

New Amendment To FMLA Expands Employees' Leave Rights

On Jan. 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act (NDAA). This act expands leave rights under the Family Medical Leave Act of 1993 (FMLA) for military families by providing up to 26 weeks of leave for employees to care for family members in the Armed Forces and up to 12 weeks of leave for a "qualifying exigency" arising out of an employee's spouse, child or parent being on active duty or being called to active duty. Aspects of the law took effect on Jan. 28, 2008, so you need to be aware of your obligations and immediately update FMLA policies and human resources materials.

KEY PROVISIONS

NDAA Creates Two New Types of FMLA Leave

First, the amendment permits a "spouse, son, daughter, parent, or next of kin" to take up to 26 weeks of leave, in a 12-month period to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, 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." The law increases the amount of leave eligible employees would have otherwise been entitled to from 12 weeks to 26 weeks. This provision became effective Jan. 28, 2008.

Second, the amendment permits an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] 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." This aspect of the legislation does not take effect until the Department of Labor (DOL) issues regulations defining "qualifying exigency." Until that time, however, the DOL is encouraging employers to provide this type of leave to qualifying employees.

New Category of Eligible Employee

The NDAA also adds a new category of eligible employees entitled to FMLA leave: "next of kin" of an injured or ill service member. "Next of kin" is defined as "the nearest blood relative" of the service member. This would apply in those instances where an injured or ill service member does not have a spouse, child or parent to care for him or her and thus would need another family member, for example, an aunt or uncle, to take leave to provide the necessary care.

Maximum Leave

With the NDAA, the maximum amount of leave available now in a 12-month period for qualifying FMLA events is 26 weeks. Thus, the 26 weeks of leave permitted by the new law is inclusive of the 12 weeks that the employee already receives under the statute, not in addition to the 12 weeks. Significantly, the 26 weeks of leave provided for in the NDAA is for a one-time use only and, unlike other forms of FMLA leave, does not renew with

each 12-month period. Therefore, once an employee uses his or her 26 weeks, he or she is only entitled to the regular 12 weeks of FMLA leave in subsequent 12-month periods. One open question with this one-time use leave, however, is whether employees who have more than one family member in the Armed Forces are entitled to 26 weeks per family member or 26 weeks in total. We expect that the DOL regulations will address this point.

WHAT THIS MEANS FOR EMPLOYERS

The DOL has stated that it will provide more guidance regarding an employer's responsibilities under the new legislation. In the meantime, employers are expected to make a

good faith effort to comply with the new legislation. Employers can do this by allowing eligible employees 26 weeks leave (in total) to care for sick or injured service members. Additionally, although "qualifying exigency" is not yet defined, since it appears that the legislation was meant to provide broad coverage, we would encourage employers to err on the side of caution and to allow employees to take any leave that would fall under a reasonable interpretation of the statute. Finally, employers need to revise and reissue FMLA policies and employee handbooks to reflect the changes to the law, as well as train supervisors and human resources personnel on the new legislation. We are available to assist you with this.

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