

States Pass New Laws for Military Family Leave

By Nadia P. Bermudez, Esq. & Amy Wilson, Esq.

Various state legislatures have recognized the sacrifices made by our military personnel and their families by enacting military family leave laws. In these states, the laws allow eligible employees to take an unpaid leave of absence in order to spend time with family members that are in engaged in or called to active military service. This article discusses the guidelines of several states' acts relating to military family leave, as well as advice to employers implementing these acts.

Indiana's New Military Family Leave Act

As of July 1, 2007, Indiana requires an employer with at least 50 employees during each working day of any 20-week period to provide up to 10 days of unpaid leave to an employee who has an active duty military family member. See Ind. Code 22-2-13-1 et seq. However the benefits of the Indiana Military Family Leave Act ("Act ") are limited to the spouse, parent, grandparent or sibling of a person who is ordered to active duty. For purposes of the Act, a "parent" is not only the biological mother or father, but an adoptive mother or father, or court-appointed guardian or custodian. In addition, a "sibling" is not only a brother or sister, but also a half-brother, half-sister, or brother or sister through adoption. However, a "grandparent" must be a biological grandparent.

In order to be eligible under the Act, the employee must have been employed by the employer over the previous 12 months, and have worked at least 1,500 hours during the 12 months before the requested leave period. In addition, the soldier must be performing full-time service for longer than 89 consecutive calendar days.

An employee can take the leave of absence while the soldier is on leave from a qualifying active duty period, or during the thirty days before or after the active duty period. The leave of absence is allowed for a maximum of ten days each year.

To be eligible for military family leave, an employee must provide written notice thirty days before the intended leave of absence. This written notice should include the active duty orders, if they are available. Active duty

orders which are issued less than thirty days before the intended leave are the exception to this rule. The employer may also require the employee to utilize available vacation or personal time during the ten day leave period. However, an employee cannot be required to utilize her medical or sick leave in the same manner. Further, the employer must allow the employee to continue his health insurance coverage at the employee's expense during the leave period.

An employee returning from leave must be restored to the same position he held before his leave, or its equivalent. This position must include the same or equivalent seniority, pay, and benefits.

California's New Leave For Spouses of Military Service Men and Women

On October 9, 2007, Governor Arnold Schwarzenegger signed California Assembly Bill 392 (AB 392) into law. AB 392, now Section 395.10 of the California Military and Veterans Code, creates an right of up to ten days of unpaid leave of absence for spouses of military personnel while such personnel are on a leave of absence from deployment—barring retaliation for such family leave. Section 395.10 takes effect immediately, said the California Legislature, “[i]n order to serve the families of those troops currently serving in military conflicts in Iraq and Afghanistan, and to assure that these families are able to spend time together during the qualified member’s leave from deployment.”

The new law applies to employers with 25 or more employees in the United States (covered employer), and their California employees who work at least an average of 20 hours per week and whose spouse is a member of the United States Armed Forces, National Guard, or Army Reserves on active duty in an area of military conflict (eligible employee)--but does not include independent contractor work.

Section 395.10 to the California Military and Veterans Code, defines a "qualified employee" as the spouse of a "qualified member" of the armed forces (i.e, an individual who has been deployed to a scene of military conflict; the spouse needs to performs an average of 20 hours per week; and the spouse must provide notice "within two business days of receiving official notice that the qualified member will be on leave from deployment" of the intent to take the leave provided by the statute. A "qualified leave

period" means the period during which the qualified member is on leave from deployment during a period of military conflict. The statute defines "military conflict" as: a period of war declared by the United States Congress; a period of deployment for which a member of a reserve component is ordered to active duty pursuant to either of the following: (i) Sections 12301 and 12302 of Title 10 of the United States Code or (ii) Title 32 of the United States Code.

Under subsection (c) the law protects covered employees from facing a backlash due to taking this leave, requiring that a "qualified employer shall not retaliate against a qualified employee for requesting or taking the leave provided for in this section."

The statute does not provide clarification on what "receiving official notice" means or what "written documentation" needs to be presented by the requesting employee. The new law means that California now has 15 recognized labor leaves permitted under its laws. Given some of the ambiguities of this new law, employers subject to the law are encouraged to be flexible and work cooperatively with covered employees to take his or her leave on agreeable dates when taking time off to spend with a military spouse on leave from deployment.

Other States

When the New York Family Military Leave Law became effective in August of 2006, it was among the first states to have a family military leave law requiring employers to provide unpaid time off to family members of those on active duty in the military. The New York law requires employers with 20 or more employees to provide the spouse of a person on active duty in a combat theater or zone of operations up to 10 days of unpaid leave. Other states have similarly passed similar laws. The Illinois Family Military Leave Act requires employers with 15 to 50 employees to provide up to 15 days of unpaid family military leave to the spouse or parent of a soldier called to military service lasting longer than 30 days. Employers with more than 50 employees must provide up to 30 days of unpaid leave. As of September 20, 2007, Maine amended its existing Family Military Leave Law to make it applicable to employers with 15 or more employees. Additionally, under Maine law, employees will be able to take leave not only during the 15 days prior to and following deployment, but also during periods when the person is on leave during active duty.

Advising Employers

Therefore, employers must ensure compliance with these new state laws by adopting a military leave policy that is consistent with the Act of their respective state. The policy should be incorporated into an employee handbook and employees should be educated as to the benefits and limitations of the policy. Finally, proper recordkeeping and notification procedures should be implemented to ensure that each employee takes only the appropriate amount of leave, and military leave is not confused with other forms of excusable absence.

(Amy Wilson, Esq. is an attorney with Locke Reynolds in Indianapolis, Indiana. Nadia P. Bermudez is an attorney with Brown Law Group in San Diego, California. Ms. Wilson and Ms. Bermudez are Newsletter Vice-Chairs for the American Bar Association, Tort Trial Insurance Practice Section's Employment Law & Litigation Newsletter.)