

# STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

NOVEMBER 16, 2009

## LABOR AND EMPLOYMENT CLIENT ALERT CONGRESS AMENDS FMLA AGAIN!



On October 28, 2009, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2010 (H.R. 2647). This new law, among other things, expands the “qualifying exigency” and “military caregiver leave” provisions under the Family and Medical Leave Act, which were added in January 2008. Although the legislation does not have an effective date, employers should presume that all provisions of the NDAA for fiscal year 2010 were effective when signed by President Obama.

### SUMMARY OF NEW LAW

- Expands “qualifying exigency leave” (previously limited to families of National Guard or Reserves Personnel) to include eligible family members of the regular **Armed Forces**.  
[PAGE 2](#)
- Expands military caregiver leave (previously limited to families of current service members) to include certain **veterans**.  
[PAGE 3](#)
- Expands definition of the term “**serious health condition**” for purposes of military caregiver leave to include any injury or illness that “existed before the beginning of the service member’s active duty and was aggravated by service in line of duty on active duty.”  
[PAGE 3](#)

### WHAT YOU NEED TO KNOW

- Recommended Steps for **compliance**.  
[PAGE 4](#)

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**QUALIFYING EXIGENCY LEAVE**

<u>January 2008 Amendments</u>	<u>H.R. 2647 (New Law)</u>
<p>Before the current expansion of the FMLA, an eligible employee could take 12 weeks of leave for a “qualifying exigency” arising out of the fact that the employee’s spouse, son, daughter or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) as a member of the Reserves or National Guard, in support of a contingency operation declared by the President, U.S. Secretary of Defense, or Congress.</p> <p>According to the Department of Labor’s (“DOL”) regulations, “qualifying exigency” includes leave for one or more of the following arising out of the active duty or call to active duty status of a “covered” military member in support of a contingency operation:</p> <ul style="list-style-type: none"> <li>▪ Short-notice deployment (up to seven calendar days)</li> <li>▪ To attend certain military events and related activities</li> <li>▪ To address child care arrangements and school activities</li> <li>▪ Financial and legal arrangements</li> <li>▪ To attend counseling sessions (provided by someone other than a health care provider)</li> <li>▪ Rest and recuperation</li> <li>▪ Post-deployment activities</li> <li>▪ Additional activities to which the employer and employee mutually agree as to both the timing and duration</li> </ul>	<p><u>Extends</u> exigency leave to eligible family members of <u>active duty</u> service members (i.e., a member of the Armed Forces who is on active duty and deployed to a foreign country).</p> <p>In addition, eligible family members of reservists may take FMLA leave for a qualifying exigency arising from the fact that the reservist is deployed to a foreign country under a call or order to active duty pursuant to certain statutory provisions.</p> <p>→ <i>This provision remains the same, except the new law is intended to extend eligibility for exigency leave to covered family members of those deployed in a foreign country and not only in support of a contingency operation.</i></p>

**MILITARY CAREGIVER LEAVE**

<u>January 2008 Amendments</u>	<u>H.R. 2647 (New Law)</u>
<p>Before the new law, an eligible employee could take unpaid FMLA leave for up to a total of 26 weeks in a single 12-month period to care for a covered service member with a serious injury or illness, if the employee is the spouse, son, daughter, parent, or next of kin of the service member.</p> <p>Military caregiver leave was only available when the service member was a current member of the Armed Forces, including a member of the National Guard or Reserves, or in those categories and on a temporary disability retired list.</p>	<p><u>Expands</u> the military caregiver leave provision to include caring for a <u>veteran</u> who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.</p> <p>In addition, the term “serious health condition” was expanded to cover not only an injury or illness incurred by a service member or veteran in the line of duty, but also an injury or illness that existed before the service member’s or the veteran’s active duty and was aggravated by service in the line of active duty.</p>

## STEPS FOR COMPLIANCE WITH THE NEW LAW

We recommend employers review their leave policies to ensure compliance with the new law. Additional steps include the following:

