

## **COMPLIANCE WITH THE 2008 AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993**

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On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, (“NDAA”) Pub. L. 110-181. As part of the NDAA, the Family and Medical Leave Act (“FMLA”) of 1993 was amended to expand its protections to cover eligible employees whose family members are serving in the United States military. The recent amendments to the FMLA went into effect the date that they were signed by the President; therefore it is important for employers subject to the FMLA<sup>1</sup> to quickly take steps to ensure that they are acting in compliance with these new provisions.

The 2008 amendments to the FMLA expand coverage in two major areas. First, under amended Section 102(a)(1)(E) of the amended Act, employees are now entitled to a total of 12 weeks of unpaid leave during a 12 month period “[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) 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 the Armed Forces in support of a contingency operation.” According to the Department of Labor’s website, “[b]y its express terms, this provision [Section 102(a)(1)(E)] of the NDAA is not effective until the Secretary of Labor issues final regulations defining ‘any qualifying exigency.’ DOL is expeditiously preparing such regulations. In the interim, DOL encourages employers to provide this type of leave to qualifying employees.” See Department of Labor website, at [http://www.dol.gov/esa/minwage/printpage.asp?REF=/esa/whd/fmla/NDAA\\_fmla.htm](http://www.dol.gov/esa/minwage/printpage.asp?REF=/esa/whd/fmla/NDAA_fmla.htm)

The second major change under the recent amendments to the FMLA is Section 102(a)(3), which provides that “an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 work weeks of leave during a 12-month period to care for the service member.” The term “covered service member” is separately defined in Section 101(16) of the amended FMLA as “a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”

According to the above-cited U.S. Department of Labor website, “[t]he Department of Labor is working quickly to prepare more comprehensive guidance regarding rights and responsibilities under this new legislation. In the interim [the Wage and Hour Division] will require employers to act in good faith in providing leave under the new legislation.” On February 11, 2008, the Department of Labor published a Notice of Proposed Rulemaking stating its intent to revise the regulations relating to the FMLA as a result of the recent amendments. The Department of Labor is currently in the process of receiving public comments responsive to its Notice of Proposed Rulemaking. It is unclear when these final regulations dealing with the amendments to the FMLA will be released by the Department of Labor.

Without clear guidance from the Department of Labor as to their present obligations under the amended FMLA, it is important for employers to take a cautious

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<sup>1</sup> Pursuant to 29 CFR 825.104(a) “an employer covered by the FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”

approach to ensure that they are acting in compliance of these new provisions. First, it is clear under amended Section 102(a)(1)(E) of the Act that as of January 28, 2008, all employers subject to the FMLA must provide eligible employees with up to 26 weeks of leave to care for spouses, children, parents, or next of kin who are members of the armed services being treated for injury or illness. "Next of Kin" is defined in amended section 101(18) of the Act as "used with respect to an individual, means the nearest blood relative of that individual."

As was stated above, amended Section 102(a)(1)(E) of the Act is not effective until the Secretary of Labor issues regulations defining "qualifying exigency". Despite this, the Department of Labor is encouraging covered employers to provide leave to eligible employees subject to this provision, and the Department of Labor is also requiring employers to act in good faith in providing employees with leave under the amendments to the FMLA. Thus although employers may not yet be specifically bound by the provisions of amended Section 102(a)(1)(E), it would be prudent for employers to immediately provide up to 12 weeks of leave to employees who are forced to undertake family obligations, such as child care, as a result of the deployment to active duty of a spouse, child, or parent of that employee.

Finally, employers covered by the FMLA should make sure that they are still in compliance with the posting requirements set forth under the Department of Labor's regulations. Specifically, 29 CFR 825.300(a), provides that "every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any 'eligible' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints for violations of the Act with the Wage and Hour Division." Thus, to fully protect themselves, employers subject to the FMLA should post notices which explain that pursuant to the recent amendments of the Act, employees who are family members of soldiers in active service in the military, and employees who are family members of soldiers who are receiving treatment for injuries or illness, are now entitled to leave pursuant to the amended Act. An example of a notice incorporating the recent amendments to the FMLA can be found on the Department of Labor's website.