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Important Update On The Family And Medical Leave Act

by Rebecca Winterscheidt & Ashley T. Kasarjian

On January 28, 2008, the President signed into law the first expansion of the Family and Medical Leave Act (FMLA) since it became law 15 years ago. The changes to the FMLA are included in the newly enacted National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986, Pub. L. 110-181). This Act includes provisions to assist military service members and their families, and most notably, provides the following two significant additions to FMLA leave:

- (1) Employees who provide care to close relatives who are military service members or who are seriously injured or ill are entitled to up to twenty-six weeks of leave; and
- (2) Employees who experience "any qualifying exigency" arising from their immediate family member being called to active military duty are entitled to up to twelve weeks of leave.

The new FMLA provisions are both confusing and complex, since many provisions are currently unclear. However, the Department of Labor will eventually issue regulations to help employers better understand the requirements. Until then, employers are required to act in good faith in attempting to comply with the law, since some portions take effect immediately.



EMPLOYEES WHO PROVIDE CARE TO INJURED SERVICE MEMBERS

An eligible employee is entitled to a total of twenty-six weeks of leave during any twelve-month period if the employee:

“is the spouse, son, daughter, parent, or next of kin of a covered service member... to care for the service member.”

A service member is considered “covered” if he or she is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, therapy, is in 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 an injury or illness incurred by the service member in the line of active duty in the Armed Forces that may render the service member medically unfit to perform the duties of his or her office, grade, rank, or rating.

In addition, this new provision provides FMLA leave for the “next of kin.” The “next of kin” is defined as an individual who is the nearest blood relative. Therefore, unlike other sections of the FMLA which only provide leave for the birth or placement of a son or daughter or to care for an employee’s own children, or parents, this section allows relatives who are not immediate family members to take leave if they are nonetheless considered the “next of kin.”

The employer may require the employee to provide certification, issued by a health care provider, to support the request for leave. In addition, an employee may take intermittent leave or reduced schedule leave when medically

necessary. This section is effective immediately, and employers must begin providing this type of leave to qualified employees at once.

EMPLOYEES REQUIRING LEAVE DUE TO A SERVICE MEMBER’S CALL TO ACTIVE DUTY

An eligible employee is entitled to a total of twelve weeks of leave during any twelve month period:

“[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”

Under this provision, an employee is entitled to leave if an immediate family member is called to active duty and if there is a related “qualifying exigency.” It is unclear what “qualifying exigency” means. However, Congress enacted the FMLA to protect the family unit by promoting its stability, economic security, and integrity. Several possible examples of a “qualifying exigency” are situations in which leave would be needed to: (1) care for a child when one of the child’s parents has been called to active duty; (2) support a family member in the preparation of deployment for active duty; or (3) maintain the household and finances of a parent who has been called to active duty.

This section does not take effect until the Secretary of Labor issues the final regulations defining “any qualifying exigency.” However, the Department of



Labor encourages employers to provide this type of leave to qualifying employees.

The phrase “contingency operation” simply refers to any active duty that is designated as a military action, operation, or hostility, or any other call or order in times of war or national emergency. Therefore, any formal call to active duty likely falls under this category.

When foreseeable, the employee has an obligation to provide notice to the employer that leave will be taken. Furthermore, an employer may require employees to provide certification of the active duty or call to active duty.

CONCLUSION

Employers should familiarize themselves with the new FMLA provisions and make revisions to their policies. In addition, it is recommended that employers notify employees of the new provisions and discuss any questions or concerns with legal counsel. If you have any questions regarding the implementation of the new FMLA provisions, please feel free to contact us.

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