



# SPECIAL Alert

## In This Issue

*In this first Special Alert for 2008, we will overview the recent expansion to the Family Medical Leave Act (FMLA). The recently passed National Defense Authorization Act included expanded FMLA rights for service members.*

*Organizations will need to amend their FMLA policies and procedures to account for these expanded rights. However, the details are slightly vague and it will be a challenge to administer these expanded rights. Hopefully, the Department of Labor (DOL) will issue some clarifying details in the near future.*

*We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGrawWentworth web site at [www.mcgrawwentworth.com](http://www.mcgrawwentworth.com).*

## “FMLA Expansion”

On January 28, 2008, President Bush signed into law the National Defense Authorization Act, which includes an expansion of the Family and Medical Leave Act (FMLA) that impacts service members and their families. This is the first major expansion of the FMLA since it was passed in 1993. In addition, the Department of Labor (DOL) recently drafted revisions to the FMLA that are currently in the review process. These revisions will likely be published within the next six months.



### Active Duty As A Qualifying Reason

The Act allows an eligible employee (as determined by the current FMLA regulations) to

parameters are not particularly clear, which will introduce more challenges to the proper administration of the FMLA.

This Special Alert summarizes these three key changes to the FMLA.

The provisions of the FMLA are modified by the Act in three key ways:

- Leave is allowed for immediate family members when a service member is called to duty.
- Extended leave is available to care for a service member with a serious illness or injury.
- The category of employees eligible to care for an injured service member has been expanded.

The new Act expands the rights of service members and military families as they struggle to cope with both extended calls to active duty and significant war-related injuries. Certainly the intent is a good one and follows trends at the state level to extend protection for military families. However, the new

take up to 12 weeks of FMLA leave for any “qualifying exigency” arising out of the fact a 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.” A contingency operation is believed to be a war or similar combat operation. It is meant for unexpected calls to active duty, not for routine National Guard duty and training operations. The Act fails to clearly define “qualifying exigency.” It seems to suggest the employee is entitled to time off to cope with a call to active duty.

The FMLA leave under this circumstance may be used on an intermittent basis if it is needed by the employee.

## Extended Leave for An Injured Service Member

The timeframe for an FMLA leave is extended to 26 weeks, during a 12-month period (the employer's leave year), for an employee who is the primary care giver of a service member with a "serious illness or injury." A serious illness or injury is defined as "an illness or injury incurred in the line of duty that may render the service member medically unfit to perform his or her military duties."

The extension will be welcome for any military family facing the challenge of helping a service member recover from a serious illness or injury sustained while in service to our country. It introduces a new definition to incorporate into FMLA policies and procedures. A serious illness or injury as it pertains to a service member is different from a "serious health condition," which is the typical qualification for an FMLA leave. Employers are entitled to request proof of the service member's serious illness or injury before granting 26 weeks of leave. The Serious Health Condition Certification Form provided by the DOL does not currently address



these new parameters that apply to service members. The DOL will likely release updated forms to assist employers with these new requirements.

The new regulations also state that the leave needed to help rehabilitate an injured service member may be used intermittently if circumstances dictate.

## More Employees Eligible for FMLA Protection

The new regulations introduce a new category of relatives which broadens the FMLA protection. In addition to immediate family members, these new requirements for service members also apply to "next of kin." Next of kin is defined as the nearest blood relative to the service member.

The new definition broadens the type of employee that may qualify to help an injured or ill service member. It may include cousins, aunts, uncles and even grandparents if they are considered the nearest blood relative. Employers are allowed to verify the relationship with the service member when the leave is initially requested. However, it will be a challenge for an employer to determine

if the employee is actually the nearest blood relative in determining if an FMLA leave should be approved.

## Concluding Thoughts

The new expansion of the FMLA is effective as of January 28, 2008. This means employers need to dust off their FMLA policies and procedures and incorporate these provisions.

The intent of these new FMLA provisions is certainly good and will provide much needed protection for employees that have struggled with obligations when a service member is called to active duty. If a service member becomes seriously injured, these expanded regulations provide extended protection so a family member can assist in the service member's recovery.

Unfortunately, the new provisions are sufficiently vague and employers will again struggle to properly manage them. Hopefully, the newly proposed regulations that are in the review process will clarify these provisions.

If you have any questions regarding this Special Alert, please contact your McGraw Wentworth Account Manager. **MW**

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