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PROBLEM PREVENTION BULLETIN ~ FEBRUARY 2008

FMLA Amended: Up to 6 Months Leave to Certain Employees with Family Members in the Military

The text of this article is available at the WAAG AND CO. website at www.WaagandCo.com (click on "News", then click on "Bulletins").

- Applies to:** Employers with 50 or more employees, as well as public agencies of any size.
- Effective:** January 28, 2008
- Synopsis:** On January 28, 2008, President Bush signed into law the "Support for Injured Servicemembers Act". The new law grants additional leave under the federal Family and Medical Leave Act of 1993 ("FMLA") to certain employees who have family members in the military. Because the FMLA amendment was included in a general military spending bill, the legislation became *effective immediately* when signed. As an amendment to the existing FMLA, the new law applies to employers with 50 or more employees, as well as public agencies of any size.
- New Categories:** The legislation creates two new categories of FMLA leave:

1. Active Duty Family Leave: Employees with a spouse, parent, or child who is on or has been called to active duty in the Armed Forces may take up to 12 weeks of FMLA leave when they experience a "qualifying exigency." Note that this term has not yet been defined by the U.S. Department of Labor.

2. Injured Servicemember Leave: Employees who are the spouse, parent, child, or "next of kin" (defined as the closest blood relative) of a servicemember who incurred a serious injury or illness on active duty in the Armed Forces may take up to 26 weeks of leave in a single 12-month period (including regular FMLA leave).

Active Duty Leave: The statute will provide up to 12 weeks of leave because of any "qualifying exigency" arising out of the fact that a covered employee's spouse, child or parent is on or has been called to active duty in the Armed Forces. Contingent upon the Department of Labor's definition of a "qualifying exigency," this provision provides 12 (twelve) weeks of leave to the immediate family of servicemembers called to active duty and would complement state family military leave laws that provide for shorter duration of leave or only cover spouses of servicemembers.

An employer may require that a request for such leave be supported by certification showing that the servicemember has been called to active duty. Because the Department of Labor ("DOL") still must define "qualifying exigency," the DOL has taken the position that it will *not* enforce this specific type of leave until it issues final regulations defining this term. Meanwhile, the DOL is officially "encouraging" employers to provide this type of leave in the interim.

Injured Servicemember Leave: The new FMLA law also provides leaves for employees to care for members of the Armed Forces, including the National Guard or Reserves, who have suffered a serious injury or illness in the line of duty while on active duty, that may render the members medically unfit to perform the duties of their office, grade, rank, or rating.

It applies broadly to servicemembers who are undergoing medical treatment, recuperation, or therapy, are in outpatient status, or otherwise are on the temporary disability retired list, for a serious injury or illness. For this type of leave, the statute expands the definition of covered employee to include the "next of kin," or nearest

Action Notes:

Route to:

HR Dept: _____

Accounting Dept: _____

Benefits Admin: _____

Managers: _____

This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of WAAG AND CO. Instead, please contact SUSAN S. WAAG, ESQ. for additional information.

blood relative, of a covered servicemember. While DOL regulations will be coming, this provision will be enforced immediately, with employers being held to a “good faith” standard until specific regulations are published.

An eligible employee may take up to six months of leave to care for an injured servicemember; however, this leave is available only in a single 12-month period. This leave may be taken intermittently, but the employee must use it up within 12 months. Note that there is no 12-month time limit on Active Duty family leave, which is more akin to traditional FMLA leave.

The new law specifically states that the injured servicemember leave “shall only be available during a single 12-month period,” and that “[d]uring the single 12-month period ... an eligible employee shall be entitled to a combined total of 26 workweeks of leave” for this type of leave and for any other FMLA leave. In other words, the employee would not have the 26 weeks for injured service member leave plus another 12 weeks for other FMLA in the same year.

The law further states that nothing about the injured servicemember leave “shall be construed to limit the availability” of other FMLA leave “during any other 12-month period.” While this preserves the employee’s right to take other FMLA leaves in future years, it strongly suggests that an employee may have only a single, life-time entitlement to servicemember leave. If true, an employee who has more than one family member in the service may be limited to caring for only one of them, if more than one were to be injured. This point is unclear; however, the DOL regulations are expected to address this issue.

Part of Existing FMLA: Because the new law amends the 1993 law, it is now merely another part of the FMLA. Therefore, other FMLA requirements, such as the requirement that returning employees be restored to the same position as when their leave commenced and the requirement to continue group health plan coverage during the leave, will apply to the newly granted types of leave. Application of paid time off to such leaves would also be the same as available for ordinary FMLA leave.

Related California Laws: This new federal bill is not the end of the story regarding support for the families of military servicemembers. As reported in the December 2007 edition of *The Strategic EMPLOYER* (page 2, “Recently Signed State Legislation; Leaves of Absence; AB 392”), California has a new law, effective as of October 9, 2007, that requires California employers with 25 or more employees to permit up to 10 (ten) days of leave to an eligible employee whose spouse is home on leave from military deployment.

Additionally, California employers who are subject to the federal FMLA will likely be covered by California’s Family Rights Act, which provides an eligible employee with time off to care for an ill parent, child, spouse or domestic partner; to bond with a new child; or to care for him / herself when the employee is unable to work due to his / her own illness.

Recommendations: Covered employers should amend their FMLA policies to provide employees with notice of these new leave entitlements. The updated policy should also be posted on company bulletin boards—at least until new federal posters are available. Employers should also do their best

to provide the new types of leave while the regulations are pending.

Conclusion: As for all leaves of absence, careful management and documentation of the time off is essential. Since there are so many time off entitlements, and since these can be very complex, professional guidance when handling leave requests is recommended.

Monitoring Will Continue: WAAG AND CO. will provide updates to the requirements of this new leave entitlement as additional guidance is developed and published by the DOL and any other relevant sources.



QUOTES

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