

Employers, Attorneys Ready for Battle Over Military Leave, FMLA Regs

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The U.S. Department of Labor (DOL) is giving nothing away, but rules on qualifying exigency, military caregiver leave and other Family and Medical Leave Act (FMLA) controversies, which are expected to be issued by the agency this fall, will probably have more impact and further reach in workplaces and human resource departments than many employers now realize, according to attorneys familiar with the FMLA legal and regulatory environment.

Employers welcomed the increased clarity they saw in most of the FMLA regulations issued in January 2009 by the outgoing Bush administration, these labor and employment law attorneys said.

However, they added, employers remain concerned about adapting to potentially complex and confusing new revisions later this year.

The 2009 rules were issued in part to incorporate the previous year's military family leave amendments. The 2010 regulations will include amendments to the law that were passed last year.

The new FMLA provisions are not expected to have a direct impact on employers and employees also covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Americans with Disabilities Act (ADA). However, the infamous "law of unintended consequences" remains in effect.

On the one hand, according to Matthew J. Gilligan, partner in the labor and employment group at Alston & Bird LLP, "USERRA does provide significant protection for disabled veterans, so an injured servicemember may likely be protected by USERRA and pursuing reemployment rights under USERRA at the same time that his or her family members are pursuing their rights under the new FMLA military caregiver provisions."

On the other hand, Gilligan said, "ADA protects an individual employee with respect to his or her own disability (e.g., an employer may not discriminate against the disabled employee, may need to accommodate such employee, etc.), whereas the new FMLA provisions pertain to family members of a covered servicemember who are seeking to care for the covered servicemember with respect to his or her service-connected disability or other injury."

“I will note,” Gilligan continued, “that if there is a request by an employee for coverage under the FMLA military caregiver provision, and the employee is subjected to adverse action, there potentially could be a separate cause of action under the theory of ‘associational’ discrimination under the ADA. Depending on the circumstances, the employee could argue that, in addition to being denied FMLA, he or she was being discriminated against on the basis of his or her association with a person with a disability.”

Awaiting DOL Guidance

The interplay, if any, between the various leave laws may be clarified by regulations the DOL plans to propose by November 2010.

“I kind of hope the Department of Labor does the least amount possible,” said Reggie Belcher, a shareholder and specialist in labor and employment law at Turner Padgett Graham & Laney, “because I think the more the regulatory agencies do, the more complicated and murky the regulations become. ... I’d be fine if the Department of Labor didn’t address [new regulations] at all.” There is probably not much chance of that happening.

In its regulatory plan released Dec. 7, 2009, (http://www.dol.gov/asp/regs/unifiedagenda/fall_2009_Regulatory_Plan2.pdf), the department said it is “reviewing the implementation of these new military family leave amendments and other revisions of the current regulations” with a view toward developing “regulatory alternatives” for rulemaking notice and comments. DOL subsequently made clear that it plans to review not only the rules it wrote for the military family leave amendments in the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) and included in the 2009 regulations, but further expansions of FMLA leave for servicemembers and their families in the NDAA for fiscal year 2010 (P.L. 111-84).

So far, FMLA attorneys said, most employers that are busy conforming employee handbooks, leave procedures and other compliance measures with the 2009 regulations have not taken special note of the new military and family leave provisions added last year—even though they are the most significant expansion of FMLA coverage since the law was passed in 1993. Such compliance cannot last long, attorneys said.

The 2009 amendments expanded FMLA coverage for qualifying exigency leave to the entire active duty U.S. Armed Forces deployed overseas, not just the National Guard and Reserves, as the 2008 amendments did.

The 2009 amendments also offer military caregiver leave to veterans as long as five years after the end of their service, and to military family members, a significantly larger population than the 2008 amendments contemplated.

“I don’t know that employers recognize what’s coming, with so many employees being eligible for qualifying exigency leave,” said Mary Carter Martin, an attorney in employment law at The Lowenbaum Partnership. “I think most employers have someone on staff who is connected in some way to the military,” she added.

Unanswered Questions

Employers will get their chance to sound off about rules implementing the latest amendments on qualifying exigency and military caregiver leave after the DOL releases its proposed regulations later this year. “The military leave regulations haven’t been fleshed out enough by experience to say where they’re falling short,” noted Martin. In the meantime, attorneys identified some areas that have already raised concern, or that can be expected to.

