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New Amendment to the FMLA now provides up to 26 workweeks of leave for employees to care for injured servicemembers and up to 12 workweeks of annual leave for a qualifying exigency related to a family member's military service.

Amendment to the Family Medical Leave Act Provides New Leave Rights for the Families of Servicemembers

By David M. Jaffe, Todd K. Boyer and Michele Z. Stevenson

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act of 2008. Among other things, H.R. 4986 (the "Amendment") significantly amends the Family Medical Leave Act of 1993 (FMLA) to extend coverage to employees to care for family members injured while on active military duty. The Amendment became effective upon the President's signature with respect to the 26 weeks of leave. The part of the Amendment concerning a "qualified exigency" will not take effect until the Department of Labor (DOL) issues final regulations that will, among other things, define that term.

It is, by now, well documented that military members who are injured in battle are surviving in record numbers, leaving active duty and requiring short and long-term care to convalesce. This law recognizes this new fact of life for military families and permits them six months of protected unpaid leave to care for family members who return injured from an active duty deployment. Employers must review and amend their leave policies to acknowledge this substantial change to the FMLA. Because HR 4986 amends the FMLA, and **not** the Uniformed Services Employment and Reemployment Rights Act (USERRA), it applies only to employers with 50 or more employees. Thus, smaller employers will not be affected (under USERRA, every employer is required to comply regardless of the number of employees).

The Amendment includes a provision that allows eligible family members of military personnel to take up to 26 weeks of leave to care for a wounded member of the Armed Forces. Additionally, it allows an eligible employee 12 weeks of unpaid leave "for any qualifying exigency" if the spouse, or a son, daughter, or parent of the eligible employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces.

The Amendment Provides for Up to 26 Weeks of Leave to Care for Injured Servicemembers

The Amendment more than doubles the amount of FMLA leave an eligible employee could have previously taken to care for an injured servicemember. H.R. 4986 amends the FMLA to require that employers provide up to **26** weeks of unpaid leave during a single 12-month period for an eligible employee who is the spouse, son, daughter, parent, or next of kin (defined as the nearest blood relative) of a "covered servicemember" to care for the "covered servicemember," which 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."

It is worth highlighting that the definition of "covered servicemember" does not use the term, "serious health condition," which continues to apply to ordinary FMLA leave, but, rather, creates the

term, "serious injury or illness," which 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." Although at first glance it may appear that the Amendment focuses only on employees who require FMLA leave to care for those wounded in combat, which of course it does, the Amendment has a much broader application and includes any injury or illness incurred in the "line of duty."

The Amendment does not define the term in the "line of duty," which is a military term of art and is not restricted to combat-related injuries. Under military regulations, injuries of any kind suffered by servicemembers are generally found to be in the "line of duty" unless the injury suffered is the result of the gross misconduct of the servicemember. Accordingly, injuries that are in the "line of duty" could include car accidents, serious non combat related illnesses such as cancer, or any other non combat related injury that renders the servicemember unfit to perform his or her duties. Additionally, the eligible employee may take leave under the Amendment even if the injury is temporary, so long as the injury renders the servicemember unfit for military duty.

The Amendment, however, does not permit employees to take leave to care for a reservist who is injured while performing regular reserve duties, which generally consists of one weekend per month and two weeks of annual training per year. The Amendment only permits employees to take time off to care for servicemembers who are injured while on active duty. Of course, if a reservist is injured while performing the servicemember's usual reserve duties, the servicemember or family member would still be entitled to 12 weeks of FMLA leave assuming FMLA eligibility requirements are met.

Under the Amendment, an employee may elect, or an employer may require, the substitution of any of the employee's accrued paid vacation leave, paid time off, personal leave, family leave, or medical or sick leave for any part of the 26-week period provided to care for the injured servicemember. However, the employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide such paid leave.

FMLA Leave to Care for Covered Service Members and Other FMLA Leave Run Concurrently

The Amendment provides that, during a 12-month FMLA period, an eligible employee shall be entitled to a combined total of 26 workweeks of leave if the leave includes a period to care for a covered servicemember. Therefore, a qualified employee may take 12 weeks of non military-related FMLA leave and an additional 14 weeks of FMLA leave to care for a covered servicemember, but the qualified employee may not take more than 26 weeks in total during a 12-month period.

