



FMLA Extension to Military Families

Employment, Labor & Benefits Practice Group

Foster Swift Employment, Labor & Benefits Quarterly

April 2008

PRACTICE AREAS

Employee Benefits

Health Care

Earlier this year, President Bush signed into law the National Defense Authorization Act (the "Act"). This Act is the first expansion of the Family Medical Leave Act ("FMLA") in 15 years and includes two major amendments to the FMLA that assist military members and their families.

The FMLA originally required employee leave to be granted under certain circumstances for specified family-related needs, such as the birth of a child or a serious health condition. The new Act requires that covered employers also provide employees up to 12 weeks of unpaid leave in a 12-month period for a "qualifying exigency" relating to the immediate family member (spouse, child, or parent) of an employee who is on "active duty," or has been notified of an impending call to "active duty." While the terms have yet to be fully defined, it appears that leave for a "qualifying exigency" should be non-medical, because FMLA already grants a leave for medical reasons. Now covered employers must provide unpaid leave (called "caregiver leave") to an employee who cares for a "seriously wounded" or "ill" (as defined by the Act) spouse, child, parent, or "next of kin," (if the employee is the closest blood relative) of the injured or recovering service member.

A covered service member is a member of the Armed Forces who is:

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

A "caregiver" may take up to 26 weeks of FMLA during a single twelve-month period.

ADDITIONAL COMPLIANCE CONSIDERATIONS

The Act includes information regarding use of intermittent leave for "qualifying exigency" leave and "caregiver" leave. The Act also provides some guidance regarding how these new types of leave are affected by existing "notice of leave" and "certification" provisions. The Act answers



some questions, but other questions remain unanswered. These questions include: (1) whether caregiver leave will apply to service members whose injuries occurred in the line of duty, but do not manifest themselves until after military service ends; (2) the degree of nexus between the eligible employee's leave and a service member's active duty status; and (3) whether "qualifying exigencies" will be limited to non-medical emergencies.

EMPLOYER POLICIES

Employers covered by the Act should amend their FMLA policies promptly to reflect the expanded rights extended to military families. Employers should also update their posted FMLA notices. Because the Act requires clarification that will not be forthcoming until some time after April 2008, employers must proceed with caution when addressing an employee's request for military-related leave. The employment attorneys at FSC&S can assist employers in modifying their policies and provide needed guidance to respond to an employee's request for this new type of FMLA leave.

