

New FMLA Provisions for Families of Military Servicemembers

Client Alert

This alert summarizes two important provisions that were recently added to the Family and Medical Leave Act (FMLA) regarding the type and scope of leave available to families of military servicemembers. These provisions are contained in H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), which President Bush signed into law on January 28, 2008. The new provisions received broad bi-partisan support in Congress and represent the first expansion of the FMLA since its passage in 1993.

New Types of FMLA Leave

The first of the two new provisions, section 102(a)(1)(E) of the FMLA, adds a fifth reason to the preexisting list of reasons in section 102(a)(1)(A)-(D) for which an eligible employee may take up to a total of 12 workweeks of unpaid leave during any 12-month period. Specifically, section 102(a)(1)(E) allows an eligible employee who is the spouse, son, daughter, or parent of a member of the Armed Forces, including the National Guard or Reserves (a "servicemember"), to take:

- Up to 12 weeks of unpaid leave during any 12-month period for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine)" if the servicemember is on active duty "in support of a contingency operation" or has been notified of an impending call or order to active duty.
 - *Certification:* Employers may not require an employee to provide a certification for leave taken under this provision, except "at such time and in such manner as the Secretary [of Labor] may by regulation prescribe."
 - *Notice:* Employees must provide "reasonable and practicable" notice to their employer where the need for leave under this provision is foreseeable.
 - *Type of Leave:* Leave under this provision may be taken intermittently or on a reduced leave schedule.

The second of the two new provisions, section 102(a)(3) of the FMLA, allows an eligible employee who is the spouse, son, daughter, parent, or next of kin (defined as "nearest blood relative") of a servicemember to take:

- Up to 26 workweeks of unpaid leave during a single 12-month period to care for the servicemember "who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."
 - *Certification:* Employers may require an employee to provide a health-care provider's certification for leave taken under this provision.

- *Notice:* Employees must provide at least 30 days' notice where the need for leave under this provision is foreseeable, except that "practicable" notice will suffice where the servicemember's care will begin in less than 30 days.
- *Type of Leave:* Leave under this provision may be taken intermittently or on a reduced leave schedule "when medically necessary."

Total Amount of Leave Provided

Employees may take up to a total of 12 workweeks of leave in any 12-month period as to leaves taken for one or more of the reasons listed under section 102(a)(1), which includes all preexisting types of FMLA leave (section 102(a)(1)(A)-(D)) and the new type of leave for "qualifying exigencies" (section 102(a)(1)(E)). Employees may also take up to 26 workweeks of leave during a single 12-month period to care for a servicemember, but any leave taken under section 102(a)(1) during the same 12-month period will be counted against the 26-workweek total.

Spouses employed by the same employer may *each* take up to 12 workweeks of leave in any 12-month period under the new provision of leave for "qualifying exigencies," just as they may currently each take up to 12 workweeks of leave in any 12-month period for their own serious health condition. Spouses employed by the same employer may be limited to an *aggregate* of 26 workweeks of leave when the leave is taken under the new provision to care for a servicemember, or when the leave is a combination of leave to care for a servicemember and any of the following: leave because of the birth of the employee's child; leave because of the placement of a child with the employee for adoption or foster care; and/or leave to care for a family member with a serious health condition.

Covered Employers

The new provisions apply to all employers currently covered by the FMLA, *i.e.*, those that employ 50 or more employees. Covered employers must provide the new types of leave to the same employees who are currently eligible for FMLA leave, *i.e.*, those who work at a location at which the employer employs 50 or more employees (or the employer employs 50 or more employees within a 75-mile radius of that location); who have been employed for at least 12 months by the covered employer; and who worked at least 1,250 hours during the previous 12-month period.

Effective Date

The second of the two new provisions (providing for leave to care for a servicemember) officially became effective as of the date of the President's signing on January 28, 2008. The first new provision (providing for leave in the event of a "qualifying exigency") will officially become effective when the Secretary of Labor issues "final regulations" defining the otherwise-undefined term "qualifying exigency." According to the Department of Labor, those regulations are being "expeditiously prepar[ed]." The Department of Labor has nevertheless advised covered employers to act in compliance with both provisions immediately.

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Steps for Employers to Take

We will issue another alert when the Department of Labor's regulations become available. In the interim, covered employers should revise the relevant sections of their internal FMLA policies, notify employees of the new provisions, and follow established FMLA procedures and act in good faith in implementing the new provisions. Employers may also check the following page on the Department of Labor's Web site for updates regarding the new provisions, as well as for a link to a version of the FMLA that includes all of the new language in bolded and italicized text: http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm.

Related New York State Law

Under New York's Military Spouse Leave Act, which took effect in 2006, employers must grant 10 days of unpaid leave to employees who are the spouses of active-duty servicemembers. The New York Act applies only to spouses of servicemembers and only when the servicemember is on leave from active duty in a combat zone during a period of military conflict.

Unlike the FMLA, the New York Act applies to employers that employ 20 or more employees in at least one location. Such employers must provide the required 10-day leave to all otherwise-qualified employees who work an average of 20 or more hours per week regardless of the length of employment.

If you have any questions about the new provisions, please contact Ellen Martin at 212.336.2860, Lisa Cleary at 212.336.2159, Catherine Williams at 212.336.2207, or Benjamin Litman at 212.336.2254.

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