

State Regulations Update

Family Military Leave—A Growing National Trend for Employees with Active-Duty Family Members

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With ongoing demands on our military servicemen and service-women, laws entitling soldiers' families to unpaid military leaves of absence from their workplaces are increasing in popularity. Employers must be informed of the relevant statutes in this area and be prepared to comply. Generally speaking, family military-leave laws provide an unpaid leave of absence to workers with active-duty family members. Presently, California, Illinois, Indiana, Maine, Minnesota, Nebraska, and New York have passed family military-leave laws. Additional states, including Hawaii and Wisconsin, have such legislation pending.

FAMILY MILITARY LEAVE UNDER FEDERAL LAW

On January 28, 2008, the National Defense Authorization Act (NDAA) was signed into law. The NDAA amends the Family and Medical Leave Act (FMLA), a federal law that entitles eligible employees to unpaid leaves of absence from work under certain circumstances.¹ The FMLA now provides two additional types of leave to eligible employees.

The first new type of family leave provided to employees is leave to care for an injured service member. Specifically, a "spouse, son, daughter, parent, or next of kin" is permitted up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."²

The second new type of leave is leave for "any qualifying exigency" arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."³

Both leaves are available during a single 12-month period and are included as part of an employee's 12-week combined total of leave available under the FMLA. The test for whether an employee is "eligible" for either of the above types of leave is the same for other FMLA leave. Accordingly, an employee must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12 months. Additionally, the employer must employ at least 50 employees within 75 miles of the relevant worksite.⁴

STATE FAMILY MILITARY-LEAVE LAWS

States may enact their own laws regarding employees' working conditions, including laws that afford workers more extensive rights than those provided under federal law. As a result, certain states now have their own laws providing employees family military leave.⁵ The laws vary by state with respect to who is covered and what leave benefits are provided. Additionally, in some states, legislation is currently pending that would provide similar entitlements to leave.

California

In California, covered employers must provide up to ten days of unpaid leave to eligible employees whose spouses are on leave from deployment during a period of military conflict.⁶ The spouse must be a member of the U.S. Armed Forces who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the president or be a member of the National Guard or Reserves who has been deployed during a period of military conflict.⁷ To be eligible, the employee must (1) work an average of 20 or more hours per week; (2) within two business days of receiving official notice that his or her spouse will be on leave from deployment, notify the employer of the intention to take leave; and (3) submit written documentation certifying that his or her spouse will be on leave from deployment during the employee's requested leave period.⁸

Illinois

The Illinois Family Military Leave Act applies to independent contractors as well as employees.⁹ Employers with 15 to 50 employees are required to

provide up to 15 days of unpaid leave to employees who are the spouses or parents of persons called to military service lasting longer than 30 days.¹⁰ Employers with more than 50 employees are required to provide up to 30 days of leave.¹¹ If the leave will consist of five or more consecutive work-days, the employees must provide 14 days' notice of the intended leave.¹² For leaves that are for fewer than five days, the employer must give notice as soon as practicable.¹³ The employee must make efforts to consult with the employer to schedule the leave so as not to unduly disrupt the employer's operations.¹⁴ Before taking family military leave, the employee must exhaust all accrued vacation leave, personal leave, compensatory leave, and all other leave, except sick leave and disability leave.¹⁵ To qualify for leave, an employee must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12 months.¹⁶

Indiana

Under Indiana law, covered employers must provide up to ten days of unpaid leave for employees who are the spouses, parents, grandparents, or siblings of persons who are ordered to active duty.¹⁷ The employee may take the leave of absence during one or more of the following periods: (1) the 30 days before active-duty orders are in effect; (2) a period in which the person ordered to active duty is on leave while the orders are in effect; or (3) the 30 days after the active-duty orders are terminated.¹⁸ To be eligible, the employee must have been employed for at least 12 months and have worked at least 1,500 hours during the 12 months immediately preceding the day the leave begins.¹⁹ The Act also requires 30 days' written notice before the leave begins, unless the active-duty orders are issued less than 30 days before that date.²⁰

