

Management Alert

The Family and Medical Leave Act is Amended to Provide Family Leave for Employees with Family Members Who Are Members of the Armed Forces

On January 28, 2008, the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*, was amended by the National Defense Authorization Act for Fiscal Year 2008 to provide for up to 26 weeks of job protected family leave to care for injured members of the Armed Forces, and up to 12 weeks of leave because of a qualifying exigency arising out of an employee's parent, child, or spouse's active duty or call to active duty. Under the amendment, a maximum of 26 weeks of leave may be taken during a 12 month period for any combination of FMLA-qualifying events. Prior to the amendment, the FMLA, which was originally enacted in 1993, provided a maximum of 12 weeks of job protected leave for the birth, adoption or foster care placement of a child, to care for a parent, child or spouse with a serious health condition, or for an employee's own serious health condition.

New Definitions

The amendment adds a number of definitions to the FMLA, including: Contingency Operation, Covered Servicemember; Next of Kin, and Serious Injury or Illness.

Contingency Operation is a military operation designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military operations against an enemy of the United States or against an opposing military force or results in the call or order or retention on active duty or under any provision of law during a war or national emergency.

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, for a serious injury or illness."

Next of Kin means "the nearest blood relative of that individual."

A *Serious Injury or Illness* is defined as "an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating."

Two New Types of Leave

Leave Where Family Member is Called to Active Duty

The amendment adds a fifth category of leave to section (a)1 of 29 U.S.C. §2612, under which an employee may take up to 12 weeks of leave in a 12-month period. The new category is defined as *"Because of any qualifying exigency as the Secretary 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 any impending call or order to active duty) in the Armed Forces in support of a contingency operation."* The precise meaning of qualifying exigency will have to be defined by the Department of Labor (DOL) and this provision will not go into effect until the regulations are issued. In an announcement on the DOL's website dated January 30, 2008, the DOL confirmed that this provision will not be effective until the Secretary of Labor issues final regulations; however the DOL announcement also states: *"In the interim, DOL encourages employers to provide this type of leave to qualifying employees."*

Leave to Care for an Injured Servicemember

The amendment also adds a new section 3 to 29 U.S.C. §2612(a), called "Servicemember Family Leave." This allows an employee who is the spouse, child, parent or next of kin of a covered Servicemember up to 26 weeks in

a single 12-month period to care for the Servicemember. It is not clear whether this leave is available to care for multiple family members, but that appears to be the case. We expect the new proposed regulations will address this point. This provision went into effect on January 28, 2008.

Maximum Leave

Under the new law, the maximum amount of leave in a 12 month period for all FMLA purposes is now 26 weeks, but an employee taking 26 weeks in a leave year will not affect the right to take up to 12 weeks in another leave year. Leave for the two new types of leave may be taken intermittently or on a reduced leave schedule, and the substitution of paid leave rules now in effect for other types of FMLA leave will also apply.

Spouse Rules

Spouses employed by the same employer may take an aggregate of 26 workweeks of leave for Servicemember Family Leave or a combination of leave under both sections 2612(a)1 and 3. Subsection 1 provides leave for the birth or placement of a child, a serious health condition of a parent, child, or spouse, an employee's own serious health condition, and due to a family member's call to active duty. Subsection 3 provides leave to care for an injured Servicemember.

Notice

Where foreseeable, the employee shall provide such notice as is reasonable and practicable.

Certification

An employer may require that a request for leave related to active duty or call to active duty be supported by a certification in a form and in such manner as the Secretary by regulation may prescribe. An employer may also require a certification of health care provider where leave is to care for a Servicemember.

Recommendations for Employers

Pending issuance of the new proposed regulations addressing the amendment, we recommend that employers do the following:

- Post a short memorandum or otherwise send information to employees explaining the new types of leave permitted under the amendment. Because leave for a qualifying exigency is not yet required, an employer may want to state that such leave will be given once the Secretary of Labor issues final regulations. We recommend posting this memorandum where the employer posts its FMLA notice (WH Publication 1420) and on its internal website, if applicable.

- If it is practicable, revise the FMLA policy to reflect the new types of leave permitted under the amendment.
- Revise leave of absence requests forms and the DOL's Employer Response form (DOL Form 381) to add these new categories of leave. It is expected that DOL will issue a revised Form 381 as part of the new proposed regulations.
- Consider the impact of the amendment on any state mandated family military leave laws.

If you have any questions regarding this Management Alert, please contact the Seyfarth Shaw LLP attorney with whom you work, or any Labor & Employment attorney on our website, www.seyfarth.com.

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