

Expansion of Family and Medical Leave Act to Cover Family of Military Servicemembers

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for 2008 (“NDAA”). The NDAA amended the Family and Medical Leave Act of 1993 (“FMLA”) by providing for two additional types of leave for families of military servicemembers. FMLA applies to employers with 50 or more employees who work 20 or more weeks in a year.

Military Caregiver Leave: The first change to the FMLA provides for protected unpaid leave for the family caregiver of a covered servicemember¹ to provide care to that servicemember. This leave is different from the other standard leave provided by the FMLA in two important ways: first, the FMLA provides for 26 weeks of leave (rather than the standard 12 weeks) in any single 12-month period; and second, this leave is available to any FMLA eligible employee who is a not only a spouse, parent, son or daughter of a covered servicemember, but also the next-of-kin (defined as the “nearest blood relative” of the servicemember). While these 26 weeks may be taken on an intermittent or reduced-schedule basis, all 26 weeks must be taken within a single 12-month period. This amendment took effect immediately upon the passage of the NDAA, and therefore, all employers must make this leave available to any eligible employee.

Leave for Active Duty of a Family Member: The second change to the FMLA allows an FMLA eligible employee to take up to the standard 12 weeks of unpaid leave during any 12-month period because of any “qualifying exigency” (i.e. need) that arises when the employee’s spouse, son, daughter or parent (but not next-of-kin) 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.² This leave may be taken on an intermittent or reduced-schedule basis; however, the employee must provide reasonable notice of such leave.³ The changes implemented by this amendment are not yet effective and will only become effective the regulations are issued by the Department of Labor (“DOL”) regarding the definition of a “qualifying exigency.” However, the DOL encourages all employers to provide this leave to eligible employees until such regulations are announced.

¹ A “covered servicemember” is defined as 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.

² Contingency operation is defined as a military operation that is either designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force or results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

³ The Secretary of Labor may issue regulations permitting an employer to require certification of the need for the leave.

Notice: The DOL has provided a new Notice addressing these amendments to the FMLA, a copy of which is attached to this alert and available at www.dol.gov/esa/regs/compliance/posters/fmla.htm. This Notice should be posted conspicuously.

Employment Policy Amendment: All employers should amend their employment policies to incorporate these new requirements under the FMLA. Please contact Lawyers Alliance for New York with any specific questions regarding employer coverage or additional inquiries regarding FMLA.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website www.lawyersalliance.org for further information.

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