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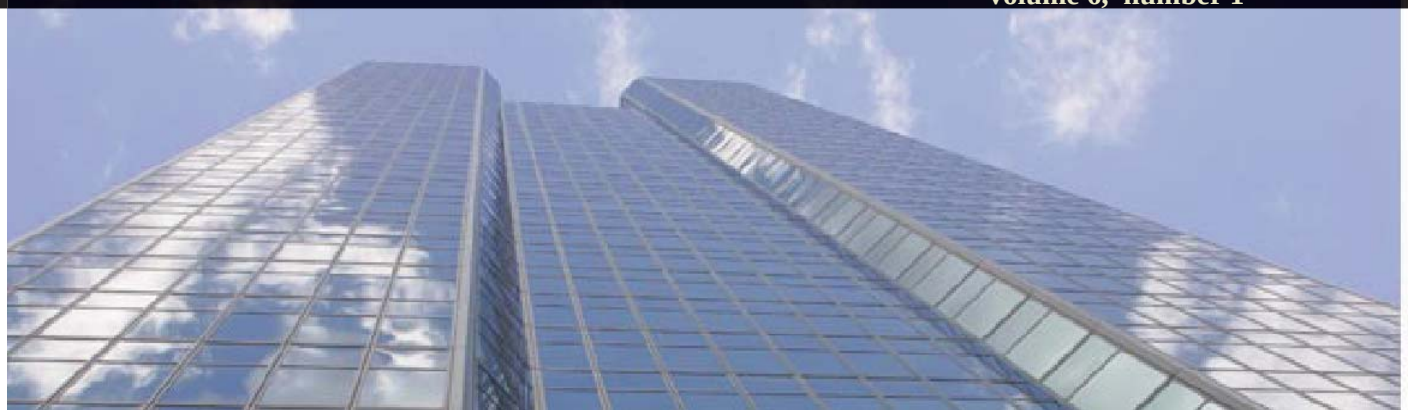

Family And Medical Leave Act (FMLA) Amended to Protect Military Families

by Thomas A. Dixon and Heidi N. Eischen

On January 28, 2008, President Bush signed an amendment to the Family and Medical Leave Act (FMLA) that extended greater leave rights to military families. The Amendment (H.R. 4986, the National Defense Authorization Act for FY 2008 or NDAA) allows an employee to take up to 26 workweeks of leave to care for an injured or ill member of that employee's immediate family who is a "covered service member" in the military. The NDAA also permits an employee to take 12 weeks of FMLA leave for "any qualifying exigency" arising out of the fact that an immediate family member in the military is on active duty or has been notified of an impending call or order to active duty in support of a "contingency operation." Employers must review and amend their leave policies to acknowledge this substantial change to the FMLA.

The Family and Medical Leave Act, which generally applies to employers who employ 50 or more people, was enacted in 1993 to provide employees with short-term family and medical leave under limited circumstances. Eligible employees can take up to 12 weeks of unpaid leave for the birth and care of a newborn child, placement of a son or daughter for adoption or foster care, care for an immediate family member (spouse, child or parent) with a disability or when the employee is unable to work because of a serious health condition. The new provisions expand the FMLA qualifying circumstances and, in some situations, the length of the leave. Because the NDAA amends the FMLA, and not the Uniformed Services Employment and Reemployment Rights Act (USERRA), the amendment applies only to employers with 50 or more employees. Thus, smaller employers will not be affected by the Amendment (under USERRA, every employer is required to comply regardless of the number of employees).

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Twenty-Six Weeks of Annual Leave To Care for Injured Servicemembers

The provisions for leave to care for a military service member became effective on January 28, 2008, and apply to employees who are a "spouse, son, daughter, parent, or next of kin [the nearest blood relative]" of the injured or ill servicemember. Covered servicemembers are those in the Armed Forces, including members of the National Guard and Reserves. To qualify for this leave, the Armed Forces member requiring care must be "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." A "serious injury or illness" is "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." The NDAA more than doubles the amount of FMLA leave an eligible employee could have previously taken to care for injured servicemember. The bill amends the FMLA to require that employers provide up to 26 weeks of unpaid leave during a "single 12-month period."

