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Labor and Employment Update: FMLA Amended Service Leave

By Ronald J. Stolkin

On January 28, 2008, President Bush signed into law the 2008 National Defense Authorization Act (NDAA), which expanded the Family and Medical Leave Act. President Bush had pocket-vetoed an earlier version of the bill for reasons unrelated to the FMLA Amendments.

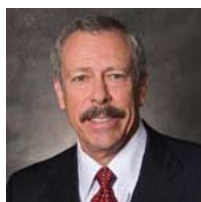
The new law creates two new forms of FMLA leave. First, an eligible employee may take up to 12 weeks of FMLA leave because of a “qualifying exigency” arising out of the fact that the spouse, son, daughter, or parent of the employee is on or has been called to active duty in the Armed Forces in support of a “contingency operation.” The Secretary of Labor must determine what constitutes a “qualifying exigency.”

Second, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a “serious injury or illness” may take up to 26 weeks of FMLA leave (more than double the current limit) in a single 12-month leave year to care for the injured servicemember. The restriction to a single leave year appears to limit this type of leave to a one-time use. The new law defines a “serious illness or injury” as an injury or illness incurred in the line of duty while on active duty that may render the member medically unfit to perform his or her military duties. This definition is broader than the meaning of a “serious health condition” otherwise used in the FMLA.

Notably, the legislation creates a new category of eligible employee entitled to FMLA leave to care for an injured servicemember – the servicemember’s “next of kin,” defined as the nearest blood relative to the service member.

The legislation caps FMLA leave in any one year to a total of 26 weeks. Employers are permitted to require certification to verify the call to active duty and/or the need for FMLA leave due to care for an injured servicemember. The Department of Labor (DOL) has explained that, although the NDAA is effective as of the date the President signed it, the provision requiring employers to grant leave because of a “qualifying exigency” does not become effective until the Secretary of Labor issues regulations defining the meaning of “qualifying exigency.” The DOL, however, encourages employers to comply with this provision in the interim.

Ronald J. Stolkin focuses his practice in labor and employment, education law and complex commercial litigation. Mr. Stolkin counsels management on personnel practices, employee discipline and labor relations. He defends employers in litigation alleging employment discrimination, breach of contract, wrongful discharge and other employment related torts and has counseled clients on a wide range of employment issues including employment handbooks and personnel policies, employment-at-will issues, wage/hour issues, drug and alcohol policies, sexual issues, employee disability issues, and leave of absence issues. He earned his B.A. (1967) and his J.D. (1970) from The University of Arizona.



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