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California's Governor Schwarzenegger signs new family military leave law providing family leave for spouses of military members who return on leave from deployment in a combat zone.

California Edition

A Littler Mendelson California-specific Newsletter

California's New Leave Law for the Spouses of Military Members

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Despite vetoing proposed bills that would have extended California leave laws in other respects, on October 9, 2007, Governor Schwarzenegger signed into law Assembly Bill 392. The new law requires public and private employers who employ over 25 employees to provide up to 10 days of unpaid leave for a "qualified" employee if the employee's military spouse is on a leave from deployment in a combat zone with the active duty, reserve military or National Guard during a period of military conflict. The law also makes it unlawful for an employer to retaliate against a qualified employee for requesting or taking this leave.

A.B. 392 went into effect immediately upon ratification by the Governor. The purpose of the legislation is to provide families of troops currently serving in military conflicts in Iraq and Afghanistan time together during the servicemember's leave from deployment in a combat zone.

Qualified Employees

Under A.B. 392, a *qualified employee* is one who works an average of 20 or more hours per week, but it does not include independent contractors. The qualified employee must also be the spouse of a "qualified" member of the military.

Under Family Code section 297.5, the term *spouse* includes registered domestic partners. Accordingly, an employer must provide a qualified employee with leave under A.B. 392 if he or she is a registered domestic partner of a qualified member of the military. However, requests for family military leave from a same-sex registered domestic partner will likely be uncommon, as servicemembers

are still forbidden under military regulations from registering as same-sex domestic partners under the current "don't ask don't tell" policy.

Leave Requirements Request

In order to take leave, a qualified employee must provide an employer with notice of his or her intention to take leave within two business days of receiving official notice that the military spouse will be on leave from deployment. An employee must also submit written documentation to his or her employer certifying that the military member will be on military leave from deployment during the time of the requested leave.

Military Conflict and Qualified Servicemember Defined

The statute defines period of *military conflict* as either "a period of war declared by the United States Congress"; or a period of deployment for which a member of a reserve component is ordered to active duty either by the Governor or the President of the United States.

In order to be eligible for the unpaid leave, an employee must be the spouse of a *qualified member* of the military. A *qualified member* is defined as (1) a member of the Armed Forces of the United States (i.e. Army, Navy, Air Force, Marines, Coast Guard) who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the President of the United States; or (2) a member of the Armed Forces Reserve Components or the National Guard

who has been deployed during a period of military conflict.

Combat zones are designated by the President by Executive Order. There are currently three active Executive Orders designating the following areas as combat zones: Afghanistan, Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, the Ionian Sea - north of the 39th parallel, the Persian Gulf, the Red Sea, the Gulf of Oman, the part of the Arabian Sea that is north of 10 degrees north latitude and west of 68 degrees east longitude, the Gulf of Aden, Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.

Therefore, in order for an employee to qualify for leave under A.B. 392, an employee's spouse must be a member of the active duty military currently on leave from serving in one of the above-mentioned combat zones. If the employee's spouse is a member of the Reserve Components or National Guard, however, then the spouse is entitled to 10 days of unpaid leave during the employee's military spouse's period of activation, regardless of whether the service is in a combat zone. This is a subtle but important distinction, because a member of the Reserve Component might be called upon to backfill a position in the United States or Western Europe vacated by an active duty member of the military and, thus, would not be serving in a combat zone. These servicemembers' families are equally entitled to the 10 days of unpaid leave under the law.

Family Military Leave Provided by Other States

With the ongoing demands placed on the United States military and their families, California has now joined more than a handful of states that provide unpaid family military leave. These states include Illinois, Indiana, Maine, Minnesota, Nebraska, and New York. Other states, including Hawaii and Wisconsin, have family military leave legislation currently pending before their respective state legislatures.

In general, the family military leave statutes apply to both public and private employers with minimum workforces ranging from 15 to 50 or more employees. The length of unpaid leave ranges from 10 to 30 days, with and

without advance notice requirements, depending on the size of the workforce.

Each statute provides a different definition of *qualified employee*, including the spouse, domestic partner (Maine), child, parent, grandparent, and/or sibling of a servicemember. While California and New York expressly exclude independent contractors from the definition of *qualified employee*, other states such as Illinois, Maine, and Nebraska expressly include independent contractors. Several states (Illinois, Indiana, Maine, and Nebraska) have eligibility requirements for length of service similar to the requirements for Federal Family and Medical Leave Act.

Requirements for the *qualified servicemember* may include that he or she be a resident of the same state as the qualified employee (Maine) or that the active duty service be longer than 30 to 180 days (Illinois, Indiana, Maine, and Nebraska).

Because the purpose of family military leave is to allow employees to spend time with family members who are serving on active duty, all of the states, except Minnesota, require that the leave be taken before, during, or after the servicemember's deployment. In Minnesota, however, the purpose of family military leave is much more limited. Employers in that state must grant up to 10 days of unpaid leave to the immediate family member (spouse, parent, child, grandparent, or sibling) of a person injured or killed while on active duty. The immediate family member is also entitled to take one day of unpaid leave to attend the send-off or homecoming ceremony of their servicemember.

Employers should be aware of these statutes in the states in which they employ workers and be prepared to adjust their leave policies as appropriate. The family military leave laws do not purport to affect an employee's right to any other legally mandated leave or employee benefit. Employers with questions about employee leave rights should consider contacting experienced employment counsel.

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