While the Amendment permits an eligible employee to take up to 26 weeks of leave to care for a covered servicemember, this leave is not in addition to the traditional 12 weeks of FMLA leave entitlement. The manner in which the time may be tracked concurrently with FMLA and the apparent distinctions various employer options for defining the 12 month period under the FMLA will be addressed in the regulations.

Employers may still require – and employees may elect – to substitute appropriate accrued paid vacation leave, paid time off, personal leave, family leave or medical or sick leave for any part of the new 26 week period.

Twelve Weeks of Leave for Any Qualifying Exigency

The Amendment also provides that an eligible employee may take up to 12 weeks of unpaid leave if the employee's spouse or child 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, but will be in regulations to be promulgated by the Department of Labor. The provisions for leave pursuant to "any qualifying exigency" are not effective until the Secretary of Labor issues final regulations that define any qualifying exigency. Congress apparently intended to provide servicemembers with time to get their affairs in order prior and subsequent to active duty (i.e., childcare issues and personal financial matters as well as sending the servicemember off or welcoming him or her back home). Until the regulations are finalized, employers should evaluate requests on a case-by-case basis and adopt a "reasonableness" approach.

Implementation: Confusion and Uncertainty

In addition to the undefined nature of any qualifying exigency, the NDAA introduces serious confusion to the FMLA certification process. Most importantly, the definition of "covered servicemember" does not use the term serious health condition (which continues to apply to ordinary FMLA leave). Instead, the concept of "serious injury or illness" is introduced and is defined as "an injury or illness …that may render the [service]member medically unfit to perform the duties of the member's office, grade, rank, or rating." Recent Department of Labor comments suggest that military branches already provide certifications of serious injury of illness and that this type of certification may be sufficient under the Amendment. Likewise, questions surrounding certification of a qualifying exigency will be a source of much debate and must be clarified (i.e., What certification is sufficient? Who can certify? When does certification need to be provided? Can an employer challenge the certification?). We must await the Department of Labor's final rules to appreciate the reach of the new law and concurrent employer and employee rights and obligations.

The Amendment also fails to define the term "in line of duty," a military term not restricted to combat-related injuries. Under military regulations, injuries of any kind suffered by servicemembers are generally acknowledged to be in the "line of duty" (unless the injury suffered is the result of the servicemember's gross misconduct). Injuries – even noncombat-related injuries – therefore, may give rise to the extended time off provided in the Amendment. One of the problematic issues yet to be addressed is whether injuries or illnesses that relate to active duty, but did not manifest themselves until after the completion of military service, are incurred in the line of duty. Also, since the Amendment applies only to servicemembers while on "active duty" (as defined by military law), it does not extend to servicemembers injured performing only regular reserve duties (e.g., the typical one weekend per month and two weeks of annual training.)

What Should Employers Do?

Employers must amend their FMLA practices now and be prepared to amend their policies as quickly as possible. Education efforts will also be necessary and revised posters will be required as issued. Policies revised before the final regulations are published will, undoubtedly, be subject to additional revision. This unfortunate circumstance may be unavoidable and advisable where regular or repeated use of the new leaves is anticipated. Where regular or repeated access to the new forms of leave is not expected, employers may consider a delay in the actual policy amendment but should seek training and guidance on the new law as soon as possible. While awaiting the final Department of Labor regulations, employers must proceed with caution. Questions about employee leave rights should be directed to experienced employment counsel.

What's Next?

On February 11, 2008, the Department of Labor proposed rules regarding the Amendment and other significant substantive changes to FMLA. Interested parties have until April 11, 2008, to submit comments to these proposed rules. Thereafter, the Department of Labor will issue final regulations. Stay tuned for further information. Department of Labor will issue final regulations. Stay tuned for further information from Eastman & Smith labor and employment attorneys regarding these and other recent changes in the law.

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