



LEGAL TOPICS

AMENDMENTS TO THE FAMILY MEDICAL LEAVE ACT AND PROPOSED NEW REGULATIONS

by Elizabeth V. LaFollette

On January 28, 2008, the National Defense Authorization Act ("NDAA") was signed into law by President Bush. The NDAA makes significant changes to the Family Medical Leave Act ("FMLA"), some of which are effective **immediately**.

Before the Amendments: FMLA Basics

Many aspects of the FMLA remain unchanged. The following basics still apply: The FMLA applies to all private employers who have 50 or more employees and all public employers, regardless of size. Employees are eligible for FMLA leave if they: 1) work at a worksite with 50 or more employees (or there are 50 or more employees working within 75 miles of the worksite); 2) have worked for the employer for 12 or more months; and 3) have worked at least 1,250 hours in the 12-month period immediately preceding the period for which they are seeking FMLA leave. If an employee meets these criteria, an employee may take up to 12 weeks of job-protected, unpaid leave: a) to care for a child born to or placed for adoption or foster care with the employee; b) to care for a spouse, son, daughter, or parent with a serious health condition; or c) because of the employee's own serious health condition which makes the employee unable to perform the essential functions of his or her position. Employees who take FMLA leave must be restored to their previous position upon return from leave, and their benefits must be protected. In short, no employee can be penalized or retaliated against for taking FMLA leave.

New Category of Leave Now Required: Military Caregivers

Under the amended FMLA, and **effective immediately**, employees who are otherwise eligible for FMLA leave now can also take FMLA leave for **military caregiving**. More specifically, an eligible employee who is the spouse, son, daughter, parent or next of kin of a member of the armed forces can now take up to 26 weeks of job-protected, unpaid leave in a single 12-month period to care for the servicemember if the servicemember is recovering from a serious injury or illness sustained in the line of active duty. This leave can be taken intermittently or on a reduced leave

schedule when medically necessary. Note that the leave is longer than other FMLA leaves—26 weeks instead of 12 weeks—and that a new relationship has been recognized as eligible for leave: "next of kin."

New Category of Leave Effective Soon: "Qualifying Exigency" Related to a Call to Active Duty

The amended FMLA also provides that eligible employees may take up to 12 weeks of job-protected, unpaid leave in a 12-month period because of "any qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty, or has been notified of an impending call to active duty, in support of a contingency military operation. This leave also can be taken intermittently or on a reduced leave schedule.

This new "qualifying exigency" provision of the FMLA does not become effective until the Department of Labor issues regulations defining a "qualifying exigency." Between now and the date the new regulations become final, employers are **encouraged, but not required**, to provide this type of leave to eligible employees. Although the Department of Labor will ultimately define a "qualifying exigency," the legislative history of the NDAA suggests that the amendment was designed to allow employees to use FMLA leave for issues directly arising from deployment and extended deployment, such as: to arrange for childcare, to attend pre-deployment briefings, to attend family support sessions, to see a servicemember off or welcome him or her back home, or to make necessary legal or financial arrangements.

Department of Labor Seeks Comments

The Department of Labor has asked for comments regarding the regulations it must enact regarding the amended FMLA. The Department also has issued a completely new set of proposed regulations covering the "old" FMLA, and has asked for comments regarding the proposed regulations. The comment period for both issues expires on April 11, 2008. Comments can be submitted electronically at <http://www.regulations.gov>.

The Department has been encouraged to act quickly to enact regulations regarding the amended FMLA. Nevertheless, it is impossible to predict with certainty how long it will be until the final regulations are in place.

Recommended Steps

Employers who would like to make comments to the Department of Labor regarding the new FMLA regulations should do so before April 11, 2008.

During the interim period between now and the effective date of the applicable regulations from the Department of Labor, employers should decide, as a matter of policy, whether they are: a) only going to allow employees to take the legally required military caregiving leave, or b) going to also allow employees to take "qualifying exigency leave" due to a call to active service (which, again, is not now required, but will be after the Department of Labor issues its final regulations).

If an employer chooses to **only** provide the FMLA leave that is legally required at this time, we recommend that it prominently post a notice with its existing employment law posters with language along these lines:

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 with an important new leave right related to military service:

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 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.

On the other hand, if an employer chooses to provide **both** the leave that is legally required and the leave that is not yet legally required, we suggest that the employer post the notice prepared by the Department of Labor, which is at the end of this client advisory and which also can be found at the Department of Labor's website at www.dol.gov.

In addition to posting the applicable notice, we recommend that the notice be distributed to all employees together with a statement that the employer's FMLA policy now includes the leave referenced in the notice. Comparable notice also should be provided to new employees when employee handbooks are typically distributed or made available during orientation. Furthermore, we suggest that employers take affirmative steps to educate their frontline supervisors of these FMLA changes because such supervisors are often the individuals to whom such leave requests are made.

Employers are also free, of course, to amend their existing FMLA policies and to distribute an updated policy. In light of upcoming regulations from the Department of Labor, however, it is likely that additional changes to any FMLA policy will be needed in the future as well.

If you have any questions about this client advisory or if you have any questions about how the changes will affect you, please contact Elizabeth V. LaFollette at (336) 271-2572, Nicole Crawford at (336) 271-3140, William P.H. Cary at (336) 271-3115, or one of the other Brooks Pierce employment attorneys listed on our firm's website.

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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.

