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LABOR & EMPLOYMENT DEPARTMENT

# ALERT

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## FMLA EXPANDED TO PROVIDE LEAVE TO THE FAMILIES OF U.S. MILITARY SERVICE PERSONNEL

By Catherine T. Barbieri

In January, President Bush signed legislation that expands the leave available to family members of United States military service personnel under the federal Family and Medical Leave Act (FMLA). The amendments, which went into effect on Monday, January 28, 2008, are the first amendments to the FMLA since its enactment in 1993. The amendments make several significant changes to the FMLA, which provides qualifying employees with up to 12 weeks of unpaid leave per year to care for their own or a family member's serious medical condition, or to care for a newborn or adopted child.

Under the amendments, covered employers (i.e. those with 50 or more employees) are required to provide up to 26 weeks of unpaid leave during a 12-month period to eligible employees who are caring for a "covered servicemember" who is injured in the line of duty. A "covered servicemember" is defined in the statute 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 in outpatient status; or is on the temporary disability retired list for a serious injury or illness. To be eligible for expanded leave, the injury must have occurred in the line of duty while the servicemember was on active duty in the Armed Forces, and must have caused the servicemember to be "medically unfit to perform the duties of the member's office, grade, rank, or rating." The servicemember's spouse, son, daughter, parent, and next of kin (i.e. nearest blood relative) are eligible for the expanded leave.

In addition, the amendments require covered employers to provide up to 12 weeks of FMLA leave to the immediate family members (spouses, children, or parents) of military personnel or reservists who have "any qualifying exigency" arising out of the servicemember's active duty or call to active duty in support of a contingency operation. The term "any qualifying exigency" is not defined in the amendments. The Department of Labor (DOL) has stated on its website that this specific provision is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." In the interim, the DOL encourages employers to provide "this type of leave" to qualifying employees.

Other FMLA protections that apply to non-military related FMLA leave, such as job restoration and continuation of health care benefits, apply to employees taking leave to care for military personnel. Intermittent and reduced schedule leave are available to employees who take leave under the amendments.

An employer may require that a request for leave be accompanied by certification that the servicemember has been called to active duty, though the amendments provide that the DOL shall define by regulation the time and manner in which the certification will be provided. In the case of foreseeable leave, the employee must provide such notice of the need for leave as is reasonable and practicable.

The DOL is committed to issuing new regulations construing the amendments as soon as possible. Until

those regulations are issued, employers will be required to comply without guidance from the DOL. In addition, employers need to update their FMLA policies to notify their employees of the amendments.

The amendments make compliance with the FMLA challenging, particularly in the absence of any DOL

regulations. Please contact the author at 215.299.2839 or [cbarbieri@foxrothschild.com](mailto:cbarbieri@foxrothschild.com) or any member of Fox Rothschild LLP's Labor & Employment Department for assistance with a request for leave under the amendments, or revising your FMLA policy.

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