

FMLA Expanded For Families of Military

Feb 05 2008

Practice Area: Labor and Employment

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 (NDAA), which, in part, amends the Family and Medical Leave Act of 1993 (FMLA) to permit certain types of leave associated with caring for an injured United States military service member or for any "qualifying exigency" arising because a spouse, son, daughter or parent of the employee is on active duty or is called to active duty to support a contingency operation.

The new FMLA provisions expand the group of people eligible for FMLA leave, as well as the amount of leave available. Further, while the term "qualifying exigency" has not yet been defined, it is possible that this term could be defined by the Department of Labor (DOL) to broaden leave rights for families of military to include items not presently covered by the FMLA, such as child care.

Leave to Care For an Injured Service Member

Under the new legislation, a spouse, son, daughter, parent or "next of kin" may take up to 26 workweeks of unpaid leave during any 12-month period to care for a member of the Armed Forces 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." "Next of kin" is defined as the nearest blood relative of the individual. This leave is only available during a single 12-month period and it may be taken intermittently when medically necessary. This type of leave is not offered in addition to FMLA leave for other reasons. Accordingly, an employee is not entitled to 26 weeks of this form of leave plus an additional 12 weeks of other FMLA leave.

The new provision not only expands the amount of leave available to families of military members, but it expands the reasons for which leave may be taken. For example, parents may now take FMLA leave to care for an adult son or daughter returning from service with a serious medical condition, a right not previously granted unless the adult son or daughter was "incapable of self care" due to a disability.

Leave Because of a Qualifying Exigency

An employee is entitled to 12 workweeks of unpaid leave during any 12-month period because of any "qualifying exigency" due to the fact that the employee's spouse, son, daughter or parent 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. While this new form of leave technically does not go into effect until after this term is defined, the DOL is encouraging employers to provide this type of leave to qualifying employees during this interim period. "Qualifying exigency" leave may be taken intermittently.

Again, the term “qualifying exigency” is not yet defined, and the DOL is writing regulations. The term is certainly broad enough that we could see the DOL expanding the circumstances for leave to include things such as child care or other life needs that could arise as the result of a family member being called for active duty.

Combinations of Leave

If an employee takes leave in a 12-month period both because of a “qualifying exigency” and to care for an injured Service member, the leave may not exceed 26 weeks in total.

Notice and Certification

To the extent the leave for a “qualifying exigency” is foreseeable, the employee must provide notice of his or her necessity for leave as is “reasonable and practicable.” Further, an employer may require that a request for leave to care for an injured service member be supported by a certification issued by a health care provider of the individual for whom the care will be provided. Employers may similarly require certification from employees requesting a “qualifying exigency” leave. The DOL may set forth regulations describing exactly what an employer may request.

Impact On Other Accrued Leave

In accordance with the current FMLA regulations, the employee may elect, or the employer may require the employee to substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for any part of the leave. Nothing in the legislation, however, requires an employer to provide paid sick leave or paid medical leave in any situation where the employer would not otherwise do so.

Effective Date and Employer Responsibilities

The DOL has taken the position that the law is effective immediately, at least as it pertains to the 26 weeks of leave to care for injured military members. The DOL is encouraging employers to provide “qualifying exigency” leave as well as during the period before regulations are issued. Here are the steps employers need to take immediately:

- Notify managers who administer FMLA that leave rights for families of military members has expanded.
- Prepare to revise FMLA policies, employee handbooks and other documents describing FMLA leave to ensure they comply with the new law.
- Call your employment law attorney if an employee requests leave to care for an injured member of the military or family of a military member being called to active duty.

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