



FMLA Amended to Add Two New Types of Family Leaves Related to Military Servicemembers

The National Defense Authorization Act for 2008 (P.L. 110-181), which was signed into law by President Bush on January 28, 2008 adds two new types of FMLA leaves for the families of servicemembers called up to active duty in the Armed Forces.

The first new type of leave is a *servicemembers family caregiver leave* that provides up to 26 weeks of unpaid leave in a single 12 month period to any eligible employee who is the spouse, child, parent or next of kin of a covered servicemember who suffered a serious injury or illness in line of duty while on active duty that renders the servicemember medically unfit to perform the duties of his/her office, grade, rank or rating. This provision was effective as of January 28, 2008.

The second type of new FMLA leave permits an eligible employee to take up to 12 weeks of unpaid leave in a 12 month as a result of any *qualifying exigency* because the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to duty in the Armed Forces in support of a "contingency operation", such as in Afghanistan or Iraq. This provision will not be effective until the U.S. Department of Labor ("DOL") issues regulations, which define the term "qualifying exigency".

This new legislation is significant for several reasons:

- *Servicemember family caregiver leave* more than doubles the available time off from work to care for an injured servicemember from 12 weeks to 26 weeks in a single 12 month period.
- The definition of serious injury or illness in line of duty is broad and applies to servicemembers who are undergoing medical treatment, recuperation or therapy, are in outpatient status or otherwise are employee caregiver on the temporary disability retired list for a serious injury or illness. For this type of leave, the employee caregiver includes the "next of kin" which is defined as the nearest blood relative of a covered servicemember.
- Qualifying exigency may include taking FMLA leave to handle non-medical related deployment issues, such as making child care arrangements, making

financial and legal arrangements, and attending counseling sessions related to the active duty of the servicemember.

The preamble to the DOL proposed FMLA Regulations raise an incredibly long list of questions for comment, relating to:

- The meaning of “undergoing medical treatment, recuperation or therapy for a serious illness or injury”;
- The meaning of “next of kin”;
- The meaning of “nearest blood relative”;
- Certifications of a serious injury or illness;
- Should son or daughter include adult children;
- The meaning of “qualifying exigency”;
- The meaning of “single 12 month period”; and
- Whether an employer can recover the health benefit premiums paid during an FMLA leave because of an employee’s failure to return to work after taking leave to care for a covered servicemember.

What do employers need to do?

- Access the FMLA Notice at <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>, post it where required labor relations notices are posted and incorporate its provisions into their written FMLA policies.
- Decide whether to wait for final DOL regulations before permitting FMLA “qualifying exigency” leaves to be taken or to establish reasonable policies for such FMLA leaves immediately.