

## **Families of Military Service Members Receive Expanded FMLA Rights Under the National Defense Authorization Act**

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### **Breaking Developments In Labor and Employment Law 01/31/08**

On January 28, 2008, President Bush signed into law the first expansion of the Family Medical Leave Act (“FMLA”), which modifies FMLA leave available to families of military service members. Section 585 of the National Defense Authorization Act (“NDAA”), H.R. 4985, amends the FMLA by adding two qualifying events for families of military service members. The first of the major changes described below is effective immediately; the second major change will not be effective until the Department of Labor adopts interpretive regulations.

First, the NDAA provides a significant expansion of the amount of leave provided to family members caring for an injured military service member, more than doubling the amount of leave typically available under the FMLA. Under the Act, a “spouse, son, daughter, parent or next of kin” may take up to 26 weeks of leave, rather than the standard 12 weeks of FMLA leave, during any 12-month period to care for a member of any branch of the Armed Forces who, due to serious injury or illness, is:

- undergoing medical treatment, recuperation or therapy;
- otherwise in outpatient status; or
- otherwise on the temporary disability retired list.

Members of the Armed Forces include members of the National Guard and the military reserves.

Second, the Act provides for family leave during a call to active duty. The NDAA provides an eligible employee with up to 12 weeks of FMLA leave for any “qualifying exigency” arising from a spouse, son, daughter or parent who is either on active duty in the Armed Forces, or who has been notified of an impending call or order to active duty in the Armed Forces. This provision will not become effective, however, until the Secretary of Labor issues final regulations defining the term “any qualifying exigency.” FMLA leave for a “qualifying exigency” is not in addition to the standard FMLA 12-week entitlement; rather, it constitutes an additional qualifying basis for seeking FMLA leave.

Most of the FMLA’s provisions remain unchanged and will apply to requests for leave under the NDAA. These provisions include: employer coverage, employee eligibility requirements, health insurance continuation, and reinstatement of employee rights upon return from leave. Employees

requesting leave under the NDAA can use the leave on an incremental basis, in the smallest increment that the employer's payroll system tracks. The amount of leave available under the FMLA for "traditional" reasons remains limited to 12 weeks, and, even when added to FMLA leave based on the newly authorized reasons available to family members of individuals in the Armed Forces, total FMLA leave for any employee cannot exceed 26 weeks in any 12-month period.

### **What this Means for Employers**

At the outset, employers with 50 or more employees who are subject to the FMLA should immediately revise their existing FMLA policies and procedures to address the new NDAA amendments to the statute.

In addition, because this new law is likely to have a significant impact on employers in the Northwest, where the population of military families is relatively high, employers should take steps to ensure that qualified employees requesting leave under the NDAA are aware of their rights and receive the benefits to which they are entitled. Until employers have experience working with this new law, employers are advised to contact counsel in order to ensure compliance with the new provisions should an employee request FMLA leave attributable to the military service of his or her own family members.

For more information, please contact the Labor and Employment Law Practice Group at Lane Powell:

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