

MILITARY FAMILY LEAVE IS NOW AVAILABLE IN MORE SITUATIONS

Congress has moved with surprising speed to expand the circumstances in which an employee may take military caregiver leave and qualifying exigency leave under the Family and Medical Leave Act (FMLA). The Supporting Military Families Act of 2009 was only introduced in the House and Senate in late July. Now it has been tacked to the National Defense Authorization Act for FY 2010, which was signed into law by President Barack Obama on October 28, 2009.

The Supporting Military Families Act makes several major changes to the military family leave provisions of the FMLA. In general, the changes have to do with the circumstances in which employees will qualify for both military caregiver leave and qualifying exigency leave.

With record numbers of North Dakota National Guard troops deployed overseas, familiarity with the recent changes to the military leave provisions of the FMLA are more important for North Dakota employers than ever.

Background

In early 2008, Congress expanded the FMLA to require covered employers to give FMLA leave to employees when they (1) experience a “qualifying exigency” arising out of a family member’s service in the military or (2) are needed to care for a family member who has been injured on active duty in the military. Those were the first major changes to the FMLA since its enactment in 1993.

In November 2008, the U.S. Department of Labor (DOL) issued new FMLA regulations that included the agency’s interpretations of the new military family leave requirements. Congress took issue with several of the DOL’s positions on the circumstances in which employees were entitled to leave. Specifically, the new legislation targets the following provisions:

- **29 C.F.R. 825.127(a).** This section of the DOL regulations states that employees may take military caregiver leave only to care for injured service members who are current members of the armed forces. In line with the statutory language, this section specifically states that employees may not take leave to care for former service members.
- **29 C.F.R. 825.127(a)(1).** This section of the regulations simply restates the legislative definition of a “serious injury or illness” for which an employee would be entitled to take leave. However, the statute did not allow leave to care for a service member who had a preexisting serious injury or illness that was aggravated during active duty.
- **29 C.F.R. 825.126(b)(2).** This section states that employees are entitled to qualifying exigency leave only when they have a family member called to active duty who is (1) a member of the National Guard or military reserves or (2) a retired member

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of the National Guard or military reserves. It also defines types of military service that qualify as being “in support of a contingency operation.”

Changes to military caregiver leave

Under the new amendments, employees are entitled to take military caregiver leave to care for family members who were injured on active duty in the military for up to five years after their separation from military service. In other words, the requirement that the family member still be in the military no longer applies.

The amendments also provide that employees will qualify for military caregiver leave when they have a family member who suffered from a preexisting serious injury or illness that was aggravated by their active-duty service in the military. The current DOL regulations had been interpreted to limit leave to new injuries or illnesses that were sustained during the family member’s military service.

Changes to qualifying exigency leave

In addition, employees will be entitled to qualifying exigency leave for any covered service member regardless of whether she is a member of the National Guard, military reserves, or other regular armed forces. Remember that previously, such leave was available only when a family member was in the National Guard or military reserves or called to active duty after retirement from the regular armed forces.

Another change is that qualifying exigency leave will be available when the employee’s family member is a member of the National Guard or military reserves and is called to active duty in a foreign country. The requirement that service members be called to active duty “in a foreign country” replaces the current requirement that they be called to active duty “in support of a contingency operation.”

One easily overlooked ramification of this change is that relatives of reservists who aren’t being deployed to a foreign country are no longer entitled to qualifying exigency leave. The DOL’s regulations had provided that this type of leave was allowed in some circumstances when a member of the National Guard or military reserves was called to active duty for service domestically, such as calls to active duty “in the case of insurrections and national emergencies.” By replacing the requirement that the service members be called to active duty in support of a contingency operation, Congress effectively eliminated the possibility of qualifying exigency leave for calls to active duty that don’t entail overseas military service.

Bottom line

The legislation didn’t include an effective date, which means that it became effective when the President signed it on October 28, 2009. Employers that are covered by the FMLA should note that this legislation effectively nullifies several portions of the final FMLA regulations that were issued in November 2008.

You also need to:

- Notify employees of the new provisions; and
- Revise your policies and procedures to ensure that they are in compliance with the new requirements.

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RISK SERVICES

It's Always Interesting

We received a call the other day from one of our members. It was one of those calls looking to find out who in our office should be the recipient of a letter. This member has an employment issue and wanted to send the NDIRF a letter to get our opinion. Here is a brief description of the situation-as always the names, faces, and places have been changed to protect the innocent, guilty and bystanders: It seems there is an employee that is creating consternation with other employees. Not that they dislike the employee, the employee does good work, when working, but does not seem to be consistently on the job when required. So the question posed was, can the employee be fired? What do you think?

Yes: ___ No: ___ Maybe: ___

We asked: Have you followed your written policies? Answer: No, we had a company draft an employee handbook, but it was never adopted. Then we asked: Have you consulted with your legal counsel? Answer: No, the officials did not want to get counsel involved. We inquired further: Has the employee's supervisor discussed the substandard performance with the employee? Answer: No, the supervisor is as frustrated as anyone with the employee. Lastly we asked: Have any employee evaluations been conducted for this employee? Answer: No. Again, can the employee be fired?

