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# **RECENT DEVELOPMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT**

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**By**

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## **I. INTRODUCTION**

- A. The Family Medical Leave Act (FMLA) is 15 years old. As predicted upon enactment, the FMLA has helped many American workers ... and hassled many human resource professionals.
- B. Just as many human resource professionals were becoming somewhat comfortable with the FMLA, the rules are changing.
- C. Two recent developments, the passage of the National Defense Authorization Act of 2008 and the publication of new proposed FMLA regulations by the Department of Labor, have worked a sea of change in benefit management.

## **II. MILITARY SERVICE LEAVE RIGHTS**

- A. General Overview
  - 1. On January 28, 2008, H.R. 4986 was signed into law. Section 585(a) of the National Defense Authorization Act for FY 2008 (NDAA) amended the FMLA.
  - 2. A fifth category was added to the existing FMLA leave provisions contained in Section 102(a) of the FMLA. Eligible employees will be able to take up to 12 weeks of unpaid leave for "qualifying exigencies" arising out of a covered family member's active military duty in support of a "contingency" operation. 29 U.S.C. § 2612(a)(1)(E) (FMLA § 102(a)(1)(E)).
  - 3. A new leave category was created. An eligible employee may take up to 26 weeks of protected leave to care for a spouse, son, daughter, parent or covered family member recovering from a serious illness or injury incurred

in the line of duty during active service. See 29 U.S.C. § 2612(a)(3); FMLA § 102(a)(3).

4. These new provisions are radically different from the current FMLA. The Department of Labor (DOL) must issue regulations to flesh out the new provisions. In the meantime, the 26-week injury leave is already effective.

## B. Definitions

1. Qualifying Exigency. Websters – “requiring immediate action.” The DOL is asking for input. The DOL has asked for comments on what should constitute a qualifying exigency for purposes of the family military leave provision. Although the DOL has opined that not every exigency will entail but rather will entitle a family member to leave, it appears that a very broad definition will be adopted. Employers should presume that time spent caring for children of a son, daughter, parent or other next of kin who has been called to active duty will constitute a qualifying exigency. It remains to be seen whether the DOL would include time off to sell a house, relocate or making arrangements for child care, attending ceremonies or obtaining financial counseling.
2. Next of Kin. The NDEA defines “next of kin” as “the nearest blood relative of that individual.” The DOL is asking for input on this definition. The DOL might define next of kin based upon existing Department of Defense interpretations. In the alternative, the DOL may adopt a broader definition defining next of kin as “any blood relative.”
3. Son or Daughter. The DOL has asked whether the definition of “son or daughter” needs to be changed for purposes of family military leave. One must be 17 years old to serve in the military. The current definition defines “son or daughter” as someone under the age of 18 or older than 18 but incapable of self-care because of a mental or physical disability. Thus, it would appear that most parents would not qualify for FMLA protected leave.
4. Contingency Operation. A contingency operation is defined as a military operation that is (1) designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or (2) recognized by law as existing if the military operation results in the (1) call up to (or retention on) active duty of members of the uniformed services under certain enumerated statutes. See 10 U.S.C. § 101.

C. Questions and Concerns

1. The definition of service members covered under the new FMLA leave provision is different, and somewhat narrower, than the definition used under the Uniformed Services Employment and Reemployment Rights Act.
2. The NDAA does not alter the current FMLA definition of “son or daughter.”
3. The 26-week military care leave entitlement has a potential significant broad reach.

III. New FMLA Regulations

- A. The DOL issued proposed regulations under the FMLA that make a number of technical changes to existing regulations.
- B. Definition of Serious Health Condition
  1. The DOL has attempted to clarify just exactly what constitutes a “serious health condition.”
- C. Substitution of Paid Leave
- D. Consecutive Employment
- E. Worksite Definition
- F. Coverage to Care for a Family
- G. Retroactive Designation
- H. The Treatment of Holidays
- I. Light Duty
- J. Penalties
- K. Perfect Attendance Awards
- L. Medical Certification Process
- M. Fitness for Duty Exams
- N. Releases

IV. Conclusion