



# New Law Expands Family and Medical Leave Act

ENHANCED LEAVE RIGHTS EXTENDED TO CLOSE RELATIVES OF SERVICE MEMBERS

## Insights

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This past week, the House of Representatives passed a revised version of the National Defense Authorization Act, which was primarily intended to address concerns over litigation surrounding the Gulf War. But one section of that bill included provisions extending FMLA protection to close family relatives of uniformed service members. The Senate subsequently passed the same bill by a resounding vote of 91 to 3. On January 28, 2008, President Bush signed the bill into law, and some of its provisions are already in effect.

The new law amends FMLA in many respects. Most importantly, it creates new entitlements in the form of both "caregiver" and "active duty" leave. Each of these provisions are available to close family members (such as a spouse, son, daughter or parent) as follows.

### New Leave Provisions

Effective immediately, *up to 26 weeks of caregiver leave* are available during any 12-month period to employees caring for a recovering service member who sustains an injury or illness while on active duty that may render that person unable to perform the functions of the member's office, grade, rank, or rating. Although the Labor Department is currently preparing comprehensive guidance regarding employer rights and responsibilities in this area, the law requires employers to act "in good faith" to provide required leave in the interim.

The new law also adds active duty leave to the list of reasons qualifying for FMLA leave. The active duty leave provisions grant *up to 12 weeks of FMLA-qualifying leave* in the event that a close family member is notified of an impending call to active duty or has, in fact, been activated for such duty. This leave may be taken for any "qualifying exigency" arising out of the family member's active duty commitment, and leave may commence as soon as he or she is notified of an impending call or order.

Unlike the caregiver leave provisions, which took place immediately, active duty leave is not slated to take effect until issuance of final regulations defining the scope of the term, "qualifying exigency." These regulations will likely be issued in the coming weeks. In the meantime, DOL is encouraging all employers to extend this leave voluntarily to qualifying employees, pending finalization of the regulations.

## **Regulatory Requirements**

Keep in mind that while these amendments leave existing FMLA provisions intact, they expressly incorporate the new provisions into FMLA's existing statutory framework. That means that employers will be expected to apply existing recordkeeping and designation procedures to the new forms of leave and, where appropriate, utilize certification forms and related paperwork.

Clarifying regulations regarding these provisions are imminent. In the meantime, any leave request associated with the close relative of a uniformed service member should be given proper consideration. You should be sure that your company coordinates these new forms of leave with other types of FMLA leave already available to eligible employees, and ensure that front-line supervisors avoid rejecting such requests without thinking them through.

## **New Corrective Regulatory FMLA Measures Also on the Horizon**

This has been a busy week for FMLA. On January 24, the DOL sent its long-awaited proposal for revised FMLA regulations to the Office of Management and Budget. OMB's review process could take several months. Upon completion, the proposed regulations will be printed in the Federal Register for public comment.

There is a lot of speculation about the substance of regulatory revisions that may be included within this package. Until they are published in the Federal Register however, the full content of the proposed changes will remain unknown.

The proposed regulatory changes gained substantial momentum back in December 2006, when the DOL first issued its "request for information" on the FMLA. At that time, Fisher Phillips was among a large number of parties calling for a practical overhaul of the regulations. The DOL issued an extensive report six months later, detailing over 15,000 comments. The most substantial areas of concern revolved around unscheduled intermittent leave, employee notice, medical certification, the interaction between FMLA and the ADA, and the definition for a serious health condition. But the report stopped short of offering any specific proposals for regulatory change.

Among other things, the new regulations are expected to respond to various provisions that have either been invalidated or challenged in the courts, including sections dealing with joint employment, prospective waiver of FMLA rights, and better coordination between dates of leave approval and commencement. Although declining to outline details of the proposed changes, a spokesperson for the administration recently expressed her desire to finalize and implement them by the end of the current term.

But the story won't end there. Democrats in Congress have already proposed other statutory amendments to FMLA, including a provision that would provide a limited period of paid leave for various qualifying reasons. This is expected to be a hot political issue over the next few months, as we approach the 15th anniversary of FMLA's passage. Other legislative proposals on the horizon may include extension of FMLA coverage to smaller employers, and the establishment of mandatory paid sick leave.

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### **More To Come**

This is obviously a dynamic area that remains in flux. We will continue to update our clients as the situation progresses. In the meantime, we encourage you to consult with your Fisher Phillips attorney, should you have any questions concerning these most recent statutory amendments, and what they could portend for the future.

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*This Legal Alert is intended to provide an overview of an important new law. It is not intended to be, nor should it be construed as, legal advice for any particular fact situation.*