

February 7, 2008

Recent Amendments to the FMLA – Exigency Leave and Servicemember Family Leave

In 1993, Congress passed the Family and Medical Leave Act (“*FMLA*”), allowing eligible employees to take up to 12 weeks of unpaid leave to care for a newborn child, a recently placed child, or family members with serious medical conditions or to recover from an employee’s own serious health condition.

On Monday, January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (“*NDAA*”), Pub. L. 110-181. Section 585 of the *NDAA* amends the *FMLA*, creating an additional category of 12 week leave (“*Qualifying Exigency Leave*”) and providing for a new, extended 26 week leave (“*Servicemember Family Leave*”). Notably, the *NDAA* amendments do not change other aspects of the *FMLA*, including covered employers and employee eligibility. The Department of Labor (“*DOL*”) is currently working on new regulations in order to provide further guidance.

Qualifying Exigency Leave

The *NDAA* amendments create a new category of 12 week leave that allows an eligible employee to take leave time “because 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 has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation¹.” The term “qualifying exigency” is not defined by the *NDAA*, but rather will be defined in regulations to be promulgated by the *DOL*. As such, this provision does not technically become effective until the final regulations are issued, but the *DOL* is urging employers to provide such leave in the interim.

Servicemember Family Leave

The *NDAA* amendments also create an extended leave period providing “an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember...a total of 26 workweeks of leave during a 12-month period to care for the servicemember.” A covered servicemember is defined as a member of the Armed Forces, National Guard or Reserves who is undergoing medical treatment, recuperation or therapy or who is otherwise in outpatient status or 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 member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating. Interestingly, this provision also applies to the “next of kin” of a covered servicemember which is a new familial term under the *FMLA*. Next of kin is defined as the nearest blood relative of that individual. This provision is effective as of January 28, 2008, and while regulations have not yet been issued, the *DOL* is requiring employers to provide such leave in good faith.

¹ The term contingency operation is defined as a military operation in which members of the Armed Services may be called to action against an enemy of the United States.

Combination Issues

Due to the now varying lengths of leave time supplied by the FMLA, the NDAA amendments restrict the total amount of leave taken under the FMLA for any one employee to 26 weeks in any 12 month period. Thus, if an employee had previously exhausted the amount of 12 week leave available to such employee, the employee is only allowed 14 additional weeks under the new Servicemember Family Leave. Similarly, if the employee exhausts all 26 weeks available under the Servicemember Family Leave, they are not allowed any further FMLA leave during a single 12 month period. Should an employee take 6 weeks of leave under the new Servicemember Family Leave, they would still be eligible for the full 12 week leave available should the employee need to take leave under any 12 week leave category.

Intermittent Leave

The new amendments also make clear that both types of leave may be taken on an intermittent basis or on a reduced leave schedule by the employee. Employees requesting intermittent leave, or leave on a reduced schedule, for Servicemember Family Leave may be temporarily transferred to an alternate position with equivalent pay and benefits.

Notice and Certification

The new amendments also provide that an employee give notice to their employer as soon as is reasonable and practicable when it is foreseeable that the employee may take leave based on the new qualifying exigency provision and provide 30 days notice when the employee plans to take Servicemember Family Leave, if such notice is possible.

The DOL will soon promulgate regulations concerning the time and manner for certification supporting Qualifying Exigency Leave, but the amendments make it clear that an employer can require certification from a health care provider of the employee, son, daughter, spouse, parent or next of kin of the employee, to support the Servicemember Family Leave.

In summary, the amendments to the FMLA create two new types of leave that covered employers are required to provide, but do not change other aspects of the Act. Thus, employers are free to continue using their normal FMLA procedures, including requiring employees to use accrued paid vacation, personal, family, medical or sick leaves concurrently with unpaid FMLA leave.

If you would like to explore any of these issues further, please contact:

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