

New law expands Family and Medical Leave Act

On January 28, 2008, President Bush signed the National Defense Authorization Act (NDAA), now Public Law 110-181. The new law includes two significant changes to the Family and Medical Leave Act of 1993 (FMLA) that provide additional leave opportunities to FMLA-eligible employees with a family member serving in the Armed Forces.

Servicemember Family Leave

The NDAA creates a new category of FMLA leave called “Servicemember Family Leave,” to allow employees to care for a family member who has been injured in the line of duty as a member of the Armed Forces. Qualifying employees are given up to *26 weeks of unpaid FMLA leave*—more than twice the usual amount of time available to employees under FMLA—over a *single* 12-month period.

Which employees can take Servicemember Family Leave?

- The FMLA, as amended, allows an employee who is the “spouse, son, daughter, parent, or next of kin” of a “covered servicemember” to take up to 26 work weeks of FMLA leave during a single 12-month period to care for the injured servicemember.
- An employee who requests this new category of FMLA leave still must meet the existing requirements for FMLA eligibility, including length of service.
- Unlike other types of FMLA leave, this leave is available to “next of kin,” meaning the nearest blood relative of a servicemember, even if he or she is not a spouse, child, or parent of the servicemember.

Who is a “covered servicemember?”

A “covered servicemember” is a member of the Armed Forces, including the National Guard and Reserves, “who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for... an injury or illness incurred by the member in line of duty on active duty... that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”

What conditions apply to the 26 weeks of Servicemember Family Leave?

Most conditions that apply to other types of FMLA leave also apply to Servicemember Family Leave. Specific conditions include:

- As with other types of FMLA leaves that are necessitated by a serious health condition, the 26 weeks of Servicemember Family Leave may be taken intermittently or on a reduced leave schedule.
- The leave is unpaid. However, an eligible employee may choose to—or the employer may require the employee to—substitute any accrued paid vacation, personal, family, medical or sick leave for any part of the 26 weeks

(although an employer need not provide paid sick leave or paid medical leave in any situation where the employer's policy wouldn't normally allow for paid leave).

- The new provision entitles an employee to a *combined* total of 26 weeks of FMLA leave during a *single* 12-month period. This means that if an employee also has some *other* FMLA-qualifying event in that 12-month period (for example, the birth of a child, or the employee's own serious health condition), his or her total amount of FMLA leave during that 12-month period is still limited to 26 weeks. This also means that even if the servicemember's recovery lasts longer than the initial 12 months, the 26 weeks of Servicemember Family Leave cannot be "renewed," and the employee would not be eligible for an additional 26 weeks of Servicemember Family Leave in the following 12 month period.
- The employer may require a certification by the servicemember's health care provider.

When do the provisions regarding Servicemember Family Leave become effective?

The statutory language regarding Servicemember Family Leave became effective immediately when the NDAA was signed, and employers must act in good faith in providing Servicemember Family Leave under the new legislation.

FMLA Leave to Address "Qualifying Exigencies" Arising Out of a Family Member's Active Duty in The Armed Forces

The NDAA's second major change to the FMLA is the addition of a new event that will entitle an eligible employee to the usual 12 weeks of unpaid FMLA leave. This new provision will allow family members time to deal with "any qualifying exigency... arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty)" in support of certain types of military operations.

Which employees can take FMLA leave to address "qualifying exigencies" related to their family member's military duties?

- This leave is only available to spouses, children or parents of active-duty servicemembers (unlike the Servicemember Family Leave, which is also available to a servicemember's "next of kin").
- As with Servicemember Family Leave, an employee who requests FMLA leave to address a qualifying exigency still must meet the existing requirements for FMLA eligibility, including length of service.

What is a "qualifying exigency?"

This key term is not defined in the amended statute. Congress has instructed the Secretary of Labor to issue regulations to explain what constitutes a "qualifying exigency" that triggers entitlement to FMLA leave.

When do the provisions regarding "qualifying exigencies" become effective?

This new "qualifying exigency" provision will not be binding on employers until the Secretary of Labor issues final regulations to explain what will constitute a "qualifying exigency." The Department of Labor has stated that it is "expeditiously preparing" the regulations; in the meantime, the Department simply "encourages" employers to give this type of leave when appropriate.



What Else Do I Need to Know about The New Amendments to The FMLA, And What Should I Do Now?

Employers should be aware that the Department of Labor is in the process of drafting guidance and regulations regarding these new provisions to further clarify and elaborate on the terms of the new law. Once the guidance and regulations are made available, employers will need to update their FMLA policies accordingly.

It is also likely that the Department will update its mandatory postings at some point, to reflect the new provisions. Employers will need to display updated postings as they become available.

Contact Information

If you have any questions concerning these or other labor and employment matters, please contact any member of the Ropes & Gray Labor and Employment Department.

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