

## CLIENT ACTION BULLETIN

February 21, 2008

CAB 08-05

## New Law Creates Leave Rights under FMLA for Military Families

**SUMMARY** The “National Defense Authorization Act for Fiscal Year 2008” (NDAA, P.L.110-181) included provisions that significantly broaden the Family and Medical Leave Act (FMLA) to support military families. In related action, the Department of Labor (DOL) followed up by issuing proposed rules under the FMLA, including preliminary guidance on the new law’s leave provisions. The NDAA stipulates that employers must give employees up to 26 weeks of unpaid leave in a 12-month period to care for a family member who has suffered a serious injury or illness while on active military duty. This provision of the new law, which went into effect January 28, 2008, applies to FMLA-covered employers (i.e., generally those with at least 50 workers, as well as public agencies, such as state and local governments, without regard to the number of employees).

In addition, the NDAA provides eligible employees the right to 12 weeks of FMLA leave for any “qualifying exigency” that arises when a family member is on active duty or is notified of an impending call to active duty status in support of a military operation. The “qualifying exigency” provision will not go into effect, however, until the DOL issues final regulations defining the term and providing additional related guidance. The agency is seeking comments on the proposed rules and anticipates releasing final rules relatively quickly.

**DISCUSSION** Background on the FMLA

The FMLA entitles eligible employees of covered employers to take up to a total of 12 weeks of unpaid leave during a 12-month period under the following circumstances: for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly adopted child; to care for an immediate family member with a serious health condition; or if an employee is unable to work due to the employee’s own serious health problem. To be eligible, employees must have worked for the employer for 12 months and for 1,250 hours of service during the previous year.

**New Military Family Leave Provisions**

The NDAA’s new military family leave provisions establish an additional leave entitlement that permits an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to a total of 26 work weeks of unpaid leave during a 12-month period to care for the injured or ill family servicemember, or up to 12 weeks of leave for a “qualifying exigency.” The 26 weeks of leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. The 26 weeks of leave is the maximum period of leave for an affected eligible employee; it includes any FMLA leave that an employee might take during the 12-month period for reasons unrelated to the military family leave.

***For purposes of leave to care for an ill or injured family servicemember***, the following applies:

- *Employer Responsibilities* – As in the case of FMLA leave in general, employers must maintain any preexisting group health coverage for the employee during the leave period and under the same conditions coverage would have been provided if the employee had not taken leave. And once the leave period is concluded, the employer must reinstate the employee to the same job or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. Thus, should an employer violate the military family leave provisions, the employee may be entitled to actual monetary losses sustained, up to a total of 26 weeks’ wages.
- *Servicemembers Covered* – The NDAA defines a “covered servicemember” as a member of the Armed Forces (including the National Guard or Reserves) who is

undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status or on the temporary disability retired list, for a serious injury or illness.

- *“Serious” Injury or Illness* – The law defines these terms as an injury or illness incurred by servicemembers while on active duty that may render them medically unfit to perform the duties of their office, grade, rank, or rating.
- *“Next of Kin”* – When discussing family members eligible for leave, the NDAA lists the spouse, son, daughter, parent, or “next of kin,” which is defined as the “nearest blood relative” of the servicemember. This differs from the FMLA’s “immediate family member” (spouses, children, parents) concept. Although the NDAA’s definition will be codified in the FMLA, the DOL is considering adopting the Department of Defense’s (DoD) definition, which is used for the disposition of remains, personal effects and the release of records. The DoD’s definition specifies a hierarchy of individuals, which includes siblings, grandparents, and others.
- *Substitution of Paid Leave* – An eligible employee may elect to substitute any accrued paid leave for unpaid FMLA leave taken to care for a covered servicemember or, once the provision goes into effect, because of a qualifying exigency. An employer is permitted to require an employee to substitute any accrued paid leave time.
- *Employee Notification* – As under the FMLA, employees desiring to take family servicemember leave must provide their employers 30 days advance notice if the need for leave is foreseeable. In addition, they must make reasonable efforts to schedule planned medical treatments so as not to disrupt unduly the employer’s operations. If 30 days notice is not practicable (because of unforeseeable circumstances or a medical emergency), notice must be given as soon as is “reasonable and practicable.”

### Leave for a “Qualifying Exigency”

The DOL’s proposed rules indicate that the following situations might qualify as a “qualifying exigency” entitling an employee to take FMLA leave: escorting a family servicemember who is being deployed to the place of departure; meeting a servicemember returning from active duty; handling economic issues resulting from a servicemember’s deployment or undertaking related financial planning; and managing childcare issues caused by the immediate family member’s deployment. Because the FMLA already permits an eligible employee to take leave to care for a son or daughter, parent, or spouse with a serious health condition, leave for a “qualifying exigency” is likely to be limited to nonmedical exigencies.

## ACTION

Employers should familiarize themselves with the NDAA’s new FMLA military family leave requirements and take steps to ensure that their programs now grant appropriate leave to eligible workers caring for an injured or ill family servicemember. Employers also should consider the possible effects of the law’s requirements for “qualifying exigencies” and submit comments to the DOL by the April 11 deadline if they have suggestions or concerns. At the same time, employers might want to file comments on the entire package of the DOL’s proposed rules under the FMLA, because the proposed rule includes numerous changes that will require employers to modify some of their practices:

- Administrative systems to track leave taken and eligibility for leave may have to be developed in light of the NDAA’s provisions;
- Communications to employees will have to be revised to reflect the availability of the new FMLA leave provisions and requirements; and,
- Employers should review their state (and local) family and medical leave laws and regulations. Covered employers must comply with the federal or state laws or regulations that provide the greater benefit for their employees.

For additional information about the NDAA or the DOL’s proposed rules, please contact your Milliman consultant.