



## Legislative Proposals Foreshadow Changes to FMLA Under Obama Administration

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Since the enactment of the Family and Medical Leave Act (FMLA) in 1993, several presidents and numerous legislators have proposed expanding the scope and coverage of the FMLA which generally provides 12 weeks of unpaid, job protected leave to eligible employees. President Bush signed the National Defense Authorization Act of 2008 which provided up to 26 weeks of leave to caregivers of wounded military personnel and provided "qualifying exigency" leave to family members of those in the National Guard or Reserves. On October 28, 2009, President Obama signed the National Defense Authorization Act of 2010 which extended qualifying exigency leave to those in active duty and also provided leave to care for veterans who subsequently develop injuries which relate back to their military service. These changes appear to be the proverbial tip of the iceberg of expansions to federally mandated unpaid and paid leave.

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The first substantial revisions to the interpretive regulations for the FMLA as a whole were effective on January 16, 2009. Some members of Congress, unsatisfied with the revisions, have proposed legislation to either undo the revisions to the regulations or expand the scope and coverage of the FMLA. Many of the concepts contained in the pending legislation are not entirely new. However, many of the proposed expansions to the FMLA are supported by President Obama and were listed as Obama Administration priorities during the 2008 presidential campaign. At some point in 2010, the Obama Administration will begin to focus on expanding paid and unpaid leave mandates. Any legislation that ultimately passes will have significant ramifications for all employers in the form of increased costs, compliance burdens and reduced operations flexibility. In light of this, employers should be mindful of the following proposals which have been introduced in Congress this year.

Introduced on February 3, 2009, just two weeks after the effective date of the revisions to the FMLA regulations, the Family and Medical Leave Enhancement Act (HR 824) expands the FMLA to cover employers with 25 or more (as opposed to 50) employees. This legislation also requires that employers provide “parental involvement leave” permitting parents and grandparents to participate in or attend school or community activities, attend routine medical and dental appointments, and to care for elderly relatives.

On March 25, 2009, the Family Leave Insurance Act (HR 1723), was introduced. This proposed legislation establishes a mandatory insurance program (and permits employers to establish a voluntary plan) providing payment of a percentage of daily earnings for 12 weeks of leave – in essence, a publicly mandated short-term disability program. The FMLA Inclusion Act (HR 2132), introduced on April 28, 2009, would amend the FMLA to include coverage for care for a domestic partner, child of a domestic partner, parent-in-law, adult child, sibling or grandparent. The next day, the FMLA Restoration Act (HR 2161) was introduced. The Restoration Act nullifies the new regulations in several key respects, including broadening the “serious health condition” definition and, therefore, expanding the FMLA’s coverage. Further, the Restoration Act would only permit employers to require recertification of a serious health condition after one year, not six months. The Restoration Act would remove the requirement that employees seeking FMLA visit a health care provider.

The Domestic Violence Leave Act (HR 2515) expands the FMLA to allow leave for “addressing domestic violence, sexual assault, or stalking and their effects.” Under this proposal, employees would receive leave for seeking medical attention, legal assistance, attending support groups, obtaining counseling and finding temporary or permanent housing. The proposal also extends leave to same-sex spouses, domestic partners and children of domestic partners.

The Balancing Act (HR 3047) was introduced on June 25, 2009, as an attempt to synthesize some of the numerous paid and unpaid leave proposals including the Healthy Families Act (56 hours of mandated paid sick leave). The paid leave would be provided to employees through a newly created Family and Medical Leave Insurance Fund – funded by employer premiums based on employee earnings. The Balancing Act also requires employers with 15 or more employees to provide seven days of paid sick leave and permits employees to take leave to attend children’s and grandchildren’s educational activities or assist elderly relatives.

Many of the aforementioned legislative proposals are either similar to legislation sponsored by President Obama while he was a U.S. Senator or endorsed by President Obama during the campaign or throughout his first year in office. While the health care debate has preoccupied most members of Congress for the summer and fall, it is only a matter of time before the Democratically controlled Congress and President Obama focus their efforts on the passage of significant expansions to employer-mandated leave.

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