

Client Advisory | *March 2008*

New Family and Medical Leave Act Entitlements for Military Families

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA). Section 585(a) of the NDAA amended the Family and Medical Leave Act (FMLA) of 1993 to provide eligible employees working for covered employers two additional leave opportunities related to military service.



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The NDAA creates a new category of FMLA leave called “Servicemember Family Leave” that allows an employee who is the “spouse, son, daughter, parent, or next of kin” of a “covered servicemember” to take up to 26 weeks of unpaid FMLA leave to care for a family member who has been injured in the line of duty as a member of the Armed Forces over a single 12-month period. This provision extends both the amount of leave (from 12 weeks to 26 weeks) for which an employee is eligible and the familial relationships that are applicable under existing FMLA regulations.

A “covered servicemember” is a member of the Armed Forces, including the National Guard and Reserves, “who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for . . . an injury or illness incurred by the member in line of duty on active duty . . . that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”

Conditions For Servicemember Family Leave

In addition to the conditions that apply to other types of FMLA leave, Servicemember Family Leave, has further conditions, including the following:

- The 26 weeks of leave may be taken intermittently or on a reduced leave schedule.
- The employee is entitled to a combined total of 26 weeks of FMLA leave during a single 12-month period. This means if the

employee has some other FMLA qualifying event in that 12-month period, his or her combined leave during that period is limited to 26 weeks.

- The employer must inform an employee of his or her eligibility status within 5 business days of the employee requesting leave or the employer learning that an employee’s leave may be for a FMLA-qualifying condition.
- The employer may require a medical certification containing sufficient medical facts to establish that a serious health condition exists.

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New Qualifying Reason for Leave – Leave to Address “Qualifying Exigencies” Arising Out of a Family Member’s Active Duty in the Armed Forces

The NDAA permits an employee to take FMLA leave for “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 operation.” Unlike Servicemember Family Leave, however, this leave is not available to next of kin.

The term “qualifying exigency” is not defined in the amended statute. In fact, the FMLA provision will not be effective until the Secretary of Labor issues final regulations defining “any qualifying exigency.” In the interim, the Department of Labor encourages employers to provide this type of leave to qualifying employees.

Covered employers will need to supplement their existing FMLA policy in order to inform employees about their eligibility for servicemember leave. Additionally, employers will need to update the required postings at worksites. A supplemental poster can be obtained from the U. S. Department of Labor’s web site:

<http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf> .

This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you have any questions regarding the matters discussed in this memorandum, please contact the Edwards Angell Palmer & Dodge attorney responsible for your affairs or:

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