



## NEW AMENDMENTS TO FMLA PROVIDE ENHANCED LEAVE ENTITLEMENTS FOR MILITARY FAMILIES

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, which includes amendments to the Family and Medical Leave Act of 1993 ("FMLA"). Before the amendments, there were four reasons that an eligible employee could take up to 12 weeks of FMLA leave each year: (1) the birth and care of a child; (2) the placement of a child for adoption or foster care; (3) care for a spouse or immediate family member with a serious health condition; and (4) the employee has a serious health condition and is unable to work.

The amendments expand FMLA entitlements to assist military service members and their families. The first provision allows up to 12 weeks of unpaid leave per year for a "qualifying exigency" related to active duty service by an employee's immediate family member. The second provision permits eligible family members to take up to 26 weeks of unpaid "caregiver leave" to care for seriously ill or injured military service members. Employers should immediately take appropriate steps to revise their related employment policies and practices to come into compliance with the new legal requirements.

### "QUALIFYING EXIGENCY LEAVE" FOR FAMILY OF MILITARY SERVICE MEMBERS

Under the new amendments, the FMLA will permit an employee to take up to 12 weeks of FMLA leave for any "qualifying exigency" arising from the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the Armed Forces. This entitlement will not become effective until the Secretary of Labor issues regulations defining what constitutes a "qualifying exigency." The Department of Labor has stated that it encourages employers to provide this type of leave to eligible employees in the interim.

### "CAREGIVER LEAVE" FOR FAMILY OF MILITARY SERVICE MEMBERS

Effective immediately, the amendments to the FMLA now also permit a spouse, son, daughter, parent, or next of kin of a member of the Armed Force or National Guard to take up to 26 weeks of FMLA leave to care for such military service member who is undergoing medical treatment, recuperation, therapy, in outpatient status, or otherwise on the temporary disability retired list, for a serious injury or illness. The term "serious injury or illness" is defined as an injury or illness incurred by the service member on active duty that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. This new form of FMLA leave is only available during a single 12 month period. The 26 weeks of "caregiver leave" may be reduced by any other form of FMLA leave taken by the employee, such that the FMLA does not entitle any employee to more than 26 weeks of leave during a 12 month period.

### MOST TRADITIONAL FMLA PRINCIPLES APPLY

While these new amendments created new leave entitlements and will present practical challenges for many employers, they do not otherwise change which employers are covered by the FMLA or the applicability of its other basic provisions. For example, both "qualifying exigency leave" and "caregiver leave" may be taken intermittently or on a reduced schedule basis. Health insurance continuation also applies for both new forms of



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#### **ADMISSIONS INFORMATION**

by state, follows respective attorney name

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FMLA leave. Employees are not entitled to be paid their regular wages or salary, but the substitution of paid leave is permitted.

Similar to other forms of FMLA leave, employers may request a medical certification for "caregiver leave," and the Secretary of Labor has been authorized to define the certification process for "qualifying exigency leave" through regulations. Eligible employees are also required to provide advance notice to the employer where the need for either new form of FMLA leave is foreseeable.

### **APPLICABLE U.S. DEPARTMENT OF LABOR REGULATIONS ARE ANTICIPATED**

The United States Department of Labor is now in the process of drafting and implementing revisions to the FMLA regulations. The revised regulations are pending internal review and approval and have not yet been made public. In the temporary absence of formal guidance, the Department of Labor has announced that it will require employers "to act in good faith in providing leave under the new legislation." It is possible that the Department of Labor's impending revised regulations will also address other issues involving the pre-existing forms of FMLA leave.

### **EFFECT OF THE NEW FMLA AMENDMENTS ON RELATED LAWS**

New York State law requires covered employers to grant up to 10 days of unpaid leave to an eligible employee whose spouse is on leave from military deployment to a combat theater during a period of military conflict. Depending on the circumstances, a military spouse may now be entitled to such leave in addition to any period of leave permitted by the amended FMLA. Other family members are not covered by the New York law.

The new amendments to the FMLA do not alter existing leave entitlements under the Uniformed Services Employment and Reemployment Rights Act ("USERA") for employees who are called to military service.

### **IMMEDIATE ACTION NECESSARY BY EMPLOYERS COVERED BY THE FMLA**

Employers covered by the FMLA must allow eligible employees to take caregiver leave effective immediately. Employers are not yet required to grant "qualifying exigency leave," as the term remains undefined.

To ensure proper notice to employees who may be eligible for the new forms of leave, employers should modify their FMLA policies to include the new forms of leave and circulate the revised policies as soon as possible.

If you have any questions regarding these FMLA amendments, please contact John Monahan at 716.843.3870 or jmonahan@jaeckle.com, Randall Odza at 716.843.3877 or rodza@jaeckle.com, or Scott Horton at 716.843.3949 or shorton@jaeckle.com.