



A Law Firm in the People Business

FMLA EXPANDED FOR SERVICE MEMBER FAMILIES EFFECTIVE IMMEDIATELY

The first-ever amendments to the Family and Medical Leave Act (FMLA) were signed into law effective January 28, 2008. One new type of leave for relatives of service members is effective immediately, and the other will become effective once regulations are finalized.

What is New?

Leave to Care for an Injured Service Member. Effective immediately, employers are required to provide up to 26 weeks of unpaid leave in a single 12-month period to an eligible employee who is a spouse, son, daughter, parent or next of kin of a member of the armed forces, including a member of the National Guard or Reserves, to care for the service member with a "serious injury or illness."

The term "serious injury or illness" is defined as an injury or illness incurred while on active duty, and in the line of duty, that may render the member unfit to perform the duties of the member's office, grade, rank or rating. This definition differs from the definition of "serious health condition" used elsewhere in the FMLA. Also, making these types of leave available to "next of kin" significantly expands the pool of eligible employees.

The Department of Labor (DOL) will issue regulations in the next few months that define "next of kin" as well as explain the calculation and coordination of the 12-month period with the employer's regular FMLA period.

Leave Where a Family Member is Called to Active Duty. The other type of leave employers will soon need to provide is up to 12 weeks of unpaid leave per year to an eligible employee based on any "qualifying exigency" arising out of the call to active duty of the spouse, son, daughter, or parent of the employee. Until the term "qualifying exigency" is defined by regulation, an employer is not required, but is encouraged, to provide this type of leave. It is anticipated that "qualifying exigencies" will include arranging for child care or attending pre-deployment or re-integration meetings for service members.

What Has Remained the Same?

Only employers with 50 or more employees are obligated to provide these new types of leave. The leave remains unpaid, but, an employer may require the employee to substitute accrued paid leave, if available. The employer must continue to provide access to health benefits and must restore the employee to his or her job upon the timely conclusion of the leave. As with the original FMLA, these two types of leave can be taken intermittently, employees should give advance notice where the need for leave is foreseeable, and the employer can require medical certifications of the need for leave to care for an injured service member. We anticipate that the DOL will provide more details when their recent overhaul of the FMLA regulations is finalized.

Litigation Avoidance Tip: Restrict Cell Phone Use While Driving

A Georgia employer recently paid out \$5.2 million to settle a suit brought because its employee rear-ended another car on an interstate highway while the employee was allegedly conducting business on a company-supplied cell phone.

Employers should have written policies restricting employees' cell-phone use while driving and must enforce those policies to keep their workforce and the general public safe. The alternative is potential serious injury and exposure to significant damages.

If you would like assistance drafting such a policy, please contact one of the Mazursky Constantine LLC attorneys.

What Should Employers Do Immediately?

- Post the new DOL poster on Military Family Leave (copy attached) in the workplace, and on your web-site, if applicable.
- Prepare to review and revise all FMLA policies, practices and forms to incorporate the new types of leave. You may wish to wait until the regulations are final.
- Train supervisors regarding the new types of leave, and the necessity of complying with the new requirements.
- Decide whether you will implement qualifying exigency leaves prior to the effective date of the final regulations.
- Consider implementing more cross-training of employees so you will be better prepared in the event employees begin to take lengthy leave.
- Consider expanding your leave donation program, if applicable, so that employees have the possibility of having some of their leave time paid for.
- Consider having employees identify, ahead of time, all family members who are serving in the military. This may allow you to better plan for absences.

If you would like assistance in complying with this new legislation or preparing revised notices, leave policies or forms, please contact Megan Gideon at 404.888.8849, Nicole Bogard at 404.888.8830, or Robert E. Johnson at 404.888.8875.

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NOTICE

Military Family Leave

On January 28, President Bush signed into law the National Defense Authorization Act for FY 2008 (NDAA), Public Law 110-181. Section 585(a) of the NDAA amended the FMLA to provide eligible employees working for covered employers two important new leave rights related to military service:

- (1) New Qualifying Reason for Leave.** Eligible employees are entitled to up to 12 weeks of leave because of “any qualifying exigency” arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation. By the terms of the statute, this provision requires the Secretary of Labor to issue regulations defining “any qualifying exigency.” In the interim, employers are encouraged to provide this type of leave to qualifying employees.

- (2) New Leave Entitlement.** An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember who is recovering from a serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the servicemember. This provision became effective immediately upon enactment. This military caregiver leave is available during “a single 12-month period” during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave.

Additional information on the amendments and a version of Title I of the FMLA with the new statutory language incorporated is available on the FMLA amendments Web site at http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm.

