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Labor Law Release

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Expansion of FMLA for Military Families

On January 28, 2008, President Bush signed the National Defense Authorization Act (NDAA) into law. The law provides eligible employees with two additional grounds for taking a leave under the Family and Medical Leave Act (FMLA).

Leave to Care for Injured/Ill Soldier. The NDAA permits a spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of unpaid leave to care for a member of the Armed Forces, 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 sustained in the line of duty on active duty.

The provisions pertaining to this leave are effective immediately.

Leave for an Exigency. The NDAA also permits an employee to take a 12-week leave under the FMLA 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 provision of the law is not effective until the DOL issues final regulations defining “any qualifying exigency.”

The DOL states it is in the process of drafting the regulations. However, we do not anticipate they will be finalized until the fall of 2008 at the earliest. Either leave may be taken intermittently. Moreover, the employer can still seek certification for a leave. Certification may be given by a health care provider of the eligible employee, or the next of kin, in case of leave due to an exigency.

If the need for a leave due to an exigency is foreseeable due to an impending call or order to active duty, the worker must notify the employer as soon as reasonable and practicable. Depending on the DOL regulations yet to be drafted, an employer may require certification be supported by proof of the call to duty.

These changes and others, to the FMLA require employers to immediately modify their FMLA policies, notices and certifications. We recommend this be done by addendum to a handbook since once the DOL regulations are final, further changes may be necessary.

The obligations arising from these amendments to the FMLA are separate and distinct from a California employer’s obligation to provide leave to a spouse when a soldier-spouse is on leave from deployment.

Contact us for assistance you may need to implement these laws in your workplace, including the drafting of necessary policy changes.

This is not intended as a complete analysis of the subject matter, or legal advice on any specific matter. Contact us if you have specific questions or need further assistance.