It should be noted that it is unclear whether the 26 weeks of leave available to an eligible employee to care for a covered servicemember is a recurring leave or a one-time use leave. It is arguable that given the language in the new law, an employee could be entitled to 26 weeks of leave in any 12-month period where he/she is otherwise eligible to take FMLA leave. DOL final regulations hopefully will clarify this ambiguity.

Eligible Employees May Take Up to 12 Weeks of Unpaid Leave if Their Spouse, Child or Parent Is on Active Duty or Faces Recall to Active Duty

The Amendment also provides that an eligible employee may take up to 12 weeks of unpaid leave if the employee's spouse, child or parent is on active duty in the military or is a reservist who faces recall to active duty if a "qualifying exigency" exists. The term "qualifying exigency" is not defined in the Amendment. It is difficult to predict how the DOL ultimately will define the term, but Congress's intent was to provide servicemembers, especially those who are ordered overseas into hostile areas, with a family support system in the event that they require time to get their affairs in order prior and subsequent to active duty (i.e., childcare issues, personal financial matters, and the like). Employers are not required to provide this type of FMLA leave until the DOL issues final regulations defining a qualifying exigency. Until the regulations are finalized, the DOL's Wage and Hour Division encourages employers to provide this type of leave to qualifying employees.

Notice Requirements for Leave Related to Active Duty or Call to Active Duty

The Amendment requires that when such leave is foreseeable, whether because the spouse, son, daughter, or parent of the employee is on active duty, or because of a notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide such notice to the employer as is reasonable and practicable.

An employer may require that an employee's request for leave related to active duty or a call to active duty be supported by a certification, the contents of which, and timing for its delivery to the employer, will be determined by the DOL when it promulgates interpretive regulations. Pending such regulations, the DOL's Wage and Hour Division will require employers to act in good faith in providing leave under the new legislation.

Relationship to State Family Military Leave Policies

Employers should be aware that time off under this new legislation may be in addition to family leave available under state law. Several states have now passed legislation providing their residents with unpaid family military leave. These states include California, Illinois, Indiana, Maine, Minnesota, Nebraska, and New York. (See Littler's October 2007 California ASAP, *California's New Leave Law for the Spouses of Military Members* available at www.littler.com.) Other states, including Hawaii

and Wisconsin, have family military leave legislation currently pending before their respective state legislatures. Employers also should be aware of applicable state statutes and modify their leave policies as appropriate. The family military leave laws do not purport to affect an employee's right to any other legally-mandated leave or employee benefit, including the additional leave benefits now available to employees under the Amendment.

What Should Employers Do Now

Employers should immediately amend their FMLA policies and practices to reflect these significant changes in the qualifying reasons and duration of protected leave. In addition, as we await final DOL regulations, employers must proceed with caution in addressing an employee's request for military-related leave. Employers with questions about employee leave rights should consider contacting experienced employment counsel.

The Proposed Regulations

On February 11, 2008, the DOL issued proposed regulations that do little to clarify some of the ambiguities that have surfaced since the President signed the Amendment into law.

The DOL seeks comments on and will further clarify the following questions with respect to family military leave:

- Whether the 26 workweek leave period is a one-time benefit to an employee during his/her employment with the same employer or a perpetual benefit that is available to an employee in each 12-month period during his/her employment with the same employer.
- Whether the 26 workweek leave period should be interpreted to apply per covered servicemember. In other words, does each eligible employee get to take 26 weeks of leave to care for each covered servicemember? Under this interpretation, for example, an eligible employee would be permitted to take 26 weeks of leave to care for his or her spouse who is a covered servicemember in a 12-month period, and the eligible employee could take another 26 weeks of leave to care for his or her parent who is a covered servicemember in another 12-month period.
- Whether an employee could take leave to care for both a spouse and a child who are covered servicemembers in the same 12-month period.
- Whether the 26 workweek leave period can be calculated per injury of a covered servicemember, such that an eligible employee may take 26 workweeks of leave during a single 12-month period to provide care to a covered servicemember and then take another 26 workweeks of leave during a different 12-month period to provide care to the same covered servicemember who is experiencing a second serious injury or illness.
- Whether the employee gets to choose how to characterize the leave if it qualifies as both ordinary FMLA leave (e.g., the servicemember is a spouse who has a serious health condition) and military family leave (e.g., the servicemember is a spouse who was seriously injured while on active duty), and whether the designation of the leave can be changed retroactively.
- Whether the 12-month period should be calculated from the date of the servicemember's injury, the date of the determination that the servicemember has a serious injury or illness, the first date on which an eligible employee is needed to care for a seriously injured servicemember, or some other basis.
- Whether the Amendment permits eligible employees to take leave to care for a servicemember whose serious injury or illness was incurred in the line of duty but does not manifest itself until after the servicemember has left military service (*e.g.*, a servicemember who suffers from post-traumatic stress disorder).
- Whether it would be appropriate to define some of the FMLA's terms differently for purposes of taking leave to care for a covered servicemember or because of a qualified exigency. For example, the legislative history suggests that the term "son or daughter" should be given a broader meaning under the military family leave provisions to include adult children.
- What type of information an employee should provide to the employer in order for the notice to be sufficient to make the employer aware that the employee's need is FMLA-qualifying. The DOL opines that the general notice principles set forth in the ordinary FMLA provisions should apply here.

