

FMLA Expanded to Cover Relatives of Military Service Members

BY EVE I. KLEIN, ESQ. AND CHRISTOPHER D. DURHAM, ESQ.

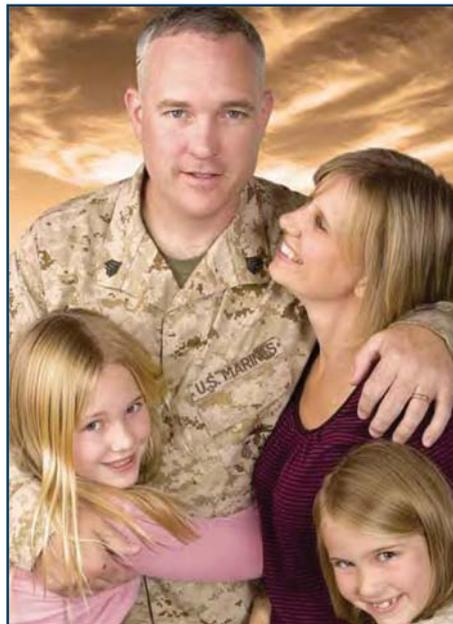
On January 28, 2008, President Bush signed the 2009 Defense Authorization Bill (Pub. L. 110-181) into law, which expands the Family and Medical Leave Act of 1993 (FMLA) to assist military members and their families. This expansion of the Act, the first in nearly 15 years, is likely to have a significant impact on covered employers as the military continues to deploy significant numbers of its men and women overseas, which in turn is placing stress on families of those service members at home.

The legislation amends the FMLA in two significant ways:

CAREGIVER LEAVE. Employees who provide care to a close relative who is a member of the Armed Forces undergoing outpatient treatment, recuperation or therapy for a serious injury or illness are entitled to *up to 26 weeks of unpaid leave*; and

ACTIVE DUTY LEAVE. Employees who have an immediate family member who is on active duty or is called to active duty to serve in a military operation, and who experience “any qualifying exigency,” are entitled to *up to 12 weeks of unpaid leave*.

Importantly, the Caregiver Leave provisions go into effect *immediately*. Accordingly, employers need to provide this leave to eligible employees at this time and should promptly modify their FMLA policies and procedures to conform to this new type (and length) of leave.



ACTIVE DUTY LEAVE

The Active Duty Leave provisions do not go into effect until the Department of Labor (DOL) issues final regulations defining the term “any qualifying exigency.” Nonetheless, employers are encouraged by the DOL to provide eligible employees with Active Duty Leave. At a minimum, this means that

employers should be aware of this type of leave and prepare modifications to their FMLA policies pending final DOL regulations.

It should also be noted that while the legislation expands the leave available under the FMLA, it applies only to employers covered under the FMLA and employees that otherwise meet the FMLA’s threshold criteria for eligibility.

CAREGIVER LEAVE

This amendment provides up to 26 weeks of unpaid leave during a single 12-month period for a “caregiver” - defined as a spouse, child, parent or “next of kin” of an injured service member - to care for that individual. A service member is covered under the FMLA if he or she is a member of the Armed Forces, including the National Guard or Reserves, and is undergoing outpatient medical treatment, recuperation or therapy for a serious injury or illness incurred in active military duty. Two aspects of this expansion of the FMLA are of particular note for employers grappling with the changes.

First, the entitlement to 26 weeks of unpaid leave more than doubles the 12 weeks of unpaid leave afforded to employees under the existing provisions of the FMLA. This leave may also be taken on an intermittent or reduced-schedule basis. Importantly, however, all 26 weeks of leave must be used during a single 12-month period.

NEXT OF KIN

Second, the inclusion of the “next of kin” of injured service members within the ambit of eligible employees expands the FMLA’s coverage as to Caregiver Leave for injured service members, and introduces some ambiguity into the eligibility determinations of employers seeking to comply with this new type of leave. The legislation defines “next of kin” as the “nearest blood relative” of the service member. Thus, it goes beyond the narrow scope of relatives covered under the FMLA’s existing caretaker provisions (which cover care for an employee’s children or parents). Employers should be aware of this coverage to ensure that they do not inadvertently deny leave to an employee who is a “distant” relative (e.g., cousin, uncle, etc.) of an injured service member, because that employee may be the service member’s “nearest blood relative” and thus entitled to Caregiver Leave.

AMENDMENT

The Active Duty Leave amendment entitles employees who experience “any qualifying exigency” related to an immediate family member’s (i.e., spouse, child or parent) being on active duty or being called to active duty in support of a “contin-

gency operation” to 12 weeks of unpaid leave during any 12-month period. The term “contingency operation” is defined as an “action or operation against an opposing military force,” excluding from the amendment’s coverage relatives of service members who are deployed on training or other missions not in support of combat operations. The leave may begin as soon as the service member receives notice that he or she is being called to active duty. If the leave is foreseeable, however, employees are directed to provide notice to the employer to the extent such notice is “reasonable and practicable.”

QUALIFYING EXIGENCY

At this time, it is unclear what “any qualifying exigency” means. Accordingly, until the DOL promulgates final regulations defining this term, employers are not required to provide Active Duty Leave to employees. However, some scenarios that seem likely to be covered when the DOL issues regulations include: leave to care for the child of a service member called to active duty; leave to care for an individual for whom the service member called to duty is currently a caretaker; leave to support a service member in his or her preparations for deployment; and leave to handle the household, finances or other matters of a service member that has been called to active duty.

CONCLUSION

These amendments to the FMLA, while an important step toward alleviating the burdens placed on military service members and their families, have the potential to complicate employer administration of the FMLA. It may be anticipated that these provisions will lead to increased litigation against employers who are not aware of or do not take the proper steps to comply with these expanded leave provisions.

Employers should keep an eye out for additional guidance from the Department of Labor, which has pledged to prepare and issue further guidance regarding compliance with the rights and responsibilities of employers and employees under these new provisions of the FMLA.

In the meantime, employers covered by the FMLA should take steps to: (1) immediately provide Caregiver Leave to all eligible employees; (2) revise their FMLA policies and procedures to ensure compliance with the new provisions regarding Caregiver Leave; (3) be prepared to implement revisions to these policies and procedures when the provisions regarding active duty leave become effective; and (4) contact counsel whenever questions regarding implementation of the new FMLA provisions arise.



Eve I. Klein is a partner in the New York office of Duane Morris where she practices in the area of employment law, labor relations and litigation. She has extensive experience advising clients about their rights and obligations regarding employment laws and regulations which affect the workplace. Ms. Klein is a 1985 graduate of Cornell Law School and a graduate, with distinction, of Cornell University School of Industrial and Labor Relations. She can be reached via e-mail at EKlein@duanemorris.com.



Christopher D. Durham is an Associate in the Philadelphia office of Duane Morris, where he practices in the area of labor and employment law. Mr. Durham is a 2005 graduate of the University of Pennsylvania Law School, where he was articles editor of the *Journal of Labor and Employment Law*, and a magna cum laude graduate of Miami University, where he was elected to Phi Beta Kappa. Chris can be contacted via e-mail at cddurham@duanemorris.com.