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Family and Medical Leave Act Expanded

On January 28, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986) into law. The law includes provisions expanding the federal Family and Medical Leave Act to guarantee job-protected leave in certain circumstances for employees who are family members of active duty military personnel.

Background

Since taking effect in 1993, the federal Family and Medical Leave Act (FMLA) has required employers to grant eligible employees unpaid job-protected leave for the employee's own serious health condition, the birth or adoption of a child, the placement of a foster child with the employee, or the care of a seriously ill child, spouse or parent. To be eligible for FMLA leave, the employee must have been employed for at least 12 months prior to the beginning of the leave by the employer from whom the leave is sought and for at least 1,250 hours during that 12-month period. The employee must also work at a site where the employer has at least 50 employees, or the employer must employ at least 50 employees within a 75-mile radius of that site. To date, FMLA has limited each eligible employee's leave entitlement to 12 weeks in any 12-month period (e.g., calendar year, fiscal year, rolling 12-month period).

As part of a defense spending bill, Congress has now approved the first expansion of FMLA since its passage nearly 15 years ago. On January 28, 2008 President Bush signed H.R. 4986 into law. The new law amends FLMA to require job-protected leave for employees who are family members of military personnel on active duty.

Expansion of FMLA Entitlements

The new law provides an extended period of leave entitlement for FMLA-eligible employees to care for certain injured servicemembers to whom they are related. It also creates a new category of FMLA leave entitlement for family members of military personnel on, or called to, active duty. The DOL has posted the amended FMLA to its [website](#).

Servicemember Family Leave

Under the amended FMLA, employers must allow employees who are immediate family members (i.e., spouse, child or parent) of a servicemember who is seriously injured in the line of active duty to take up to 26 weeks of job-protected leave during a single 12-month period. Further, the new law extends this right to any "next of kin" (defined as the nearest blood relative) who serves as an injured servicemember's caregiver. Other FMLA leaves taken during the period will count towards the overall limit of 26 weeks. However, an employee's exhaustion of 26 weeks of FMLA leave during a 12-month period to care for the servicemember will not limit the availability of FMLA leave in subsequent periods.

This extended FMLA leave is available for the care of a member of the Armed Forces, National Guard or Reserves who is undergoing medical treatment, recuperation or therapy, or is in outpatient status at a military medical facility, or is otherwise on the temporary disability retirement list, for a serious injury or illness. For this purpose, only injuries or illnesses incurred in the line of duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating will qualify as serious. The leave may be taken intermittently or on a reduced leave schedule (i.e., reduced hours per workday).

Under current FMLA regulations, an employee may elect, or an employer can require the employee, to use accrued vacation time, personal time, or sick leave for any part of a FMLA leave, and the employer is not required to provide paid sick leave in any situation in which the employer would not normally provide paid leave. These same rules have been adopted in the context of the longer leave entitlement. Thus, the employer may still require the employee to substitute paid leave for any part of the 26-week period.

Leave Entitlement for "Qualifying Exigency"

The law provides a new entitlement category for the 12 weeks of job-protected leave granted under FMLA – i.e., an employer must provide leave for any "qualifying exigency" when an employee's immediate family member is on, or is called to, active duty in support of a "contingency operation." Contingency operations generally include military actions or operations in a combat zone or combat theater, as designated by the Secretary of Defense. This leave, which does not extend to "next of kin," may be taken intermittently or on a reduced leave schedule. As noted below, this new entitlement does not go into effect until DOL has issued guidance on what is a "qualifying exigency."

BUCK COMMENT. *A number of states (e.g., California) have enacted laws requiring employers to allow military family leave prior to or during deployment of spouses or other immediate family members to a designated combat theater or combat zone. (See our October 16, 2007 [For Your Information.](#)) Thus, employers must ensure compliance with both federal and applicable state laws.*

Notice Requirements

FMLA generally requires employees to provide at least 30 days' advance notice of foreseeable leaves to their employers (if not foreseeable, notice as soon as is reasonable and practicable). These standards apply to servicemember family leaves. If the leave is for a qualifying exigency, the new law requires that the notice be given as soon as is reasonable and practicable – the 30-day notice requirement does not apply.

Spouses Employed by the Same Employer

Where a FMLA-eligible husband and wife both work for the same employer, FMLA aggregates and limits their combined leave entitlement to 12 weeks during any 12-month period for the birth or adoption of a child or to care for a sick parent. For other qualifying events, the leave periods are not aggregated. Under the new law, the aggregate leave for a husband and wife to care for an injured servicemember may be limited to 26 weeks during the single 12-month period. If a combination of leave is taken by the couple to care for an injured servicemember and for the birth or adoption of a child or to care for a sick parent, the total leave is still limited to 26 weeks. In that case, however, no more than 12 weeks leave may be taken in the 12-month period for the birth or adoption or to care for the parent.

BUCK COMMENT. *The new law does not address spousal sharing of leave when the entitlement is due to a qualifying exigency.*

Certification Requirements

Consistent with current FMLA regulations, employers may require appropriate and timely certification to substantiate an employee's request for servicemember family leave or leave for a qualifying exigency. It is anticipated that both the time and manner of certification will be prescribed in regulations. Similarly, an employer may require an employee to substantiate an inability to return to work due to the continued care of the servicemember by providing a certification from the servicemember's health provider.

No Recovery of Health Benefits on Failure to Return from Leave

FMLA requires employers to continue health benefits during a FMLA leave, and to recover any premiums paid if the employee fails to return from the leave unless the failure is due to his or her own illness or the continued care of an ill spouse, child or parent. The law extends this exception to the recovery of premiums for employees on servicemember family leave who do not return due to the continued care of the injured servicemember.

Noncompliance

Under current regulations, an employer who interferes with the employee's exercise of FMLA rights or discriminates against any individual for exercising such rights must pay damages to the employee equal to lost wages, benefits, etc. For affected employees who suffer no actual loss of wages, salary, benefits or other compensation, the damages are actual monetary losses, capped at an amount equal to 12 weeks of salary or

wages. Under the new law, for servicemember care related cases, these damages are capped at an amount equal to 26 weeks of salary or wages.

Effective Date

The new servicemember family leave provisions allowing 26 weeks of leave to care for an injured servicemember are effective January 28, 2008. However, the provision permitting leave for “any qualifying exigency” arising out of the fact of, or call to, active duty of an immediate family member is not effective until the DOL issues final regulations defining that term.

While the DOL prepares guidance on these new FMLA rights and responsibilities, employers must act in good faith in providing leave. The DOL also encourages employers to provide leave for “any qualifying exigency” in the interim.

Conclusion

Employers must review their leave policies, practices and procedures to ensure compliance with the expanded FMLA entitlements. Communications and other plan documentation (e.g., SPDs) may need to be updated to describe the new entitlements. Buck’s consultants would be pleased to assist you in meeting these new federal requirements as well as those under state and local leave laws.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.