Yes: ___ No: ___ Maybe: ___

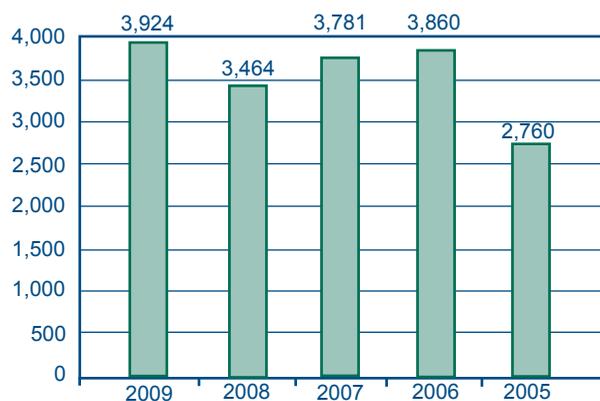
Well, the letter was answered. The answer was short but we are sure it didn't seem sweet.

- Adopt your employee handbook.
- Have your legal counsel review the handbook and be involved in employment issues.
- Follow your employee handbook to the letter.

Once you have followed your employee policies and procedures, and consulted your legal counsel, you MAY be able to terminate an employee with little risk of consequences. In the above case, it may take additional time before the employee could be terminated with minimal risk of adverse consequences to the employer. But, looking on the bright side, once this employee understands exactly what is expected of them and understands the possible ramifications, their work habits may abruptly change. Let's look on the bright side. ■

FINANCIAL INSIGHTS

LOSSES PAID (in thousands)



This graph represents losses paid by NDIRF over the past 5 years, including payments made to adjusters and attorneys assisting in the claims settlement process. Since its inception in 1986, NDIRF has paid losses totaling more than \$68.8 million. ■

FROM THE CEO

Good news, bad news.

The good news is that NDIRF, once all of the beans have been counted, audited and analyzed, will show up with a much better year in 2009 than we experienced in 2008. The conferment of benefits to be paid to Fund members this April will likely be on the order of \$1 million more than last year. Mostly, this is the result of dramatically improved financial market conditions.

The bad news is that “mostly, this is the result of dramatically improved financial market conditions.” There was no assistance from claim experience. In fact, claim losses in 2009 were approximately \$5.8 million, up from \$4.3 million in 2008 and \$3.7 million in 2007. Not the type of trending numbers we would prefer to see.

Since the only year, other than 2009, NDIRF claim losses exceeded \$5 million was the only other year snowfall in Bismarck also exceeded 100 inches (1997 - \$5.1 million), one might conclude that tough winters followed by floods do not bode well for NDIRF claim losses – and one would be correct, based on our experience. The challenge for all of us in 2010 is to manage our public risk so as to allow eventual placement of 2009's loss experience in the category of just another severe weather year – not a harbinger of rising claims trends. ■

1st Human Resource Conference for Local Government

The first statewide conference on Human Resource Management specifically designed for local governments will be held April 21 and 22, 2010 in Bismarck, North Dakota. This conference will address issues for policy makers, human resource staff, business managers, auditors and supervisors – anyone who has a responsibility for managing people. The conference welcomes all types of local government officials: city government, county government, parks and recreation, schools, public health and townships.

Roxanne Emmerick, a nationally known speaker and author, will kick off the session with key note address titled “Thank God it’s Monday.” This session is based on her best-selling book by the same name.

Five different breakout sessions will be held, addressing a variety of legal and policy challenges for local governments, including:

- Recruitment/selection (including a panel discussion on background check policies, procedures and pitfalls)
- Compensation and benefits
- Employment relationships
- Risk management
- Public processes in human resource management (will include information on North Dakota open meetings/ open records laws)

The closing session will feature Sarah Herman who will address legal compliance issues. In addition to offering major sessions, the conference will unveil the new Human Resource Reference Guide for Local Governments. This will be an on-going resource for local governments in North Dakota. The conference will also provide an opportunity to network with human resource staff in other political jurisdictions in your region.

Registration for the conference will be available on association (NDACO; NDLC; NDSBA; NDRPA; etc.) websites, including NDIRF, starting January 15, 2010. **SAVE THE DATE** for this important event - you don’t want to miss it! ■

Mark Your CALENDAR

April 2010

- 27: ND League of Cities Regional Meetings, NC Region, Wilton
- 28: SW Region, Bowman
- 29: NW Region, Watford City

May 2010

- 4: ND League of Cities Regional Meetings, NE Region, Pembina
- 5: SE Region, Casselton
- 6: SC Region, Napoleon
- 12: NDIRF Annual Meeting Ramkota Inn, Bismarck
- 12: NDIRF Board of Directors Meeting NDIRF offices, Bismarck

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