

The U.S. Department of Labor Issues Final Rule Amending the FMLA Regulations *By Richard B. Galtman*

As we reported last year, on January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 (NDAA) which amended the Family Medical leave Act of 1993 (FMLA) to address the needs of employees with family members serving in the U.S. Armed Forces.

First, the NDAA amended the FMLA to permit a “spouse, son, daughter, parent, or next of kin” to take up to 26 workweeks of leave to care for 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 otherwise on the temporary disability retired list for a serious injury or illness. This has come to be referred to as the “Military Caregiver Leave.” This leave became effective as of the date of the President’s signing of the law. (January 28, 2008).

The NDAA also amended the FMLA to permit an employee to take 12 weeks of FMLA leave for “any qualifying exigency” arising out of the fact that a spouse, 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.” Appropriately, this leave has been referred to as “Qualifying Exigency Leave.” By its express terms, this leave did not become effective until the Secretary of Labor issued the final regulations defining “any qualifying exigency.”

The U.S. Department of Labor (DOL) indicated that it would be preparing guidelines regarding the applicable rights and responsibilities under the new legislation before the end of 2008. On November 17, 2008, the DOL issued its long-awaited extensive amendments to the current FMLA regulations which included the promised provisions applicable to the two new military family leave entitlements enacted by the NDAA.

In particular, Section 825.127 of the new regulations added the “Military Caregiver Leave” into the existing regulations, and added provisions to define such terms as “serious injury or illness,” and “outpatient status” in relation to those servicemembers covered under the Act. Section 825.127 also added new definitions of “son or daughter,” “parent,” and “next of kin” in relation to those servicemembers to address the fact that the “Military Caregiver Leave” extends to family members beyond those covered under the existing regulations related to other qualifying FMLA leave.

Section 825.127 also addressed the fact that the “Military Caregiver Leave” extends beyond the normal 12 weeks of FMLA leave to provide a total of 26 workweeks during a single 12 month period. Section 825.127 makes clear however, that unlike the other FMLA qualifying leaves, the “single 12-month period” applicable to the 26 weeks of “Military Caregiver Leave” begins on the first day the employee takes leave to care for a covered servicemember and ends 12 months after that date regardless of how the employer determines the 12 month period of entitlement for the other qualifying FMLA leaves. In addition, Section 825.127 sets forth that an eligible employee can utilize a

combined total of 26 workweeks of “Military Caregiver Leave” and any other FMLA qualifying reason (limited to a maximum of 12 weeks) during that “single 12-month period.”

Section 825.126 of the regulations addresses the “Qualifying Exigency Leave” provisions of the NDAA. As expressed by the Secretary of Labor’s commentary and in the regulations themselves, the “Qualifying Exigency Leave” was intended to provide 12 weeks of job protected FMLA leave to allow the families of members of the Armed Forces, National Guard and Reserves to manage their affairs (a “qualifying exigency”) while the servicemember is on active duty serving in support of a “contingency operation.”

Section 825.126 broadly defines “qualifying exigency” by referring to a number of categories of circumstances for which employees can use FMLA leave: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities arising from or necessitated by a covered military member’s active duty or call to active duty status;(4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities agreed to by the employer and employee. Similar to Section 825.127, Section 825.126 also defines such terms as “covered military member,” “son or daughter,” and “active duty or call to active duty status.” In addition, Section 825.126 defines when a military operation is a “contingency operation” for such leave purposes.

While addressing the parameters of two new military related FMLA leaves, the regulations make clear that the “Military Caregiver Leave” and the “Qualifying Exigency Leave” are still subject to the same general eligibility, employer and employee notification and certification requirements applicable to all FMLA leaves. However, the regulations do include two new certification forms that may be used by employees and employers for such leaves.

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