying exigency" can be any of the following: issues relating to short-notice deployment, military events and related activities, childcare and school-related activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any other activity arising out of the active duty that the company and the employee agree is a qualifying exigency.

The October 2009 amendments expand exigency leave in the following important ways:

- The phrase **active duty** became **covered active duty** and now includes the duty of members of a "regular component of the Armed Forces" during deployment to a foreign country. Before the October 2009 amendments, **active duty** referred only to the duty of members of the National Guard, reservists, and retirees, and thus only family members of National Guard members, reservists, and retirees were entitled to exigency leave.
- The phrase **in support of a contingency operation** was removed, thus allowing employees to take exigency leave regardless of the type of operation in which their family member participates.