



## The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

### **President Obama Signs Legislation Amending FMLA to Expand Military Families' Leave Rights**

#### **Introduction**

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (“NDAA 2010”). Although primarily a defense appropriations bill, NDAA 2010 also made several significant amendments to the military leave provisions of the Family and Medical Leave Act (“FMLA”). These new amendments take effect immediately.

#### **Background**

In recognition of the sacrifices made by America’s military families, the FMLA was amended in 2008 to provide greater leave rights for family members of individuals serving in the Armed Forces. The amendments introduced two new kinds of FMLA leave: Military Caregiver Leave and Qualifying Exigency Leave. Military Caregiver Leave allows an eligible employee who is the spouse, child, parent or “next of kin” of an injured servicemember to take up to 26 workweeks of unpaid leave in a single 12-month period. Military Caregiver Leave covers injuries or illnesses incurred in the line of duty that may render the servicemember unfit to perform the duties of his or her office, grade, rank or rating. As originally enacted, Military Caregiver Leave applied only to current members of the Armed Forces, or to members on the temporary disability retired list.

The original FMLA Qualifying Exigency Leave provisions allow spouses, parents and children of members of the National Guard or Reserves who have been called to active federal service to take up to 12 weeks of unpaid leave. This leave can be used for a variety of reasons, including preparing for deployment, arranging for child care, making legal or financial arrangements, attending counseling, or spending time with a servicemember on a short-term rest and recuperation leave. Originally, Qualifying Exigency Leave was only available to eligible family members of individuals in the National Guard or Reserves, and did not apply to employees whose family members were active members of the Armed Forces.

#### **Changes to Military Caregiver Leave**

The NDAA 2010 has made two significant changes to the Military Caregiver Leave provisions. First, the scope of covered injuries and illnesses has been expanded. Military

Caregiver Leave now covers not only injuries or illnesses incurred in the line of duty, but also those injuries or illnesses that existed before active duty, but were aggravated by the servicemember's actions in the line of duty.

Second, Military Caregiver Leave has been extended to the families of veterans. In addition to current members of the Armed Forces, the definition of "covered servicemember" now includes:

a veteran who is undergoing medical treatment, recuperation or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

Thus, eligible employees may now take Military Caregiver Leave for veterans who incurred injuries or illnesses (or aggravated existing injuries or illnesses) in the line of duty, provided that the medical treatment occurs within five years of the servicemember's membership in the Armed Forces.

### **Changes to Qualifying Exigency Leave**

The NDAA 2010 also made a substantial change to the eligibility requirements for Qualifying Exigency Leave. Prior to the passage of the NDAA 2010, Qualifying Exigency Leave had been available *only* to families of members of the National Guard or Reserves. Families of active Armed Forces servicemembers were not eligible for leave. Moreover, even if an individual was a member of the National Guard or Reserves, Qualifying Exigency Leave was limited to military service in support of a "contingency operation," a term with a complicated legal definition. Now, Qualifying Exigency Leave is available to eligible family members of *any* member of the Armed Forces on active duty in a foreign country or who is called to active duty in a foreign country.

### **Conclusion**

The NDAA 2010 has expanded the definitions for both "serious injury or illness," and "covered servicemember," and also allows family members of individuals in active military service to obtain FMLA leave. Due to these expansions, it is likely the number of employees requesting military leave pursuant to the FMLA will rise. Thus, employers should take several steps to ensure compliance with the new military leave amendments. First, employers should update their employee handbooks and personnel policies to reflect the changes to the FMLA. Second, employers should inform supervisors and human resources professionals about the amendments so that they will be able to guide eligible employees through the process of requesting leave. Third, employers should be aware that the U.S. Department of Labor will likely publish a new FMLA notice in the coming months incorporating these amendments, and

may also publish new regulations interpreting the amendments. Employers with any questions regarding how to implement these new FMLA military leave provisions should contact any one of Liebert Cassidy Whitmore's offices.

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