



Another Hazard for Employers: Amendments to the Family and Medical Leave Act Increase Employee Leave Entitlements

In January 2008, President Bush signed into law amendments to the National Defense Authorization Act that amend the Family and Medical Leave Act ("FMLA") and create new entitlements to FMLA leave for members of the armed services and employees who need to take care of injured servicemembers. Employers who employ 50 or more employees within a 75 mile radius for at least 20 weeks out of any given year are subject to the FMLA and must take immediate action to comply with the new law.

What are the new leave entitlements?

The FMLA amendments effectively create two (2) new types of leave:

1. Emergency leave due to family member's call to active duty.

Eligible employees may take up to twelve (12) weeks of leave because of an emergency created by the fact that a spouse, son, daughter, or parent of the employee is either on active military duty or has been notified of an impending call to active duty status in support of a contingency operation (i.e. a military operation requiring short notice to a servicemember of the need to report to active duty); and

2. Leave to care for an injured service member.

Eligible employees who are a spouse, son, daughter, parent or next of kin of an injured servicemember who is recovering from a serious illness or injury sustained in the line of duty and while on active duty is entitled to up to twenty-six (26) weeks of leave in a twelve (12) month period to care for that injured servicemember. Under this new leave entitlement, an eligible employee is entitled to a combined total of twenty-six (26) weeks of all types of FMLA leave in a twelve (12) month period.

What does an employer do now?

The Department of Labor has yet to issue regulations that will complete the implementation of the above amendments.

However, the Department of Labor has stated that it expects employers to do two things immediately while employers await the issuance of the new regulations:

(1) notify their employees about the new leave entitlements by updating a handbook, etc., and
(2) begin to offer immediately the injured servicemember leave described in paragraph 2 at left.

The Department of Labor is not requiring employers

to comply with the emergency leave described in paragraph 1 at left because the Department has to establish standards for the type of military operation that will qualify for the leave entitlement.

It will not be easy for employers to determine whether an employee is entitled to leave to care for an injured servicemember. The employee requesting leave must be an "eligible employee" (i.e. employed with the employer for one year and worked 1,250 hours in that year). The employer also will need to obtain information about the servicemember's illness or injury that requires care and whether that illness or

injury occurred in the line of duty and while the servicemember was on duty. Unlike other forms of FMLA leave, the Department of Labor has not issued any forms that an employer can request the employee to fill out in order to determine leave eligibility. Employers face a new challenge in FMLA compliance with few guidelines and significant liability resulting from any missteps. Each request for leave requires an independent, detailed factual analysis to minimize that liability.



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Kimberly L. Russell is a principal and member of the Business & Commercial Litigation, Employment Law for Employers and Real Estate & Title Litigation groups. She devotes a significant part of her practice to defending employers in all types of employment litigation including sex, age, race and disability discrimination claims, wrongful discharge, Family and Medical Leave and wage claims, as well as counseling employers on issues related to the daily operations of a business. If you have any questions or want to discuss any issues surrounding FMLA or other employment issues, you can reach Ms. Russell at 610.941.2541 or by email to krussell@kaplaw.com.