

## **THE FMLA HAS BEEN AMENDED TO PROVIDE LEAVE TO FAMILIES OF MEMBERS OF THE ARMED FORCES**

On January 28, 2008, President Bush signed legislation as part of the National Defense Authorization Act for Fiscal Year 2008 that amended the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* This legislation expands the FMLA in two significant ways. First, the FMLA will now permit a “spouse, son, daughter, parent or *next of kin*” to take up to **26 weeks** of leave during **a single 12-month period** to care for a “covered service member” who suffers from a “serious injury or illness” incurred on active duty (referred to below as “injured service member family leave”). Second, the FMLA will soon provide that an employee may take up to **12 weeks** of FMLA leave for a “*qualifying exigency*” that arises when a spouse, parent or child is on or has been called to active duty.

The amendments dealing with “injured service member family leave” take effect immediately. The amendments dealing with “active duty family leave” will not be effective until the Department of Labor (DOL) issues regulations addressing the amendments and defining what constitutes a “qualifying exigency” for such a leave. The DOL is encouraging employers, however, to voluntarily provide “active duty family leave” in the interim before new regulations are issued.

### **Injured Service Member Family Leave**

Effective immediately, employees are entitled to “injured service member family leave” to care for a member of the Armed Forces if they are a spouse, son, daughter, parent or next of kin of a “covered service member” who has a “serious injury or illness” incurred on active duty. Such leave is limited to a **single 12-month period** but can last as long as **26 weeks**. During the single 12-month period, an employee is limited to a combined total of 26 weeks of “injured service member family leave” and any other type of FMLA leave, including “active duty family leave.” It is not clear whether the same employee can take additional “injured service member family leaves” for other members of his/her family who suffer a serious injury or illness on active duty. The upcoming regulations will presumably address this issue.

- A **covered service member** 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**.
- A **serious injury or illness** is defined more broadly than a “serious health condition” under the FMLA. It means an injury or illness incurred by a service member in the line of duty on active duty “that **may** render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.” This vague definition is much broader in scope

than the definition of a “serious health condition” under the FMLA. It is not clear what conditions “may” render a person unfit for duty.

- Leave is available to a spouse, son, daughter, parent or *next of kin* of a covered service member. *Next of kin* is defined as the “nearest blood relative” of the service member. Thus, leave might be available to a brother or sister.
- **Outpatient Status** means the status of a covered service member assigned (1) to a military medical treatment facility as an outpatient, or (2) to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.
- If a husband and wife employed by the same employer both attempt to use an “injured service member family leave,” the aggregate number of weeks to that they can use is a combined total of 26 during a single 12-month period, including any time spent on other types of FMLA leave.

### **Active Duty Family Leave**

Once the DOL issues new FMLA regulations, employees will be entitled to “active duty family leave” because of “any qualifying exigency” arising out of the fact that a spouse, son, daughter or parent of the employee is on active duty or has been notified of an impending call or order to active duty. We suspect that when the DOL issues regulations, it will define “any qualifying exigency” to include taking over the service member’s responsibilities for newborn care, care for a seriously ill family member, or care of a newly placed adopted or foster care child. It is not clear what other “exigencies” might be included.

### **Other Important Provisions**

An employee can elect or the employer can require a substitution of accrued paid vacation, personal leave, family leave, or medical or sick leave for an injured service member family leave. There is no requirement that the employer provide any paid sick leave or paid medical leave in any situation in which the employer would not normally provide such paid leave. An employee can elect or the employer can require a substitution of accrued paid vacation, personal leave or family leave for an active duty family leave.

When an active duty family leave is foreseeable, the employee must provide such notice as is “*reasonable and practicable*.” There is no 30-day notice requirement for such foreseeable leaves, as there is for other types of FMLA leaves.

Employers may require that “active duty family leaves” be supported “by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.” An employer may also require a certification of a health care provider for “injured service member family leaves.”

## **Recommendations**

Since implementing regulations have not yet been issued by the DOL, there are still a number of open questions concerning the implementation of these amendments to the FMLA. Employers, however, should revise their FMLA policies to provide for “injured service member family leave.” When the DOL issues regulations regarding the amendments, it will presumably revise its prototype Employer Response (Form WH-381) and Medical Certification (Form WH-380) forms and its FMLA Posting. Until then, employers should revise their leave of absence request forms, Employer Response forms and Medical Certification forms to incorporate these new types of leave. Employers should also consider posting a short notice next to the existing FMLA Posting describing the two new types of FMLA leave but noting that “active duty family leave” will not be available until the DOL issues regulations governing such leave.