- Revise your FMLA policies, procedures, and administrative forms to ensure they comply with the expanded military leave provisions of the new law (i.e., include regular Armed Forces under the scope of “qualifying exigency,” delete references to “contingency operations,” and expand military leave coverage to include veterans).
- The new law directs the Secretary of Labor to promulgate regulations defining “qualifying injury or illness” in the case of veterans of the Armed Forces. In the interim, employers should consult with employment counsel and interpret this term broadly to comply with the intent and spirit of the law.
- Train supervisors and managers on the new law, and ensure compliance with the expanded military leave provisions.
- The DOL will likely revise its required FMLA Poster/Notice in the near future. Under the FMLA regulations passed in January 2009, if a covered employer has any eligible employees, it must also provide the Poster/Notice to each employee by including the notice in the employee handbook or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist. If using another format, the employer must incorporate all the information in the Poster/Notice, including the poster’s last two sections entitled “Unlawful Acts by Employers” and “Enforcement.” NOTE: Some employers prefer to duplicate the entire Poster/Notice and include it in their handbook as an appendix to the policy, rather than include these sections in their written policy. Employers should also monitor the DOL’s website for release of the new Poster/Notice.
- Replace existing FMLA Poster/Notice with the new one when it is published, and post in conspicuous places where it can be readily seen by employees and applicants.

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Lisa Berg is a Shareholder in the Labor and Employment Law Department. Ms. Berg provides advice and counseling to employers of all sizes to minimize risk of labor and employment litigation.

Ms. Berg also has considerable expertise in all areas of traditional labor law, including management of company responses to union organizational campaigns (both corporate campaigns and election petitions), representation of employers during representation case hearings before the National Labor Relations Board, training supervisors to avoid unfair labor practice charges, litigation of unfair labor practice charges, prevention and management of picketing and strikes, negotiation of collective bargaining agreements, development of policies and procedures to maintain a union-free workplace, arbitrating grievances, managing union decertification's, and establishing positive working relationships with unions already representing clients' employees. In addition, Ms. Berg counsels clients on union avoidance and has conducted hundreds of seminars for clients and professional organizations on how to remain union-free.

Ms. Berg exclusively represents management in labor and employment matters, and has experience in a diverse group of industries, including healthcare, pharmaceutical, airline, manufacturing, automobile, legal, housing, construction, arts, professional sports, banking, real estate, financial, hospitality, and retail.

Prior to joining the Firm, Ms. Berg gained legislative experience working in Washington, D.C. for Congressman Matthew McHugh, as well as with the American Israel Public Affairs Committee ("AIPAC"). Ms. Berg also clerked for the United States Department of Justice, Office of Special Investigations, the division assigned to prosecute Nazi war criminals. She was selected by the U.S. Government to work in former East Germany (Alexanderplatz), shortly after the fall of communism, to research Nazi and concentration camp files in the East German National Archives.

### **Practice Areas**

Labor and Employment

### **Industries**

Construction

Healthcare

Hospitality and Leisure

Pharmaceutical and Life Sciences

Retail

### **Education**

J.D., Emory University, 1992

B.S., Cornell University, 1989

### **Admissions**

Florida, 1992

### **Ratings & Certifications**

AV Rated by Martindale-Hubbell

Board Certified by The Florida Bar  
in Labor and Employment Law

## LABOR AND EMPLOYMENT DEPARTMENT

We understand that our clients are in an extremely competitive business market. We understand that employers (large and small in both the public and private sectors) need timely, practical business-oriented advice on labor and employment issues. We understand that our clients must deliver services faster and better to remain competitive and profitable. We also understand that “human resources” are not a commodity, but real people with real workplace problems that are often difficult for our clients to address alone. We believe that partnering with our clients to provide strategic preventive counseling, training (in English, Spanish and Creole), audits and legal representation is the best antidote to complex and challenging workplace problems.

We also believe that if our clients become involved in a lawsuit, grievance, arbitration, claim of discrimination or wrongful discharge in any legal forum, they each deserve ethical and zealous representation. We are experienced trial attorneys, not just “litigators.” We are also labor attorneys with “in the trenches” experience in dealing with unions seeking to represent blue collar, white collar and professional employees.

### Range of Services

- Employment Discrimination Litigation Strategy
- Employment Law Consulting
- Labor Law
- Litigation
- Litigation Avoidance
- Representation before Administrative Agencies

### Top Ranked in Florida

*“The team, comprised of 18 attorneys in Miami, Tampa and Fort Lauderdale, **offers a superb service and extremely high-quality work.** The group is considered to be **among the best in the state** and the lawyers have a great depth of experience across a range of areas including union avoidance issues, employment discrimination litigation, noncompete agreements, and representing clients before administrative agencies. However, its practice is by no means confined to these areas and the lawyers are also **adept at dealing with a broad range of issues** including increased amount of litigation of late, particularly in relation to age discrimination and wage and hour class action along with FLSA-related matters. The team has been described as **synonymous with labor and employment in Florida and extremely experienced.**”*

– Chambers USA, 2009