Maine

In Maine, an employee may take up to 15 days of unpaid family military leave during the 15 days immediately before deployment, the 15 days immediately after deployment, or both.²¹ To qualify, an employee must be the spouse, domestic partner, or parent of a Maine resident deployed for a period lasting longer than 180 days.²² If the leave will last five or more consecutive work days, 14 days' notice is required.²³

Minnesota

Minnesota provides up to ten days of unpaid leave for employees whose immediate family member has been injured or killed while engaged in

active military service.²⁴ The definition of employee under this Act includes independent contractors.²⁵ Covered employers include any persons or entities located or doing business in Minnesota and having one or more employees, and the employee requesting leave must give as much notice as practicable.²⁶

Nebraska

The Nebraska Family Military Leave Act requires employers with 15 to 50 employees to provide up to 15 days of unpaid leave to employees who are spouses or parents of service members called to serve for a period of 179 days or longer.²⁷ Employers with over 50 employees are required to provide up to 30 days of leave.²⁸ To be eligible, the employee must have worked for the same employer for at least 12 months and have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the leave.²⁹ If the leave is to last five or more consecutive workdays, the employee must give 14 days' notice.³⁰

New York

In New York, employers with 20 or more employees must provide up to ten days of unpaid leave to employees who are the spouses of service members deployed during a period of military conflict to a combat theater or combat zone of operations.³¹ There is no notice requirement. To qualify for leave, the employee must work an average of 20 or more hours per week.³² There is no requirement that the employee serve any particular length of employment prior to requesting leave.

CONCLUSION

Chances are that you, a coworker, or someone you know has a family member in the Armed Forces, National Guard, or Reserves. Employers must be mindful of their obligations to provide family military leave under a variety of circumstances. The safest way to avoid unwanted legal issues over failing to provide proper leave or interfering with an employee's protected leave is to train supervisors and managers regarding applicable leave laws and to provide examples of scenarios where the entitlement to leave might arise. Another important measure employers should take is to revise their leave policies to include family military leave. Ultimately, employers need to ensure that their operations comply not only with federal law, but with emerging state laws as well.

NOTES

1. 29 U.S.C. §§ 2601, et seq.
2. Title I of The Family and Medical Leave Act of 1993, as amended, §§ 101-102.
3. Id.
4. Id.
5. Cal. Mil. & Vet. Code § 395.10 (2008); 820 Ill. Comp. Stat. 151/10 (2008); Ind. Code §§ 22-2-13-1, et seq.; Me. Rev. Stat. Ann. tit. 26, § 814 (2008); Minn. Stat. § 181.947 (2008); Legislative Bill 497, 100th Leg., 1st Sess. (Neb. 2007); N.Y. (Labor) § 202-i (Consol. 2007).
6. Cal. Mil. & Vet. Code § 395.10 (West 2008). A covered employer must have 25 or more employees, and includes any individual, corporation, company, firm, state, city, county, city and county, municipal corporation, district, public authority, or any governmental subdivision.
7. Id.
8. Id.
9. 820 Ill. Comp. Stat. 151/5 (2008).
10. 820 Ill. Comp. Stat. 151/10 (2008); 820 Ill. Comp. Stat. 151/5 (2008).
11. 820 Ill. Comp. Stat. 151/10 (2008).
12. Id.
13. Id.
14. Id.
15. Id.
16. 820 Ill. Comp. Stat. 151/5 (2008).
17. Ind. Code §§ 22-2-13-11; 22-2-13-11.
18. Ind. Code § 22-2-13-11.
19. Id.
20. Ind. Code § 22-2-13-12.
21. Me. Rev. Stat. Ann. tit. 26, § 814 (2008) .
22. Id.
23. Id.
24. Minn. Stat. § 181.947 (2008).
25. Id.
26. Id. The Act specifically states that it does not prevent an employer from providing additional leave benefits.
27. Legislative Bill 497, 100th Leg., 1st Sess. (Neb. 2007).
28. Id.
29. Id.
30. Id.
31. N.Y. (Labor) § 202-i (Consol. 2007).
32. Id.

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