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Congress Expands FMLA Leave for Military Duty and Injuries

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Amendments Address Leave for Employees with Family Members Serving or Injured on Military Duty

Congress passed legislation last week which, if signed by President Bush as expected, will amend the Family and Medical Leave Act (FMLA) for the first time since its passage in 1993. The amendment will require that covered employers grant FMLA leave to employees to care for family members injured in military service or to handle "exigencies" related to a family member's military call-up or service.

The FMLA will continue to apply only to employers who employ at least 50 or more employees each working day in 20 or more workweeks of the current or previous calendar year.

Employees who are called to or enlist for nearly all forms of military service are already entitled to up to 5 years of protected leave from their jobs, as well as reinstatement rights, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA includes provisions that dictate the position to which the employee returning from leave must be reinstated, how to accommodate employees returning with battlefield injuries, and other related issues. The new FMLA amendments now address leave requirements for employees who themselves are not called to serve, but rather are family members of those who are.

Since the new FMLA provisions do not contain a future effective date, employers will need to comply with them as soon as the President signs the legislation in to law.

Two New Forms of FMLA Leave

Under the new amendments, employees who would otherwise be eligible for FMLA leave—those with 12 months of employment, 1,250 hours worked in the 12 months preceding the requested leave, and who work where at least 50 employees are employed within a 75-mile radius—will now be entitled to leave for the following two new circumstances (in addition to the leave available for an employee's serious health condition, the serious health condition of an employee's parent, spouse, or child, or birth or adoption):

1) Family Member Military Duty "Exigency" Leave: An employee whose spouse, son, daughter, or parent either has been notified of an impending call or order to active military duty or who is already on active duty is entitled to up to 12 workweeks of leave to deal with "any qualifying exigency" related to or affected by the family member's call-up or service.

Except as explained below, any leave taken for this purpose would be counted with other types of FMLA leave toward the employee's 12-workweek limit in a 12-month period.

Points for Employers to Note:

- What is an "exigency?" As yet, there is no definition of "any qualifying exigency." A common sense approach will be best, keeping in mind that the nation's laws regarding employment protections for individuals called to military duty are meant to be read to provide maximum protection to the affected employees. Until there is further guidance from the Department of Labor, examples of an "exigency" caused by a family member's military call-up or service might include child or elder care (even without a serious health condition), or helping the family member

prepare for departure for duty.

- Who are qualifying family members? "Spouse" and "parent" will presumably mean what they mean now under the existing FMLA regulations. "Son" and "daughter" will probably be defined the same as "child," except that the person will not have to be a minor.
- Can employers require certification? Employers will not be able to require employees requesting this leave to follow certification requirements related to the existing WH-380 "Certification of Health Care Provider" form, as no medical condition will be at issue. The new law does direct that regulations be issued regarding certification requirements for this type of leave. In the meantime, it should be reasonable for employers to request some type of written proof of the qualifying family member's call-up or current military service prior to granting leave.

2) Military Injury Care-Giving Leave: An employee whose spouse, parent, son, daughter, or "next of kin" is injured or recovering from an injury incurred while on active military duty is entitled to up to 26 workweeks of leave in a single 12-month period to care for that family member.

Eligible employees are entitled to this extended form of FMLA leave only once in a single 12-month period, although an employee might qualify again for a 26-week leave entitlement if a separate family member were injured. Other FMLA leave already taken in a 12-month period would be counted with this form of leave toward the employee's annual leave entitlement.

Example: An FMLA-eligible female employee takes 9 weeks of leave for the birth of a child. Her husband is called to military duty and is injured and sent home. The employee would be entitled to an additional 17 weeks of leave for the purpose of caring for her husband in the 12-month period at issue. If the employee's baby were to be hospitalized at some point, the employee could take FMLA leave to care for her baby as well. While this outcome is not entirely clear given that no courts have interpreted the new FMLA leave amendment yet, the employee would presumably be legally entitled to only 3 more weeks to care for her baby (as this form of leave would be subject to the traditional 12-workweek limit) and would also be subject to the 26 week total allotment.

Points for Employers to Note:

- "Next of Kin" is new. While FMLA leave to care for a family member is traditionally limited to caring for a spouse, parent, or child (as defined by the existing FMLA regulations), an employee may take military injury care-giving leave to care for a military service person whose "next of kin" is the employee. "Next of kin" is defined as the closest blood relative of the injured or recovering service member.
- Certification requirements not tied to "Serious Health Condition." At present, the same FMLA certification policies and procedures that an employer would use for an employee who requested traditional FMLA leave to care for a family member may be applied in this situation. In other words, the employer may require certification "proof" of the family member's injury, recovery, and/or qualifying need for care. Note, however, that the injured family member need not have a "Serious Health Condition" as currently defined in the FMLA. Rather, for an employee to be eligible for this new form of FMLA leave, the family member must merely have an injury or illness incurred on active military duty that could render the person medically unfit to perform his or her military duties. An employee is also entitled to this leave while the family member is undergoing medical treatment, recuperation, or therapy for the covered injury or illness, even if the family member is on a temporary disability retired list relative to the injury

or illness.

It is likely that regulations will be forthcoming to better define and explain an employer's obligations and employees' rights on all of these points, though it is impossible to predict when that might occur. Assuming the amendments are signed in to law by the President, written FMLA policies (such as in an employee handbook) and postings will need to be changed, the latter presumably when the Department of Labor revises its model postings to reflect the changes to the law. Miller Canfield will provide further updates on these issues as appropriate.

In all situations for these new types of FMLA leave, common sense should prevail until regulations are issued to better define an employer's obligations to eligible employees. Given the broad interpretation of laws that provide protection for individuals affected by military service, on a close call, employers should give the affected (eligible) employee the benefit of the doubt.

If you have questions about these or any other employment issues or practices, please contact Miller Canfield's Labor and Employment Group; Megan P. Norris at 313.496.7594.