

HR BULLETIN

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CONGRESS EXPANDS FMLA FOR FAMILIES OF SERVICE MEMBERS

Congress recently enacted the National Defense Authorization Act for Fiscal 2008 (the "Act"), which was signed by President Bush on January 28, 2008. One feature of the Act is a provision that amends the Family and Medical Leave Act of 1993 ("FMLA") to extend leave of absence rights to family members of military service members. The Act requires that employers, under certain circumstances, offer up to 12 workweeks of leave to family members of individuals who either are on active duty or are being called to active duty. The Act also requires employers to offer up to 26 workweeks of leave in any 12-month period to any family members of qualifying wounded service members.

The Act amends the FMLA by mandating that any eligible employee is entitled to up to 12 workweeks of leave within a 12-month period due to a "qualifying exigency" resulting from a spouse, son, daughter or parent being on active duty or receiving notice of an impending call to active duty. The Act does not define the term "qualifying exigency," and it is expected that the United States Department of Labor (the "DOL") will define the term in its regulations.

The Act further amends the FMLA by requiring employers to provide up to 26 weeks of leave within a 12-month period to any employee who is the spouse, son, daughter, parent or "next of kin" of a "covered servicemember." The term "next of kin" is defined as the nearest blood relative of that individual. The term "covered servicemember" is defined as a member of the armed forces (including members of the National Guard or Reserves) who, as a result of a "serious injury or illness," is undergoing medical treatment, recuperation or therapy, is in outpatient status or is on the temporary disability retired list. Finally, the term "serious injury or illness" is defined as an injury or illness incurred by the servicemember 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.

The Act does not require that this leave be provided on a paid basis. However, under either type of leave, an employer may require an employee to first use any other accrued paid vacation leave, personal leave, family leave or medical or sick leave for any part of the leave period. An employee also may elect to apply his or her otherwise accrued paid leave to the 12 or 26 workweek leave, whichever is applicable. Notably, these new provisions do not require an employer to provide paid

leave in a situation in which the employer usually would not provide paid leave, and an employee may not take more than a maximum of 26 workweeks of FMLA leave during a 12-month period. Additionally, similar to the FMLA provisions previously in effect, spouses who both are employed by the same employer are limited to an aggregate of 26 weeks of servicemember family leave during a 12-month period.

In a case in which the need to take such leave due to a “qualifying exigency” is “foreseeable,” the employee will be required to provide “reasonable and practicable” notification to the employer. In addition, the employer may require that an employee requesting such leave support their request with appropriate certification, which must be procured in a “timely manner.” Valid examples of such certification may be specified by the DOL in its regulations.

No definitive effective date for the new FMLA leave provisions was contained in the Act. However, the DOL announced on January 31, 2008 that the 26 workweek provision became effective when the Act was signed by the president (i.e., January 28, 2008). The DOL also indicated that the new 12-week leave provision related to a “qualifying exigency” will not become effective until the DOL’s regulations are issued, although the announcement from the DOL encourages employers to provide this form of leave sooner. Therefore, employers should prepare for enforcement of the 26-week provision immediately, and can wait to enforce the 12-week “qualifying exigency” rule pending the issuance of guidance by the DOL.

Employers should be aware that some states have passed similar laws that expand the leave rights of eligible employees of military families, and should be sure to check both federal and state leave laws as there may be some important differences between the two.

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