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Department of Labor Proposes to Expand FMLA Rights for Military Families

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1.1.3.9—Military Family Members

On January 30, 2012, Secretary of Labor Hilda L. Solis announced that the United States Department of Labor (DOL) had issued a Notice of Proposed Rulemaking (NPRM) to implement new statutory amendments to the Family and Medical Leave Act (FMLA) that would expand military family leave provisions.

Congress enacted the FMLA in 1993. This law provides up to 12 weeks of unpaid, job-protected leave to eligible employees of covered employers for the following reasons:

1. Incapacity due to pregnancy, prenatal medical care or child birth.
2. To care for the employee's child after birth or placement for adoption or foster care.
3. To care for the employee's spouse, son or daughter, or parent who has a serious health condition.
4. For the employee's serious health condition that makes the employee unable to perform the employee's job.

After the terrorist attacks of September 11, 2001, Congress has amended the FMLA to add additional circumstances for FMLA leave. An eligible employee with a spouse, son, daughter, or parent on active duty or called to active duty status in the National Guard or Reserve in support of a contingency operation may use his or her 12-week FMLA leave entitlement to address certain qualifying exigencies, including attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

The FMLA also includes a special leave entitlement that permits an eligible employee to take up to 26 weeks of unpaid leave to care for a covered service member during a single 12-month period. A covered service member is a current member of the Armed Forces, including a member of the National Guard or Reserve, who has a serious injury or illness incurred in the line of duty while on active duty that may render the service member medically unfit to perform his or her duties and for which the service member is undergoing medical treatment, recuperation, or therapy or is in an outpatient status or is on the Temporary Disability Retired List.

The proposed language of the January 30 DOL NPRM would extend the entitlement of military caregiver leave to family members of veterans for up to five years after leaving the military. At this time, the law only covers family members of "currently serving" service members. Additionally, the DOL proposal expands the military family leave provisions of the FMLA by extending qualifying exigency leave to employees whose family members serve in the regular Armed Forces. Currently, the law only covers families of Reservists and National Guard members.

I strongly support the FMLA and this proposed expansion of FMLA rights for military family members, but I want to point out that the majority (or at least a very substantial minority) of military family members who wish to take FMLA leave are not eligible because they or their employers are not covered by the FMLA. The military-related expansions of FMLA leave, under statutory amendments after 2001, have not changed the 1993 basic eligibility criteria for FMLA coverage.

To take FMLA leave, either the traditional FMLA leave or the military expansions, an employee must have worked for the employer for at least a year *and* the employee must have worked at least 1250 hours for the employer over the previous 12 months prior to the proposed FMLA leave. Moreover, there must be at least 50 employees of the employer within 75 miles.

Bob Smith wants to take FMLA leave to be with his wife (a National Guard member) as she reports for active duty and deployment to Afghanistan. Bob is not eligible for FMLA leave because he has only worked for the employer for 11 months.

Mary Jones wants to take time off from her job to help care for her husband, who was horribly burned in an IED explosion in Afghanistan and is hospitalized at the Brooke Army Medical Center in Texas. Mary is not eligible for FMLA leave, because she was laid off from her job for a few weeks in the last year, and during that year she only worked 1240 hours.

Larry Adams works for the 25-person DC office of XYZ Corporation, which has tens of thousands of employees in the West Coast and Rocky Mountain states. The DC office is the only XYZ facility east of the Mississippi River. Larry wants to take FMLA leave to help care for his son, who was badly wounded in Afghanistan and is hospitalized at the Walter Reed National Military Medical Center in Bethesda, Maryland. Larry is not eligible for FMLA leave because his employer does not have at least 50 employees within a 75-mile radius of the facility where Larry works.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to essentially all employers and essentially all employees. The FMLA is much more restrictive as to its coverage. This point needs to be made in press releases touting expansions of FMLA rights.