

NEW LEAVE BENEFITS FOR MILITARY FAMILIES
UNDER THE FEDERAL FAMILY MEDICAL LEAVE ACT (FMLA)

Lizbeth V. West, Esq.
Weintraub Genshlea Chediak

Employers have been watching and waiting to see if the proposed amendments to the FMLA would become law and if so, what it would mean for the workplace. On January 28, 2008, President Bush signed into law the expansive amendments to the FMLA which provide greater benefits to employees who have family members in the armed services. The new law becomes effective immediately.

The FMLA amendments are now codified as Section 585 of Division A, Title V, Subtitle H of the National Defense Authorization Act and, in summary, provide for the following:

1. "Exigency" Leave. The new law provides for an additional basis for an employee to take FMLA leave if there is a "qualifying exigency" that arises from the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty. Congress has directed the Secretary of Labor to issue regulations to determine what constitutes such an "exigency".

An employee seeking a leave related to an "exigency" must provide as much notice to the employer as is reasonable and practicable and, just like in the case of other qualifying reasons for FMLA leave, employees qualifying for "exigency" leave are entitled to 12 weeks in a 12 month period.

2. "Caregiver" Leave. The other new FMLA leave entitlement provides that an eligible employee may take up to 26 weeks of FMLA leave in a single 12-month period to care for a spouse, son, daughter, parent, or next of kin ("nearest blood relative") who is a covered servicemember. A "covered servicemember" is one who is in the Armed Forces, including members of the National Guard or Reserves, who has a "serious illness or injury" incurred while on active duty that may render the servicemember unable to perform the duties of his or her office, grade, rank or rating and for which the servicemember is: a) undergoing medical treatment, recuperation, or therapy; b) an outpatient; or c) on a temporary disability retired list. This leave entitlement is available during a single 12-month period.

The law provides that if an employee is eligible under the "caregiver" basis for leave and another basis for FMLA leave (e.g. "exigency" or one of the other reasons already listed under the FMLA), he/she shall be entitled for a combined total of 26 weeks during the 12 month period. Also, in cases where both spouses work for the same employer, the

aggregate total of leave for caregiver leave is 26 weeks. Just like with other FMLA leave entitlements, “exigency” leave and “caregiver” leave may be taken on an intermittent or reduced schedule basis. The law also authorizes an employee to elect or an employer to require, that the employee substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave for these FMLA qualifying leaves of absence. Finally, the law provides that an employer may require a medical certification for caregiver leave and authorizes the Secretary of Labor to define this process through its regulations. We will update you as the Secretary of Labor issues its regulations on these two new FMLA leave entitlements.

On a related note: California employers should keep in mind that there is also a newly enacted state Military Family Leave law that entitles certain qualified employees unpaid leave to be with their family members who are on leave from the military service.