Firehouse Lawyer

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Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 35 fire districts and regional fire authorities in Pierce, King and other counties throughout the State of Washington.

His office is located at:
10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(in Gig Harbor Fire Dept's Station 50)

Mailing Address:
P.O.Box 65490
University Place, WA 98464

Telephone: 253.858.3226

Fax: 253.858.3221

Email Joe at:
firelaw@comcast.net

Access this newsletter at:
www.Firehouselawyer.com

Inside This Issue

1 Military Family Leave – The New FMLA Regulations

2 Veterans Scoring Criteria Status (formerly Veterans Preference statute)

3 Another Statute Regarding the Employment Rights of Military Members

4 Thank You to All Clients and Other Friends for Your Support and Your Patience

4 Disclaimer

Military Family Leave – The New FMLA Regulations

Because the U.S. Department of Labor promulgated some new regulations, effective January 16, 2009, and because a client asked me recently about the Family and Medical Leave Act (FMLA) entitlements approved by Congress in January of 2008, I decided this is a good time to write about that subject.

In January 2008, Congress amended the FMLA to provide added entitlements for relatives of those called to military service. The new DOL regulations, effective on January 16, 2009, clarify many questions about military family leave. In this article, I will discuss a few of the key provisions that may be encountered by my fire service employers and clients.

There is a new type of leave, referred to as qualifying "exigency leave", which allows eligible employees of covered employers to take up to 12 weeks of FMLA leave in the event of a qualifying exigency. If a spouse, child or parent of an employee is on active duty or called to active duty in the armed forces in support of a "contingency operation" then the leave is available. The regulations clarify, however, that this exigency leave applies only to families of members of the National Guard, reserves and certain retired military members. It does not apply to families/employees of members of the regular armed forces. It appears that the logic of that is that families of those in the regular armed forces are accustomed to such calls or military orders, but members of the National Guard or reservists might not be. This qualifying exigency leave applies only to a federal call to duty or a state call under order of the President.

The new regulations contain a specific and exclusive list of reasons for qualifying exigency leave:

- For a short-notice deployment (order given no more than seven days before deployment), the employee can take up to seven days leave beginning on the date of notification;
- For military events and related activities such as military-sponsored ceremonies and family support and assistance programs sponsored by the military and related to the call to duty;

- For urgent child-care and school activities;
- For financial and legal tasks, such as making or updating legal arrangements to deal with the call to duty;
- For counseling for the employee or minor child, if not already covered by FMLA;
- To spend time with the military member on rest and recuperation breaks during deployment, for up to five days per break;
- For post-deployment activities such as arrival ceremonies or reintegration briefings, or to address issues arising from the service member's death while on active duty
- For other such purposes arising out of the call to duty, as agreed upon between employee and employer.

An employee seeking qualifying exigency leave must give reasonable and practicable notice to the employer if the exigency is foreseeable. In the notice, the employee should notify the employer of the call to duty, cite a listed reason as above, and give the anticipated length of the requested leave of absence. All of the family member terms are construed broadly, i.e. a son includes biological, adopted, foster child, stepson, legal ward or one for whom the employee stood in place of the parent. The employer may require certification, for example, by asking for a copy of the active duty orders, but there is an optional form, WH-384 for qualifying exigency leave certification.

The regulations and the law also provide for military caregiver leave. Under those regulations, a qualifying employee may take up to 26 workweeks of leave during a single 12-month period to care for a covered service member. The employee's relationship with the member is defined broadly here as well: spouse, parent, child, or next of kin. But in this instance the military member may be regular armed forces as well as the National Guard or reserves mentioned above in the discussion about qualifying exigency leave. The service member cared for must have a serious illness or injury incurred in the line of duty, as determined by the Department of Defense. Again, certification may be requested by the employer from specific military health care providers. The DOL again offers an optional form, WH-385, for certifying military caregiver leave. Parent is defined broadly but does not include in-laws. For purposes of these regulations, there is a separate "FMLA year" starting with the first date of caregiver leave and ending 12 months later. Such caregiver leave may be taken in a 26-week block or intermittently. Regular FMLA leave is taken in accord with a calendar of the employer's choosing as far as the starting of the 12-month period.

The client question asked if the FMLA leave for the military family member qualifying exigency leave was to be paid or unpaid. Actually, as provided in the law and regulations, as well as most employer policies, FMLA leave is intended to be unpaid. However, if the employee has on the books accumulated vacation leave, comp time, or holiday, the employee has the right to "convert" the unpaid FMLA leave to paid leave, and you cannot deny that right. Actually, this employer could have asked for clarification or certification, as this article demonstrates. The employer did not state whether the member was National Guard, reserve, retired and recalled to duty, or simply an active regular member of the military. According to the regulations effective later this week, that is an important question to ask.