With respect to leave on the basis of "qualifying exigencies," the DOL seeks comments on the following issues:

- What type of information should be provided in a certification related to active duty or call to active duty status in order for it to be considered complete and sufficient?
- Who may issue the certification related to active duty or a call to active duty?
- Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit? Who else might certify that a particular request for FMLA leave is because of a qualifying exigency?
- Should the certification requirements for leave taken because of a qualifying exigency vary depending on the nature of the qualifying exigency?
- What is the proper timing for providing such a certification?
- Who should bear the costs, if any, of obtaining the certification?
- Should an employer be permitted to clarify, authenticate or validate an active duty or call to active duty certification or that a particular event is a qualifying exigency; if so, within

what limitations?

- Should a recertification process be established for certifications related to leave taken because of a qualifying exigency and, if so, how would it compare to the current FMLA recertification process?

On other matters, the DOL has provided its initial interpretation:

- Regarding the issue of what it means for a servicemember to be "undergoing medical treatment, recuperation, or therapy for a serious illness or injury," the DOL opines that any treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness, not just that provided by the Armed Forces, should be covered. The DOL takes no position regarding whether there should be a temporal proximity requirement between the injury or illness and the treatment, recuperation, or therapy and seeks comments on that issue.
- With respect to the meaning of the term "next of kin," the DOL consulted with the Department of Defense, which uses the following list to define "next of kin:" (1) unremarried surviving spouses; (2) natural and adopted children; (3) parents; (4) remarried surviving spouses (except those who obtained a divorce from the servicemember or who remarried before a finding of death by the military); (5) blood or adoptive relatives who have been granted legal custody of the servicemember by court decree or statutory provisions; (6) brothers or sisters; (7) grandparents; (8) other relatives of legal age in order of relationship to the individual according to the civil laws; and (9) persons standing in *loco parentis* to the servicemember. The DOL has solicited comments to determine, among other things, whether a certification of "next of kin" status should be required. Also, the DOL seeks comments on the question of whether each covered servicemember may only have one next of kin.
- Qualifying Exigency:
  - While the proposed regulations do not attempt to define the term, the DOL cites to several statements made by members of Congress on the floor of the House to explain the meaning of the term. It is clear that the intent of the term is to provide assistance to families who must now prepare for, and deal with, the servicemember's deployment. For example, leave should be permissible for the eligible employee to arrange for childcare; attend predeployment briefings and family support sessions; see the servicemember off or welcome him/her back home; handle legal, economic or financial planning issues; pay bills; go to the bank; pick up children from school; care for children; and provide emotional support to the rest of one's family. In other words, congressional intent is clear that the term should be interpreted expansively.
  - Since the Amendment uses the word "qualifying," not every exigency will be covered.
  - There must be some nexus between the employee's need for leave and the servicemember's active duty status.
  - Since the FMLA already permits leave to care for a family member's serious health condition, leave for a qualifying exigency should be limited to non-medical related exigencies.
  - The same notice requirements used for ordinary FMLA leave should be used to deal with qualified exigencies.
- The DOL anticipates changing FMLA section 825.400(c) to provide that, in a case involving a violation of the military family leave provisions, an employee is entitled to actual monetary losses sustained up to a total of 26 weeks of wages.
- The DOL plans on changing the proposed FMLA poster to incorporate the Amendment's changes.

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