



Steven Gutierrez

Partner
303.295.8531
Denver
sgutierrez@hollandhart.com

Employers beware - the National Defense Authorization Act of 2008 amends the FMLA

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Insight — 2/6/2008

President Bush signed the 2008 National Defense Authorization Act ("NDAA") on January 28, 2008. Though the NDAA's primary importance is to authorize funding for the defense of the United States and its interests abroad, the NDAA, effective immediately, amends the Family and Medical Leave Act of 1993 (FMLA) to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 work weeks 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 otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

The Department of Labor has announced that it will work quickly to prepare comprehensive guidance that will define both employee rights and employer responsibilities under this new legislation. In the meantime, the Department of Labor has emphasized that employers should act in good faith while administering leave under the FMLA when the care of a member of the Armed Forces is at issue. Furthermore, the Department of Labor urges employers to use FMLA-type procedures as appropriate, citing, as an example, procedures regarding substitution of paid leave and notice.

In addition to the foregoing, the NDAA will permit employees to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) 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." This portion of the NDAA is not effective (by its express language) until the Secretary of Labor is able to issue final regulations defining "any qualifying exigency." Again, the Department of Labor has indicated that it will move quickly and expeditiously to prepare and issue regulations related to the NDAA amendment. Employers are encouraged to provide leave for "any qualifying exigency" in the interim.

Until the Department of Labor issues final regulations, the impact of the NDAA's amendments to the FMLA remain uncertain. Employers should be careful to review existing obligations under the FMLA and process claims for leave related to the care of a member of the Armed Forces very carefully. In so doing, employers should be mindful that the public purpose of the FMLA and the NDAA amendments are to balance the demands of the workplace with the needs of families, promote the stability and

economic security of families, and to promote national interests in preserving family integrity. Leave under the FMLA is intended to accommodate an employee's need for reasonable leave and the employer's legitimate business interests, while it promotes the goal of equal employment opportunity for women and men who may need reasonable leave.

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