

# **FMLA coverage expanded to include families of military personnel**

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On January 28, 2008, President Bush signed into law, H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"). The NDAA provides additional protection under the Family & Medical Leave Act ("FMLA") for military families. President Bush previously vetoed similar legislation; however, the signing of the NDAA into law is not surprising as this legislation had overwhelming bi-partisan support by the United States Congress.

Human resources practitioners are aware that FMLA provides eligible employees of a covered employer the right to take up to 12 weeks of unpaid leave during any 12-month period for one or more of the following reasons: the birth and care of the newborn child of the employee; placement with the employee of a son or daughter for adoption or foster care; care for an immediate family member (a spouse, child, or parent) with a serious health condition; or when the employee is unable to work because of a serious health condition. For a person to be considered an eligible employee, the individual must have been employed by the employer for at least 12 months and must have worked at least 1250 hours for that employer during the 12 month period preceding the start of the leave.

However, section 585 of the NDAA expands the qualifying events and expands FMLA protection and rights for FMLA-eligible employees in situations where a family member is called to active duty or if it is necessary to provide care to an injured servicemember.

Qualified employers are now required to provide up to 26 weeks of unpaid leave during a 12 month period to eligible employees who are caring for a "covered servicemember" wounded while in the line of duty. The employee applying for leave must be the spouse, son, daughter, parent or next of kin (nearest blood relative) to the servicemember in order to qualify for the caregiver provisions of the NDAA. A "covered servicemember" is 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 "serious injury or illness" means an injury or illness incurred by the member in the 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.

In situations where there has been a call to active duty, 12 weeks of FMLA is available to an employee of a spouse, son, daughter or parent of military personnel and reservists being called to active duty or having been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. Leave may be used for any "qualifying exigency" arising out of the service member's current tour of active duty or because the servicemember is notified of an impending call to duty in support of a contingency operation. The term "qualifying exigency" is yet to be defined by regulation. While qualifying exigencies has not yet been defined, it is likely that examples may include total or partial troop mobilization, deployment, national emergency, reserve augmentation of the regular forces or recall to active duty.

The NDAA also permits an employer to require certification to support the servicemember's call to active duty. Further, most of the other provisions of FMLA remain unchanged and apply to the new

qualifying events, such as employee eligibility requirements, health insurance continuation and job reinstatement rights. Likewise, employees can utilize the leave provided by the NDAA on an incremental basis or in the smallest permissible increment on the employer's payroll system.

The Department of Labor ("DOL") has already issued guidance regarding the NDAA. The DOL has advised the caregiver provisions of the NDAA are effective as of the date of the President's signing, but the call to active duty provision will not become effective until the final regulations are issued defining "any qualifying exigency." Further, the DOL has indicated that it is working quickly to prepare comprehensive guidance regarding this new legislation, and in the interim, employers are required to act in good-faith in providing leave under the new legislation. As a result, employers are required to comply with the NDAA without guidance from the DOL. Such requirements certainly will add to the confusion and concern for compliance with the existing FMLA provisions.

As a practical matter, employers are encouraged to immediately revise its' policies and procedures that outline FMLA rights available to employee and the process of applying for a leave of absence. Mr. Baker may be contacted with questions or concerns regarding FMLA, NDAA or other leave issues. He is available to assist in the revision/drafting of policies.