

## New Family and Medical Leave Act Rights

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As of January 28, 2008, the Family and Medical Leave Act (FMLA) provides leave rights to family members of persons serving in the Armed Forces, including the National Guard and Reserves. FMLA policies and practices should be updated immediately to include these new provisions.

Employers with fifty or more employees within a 75-mile radius must provide eligible employees with up to twelve weeks of job-protected, unpaid FMLA leave under enumerated circumstances related to the birth and care of a newborn, the employee's own serious health condition, or the care of an employee's immediate family member suffering a serious health condition. The recent amendments to the FMLA add two new qualifying events that will entitle eligible employees to FMLA leave: (1) leave to care for a seriously injured service member and (2) leave due to an "exigency" arising out of active duty of an immediate family member.

### **Leave to Care For Injured Service Member**

The FMLA now provides job-protected, unpaid leave of up to twenty-six weeks to eligible employees to care for a seriously injured service member. The recent FMLA amendment provides a "spouse, son, daughter, parent, or next of kin" with up to 26 work-weeks of leave to care for 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." This change is significant for several reasons: it expands the maximum leave period associated with this circumstance to 26 weeks (other FMLA leave periods are for a maximum of 12 weeks); and it expands the group of family members entitled to this kind of leave to include "next of kin." "Next of kin" has been defined as the nearest blood relative. Spouses employed by the same employer who wish to take leave to care for the service member will be able to take an aggregate of 26 weeks during the 12-month period.

### **Leave Due to "Exigency" Related To Active Duty**

Eligible employees will now also be entitled to take up to 12 weeks of FMLA leave for "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 the Armed Forces in support of a contingency operation. This amendment to the FMLA is technically not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." In the interim, however, the U.S. DOL has encouraged employers to grant leave on this basis to qualifying employees at this time.

The U.S. DOL is developing further guidance regarding these changes to the FMLA. It has stated that pending the release of additional compliance guidance and/or rules, employers are required to act in good faith in providing leave under the amendments.

The [U.S. DOL website](#) contains a brief summary of the changes and links to other useful compliance assistance and information to employers on this issue, the DOL web page will be updated as new information becomes available.

In light of these changes, employers should promptly update Family and Medical Leave policies and leave request forms. Managers and supervisors should be alerted to these changes to avoid unwitting violations of the FMLA. Watch for additional guidance from the U.S. DOL and future Bernstein Shur client alerts on this important compliance issue.

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