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A Client Alert from Paul Hastings

New Leave Law Protects Family Members of Soldiers and Sailors

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On January 28, 2008, President Bush signed Public Law 110-181, which for the first time since the enactment of the Family Medical Leave Act ("FMLA") expands the FMLA to provide two new forms of leave to employees with family members serving in the military. To assist employers in navigating their way through the new law, we summarize the sections of the FMLA that are affected and provide general advice and practical pointers below.

What are the new leave entitlements?

The new law creates two new forms of FMLA leave. First, an eligible employee may take up to 12 weeks of FMLA leave in a 12-month period because of a "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." The Secretary of Labor must issue regulations defining the meaning of "qualifying exigency" before this type of FMLA leave becomes effective. The U.S. Department of Labor encourages employers to provide this type of leave to qualifying employees – to the extent it is understood – in the meantime.

Second, an eligible employee who is a spouse, son, daughter, parent or next of kin of a servicemember with a "serious injury or illness" may take up to 26 weeks of FMLA leave during a 12-month period to care for that servicemember. Leave under this provision is available only during a single 12-month period and is combined with all other FMLA leaves in that period.

Who is an eligible employee?

Under the expanded law, a "next of kin" employee also is entitled to take FMLA leave to care for an injured

servicemember. "Next of kin" means "the nearest blood relative of that [injured servicemember]."

How can leave under the new qualifying events be taken?

Leave under both new qualifying events can be taken in blocks, intermittently, or on a reduced work schedule. As before, the FMLA allows employees to take leave in the shortest increments tracked by the employer's payroll systems. The rules governing the employer's right to require that an employee on intermittent leave or reduced work schedule transfer to an alternative position have not changed.

What are the notice requirements for the new leave events?

For the two new qualifying leave events, the employee is expected to provide notice as soon as reasonable and practicable, except where the leave involves a planned medical treatment for the injured servicemember, in which case the employee is expected to provide 30-day's notice if possible.

May an employee elect, or may an employer require, substitution of paid leave for the new leave?

Yes. The rules regarding substitution of paid leave have not changed. Where the employee takes leave for a qualifying exigency arising out of the active duty of a spouse, son, or daughter, the employee may elect, or the employer may require, that the employee substitute accrued paid vacation leave, personal leave, or family leave for any part of the leave. Where the employee takes leave to care for an injured servicemember, the employee also may elect, or the employer also may

require, that the employee substitute accrued paid medical or sick leave.

What medical certification is required for the new types of leave?

For leave in connection with a qualifying exigency related to active duty, the employer may require that the employee provide certification issued in accordance with the time and manner regulations promulgated by the DOL, to the extent the DOL issues such regulations. For leave taken for the purpose of caring for an injured servicemember, the employer may require that the employee provide certification issued by the injured servicemember's health care provider.

Practical Pointers

Employers must act quickly to comply with the new military family leave law. To avoid the risk of non-compliance, we recommend employers:

1. **Review and revise** FMLA policies and administrative practices in order to comply with the new law.
2. **Notify** employees about the new leave options.
3. **Review and revise** employee handbooks in order to effectively communicate the new

FMLA qualifying events and rules to employees.

4. **Stand by** for the DOL to issue regulations defining "qualifying exigency" in connection with the "active duty" qualifying event. In the meantime, **use your best judgment and interpret the term broadly**, with the intent to carry out the spirit of the law regarding the grant of leave under such circumstances. Until the applicable regulations are promulgated, employers may want to consult with employment counsel regarding qualifying events under this prong of the new law.
5. **Train** supervisors and managers charged with making decisions and/or communicating information regarding the FMLA to employees about the importance of understanding and complying with the company's FMLA policies.
6. **Monitor** FMLA compliance by supervisors and managers.
7. **Investigate** any complaints about non-compliance with the FMLA thoroughly.
8. **Protect** against retaliation for an employee's attempt to exercise his or her FMLA rights under the new law.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings lawyers:

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