

November 2009

## Labor and Employment Relations Alert

### **Congress Expands Family and Medical Leave Military-Related Leave Provisions**

On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act ("2010 NDAA" or "Act"). Although the Act primarily deals with the funding of the U.S. Armed Forces, one of the riders to the Act amends the federal Family and Medical Leave ("FMLA") to expand situations in which employees are entitled to be absent from work with respect to their family members in the armed services.

In passing the 2010 NDAA, President Obama and the current Congress broaden the group of individuals that may benefit under the military-related leave provisions originally enacted under President Bush when he signed the 2009 National Defense Authorization Act. The U.S. Department of Labor ("DOL") must once again amend its FMLA regulations.

#### **Effective Date**

The DOL has been ordered to amend its regulations that went into effect on January 17, 2009 consistent with the expanded FMLA rights provided by the 2010 NDAA. Congress did not specify that the expanded rights would be effective only after the DOL's new regulations are released, which was the case when the FMLA was previously amended. Consequently, it appears that the Act is effective immediately.

#### **Leave for a Qualifying Exigency Now Applies to Family Members of Individuals in the Active Armed Services**

Specifically, the Act expands the use of leave due to a qualifying exigency to cover family members of individuals in the active armed services. The DOL's January 17, 2009 regulations limited the availability of FMLA leave for a qualifying exigency to only those employees with family members in Reserve components of the military and National Guard and retired members of the Regular Armed Forces and retired Reserve. The 2010 NDAA expands the law to now require employers to also provide qualifying exigency leave to spouses, children and parents of individuals deployed to or returning from a foreign country due to service with the Armed Forces.

#### **Leave to Care for the Serious Illness or Injury of a Covered Servicemember Now Includes Injuries or Illness of Veterans**

The Act also expands the definition of a "serious illness or injury" and of a "covered servicemember" for purposes of an employee's entitlement to FMLA leave to care for the serious illness or injury of a covered servicemember.



Under the Act, a serious illness or injury now includes conditions which existed before the beginning of the member's active duty which were aggravated by active duty service in the Armed Forces and injuries or illnesses incurred by veterans in the line of duty (or whose condition was aggravated by active duty service) regardless of when the condition manifested itself.

Additionally, the Act expands the definition of a covered servicemember to include veterans of the Armed Forces (including the National Guard and Reserves). The regulations had interpreted the old statutory language to only apply to employees who were the spouse, child, parent, or next of kin of *current* members of the Armed Forces (including a member of the National Guard or Reserves, or a member of the Armed Forces, or the National Guard or Reserves on the temporary disability retired lists).

However, not all veterans will qualify as a covered servicemember. Under the Act, a veteran is only a covered servicemember if the medical treatment, recuperation or therapy he or she receives occurs within five years of the date he or she left the Armed Services.

## Next Steps

Employers will need to revise their FMLA policies (and likely their FMLA forms) to address the expanded availability of qualifying exigency leave and expanded definitions of "covered servicemember" and "serious illness or injury." We anticipate that the DOL will revise its sample form for the Certification of a Serious Illness or Injury to incorporate the new terms. Employers will also need to discuss the broadened FMLA coverage with the individuals responsible for administering FMLA for the employer.

If you have any questions about the content of this Alert or any other issues associated with the FMLA, please contact one of the authors or your Michael Best Attorney.

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