
LABOR AND EMPLOYMENT LAW UPDATE

SERVICE MEMBER FAMILY LEAVE

Employers covered by the FMLA must provide an eligible “spouse, son, daughter, or next of kin” with up to 26 workweeks (or 6 months) of leave during a 12-month period to care for 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.”

The term “outpatient status” means “the status of a member of the Armed Force assigned (a) a military medical treatment facility as an outpatient; or (b) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.”

WHAT HAS CHANGED? Previously, only 12 weeks of FMLA leave were available to an eligible employee to care for a spouse, son, daughter or parent with a serious health condition. For the care of a service member, the amendments now allow:

- (1) a total of 26 weeks of leave, which may combine Service Member Family Leave with other types of FMLA leave; and
- (2) leave by an employee who is merely the service member’s “next of kin”, which is defined as “the nearest blood relative.”

WHAT IS A “SERIOUS INJURY OR ILLNESS?”

The term is not limited to a combat-related injury or illness. Rather, the term broadly includes any injury or illness incurred “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.”

IS INTERMITTENT SERVICE MEMBER FAMILY LEAVE AVAILABLE? Yes. The amendments specifically allow Service Family Member Leave to be taken intermittently or on a reduced leave schedule when medically necessary.

EFFECTIVE IMMEDIATELY: NEW FMLA LEAVE ENTITLEMENTS FOR MILITARY FAMILIES!

With little advance warning to employers, President Bush signed into law on January 28, 2008 amendments to the Family & Medical Leave Act (“FMLA”) for family members of military personnel. The amendments are part of the broader National Defense Authorization Act.

The amendments effect two significant changes to the FMLA. Effective immediately is a new type of FMLA leave known as “Service Member Family Leave.” A new ground for FMLA leave for military exigencies will become effective once the U.S. Department of Labor issues interpretive regulations.

Time will ultimately reveal the full impact of the two changes upon employers covered by the FMLA, i.e., those with 50 or more employees. With nearly 3 million active and reserve service members, and ongoing wars in Iraq and Afghanistan, the impact will likely be significant and immediate.

MILITARY EXIGENCY LEAVE

An eligible employee is entitled to a total of 12 workweeks of leave during any 12 month period for

“any qualifying exigency . . . 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 an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”

WHAT HAS CHANGED? Previously, employees were not eligible for FMLA leave under such circumstances.

WHAT IS A “QUALIFYING EXIGENCY”? The term is not defined by the amendments. The task of defining the term has been left to the U.S. Department of Labor. Since the agency cannot adopt regulations without an opportunity for notice and comment by the public, it may be quite some time before a definition of “qualifying exigency” is available to covered employers.

IMMEDIATE ACTION REQUIRED

At least three steps must be taken by covered employers immediately to comply with the new FMLA amendments:

- * Employers must be prepared to review requests for Service Member Family Leave.
- * Employers must adopt policies and procedures for dealing with potentially lengthy Service Member Family Leaves which address such issues as maintenance of health benefits and job restoration. It is recommended that these policies and procedures be reviewed by legal counsel before implementation.
- * Employers must inform their employees in manuals and other written materials of the availability and eligibility requirements for Service Member Family Leave.

ADDITIONAL QUESTIONS? If you have any questions regarding the FMLA, including the new amendments, or any other labor and employment law matter, please contact [Robert Chadwick](#) at [Campbell & Chadwick, P.C.](#)



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