

FEBRUARY 2008

FMLA EXPANDED FOR FAMILY MEMBERS OF MILITARY

By Sarah Wirtz and Tracy Cahill

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for 2008. Among other things, this law amended the Family and Medical Leave Act ("FMLA") to provide additional leave benefits to family members of individuals in the Armed Forces.

The new law amends the FMLA in two significant ways:

New "Qualifying Exigency" Leave for Family Members of Military

The FMLA was expanded to allow eligible employees to take leave for "*any qualifying exigency . . . arising out of the fact that the spouse, 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.*" (Emphasis added.) The FMLA previously allowed an employee to take 12 weeks of leave during a 12-month period only for the following reasons: (1) the birth, adoption or foster care placement of a child; (2) to care for a family member with a serious health condition; or (3) because of the employee's own serious health condition.

The Department of Labor will be issuing regulations defining what a "qualifying exigency" means. Until then, covered employers are not yet required to provide "qualifying exigency" leave; however, the Department of Labor is encouraging employers to comply in good faith even before any explanatory regulations are issued.

New Extended FMLA Leave to Care for Injured Servicemember

Effective immediately, under a second new FMLA provision, an eligible employee who is the spouse, son, daughter, parent, or next of kin (defined as nearest blood relative) of a "covered servicemember" is entitled to a combined total of 26 weeks of leave during a single 12-month period to care for the injured servicemember. Any FMLA used during this 12-month period for other purposes will count against the 26 weeks of leave for this purpose. Servicemember caregiver leave will be available on an intermittent or reduced-schedule basis, provided that the 26 weeks of leave must be completed within the 12-month period. Employers may seek certification to verify the need for servicemember caregiver leave.

A "covered servicemember" means 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 due to an injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

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LEARN MORE ABOUT IT:

ON FEBRUARY 28, TRACY CAHILL AND SARAH WIRTZ WILL PRESENT AN AUDIO CONFERENCE, "CHANGES TO FMLA MILITARY LEAVE RULES: WHAT YOU NEED TO KNOW NOW." MS&K HAS ARRANGED FOR CONFERENCE PRODUCER, BUSINESS & LEGAL REPORTS, TO OFFER A DISCOUNT OF 50% WHEN YOU REGISTER AT WWW.MSK.COM.



Q: DO I HAVE TO CHANGE MY FMLA POLICY TO REFLECT THESE CHANGES IN THE LAW?

A: UNDER THE FMLA, EMPLOYERS ARE GENERALLY REQUIRED TO INCLUDE INFORMATION ABOUT EMPLOYEES' FMLA ENTITLEMENTS AND OBLIGATIONS IN THEIR EMPLOYEE HANDBOOKS. EMPLOYERS ARE ALSO REQUIRED TO POST FMLA INFORMATION IN THE WORKPLACE. EMPLOYERS SHOULD UPDATE THEIR FMLA POLICIES AND POSTINGS TO REFLECT THESE NEW CIRCUMSTANCES UNDER WHICH FMLA LEAVE MAY BE GRANTED. THE DEPARTMENT OF LABOR IS EXPECTED TO ISSUE OTHER FMLA REGULATIONS TO ADDRESS OTHER ASPECTS OF THE LAW. IN THE INTERIM, EMPLOYERS, AT A MINIMUM, SHOULD POST AND DISTRIBUTE NOTICE OF THESE NEW FMLA LEAVE PROVISIONS FOR FAMILY MEMBERS OF SERVICEMEMBERS.

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Other FMLA Requirements Still Apply

The FMLA currently applies only to employers with 50 or more employees and to eligible employees who work for an employer with 50 or more employees within a 75 road-mile radius. Additionally, an eligible employee must have one year of service and have worked at least 1,250 hours in the previous 12-month period.

Health insurance coverage must continue during these new FMLA leaves. Notice of any foreseeable leave may be required. The employer must provide a guarantee of reinstatement to eligible employees taking up to the maximum amount of FMLA leave for these new reasons.

For any assistance in complying with the FMLA generally, or these new provisions, please contact MS&K's Labor Department.

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Q: ARE THERE ANY SIMILAR STATE LAWS REQUIRING ME TO PROVIDE LEAVE SPECIFICALLY FOR FAMILY MEMBERS OF SERVICEMEMBERS?

A: CURRENTLY, SEVEN STATES - CALIFORNIA, ILLINOIS, INDIANA, MAINE, MINNESOTA, NEBRASKA, AND NEW YORK - HAVE LAWS REQUIRING EMPLOYERS TO PROVIDE LEAVE FOR FAMILY MEMBERS OF SERVICEMEMBERS. DEPENDING ON THE STATE, EMPLOYEES MAY BE ENTITLED TO TIME OFF WHEN THE SERVICEMEMBER IS CALLED UP TO ACTIVE DUTY, COMPLETES ACTIVE DUTY, IS ON LEAVE FROM ACTIVE DUTY, AND/OR IS INJURED OR KILLED DURING ACTIVE DUTY. EMPLOYERS IN THESE STATES SHOULD TAKE CARE TO PROVIDE AND ADMINISTER LEAVE IN A MANNER THAT COMPLIES WITH BOTH THE AMENDMENTS TO THE FMLA AND THE APPLICABLE STATE LAW(S).

EACH STATE LAW HAS DIFFERENT REQUIREMENTS THAT AN EMPLOYEE MUST SATISFY BEFORE HE OR SHE IS ELIGIBLE FOR SUCH LEAVE. FOR EXAMPLE, CALIFORNIA REQUIRES EMPLOYERS OF 25 OR MORE TO PROVIDE ELIGIBLE EMPLOYEES UP TO 10 DAYS OF UNPAID TIME OFF WHEN THEIR SPOUSE IS ON LEAVE FROM DEPLOYMENT TO A MILITARY CONFLICT. TO BE ELIGIBLE FOR SUCH LEAVE, AN EMPLOYEE MUST WORK AT LEAST 20 HOURS ON AVERAGE PER WEEK, NOTIFY THE EMPLOYER OF HIS OR HER INTENT TO TAKE TIME OFF WITHIN 2 DAYS OF RECEIVING OFFICIAL NOTICE OF THE SPOUSE'S LEAVE, AND SUBMIT DOCUMENTATION CERTIFYING HIS OR HER SPOUSE WILL BE ON LEAVE.

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