



# LEGAL TOPICS

December 2009

## FAMILY MEDICAL LEAVE ACT AMENDED AGAIN

On October 28, 2009, Congress amended the Family Medical Leave Act (“FMLA”) yet again. These changes affect all employers subject to the FMLA, including all private employers with 50 or more employees, all public employers, and all public and private elementary and secondary schools. The amendments already are in force.

### **FMLA Recap**

In January of 2008, the National Defense Authorization Act (“NDAA”) made significant changes to the FMLA. Under the NDAA, FMLA leave was expanded to include leave for military caregiving and for “any qualifying exigency” arising out of the fact that an employee’s spouse, son, daughter, or parent had been called to active military duty.

The Department of Labor (“DOL”) issued new FMLA regulations on January 16, 2009. The new regulations addressed the changes imposed by the NDAA.

Now, Congress has amended the FMLA yet again, expanding the leave rights granted under the 2008 NDAA.

### **“Qualifying Exigency Leave” Expanded to Include Leave Needed Because Full-Time Members of the Armed Forces Have Been Deployed to Serve in a Foreign Country**

Based on the language of the 2008 NDAA, the DOL’s regulations stated that qualifying exigency leave only applied when a member of the National Guard, Reserves, or retired military had been called to active duty in support of a federal contingency military operation. The DOL regulations stated that no FMLA leave was available if a current, full-time member of the Armed Forces was deployed.

The new FMLA amendments have changed this limitation. Now, eligible employees may take up to 12 weeks of job-protected, unpaid leave in a 12-month period because of “any qualifying exigency” arising out of the fact that an employee’s spouse, son, daughter, or parent has been deployed to a foreign country as a member of the Armed Forces, or has been notified of an impending call to such duty. *This qualifying exigency leave is available regardless of whether the individual who is being deployed to a foreign country is a full-time member of the Armed Forces or a member of a reserve component of the Armed Forces.*

### **Military Caregiver Leave Expanded to Include Care for Veterans**

The 2008 NDAA expanded FMLA leave rights to include a new class of FMLA leave—military caregiving. More specifically, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember can take up to 26 weeks of job-protected, unpaid leave in a single 12-month period to care for a covered servicemember if the servicemember is recovering from a “serious injury or illness sustained in the line of active duty.”

Before October 28, 2009, military caregiving leave only applied to eligible employees seeking to care for *current members* of the Armed Forces, National Guard, Reserves, or members of such organizations who were on the temporary disability retired list. Before, eligible employees could not take FMLA leave to care for former members of the military or members on the permanent disability retired list.

These rules have changed. Now, eligible employees can take FMLA military caregiving leave to care for a *veteran* who is recovering from a serious injury or illness sustained in the line of active duty. The only limitation is the veteran must have served in an active duty capacity within 5 years of the date the veteran needs care.

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## Steps You Should Take

If the FMLA applies to you, these are the practical steps you should take in light of the recent FMLA amendments:

- The FMLA policy in your employee handbook probably needs to be reviewed and revised (again). The policy now should include appropriate language regarding the expanded military caregiver and qualifying exigency leave.
- Note that the DOL has not yet updated its FMLA poster or FMLA forms. When it does, you will need to use the new poster and new forms.
- Make sure the individual(s) in your organization responsible for FMLA compliance are aware of, and learn, the new rules.

- Educate your front-line managers about the FMLA military caregiver and qualified exigency leave because these are the individuals most likely to receive such leave requests in the first instance.

If you have any questions about this client advisory or if you have any questions about how the new regulations will affect you, please contact Elizabeth V. LaFollette at (336) 271-2572, Patricia Goodson at (919) 573-6242, Nicole Crawford at (336) 271-3140, or one of the other Brooks Pierce employment attorneys listed on our firm's website.

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