

## **Family and Medical Leave Act Amendments Expand Leave for Families of Members of the Armed Forces**

**January 31, 2008**

This week, President Bush signed the National Defense Authorization Act for Fiscal Year 2008, which amends the Family and Medical Leave Act of 1993 (FMLA) to provide broader leave protections to families of members of the armed forces. In short, the new FMLA provisions require employers to provide up to 26 weeks of leave in a single 12-month period for family members caring for injured service men and women, and up to 12 weeks of leave in a 12-month period to tend to any “exigency,” medical or otherwise, arising from a service member’s call to duty. While Congress gave the U.S. Department of Labor (DOL) rule-making authority to define certain terms and requirements under the act, employers will have to begin partial implementation immediately because the new provisions became effective upon the President’s signature on January 28.

Coincidentally, the President signed this new law just days after DOL announced that it was about to propose new regulations to address various other unidentified issues arising under the FMLA. The proposed regulatory package has already been sent to the Office of Management and Budget for approval before publication.

### **Background**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) already provides members of the armed forces up to five years of protected military leave. USERRA regulates how employers must accommodate employees returning with service injuries, but that protection does not extend to the family members of service members who may be called upon to care for an injured service member upon his or her return to civilian life.

Prior to the amendments, the FMLA provided no leave entitlement specific to the families of members of the armed forces. However, a growing number of states, including California, Illinois, Indiana, Maine, Minnesota, Nebraska, and New York, have enacted state military family leave laws that specifically require unpaid leave to family members.

Before the recent FMLA amendments, eligible employees, including the families of service members, were entitled to a total of 12 work weeks of unpaid leave during any 12-month period only for the following reasons: (1) the birth and care of the newborn child of the employee; (2) placement with the employee of a son or daughter for adoption or foster care; (3) to care for an immediate family member (spouse, child, or parent) with a serious health condition; or (4) to take medical leave when the

employee is unable to work because of his or her own serious health condition. As a general matter, the employee had to be a parent, spouse, or child of the injured service member, and the service member's injury had to be a "serious health condition" as defined under the FMLA.

The new federal amendments signed into law this week alter that landscape in several important ways.

### **Leave for Care of Ill or Injured Service Member**

First, the new law allows an employee who is the spouse, son, daughter, parent, or *next of kin* of a covered service member up to *26 weeks* of unpaid leave *in a single 12-month period* to care for that service member, more than doubling the amount of leave time that service member caregivers could claim under prior law. In addition, "next of kin" (as opposed to only parents, spouses, and children) are entitled to leave to care for an ill or injured service member. This will include blood relatives (e.g., grandparents) who generally did not qualify at all for leave under the FMLA. The term "covered service member" is broadly defined to include any service member who is "undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." A "serious injury or illness" is defined as one incurred in the line of active duty which "may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." Provisions relating the leave for care of an ill or injured service member go into effect immediately.

### **"Exigency" Leave**

Congress also amended the list of qualifying reasons for which an eligible employee can take FMLA leave. Eligible employees are now entitled to take up to 12 work weeks of leave for a "qualifying exigency" arising out of the employee's spouse, son, daughter, or parent being on active duty or having been notified of an impending call or order to active duty in the armed forces in support of a contingency operation. Notice of the need for this leave will have to be provided to the employer "as is reasonable and practicable." Although it is expected that this form of leave will typically address situations in which an employee's life is significantly disrupted due to a family member's deployment, DOL will need to define "qualifying exigency" before this portion of the law becomes effective. Until then, on its website, the DOL is "encouraging" employers to offer some form of emergency leave to eligible employees.

### **Interplay with Existing FMLA Requirements**

Congress has not altered eligibility requirements under the FMLA more generally, i.e., the requirement that the employee requesting leave be employed by the employer for at least 12 months, and employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. Other existing provisions, such as substitution of paid leave, also apply. The new law does address notice and certification requirements, giving DOL authority to develop rules addressing reasonable certification requirements related to a call to active duty.

Please note that the new leave entitlements are not in addition to an employee's FMLA entitlement for other qualifying reasons. Therefore, if an employee already has used 12 weeks of FMLA leave for the birth of a child, for example, the employee is not entitled to an additional 12 weeks of leave in that 12-month period to deal with exigent circumstances arising from a family member's call to active duty, or would be entitled to only 14 additional weeks of leave to care for an ill or injured service member (i.e., 26 weeks entitlement minus 12 weeks already used for other qualifying reason).

## Conclusion

With almost 250,000 soldiers in active duty across the world, we expect that the FMLA amendments will have a significant and immediate impact on employers. Employers will face immediate requests under the new law and, to that end, must take steps to understand their obligations as quickly as possible. As an initial matter, employers are advised to review their leave policies and consider revisions that will cover the new types of leave now provided by law.

Employers are also reminded that there is a great deal of uncertainty with respect to a number of key terms in the new law. DOL is expected to issue regulations to help define, for example, a “qualifying exigency” for purposes of leave. Similarly, while the law provides that eligible employees are entitled to an extended 26-week leave only once in a single 12-month period, serious disagreement already exists as to the intention of the amendment in this regard, requiring DOL clarification.

Morgan Lewis routinely advises employers regarding FMLA compliance, including the development and implementation of FMLA policies. If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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