



November 4, 2009

www.klgates.com

Author:**Amy L. Groff**

amy.groff@klgates.com

+1.717.231.5876

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Recent Legislation Extends FMLA Rights to More Military Families

On October 29, 2009, Congress extended the military family leave provisions of the Family and Medical Leave Act (“FMLA”) to a more broadly defined category of military family members. Two forms of military-related FMLA leave are available--exigency leave and military caregiver leave. Exigency leave was originally limited to families of National Guard or Reserves members. It is now available to families of all active duty servicemembers. Military caregiver leave was originally limited to families of current servicemembers. It is now available to families of wounded veterans as well. These changes are effective immediately, although the Department of Labor is expected to issue regulations providing further guidance.

While the recently enacted law increases the number of potentially affected employees, it remains the case that the family member taking this form (or any form) of FMLA leave must work for an FMLA-covered employer and must be an “eligible employee,” meaning that the employee has worked for the employer for at least 12 months, has worked at least 1,250 hours in the 12-month period preceding the leave, and works at a worksite with at least 50 employees within 75 miles of the site.

Qualifying Exigency Leave

Qualifying exigency leave allows a spouse, parent, son, or daughter of a National Guard or Reserves member to use some or all of the 12-week FMLA leave entitlement for “qualifying exigencies” arising out of the fact that the member is on active duty or called to active duty. Qualifying exigencies are defined by regulation and include issues arising from a short-notice deployment, military events, child care, school activities, financial or legal arrangements, counseling, rest and recuperation, post-deployment activities, and anything else the employer and employee agree to designate as a qualifying exigency.

The 2009 law extends this form of leave to allow families of active duty servicemembers (i.e., members of a regular component of the Armed Forces during deployment to a foreign country) to take leave for a qualifying exigency.

Military Caregiver Leave

Military caregiver leave provides up to 26 weeks of job-protected FMLA leave in a 12-month period for family members of “covered servicemembers” who suffer serious injury or illness in the line of duty, while on active duty. This includes family members of current members of the Armed Forces, including the National Guard or Reserves (or a member on the temporary disability retired list), who are undergoing medical treatment, recuperation, or therapy for the serious injury or illness.

The 2009 law expands military caregiver leave to cover family members of wounded veterans. Specifically, it covers family members of veterans who (1) are undergoing medical treatment, recuperation, or therapy for a qualifying serious injury or illness incurred in the line of duty on active duty (the new law recognizes for both veterans and current members of the Armed Forces that a serious illness or injury can include a preexisting injury or illness that was aggravated in the line of duty on active duty) and (2) were members of the Armed Forces, including the National Guard or Reserves, at some point during the five-year period before undergoing the treatment, recuperation, or therapy.

Conclusion

These changes to the FMLA will increase the number of employees entitled to take job-protected FMLA leave and will require employers to revise written policies, procedures, postings, and employee handbooks. Employers should also provide updated training to supervisors and human resources staff so that they handle leave requests appropriately. We expect the Department of Labor to issue regulations providing further guidance and will keep our clients informed as these regulations are finalized.

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