

March 5, 2008

FMLA Update: What Employers Need to Know

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA) which, among other things, amended the Family and Medical Leave Act (FMLA) to provide legally-protected time off from work for families of military service members. This amendment marks the first expansion of the FMLA since it was enacted in 1993. While the FMLA already required much of employers, it now requires more.

The new law created two new types of FMLA leave for eligible employees with a family member in the military. These two types of "Servicemember Family Leave" are:

- 1) up to 12 workweeks of leave in 12-month period because of a "qualifying exigency" arising out of the servicemember's active duty or a servicemember's impending call/order to active duty in the Armed Forces; and
- 2) up to 26 workweeks of leave in a 12-month period to care for a covered injured or ill servicemember.

If an employee is eligible for both types of Servicemember Family Leave within a 12-month period, the leave periods will run concurrently and no more than 26 workweeks of FMLA leave may be taken within a 12-month period. Set forth below are answers to employers' most

common questions about the new law:

1. Are you covered by the NDAA's amendments to the FMLA?

Yes, effective January 28, 2008, employers that are otherwise covered by the FMLA are subject to the new law. Employers with at least 50 employees within a 75 mile radius are covered.

2. Is the employee requesting leave covered by the new law?

To qualify for 12 weeks of leave based on a "qualifying exigency," the employee must be the spouse, parent or child of a servicemember on active duty (or who has been notified of an impending call or order to active duty) in the Armed Forces.

To qualify for 26 weeks of leave to care for a covered servicemember, the employee must be the spouse, child, parent or *next-of-kin* (nearest blood relative) of the covered servicemember. This is the only type of FMLA leave for which an employee who is "next of kin," but not a parent, spouse, or child, may qualify.

Employees must also meet the original eligibility criteria under the FMLA: (1) the employee must have been employed by the employer for

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at least 12 months; and (2) the employee must have worked at least 1,250 hours within the past 12 months.

3. Who is a “covered servicemember”?

A covered servicemember is any member of the Armed Forces, including members 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. A “serious injury or illness,” in the case of a member of the Armed Forces, means an injury or illness incurred 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.

4. What is a “Qualifying Exigency”?

Eventually the Secretary of the Department of Labor (DOL) will determine, by regulation, the meaning of “qualifying exigency.” Until then, employers need to use good judgment in evaluating the situations that will arise and determining if they appear to be a “qualifying exigency.” Overseas assignments, recalls to active duty and troop mobilizations likely qualify. Qualify exigencies are not necessarily limited to situations that involve a serious health condition of the covered servicemember.

5. How often can an employee take the 26-week “Servicemember Family Leave”?

Once during a 12-month period.

6. Can Servicemember Family Leave be taken intermittently?

Yes. Subject to certain notice and other requirements, both the 12-week and 26-week Servicemember Family Leave can be taken intermittently or

on a reduced leave schedule.

7. Is Servicemember Family Leave Paid or Unpaid?

Like all other types of FMLA leave, Servicemember Family Leave may be unpaid. Employers may voluntarily provide paid leave for some or all of the leave if they choose. Further, an eligible employee may elect, or an employer may require, employees to substitute accrued paid vacation leave, personal leave or family leave for any part of the unpaid 12-week Servicemember Family Leave.

In addition to vacation, personal or family leave, an eligible employee may further elect, or an employer may require, the employee to substitute accrued medical or sick leave for any part of the 26-week Servicemember Family Leave. However, the law does not require the employer to provide paid sick or medical leave in any situation in which the employer would not normally provide any such paid leave.

8. What actions should employers take now?

- Review existing FMLA leave policies and revise them in compliance with the requirements of the new law.
- Notify employees promptly about the new leave options.
- Be on the lookout for the impending regulations from the Department of Labor on the definition of “qualifying exigency,” and be prepared to revise policies accordingly.
- Review the proposed revisions to the FMLA issued February 11, 2008 and comment by April 11, 2008. The proposed regulations impact all of the following areas:
 - * Employer notice obligations and penalties for failing to meet those obligations;
 - * light duty work;
 - * whether FMLA claims may be



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- waived voluntarily by employees;
- * the definition of a "serious health condition";
- * employee notice obligations;
- * the medical certification process and the revised certification form WH-380 (the proposed form is longer!) as well as fitness for duty exams; and
- * perfect attendance awards.

For more information on the FMLA or other employment law issues, please contact any member of the Employment Law Team at Hancock, Daniel, Johnson & Nagle, P.C.: Kimberly W. Daniel, B. Page Gravely, Jr., Stephanie Lindsey Hiss, or Joan M. Mielke at (804) 967-9604 or by email (kdaniel@hdjn.com; pgravely@hdjn.com; shiss@hdjn.com; or jmielke@hdjn.com).

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