

January 2008

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FMLA EXPANDED TO COVER FAMILY MILITARY LEAVE

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for fiscal 2008. A little known or discussed section of this Act expands the FMLA to cover leaves related to military service. With the President's signature, the FMLA now provides two new types of leave: (1) family military leave; and (2) caregiver military leave.

1. To qualify for "family military leave" under the new law, an employee must be:
 - Eligible to take FMLA leave;
 - The spouse, son or daughter or parent of a Servicemember who is on active duty or who is called to active duty in the Armed Forces (including the National Guard or Reserves) in support of a "contingency operation"; and
 - Requesting the leave because of a "qualifying exigency."

If the above requirements are met, the employee is entitled to 12 weeks of FMLA leave, which can be taken intermittently.

A "contingency operation" means a military operation that: (a) is designated by the Secretary of Defense as an operation in which members of the Armed Forces may become involved in military action against an enemy of the United States or against an opposing military force; or (b) results in a call to active duty during war or national emergency declared by the President or Congress. All military operations supporting efforts in Iraq and Afghanistan are "contingency operations."

A "qualifying exigency" is not defined in the new law. Congress directed the U.S. Department of Labor to define the term.

2. A separate type of leave has also been created to assist Servicemembers who are injured in the line of duty. To qualify for "caregiver military leave," an employee must be:
 - Eligible to take FMLA leave;
 - The spouse, son, daughter, parent or next of kin of a "covered Servicemember" of the Armed Forces (including National Guard and Reserves); "next of kin" is defined as the nearest blood relative of that individual; and
 - Requesting the leave to care for a "covered Servicemember."

Labor and Employment E-Alert *cont.*

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If an employee meets these requirements, the employee is eligible for up to 26 weeks of FMLA leave, which can be taken intermittently. This leave “shall only be available during a single 12-month period.”

A “covered Servicemember” is a member of the Armed Forces 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.” A “serious injury or illness” is an injury or illness incurred by the Servicemember in line of duty on active duty that may render the Servicemember medically unfit to perform the duties of the Servicemember’s office, grade, rank or rating. Outpatient status means that the Servicemember is assigned to a military medical treatment facility as an outpatient or is assigned to a unit established for the purposes of providing command and control to Servicemembers receiving medical care as outpatients.

This FMLA expansion takes effect immediately. However, much has been left to the U.S. Department of Labor to define and interpret. The DOL will likely issue guidance and regulations within the next 90 days. In the meantime, the DOL advises that employers must do their best to comply.

In addition to this new federal mandate, several states have their own laws providing for certain paid or unpaid family military leave.

Proactive employers should:

- Review and update their FMLA policies and procedures to include these two new types of FMLA leaves;
- Consider the state laws that may be applicable to their leave policies; and
- Be prepared to respond to request for these FMLA military leaves.

If you have any questions about this or any other employment-related issue, please contact your Vorys lawyer.

This alert contains information necessarily of such a general nature that it cannot be regarded as legal advice. Vorys, Sater, Seymour and Pease LLP is available to provide additional information and to discuss matters contained herein as they may apply to specific situations. Vorys, Sater, Seymour and Pease LLP, ©2008. For additional information, visit www.vorys.com.