

FMLA Expands to Provide Additional Leave for Members of Military Families

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA) and, in so doing, amended the Family and Medical Leave Act (FMLA). The legislation, the first major revision to the FMLA since it was enacted in 1993, expands the FMLA in two significant respects.

Caregiver Leave

The NDAA expands the FMLA to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 weeks of FMLA leave during a single 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." A "serious injury or illness" is defined as an injury or illness incurred by a member of the Armed Forces in the line of active duty that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating. Significantly, that definition is different from the definition of a "serious health condition" under the FMLA. The Department of Labor (DOL) is working to prepare more comprehensive guidance regarding rights and responsibilities with respect to this new caregiver leave. In the meantime, employers are expected to act in good faith in providing leave under the new legislation. Employers may, however, request that employees support a request for caregiver leave by a certification issued by a health care provider.

Active Duty Leave

The NDAA also permits an eligible employee to take up to 12 weeks of 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." The term "qualifying exigency" is not defined in the NDAA. The DOL will issue regulations to clarify what constitutes a "qualifying exigency." If leave under this provision is foreseeable, the employee should provide the employer with

POSTED:

Feb 13, 2008

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"reasonable and practicable" notice. Employers are also entitled to request that employees provide certification that the service member is on active duty or has been called to duty.

Employers should note that the other requirements of the FMLA, such as the requirement that employers reinstate employees returning from FMLA leave to an equivalent position, apply to these two new types of FMLA leave. The DOL issued guidance indicating that the caregiver leave provision is effective as of January 28, 2008, and so employers should immediately begin granting such leave in good faith as they await the anticipated DOL regulations. The active duty leave provision will not be in effect until the DOL issues final regulations defining "qualifying exigency." The DOL has put those regulations on a fast track and encourages employers to begin providing active duty leave in good faith even before the final regulations are issued. In addition, employers should revise their FMLA leave policies to incorporate the NDAA's expansion of the FMLA.

The attorneys in Reinhart's [Labor and Employment Department](#) are experienced in advising employers on the rights and obligations that exist under the FMLA, and would be pleased to assist you if you have questions concerning the amendments to the FMLA, or concerning the FMLA generally.

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