



CURRENT AND UPCOMING CHANGES TO THE FAMILY AND MEDICAL LEAVE ACT

Employers with 50 or more employees need to be aware of recent and upcoming changes to the Family and Medical Leave Act of 1993 (FMLA). This Thompson & Knight Client Alert outlines (1) the immediate and upcoming FMLA changes made by the National Defense Authorization Act and (2) upcoming changes to the FMLA regulations issued by the Department of Labor (DOL).

National Defense Authorization Act

President Bush has signed into law the National Defense Authorization Act for Fiscal Year 2008 (NDAA). Among other things, the NDAA amends the FMLA by providing two new types of leave to employees who are otherwise eligible to take FMLA leave:

Caregiver Leave for an Injured Servicemember

Effective immediately, an eligible employee who is the spouse, son, daughter, parent, or “next of kin” to a “covered servicemember” may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. For purposes of this type of leave, a “covered servicemember” is any 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.” The statute defines “serious injury or illness” as an injury or illness incurred by the servicemember in line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of the servicemember’s office, grade, rank, or rating.

Caregiver Leave is broader than other types of FMLA leave in at least three ways:

- **Length of Leave:** Eligible employees on Caregiver Leave may now take up to 26 workweeks of leave during a “single 12-month period.” It is unclear whether an employee who takes 26 workweeks of Caregiver Leave during one 12-month period may take 26 workweeks of Caregiver Leave in a subsequent 12-month period to care for a different servicemember. The DOL has acknowledged the statute’s ambiguity, and indicated that it will issue guidance in the near future.
- **Severity of Injury or Illness:** One of the requirements of Caregiver Leave is that the covered servicemember suffered a “serious injury or illness.” Unlike a serious health condition, a “serious injury or illness” need not necessitate inpatient care or continuing treatment by a health care provider.
- **Qualified Family Members:** An eligible employee may take Caregiver Leave to care for his or her spouse, son, daughter, parent, or “next of kin,” which is defined as the

employee's "the nearest blood relative." Prior to the enactment of the NDAA, FMLA leave did not extend to "next of kin."

Family Leave Due to a Call to Active Duty

The NDAA also provides that eligible employees may take up to 12 weeks of leave during a 12-month period to handle any "qualifying exigency" that arises out of 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. That provision does not become effective until the Secretary of Labor issues regulations defining "qualifying exigency." In the interim, however, the DOL has encouraged employers to provide this type of leave to eligible employees. We anticipate that the forthcoming definition of "qualifying exigency" may include some or all of the following, if necessitated by a call to active duty:

- Making arrangements for child care.
- Making financial and legal arrangements to address the servicemember's absence.
- Attending counseling related to the servicemember being on active duty.
- Attending official ceremonies or programs where the participation of the family member is requested by the military.
- Attending to farewell or arrival arrangements for a servicemember.
- Attending to affairs caused by the missing status or death of a servicemember.

Upcoming Regulation Changes

The DOL has proposed a number of changes to the FMLA's regulations. The most significant areas of potential change are:

- **Continuing Treatment Definition:** One way an employee currently can establish a serious health condition is by demonstrating a period of incapacity of three consecutive calendar days that also involves two visits to a health care provider. The proposed regulations specify that those two visits must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist.
- **Intermittent Leave:** Under current regulations, employees who take intermittent leave must "attempt" to schedule leave so as to not disrupt the employer's operations. The proposed regulations would require the employee's "reasonable effort."
- **Medical Certification Process:** The proposed regulations provide that once an employee gives notice of the need for FMLA leave, an employer will have five business days to notify the employee of his or her FMLA eligibility and to request medical certification. The proposed regulations also clarify the circumstances in which employers may deny leave to employees who fail to provide sufficient medical certification, and remove the requirement of employee consent when employers need to contact the employee's doctor to authenticate the medical certification.
- **Becoming Eligible While On Leave:** The proposed regulations allow employees to become eligible for FMLA protection while on non-FMLA leave. Thus, for example, an

employee who has worked 1,300 hours but has only been employed for 50 weeks may take non-FMLA leave and — after two weeks have passed — would be eligible for FMLA protection in the form of an additional 12 weeks of leave.

The proposed rule may be accessed at <http://www.dol.gov/esa/whd/FMLANPRM.htm> by clicking “Notice of Proposed Rulemaking (NPRM)” and will be open for public comment until April 11, 2008. Employers who wish to comment on the new rule may do so by visiting www.regulations.gov and entering “RIN 1215-AB35” in the “Comment or Suggestion” box. The DOL has said it expects the final regulations to be issued before the end of the Bush Administration. On a related point, members of Congress already have criticized the proposed changes as being too favorable to employers and indicated an intent to stop them from becoming effective.

WHAT SHOULD EMPLOYERS DO?

Employers should immediately allow employees to take caregiver leave, and should consider whether to allow employees to take leave for exigencies caused by a call to active duty. In addition, we recommend that employers review and revise their existing Family and Medical Leave policies to comply with the revised FMLA. Employers should also consider commenting on the DOL’s proposed rule. Thompson & Knight can assist in the preparation and submission of those comments.

If you have any questions or concerns about your company’s Family and Medical Leave policy (or if there is any other legal matter that you need assistance with) we have the experience and expertise to help you. Please contact the Thompson & Knight attorney with whom you regularly work or one of the following attorneys below.

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