

## NEW FMLA AMENDMENTS PROVIDE FOR FAMILY MILITARY LEAVE

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**O**n January 28, President Bush signed into law important new amendments to the federal Family and Medical Leave Act ("FMLA"). These amendments relate to military families, creating two new circumstances in which employees with family members in the armed services may be entitled to FMLA leave. In certain limited situations, the amendments also raise the total amount of an employee's FMLA leave entitlement to 26 weeks in a single year.

The FMLA amendments add the following leave entitlements for eligible employees:

1. **On an annual basis:** Up to 12 weeks of leave for an "exigency" related to active duty service by the employee's immediate family member; and
2. **Once during an employee's employment:** Up to 26 weeks of leave to care for a spouse, son, daughter, parent, or next of kin who is a member of the armed forces and who is undergoing medical treatment or who is medically unfit to perform military duties due to an injury or illness incurred while on active duty.

Certain challenges may arise for employers in applying these amendments, especially in the near term. For example, because what constitutes a qualifying "exigency" entitling an employee to leave is not defined in the law, employers will have to do their best to reasonably interpret that term. Another issue relates to certification. While employers may require certification, employers' existing forms --- and those available from the U.S. Department of Labor ("DOL") --- do not address the circumstances and eligibility criteria relating to the new military leave entitlements. The DOL has not indicated when it will release a new certification form, regulations, or any other information related to compliance with the amendments.

Other provisions of the new FMLA amendments include:

- A requirement that an employee seeking a leave related to an "exigency" must provide as much notice to the employer as is "reasonable and practicable"; and

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- The addition of a “next of kin” category of employee eligible for leave, while the FMLA previously only required leave to care for “immediate family members”

It is also important to note that a service member’s lack of medical fitness for duty due to illness or injury is not the same as a “serious health condition” as that term applies elsewhere in the FMLA.

While these amendments create new leave entitlements, they do not change the basic provisions of the FMLA:

- Employers are subject to the FMLA if they employ at least 50 or more employees in 20 or more workweeks of the current or previous calendar year.
- Employees may use the various types of FMLA leave if they have 12 months of employment, 1,250 hours worked in the 12 months before the requested leave, and work at a site where at least 50 employees are employed within a 75-mile radius.
- Employees may substitute, and employers may require that employees substitute, any available paid leave for unpaid FMLA leave.
- Employers may require certification of an employee’s eligibility for leave.
- The FMLA does not require leave to be paid.

Employers should also keep in mind that employees who enlist or are called up for military service are already entitled to leave from their jobs and reinstatement under the federal Uniformed Services Employment and Reemployment Rights Act (“USERRA”). In addition, in 2007 Nebraska adopted the Nebraska Family Military Leave Act, which applies to employers with as few as 15 employees. Those Nebraska employers with more than 50 employees should follow the federal FMLA as amended as it provides greater benefits to employees.

The FMLA amendments became effective immediately when the President signed them into law. The Secretary of Labor will now begin work on regulations to implement the new provisions, but employers are required to comply with the law even before the regulations can be developed.

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