

LAW ALERT
The "2010 National Defense Authorization Act"
Expands FMLA Military Leave Entitlements
Lizbeth V. West, Esq.

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647). The new law is expansive with over 500 pages of text. Section 565 of the Act makes significant changes to the military leave entitlements under the Family and Medical Leave Act (FMLA) which went into effect earlier this year. Below is a summary of some of the changes made:

Qualifying Exigency Leave.

Currently, if an employee has a family member (e.g. spouse, son, daughter, step-son, or step-daughter) serving in the National Guard or Reserves (not active duty military) and such family member is called to active duty, the employee may be eligible for up to 12 weeks of "qualifying exigency" leave if time off is needed to address qualifying exigencies arising out of the fact that the family member has been called to active duty. Examples of qualifying exigencies for which an eligible employee may take leave to attend to include: military events and related activities, childcare and related activities, financial and legal activities, counseling, rest and recuperation (up to 5 days of leave to spend time with a military family member on short term leave from deployment), post-deployment activities for a period of 90 days following termination of military family members active duty status, and other events agreed upon by the employer and employee.

New Law: Under HR 2647, those employees with a family member in any regular component of the Armed Forces (not just the National Guard or Reserves) are eligible for Qualified Exigency leave. The new law also removes the requirement that this sort of leave can only be taken to support a contingency operation. Rather, it is available "because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered activity duty) in the Armed Forces."

Military Caregiver Leave.

Currently, if an employee has a covered family member in the armed services (e.g. spouse, son, daughter, step-son, step-daughter, parent, step-parent, or "next of kin" which is defined by the regulations as either the person designated by the service member or the nearest blood relative) who is undergoing medical treatment, recuperation, or therapy or is otherwise in outpatient status, or on the temporary disability list for a serious injury or illness incurred in the line of duty on active duty, the employee may be eligible for up to 26 weeks of military "service member care" leave if time off is needed to care for the covered family member.

New Law: Under HR 2647, the definition of "covered servicemember" does not just apply to active members of the Armed Forces (including National Guard and Reserves), but has been

extended to veterans who were members of the Armed Forces (including the National Guard or Reserves) at any point in time within five (5) years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy. The new law also extends the definition of “serious health condition” for active duty covered servicemembers to include any injury or illness that “existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces.” In the case of veteran covered servicemembers, a “serious health condition” includes any injury or illness that “was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces) *and that manifested itself before or after the member became a veteran.*”

What Should Employers Do?

1. Review and update FMLA policies and administration documents to be sure that they accurately reflect the new HR 2647 definitions and requirements.
2. Train those charged with administering FMLA leave requests and leaves with the new HR 2647 requirements.
3. Keep an eye out for new guidelines and publications from the Department of Labor on the new HR 2647 requirements.

Lizbeth “Beth” West is a shareholder in the Labor and Employment Law Section and Disputes, Trials & Appeals Section at Weintraub Genshlea Chediak. Beth’s practice focuses on counseling employers in all areas of employment law, and defending employers in state and federal court, as well as before administrative agencies. She has extensive experience in defending wage and hour claims, and complex whistle-blowing and retaliation claims. She also provides training services on various employment issues, such as sexual harassment and violence in the workplace. If you have any questions about this Legal Alert or other employment law related questions, please feel free to contact Beth West at (916) 558-6082. For additional articles on employment law issues, please visit Weintraub’s law blog at www.thelelawblog.com.