

Federal Legislative Brief

FMLA Benefit Expansion: Action Required— 2008-5



In December 2007, Congress passed and President Bush vetoed a defense authorization bill containing, among other things, an Amendment to the Family and Medical Leave Act (FMLA) to provide specific benefits to military families. Congress reworked the defense authorization bill and once again, attached the FMLA Amendment. President Bush signed this second bill (The National Defense Authorization Act) on January 28, 2008. Except as otherwise noted, the FMLA Amendment takes effect immediately.

In Brief

The FMLA Amendment (the Amendment) provides for two new leave entitlements:

- 1. Call to Active Duty; 12 Week Leave:** Available to an eligible employee who is the spouse, son, or daughter, parent, or next of kin of a Covered Service Member who is on active duty (or has been notified of an impending call to active duty) in support of a Contingency Operation as a result of a Qualifying Exigency (e.g. child care).
- 2. Caregiver Leave; 26 Week Leave:** Available to an eligible employee who is the spouse, son or daughter, parent, or next of kin of a Covered Service Member who is undergoing medical treatment, recuperation or therapy, are in an outpatient status, or on temporary disability due to an injury or illness incurred in the line of duty. This leave also may be taken on an intermittent basis or pursuant to a reduced leave schedule.

Background on FMLA and the California Family Rights Act

Here are the basic FMLA rules as originally enacted in 1993:

- 1. Covered Employer.** Employers who employ 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding year.
- 2. Eligible Employee.** An employee who has been employed by the employer for at least 12 months; has worked at least 1,250 hours during the 12 month period immediately preceding the start of the leave; and, works at a worksite where 50 or more employees are employed by the employer within a 75 mile radius.
- 3. Entitlement Prior to the Amendment.** Under the original FMLA law, an eligible employee is entitled to 12 weeks of unpaid leave for any of the following: (1) the employee's own serious health condition that makes the employee unable to perform the functions of the employee's position; (b) the birth of the employee's child, to care for the employee's own newborn child, or for placement of a child with the employee for foster care or adoption; or (c) to care for the employee's spouse, child, or parent with a serious health condition.

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4. **California Family Rights Act.** Current California law (CFRA) provides the identical benefits to employees who meet the FMLA eligibility requirements applicable to most employers not subject to FMLA. The CFRA applies to employers who do business in California with 50 or more employees (full time and part time) working anywhere within the United States or its possessions, including non-profit religious organizations. It also applies to the State of California and any of its political subdivisions, cities, and counties regardless of the number of employees. For details on the CFRA, please refer to <http://www.dfeh.ca.gov/about/cfraDescription.aspx>

At present, the California Legislature has taken no action to amend the CFRA to incorporate the federal Amendment. However, effective January 1, 2008, California now provides new military leave up to 10 days at the time an active duty member of the Armed Forces is on military leave ([AB 392](#)). This new California legislation applies to employers with 25 or more employees. For details of this legislation, please refer to our legislative update 2008-3, first published on January 27, 2008.

Details

For purposes of the Amendment, these terms are defined as follows:

1. **Covered Service Member.** A Covered Service Member means a member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is on the temporary disability retired list due to an injury or illness incurred in the line of duty.
2. **Contingency Operation.** The term “Contingency Operation” includes military actions as designated by the Secretary of Defense involving hostilities against an enemy of the United States or other calls to duty during times of war or national emergency.
3. **Qualifying Exigency.** The term “Qualifying Exigency” is not defined in the Amendment. The Department of Labor (DOL) has been directed to promulgate regulations defining what constitutes a “Qualifying Exigency,” and has said that “Qualifying Exigency” leave technically will not take effect until it has issued those regulations. However, the DOL has advised employers to make their own determinations in good faith until it publishes regulations.
4. **Next of Kin.** The Amendment defines “Next of Kin” as the nearest blood relative of the Covered Service Member.

Discussion

1. **All Other Provisions Remain Unchanged.** In other words, all existing provision of FMLA will apply to the two new entitlements. The leave notice provisions, substitution of paid leave, job guarantees and benefits protections remain in place for purposes of the new leave entitlements.
2. **Maximum Leave Period.** The taking of leave under the “Active Duty” provision will reduce the leave available for other types of leave during the same twelve month period. Similarly, it’s our view that leave taken under the Military Disability provision will be reduced by other leaves taken in the same twelve month period.
3. **The Uncertainties.**
 - a. As we stated above, the Amendment contains no clear definition of “exigencies.” We can only assume, for the time being, that exigencies means a temporary family related emergency exacerbated by the absence of the Covered Service Member. Employers will have difficulty evaluating the employee’s circumstances prior to the issuance of DOL guidance, and may need to revisit its decisions at the time the DOL publishes guidance.

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- b.** The Amendment defines a “service injury or illness” as one incurred in the line of duty which may render the member medically unfit to perform his/her duties based on the member’s office, grade, rank, or rating. The original statute contains a much tighter definition for “serious health condition.” For purposes of the Amendment, what degree of certification will an employer obtain from the military regarding the service member’s inability to perform his/her duties?
- c.** Finally, the Amendment appears to limit the Military Disability leave to no more than 26 weeks during a single twelve month period. Some practitioners argue that the 26 weeks is in addition to 12 weeks for other FMLA leave.

We expect the DOL regulations, when published, will remove these uncertainties.

Action Plan

Employers who are currently subject to the FMLA should take the following steps:

- 1.** Review all existing leave policies and procedures for compliance with the Amendment;
- 2.** Provide Notice to all employees regarding the availability of leave provided under the Amendment;
- 3.** Establish a policy and draft a written procedure for leave requests associated with a family member who has a qualifying injury or illness incurred in the line of duty;
- 4.** Establish a general policy and procedure for leave requests associated with a family member’s call to active duty. Note, although the DOL officially has deferred the effective date of this provision, it also has encouraged Covered Employers to provide this “Active Duty” leave to qualifying employees with family members who are called to active duty without specific guidance;
- 5.** Monitor all requests for leave granted or denied. Revisit these request, if necessary, at the time the DOL publishes regulations.

It is our understanding that the DOL has begun drafting regulations applicable to the Amendment. It also is in the final stages of preparing revised FMLA regulations intended to address open issues from the original regulations as published in 1994.

We will keep you informed of developments.

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