Employers should be especially interested in further clarifying the interaction and potential overlap of FMLA leave for qualifying exigencies and for military caregiver leave, said Joshua Zuckerberg, partner in the labor and employment law department at Pryor Cashman LLP. An employee with his or her own serious health condition could get 12 weeks leave for that and come back soon after for up to 26 weeks of military caregiver leave for a servicemember relative, he noted. “That’s one I think employers would appreciate having as much clarity as possible on,” Zuckerberg said.

Confusion over the reach of the new military caregiver leave provisions extends even to non-employment law attorneys, who wonder why it applies to them if their clients have no military personnel on staff, said Lesley Pate Marlin, associate in the law and employment practice group at Venable LLP. Too many also fail to understand that the 2009 amendments expanded qualifying exigency coverage beyond the Guard and Reserves to the entire U.S. armed forces deployed abroad, she said.

“The certification process for determining whether the servicemember has a ‘serious health condition’ is significantly different from the way [it] is determined under the other FMLA provisions,” observed Gilligan. Because the basic definition of a qualifying illness or injury means the servicemember is unfit to perform regular military duties, Gilligan said, certification for caregiver leave requires not only medical expertise but some level of military knowledge. Current regulations identify particular health providers who may complete the certification form. DOL could revisit that list.

“Also, unlike other FMLA leaves, the employer cannot seek a second opinion” for leave certification, Gilligan said. “Once certification is provided, no recertification is permitted” under the current regulations, he said.

“Another unique feature is where the [Department of Defense] has extended an ‘Invitational Travel Order’ to a family member,” Gilligan said. “This is where the military healthcare professional has made a decision that the family member is needed to be present for the covered servicemember, and thus issues travel orders to the family member. When these are issued, the family member automatically qualifies for FMLA leave without the need for a separate certification.”

How the new military family leave amendments may interact with myriad complementary (or conflicting) state laws also remains uncertain. New Jersey’s Family Leave Act, one of the nation’s earliest and most comprehensive state leave laws, provides some benefits more generous

than the federal FMLA, noted Randi Kochman, partner in employment law at Cole Schotz Meisel Foreman & Leonard, P.A. Thus, an employee could take state FMLA leave to care for a parent-in-law (not permitted under the federal FMLA), then request up to 26 weeks of FMLA caregiver leave for a military relative. “So that’s a little bit of tension” perhaps awaiting DOL regulatory clarification, Kochman said.

Beyond Exigency, Caregiver Leave

One proviso in the DOL’s regulatory agenda, perhaps overlooked, is notice that the agency is considering “other revisions of the current regulations” beyond the 2008 and 2009 amendments.

Employment law attorneys said that might mean regulators are ready to bring some much-needed clarity to issues surrounding intermittent leave, one of the more enduring controversies in FMLA compliance.

“Specifically, non-scheduled [intermittent] leave, non-planned leave,” Kochman said. “Is that intermittent leave or not? ... The question is whether leave comes up unexpectedly, or whether it’s brief but scheduled. When people have migraines and just decide not to come to work, that’s not intermittent leave, I think, though employers put up with it, mostly. I don’t think it is [intermittent leave], but I cannot advise my clients that they can deny it, because it’s unresolved.”

Recertification of serious health conditions for intermittent leave was improved in the 2009 regulations, said Alicia Starkman, associate in the labor and employment group at Alston & Bird; employers in most situations can now request recertification every six months. But recertification in other circumstances can be ordered as frequently as every 30 days, she said, and some employers would like to see a more flexible interval.

New 2009 forms—especially separate ones for an employee’s own serious health condition and another form for family members—addressed some employer concerns about employees “gaming” the FMLA system, Starkman added. DOL could improve the system by allowing more opportunities to verify serious health conditions.

“Employees can just say ‘FMLA’ and if they’ve been approved for intermittent leave, it’s considered automatic; it should be verifiable,” Starkman said. “I’d like to see some more tools in the employer’s arsenal.”

Attorneys are also watching to see if the DOL moves on some items of the Obama administration’s 2008 election year agenda regarding the FMLA.

During that campaign, Belcher said, Obama mentioned a number of FMLA and related leave law changes he said he would favor. These included expanding the definition of family to embrace grandparents and same-sex couples, both groups currently ineligible for FMLA leave; leave for parent-teacher conferences and other nontraditional “family” activities; and leave to deal with the consequences of sexual assault or domestic violence.

Each of those would significantly increase the burden employers face when complying with the FMLA.

Legislation has been introduced in Congress to deal with many of these proposals, and it is unclear how the DOL could promulgate regulations approximating them without new law, but “it’s these types of changes that you’re going to see pushback from the business community,”

Belcher said, “and from the Republicans in Congress.” For the time being, the regulatory ball is still in the Department of Labor’s court.

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