VETERANS SCORING CRITERIA STATUS (formerly Veterans Preference statute)

I continue to get questions periodically about the Washington statute pertaining to the rights of veterans who are candidates for public employment to get added credit on employment tests. RCW 41.04.010 provides the requirements of the veterans scoring criteria. The statute itself either requires that 5% or 10% shall be added to the examination score for each qualifying veteran. The employer has the right to require a copy of the DD214 (discharge papers) to prove veteran status. Remember, however, that the statute expressly states the % is added based on a score of 100 as being perfect.

The question I have been asked is whether the veterans "preference" is to be added to each part of the test or whether it can be added at the end of all testing, which some employers would prefer to do, as it seems easier or more fair to all concerned. The problem, as I see it, is that some veterans might then be eliminated without any preference being afforded them as required by law. Of course this only applies if the usual methods are employed, i.e. that applicants may not move ahead to the oral examination or interview unless they "pass" the written test. Since the statute requires the preference or scoring criteria to be employed in each such "examination", and since the written test is a separately scored examination which can lead to elimination, I think it probably is a statutory violation not to apply the veterans preference to each separately scored part of a test that can eliminate any candidates. If a veteran is eliminated in such a process without the benefit of application of the preference or scoring criteria, what good is the statute? It seems to me that is the very purpose of the statute, i.e. to provide a preference or help in hiring (one time only) to our returning veterans. I will continue to counsel against any other interpretation of the statute.

ANOTHER STATUTE REGARDING THE EMPLOYMENT RIGHTS OF MILITARY MEMBERS

Maybe we should just admit it. This edition of the *Firehouse Lawyer* is dedicated to the issues relative to military members and public employment. Another statute I am asked about (infrequently) is USERRA. This abbreviation is short for the Uniformed Services Employment and Reemployment Rights Act of 1994. The Act itself can be found in the U.S. Code at Chapter 43, Part III, Title 38. The regulations to implement the Act, administered by the U.S. Department of Labor are at 20 CFR Part 1002.210.

The intent of this statute is to minimize the disadvantages to an individual that occur when that person is absent from their employment to serve in the military of the United States. For example, under USERRA, a person whose military service lasts 91 days or more must be promptly reemployed in the following order of priority: (1) In the job the person would have held had they remained continuously employed or a position of equivalent seniority, status and pay so long as qualified for the job, or able to become qualified after reasonable efforts to qualify; or (2) if the person cannot be qualified as above, in the pre-service position, so long as qualified or "qualifiable" as above, or (3) if the employee cannot become qualified as in (1) or (2) in any other position, which is the nearest approximation of (1)…for which the person is qualified, with full seniority.

If you have a seniority system, there can be no loss of seniority during the period serving in the military. All time spent in service counts for seniority purposes, so there is no break in service while in the military, or loss of any seniority right. In fact, time spent in the service and the prior time spent employed both count for purposes of the FMLA, which has some limitations on eligibility for FMLA benefits based on length of time employed. Thus, the employer cannot deny FMLA leave for failure to have enough "time employed" on the books, if the missed time is due to military service.

Recently, we had a client question how to handle the promotional testing and rights to promotion of a person still on active duty. I concluded, based mostly on USERRA, that it would be prudent to allow the person to test for the promotion, even though they could not actually accept the promotion, in order to best protect their seniority and USERRA rights.

We suspect that there will continue to be an increase in returning veterans to our public work forces in 2009 and future years. Therefore, we recommend that fire districts and similar departments or local employers go out of their way to learn about all of these laws affecting veterans and public employers who hire veterans.

THANK YOU TO ALL CLIENTS AND OTHER FRIENDS FOR YOUR SUPPORT AND YOUR PATIENCE

As many of my clients know, my son Eric, 26, has been undergoing a complicated series of brain surgeries in a valiant attempt to find a permanent cure for his epileptic seizures. At this writing, he has been at Swedish Hospital for more than ten days, and we are not "out of the woods" yet. Needless to say, this has made it difficult for me to maintain a normal work schedule. This week I have reduced my work schedule to the point that I am only able to complete the immediate demands and "emergencies" that clients place before me. Since January 5th, I have spent every other day or "24 hour shift" at the hospital staying overnight in Eric's room. I cannot say enough about the wonderful surgeons, other doctors, and staff at Swedish.

Eric has been very successful in the twenty years or so since he started having this problem. At Curtis High School, he became an accomplished singer and actor, and was very popular, having been named Prince of the Homecoming Court. In college at PLU, he decided to focus better academically, so he had little time for extracurricular activities except for performing with his bands. After Freshman Year, he made Dean's List almost every time and graduated with a major in Political Science. He deferred a decision about law school until he could get this seizure problem solved once and for all. Yet, he works full time at the Animal Emergency Clinic in Tacoma.

We are proud of our brave son, and we thank all of you who have supported us through this ordeal. Soon we hope to report a successful second surgery and return to good health so he (and my wife and me) can return to a normal life.

DISCLAIMER