

FMLA Leave Expanded for Armed Service Member Families

The Bottom Line

By: Lisa Pepoon, Senior Consultant, Laurus Strategies

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, which amends the Family and Medical Leave Act (FMLA) to provide additional leave for military families. Following is what this means to our clients and their employees:

Summary of Current FMLA

An eligible employee can take up to 12 weeks of unpaid, job-protected leave during a 12-month period for the following:

- The employee's own serious health condition that makes the employee unable to perform the functions of the employee's position.
- The birth of the employee's child, to care for the employee's own newborn child, or for placement of a child with the employee for foster care or adoption.
- To care for the employee's spouse, child, or parent with a serious health condition.

Amended FMLA

Employers are now required to offer:

1. Up to 26 weeks of unpaid, job-protected leave to an eligible employee who is a spouse, son, daughter, parent, or next of kin of a member of the Armed Forces to provide care for the servicemember with a serious injury or illness.

2. Up to 12 weeks of unpaid, job-protected leave per year to an eligible employee based on any "qualifying exigency" arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty or called to active duty in the Armed Forces. The precise meaning of "qualifying exigency" has yet to be defined by the Department of Labor (DOL).

Effective Dates

The Servicemember Family Leave (#1 above) was effective immediately (January 28, 2008). The Qualifying Exigency Leave (#2 above) will not be effective until the Secretary of Labor issues final regulations; however, the DOL encourages good faith compliance in the interim.

What Employers Need to Do Now

- Allow FMLA leaves for the two new reasons allowed under the amendment (#1 and #2 above).
- Notify employees of the new types of leave permitted under the amendment.
- Revise FMLA policy.
- Revise Leave of Absence request forms.

For further background and reference, please review the article below published by one of our legal partners, Drinker Biddle. **Should you have any questions, please contact your Laurus Strategies Client Manager.**

Further Background

By: Gregory W. Homer and Alisa H. Reff, Drinker Biddle Labor Employment Practice Group

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-81. Included in the NDAA is an amendment to the Family and Medical Leave Act (FMLA) which expands the purpose for which leave may be taken under FMLA. Under

the FMLA, as amended, an eligible employee can now take leave under the FMLA for two additional reasons:

- First, an eligible employee may take a total of 12 workweeks of leave during any 12-month period "[b]ecause of any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or is notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." § 102(a)(1)(E).

- Second, subject to receiving medical certification when requested, an eligible employee “who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12- month period to care for the servicemember.” § 102(a)(3). This latter type of leave is referred to as “Servicemember Family Leave” and, unlike other types of FMLA leave, the statute specifically states that Servicemember Family Leave shall only be available during a single 12-month period.

The amendment providing for Servicemember Family Leave was effective immediately upon the President’s signature. The amendment providing for leave due to a “qualifying exigency” is not effective until the Secretary of Labor issues implementing regulations.

The amended FMLA does not define “qualifying exigency,” but rather has left it to the Secretary of Labor to define that phrase by regulation. However, it does define “covered servicemember” as “a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” Moreover, the phrase “serious injury or illness,” when dealing with a covered servicemember, means “an injury or illness incurred by the member in line of

duty on active duty in the Armed Forces that may render the member unfit to perform the duties of the member’s office, grade, rank or rating.”

As with FMLA leave taken for other situations involving a serious health condition, leave taken due to a qualifying exigency or to care for a covered servicemember can be taken intermittently or on a reduced work schedule.

What remains unanswered is the type of documentation that can be requested when an eligible employee requests leave under § 102(a)(1)(E) due to a qualifying exigency. Section 103(f) of the amended FMLA states that it is up to the Secretary of Labor to decide whether leave due to a qualifying exigency should be required to be supported by a certification. However, if the DOL regulations require a certification, under the amended FMLA, the employee shall provide the certification in a “timely manner.” In addition, it is unclear whether the 26 weeks of Servicemember Family Leave is per eligible employee or per covered servicemember.

Although employers do not yet have the benefit of regulations issued by the DOL, the Wage and Hour Division’s website states that the division will require employers to act in good faith in providing leave under the new legislation. Thus, employers would be wise to revise their FMLA policies immediately to reflect, at a minimum, the new reasons for which an eligible employee may take FMLA leave.

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