

## EXPANDING FMLA – THE NATIONAL DEFENSE AUTHORIZATION ACT FISCAL YEAR 2008

### OVERVIEW

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 (NDAA). Among other things, the NDAA expands FMLA to allow eligible employees to use leave under certain circumstances when a spouse, son, daughter or parent is called to active duty or injured in the course of their services.

### Service Member Family Leave (Section 102(a)(3))

The law provides that an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member<sup>1</sup> shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the service member 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<sup>2</sup>. This provision includes a new category of covered employee, “next of kin,” which is defined as the nearest blood relative to the service member.

### Entitlement to Leave – Armed Forces “Qualifying Exigency” (Section 102(a)(1)(E))

Additionally, the NDAA modifies FMLA to permit employees to take a total of 12 weeks of FMLA leave for any qualifying exigency (as the Secretary, shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter or parent of the employee is on active duty or has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operations. The term “any qualifying exigency” is not defined in the statute. The Department of Labor (DOL) has been authorized to define “any qualified exigency,” and will do so in subsequent regulations. In the interim, DOL encourages employers to provide this type of leave to qualifying employees.

### EFFECTIVE DATES & ACTION ITEMS

The 26-week service member family leave is effective as of January 28, 2008. The DOL is currently working to prepare more guidance on this requirement, including clarifying the rights and responsibilities of employees & employers. In the interim, employers are required to act in good faith compliance with the new legislation.

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<sup>1</sup> Sec 101(16) The term “covered servicemember” means a member of the Armed Forces, including a member of the National Guard or Reserves.

<sup>2</sup> Sec 101(19) Serious injury or illness is defined to mean: “in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”

As for the second provision, expanding the 12-week FMLA leave for “any qualifying exigency,” the DOL stated this provision will not be effective until regulations are issued.<sup>3</sup>

The NDAA amends the FMLA statute; therefore, all of the provisions and protections afforded under FMLA will apply in these two new categories. As the 26-week requirement is currently effective, employers will likely want to take steps to review and modify existing policies and handbook provisions. Employers will also want to make necessary communications of new FMLA eligibility rights to employees. At this time, the DOL has not provided revised Model Notices to incorporate the FMLA language. However, guidance is expected from the DOL in the near future.

#### **FOR MORE INFORMATION**

- The Family Medical Leave Act as Amended by Section 585 of the National Defense Authorization Act of FY 2008
  - <http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>
- Department of Labor Announcement of the Changes to FMLA (watch this link for updates as additional guidance is developed)
  - [http://www.dol.gov/esa/whd/fmla/NDAA\\_fmla.htm](http://www.dol.gov/esa/whd/fmla/NDAA_fmla.htm)

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<sup>3</sup> See *DOL Announcement of Changes to FMLA*.