

FMLA AMENDED TO PROVIDE LEAVE TO MILITARY FAMILIES

The Family and Medical Leave Act (FMLA) now grants FMLA leave rights in two additional circumstances that address the needs of military families. First, employers must provide caregiver leave of up to 26 weeks for an employee who is needed to care for a family member who was injured or became ill while on active military duty. Second, after the government issues implementing regulations, employers must grant active duty leave of up to 12 weeks to employees who have a family member called up to or engaged in active military duty.

President Bush signed these new FMLA provisions into law on January 28, 2008 as part of the National Defense Authorization Act for Fiscal Year 2008 (NDAA). The caregiver leave provisions became effective immediately on signing. Employers, therefore, need to understand the new provisions and modify their policies, procedures and FMLA practices accordingly.

The FMLA's applicability is unchanged. The law continues to apply to employers who employ 50 or more employees within a 75-mile radius during 20 or more workweeks in the current or previous calendar year. The FMLA expansion also does not alter the FMLA's employee eligibility requirements. In order to be eligible for FMLA leave – including caregiver leave and active duty leave – an employee must meet three conditions:

- Work for a covered employer
- Have worked at least 12 months (need not be a continuous period) for the employer
- Have worked at least 1,250 hours in the year immediately preceding the start of the leave



CAREGIVER LEAVE

The NDAA amends the FMLA to provide up to 26 weeks of unpaid leave to a qualified employee to care for a family member who is an Armed Forces servicemember recovering from a serious illness or injury (defined as a condition incurred while on active duty that may render the servicemember medically unfit to perform the duties of his office, grade, rank or rating). To qualify for caregiver leave, the serious illness or injury must be such that the servicemember is undergoing medical treatment, recuperation or therapy, is otherwise in an outpatient status, or is on the temporary disability retired list.

An employee may take caregiver leave only to care for a servicemember who is the employee's spouse, son, daughter, parent or next of kin (defined as the employee's nearest blood relative). For other FMLA qualifying events, a family member is defined as the spouse, son, daughter or parent of the

employee. The NDAA extends the FMLA's definition of family member to include the next of kin solely for purposes of caregiver leave.

The 26-week caregiver leave is not added to FMLA leave taken for other reasons. For example, if an employee has a serious health condition, uses 12 weeks of FMLA leave as a result, and then later in the same 12 month-period requests FMLA caregiver leave, the employee would be entitled to no more than 14 weeks of caregiver leave. Additionally, the 26-week leave entitlement may only be taken in a single 12-month period.

ACTIVE DUTY LEAVE

The FMLA's active duty leave provisions provide up to 12 weeks of unpaid FMLA leave to qualified employees. The leave is available for any "qualifying exigency" arising out of the employee's spouse, son, daughter, or parent being on or called to active duty (or being notified of an impending call or order to active duty) in support of an action or operation against an opposing military force. The NDAA did not define the term "qualifying exigency," but rather directed the Secretary of Labor to issue regulations defining it. The Department of Labor (DOL) is writing regulations that will define this term. The active duty leave provisions will become effective when those final regulations are issued.

Employees requesting active duty leave must provide notice to their employers as soon as is "reasonable and practicable" when the need for leave is foreseeable. The NDAA did not define reasonable and practicable. It is likely, however, that the DOL will issue guidance on the notice requirement.

An employer may require that a request for active duty leave be supported by certification that the servicemember has been called to active duty. The NDAA authorizes the Secretary of Labor to issue regulations defining the certification process.

OTHER FMLA PROVISIONS APPLY

The new law does not replace or repeal existing FMLA regulations. FMLA rights, such as job restoration and continuation of health insurance benefits, apply to employees taking FMLA leave under the new provisions. Similarly, an employee may elect or an employer may require an employee to substitute accrued paid leave during unpaid caregiver or active duty leave. In addition, both active duty leave and caregiver leave may be taken on an intermittent or reduced schedule basis in the same manner that intermittent or reduced schedule leave may be taken for serious health conditions.



EFFECTIVE DATE

The provisions enacting caregiver leave became effective on January 28, 2008, the date the president signed the legislation into law. Until the DOL issues regulations that explain how to provide caregiver leave, employers are required to act in good faith to provide leave under the new law.

Because the active duty leave provisions are dependent on the DOL's definition of a "qualifying exigency," those provisions are not effective until final regulations are issued. In the meantime, the DOL is encouraging employers to provide active duty leave.

The DOL has created a page on its website devoted to the FMLA amendments and has committed to updating it as additional guidance is developed and published. This website also contains the FMLA statute, as amended by the NDAA.

ACTION PLAN FOR EMPLOYERS

Even before the new DOL regulations are issued, employers should update their FMLA policies to include caregiver leave and active duty leave. A sample FMLA policy with the new provisions appears below.

Employers will also need to update their FMLA workplace postings. The DOL provides a **downloadable Notice of Family Military Leave** on its website that employers can use to supplement their existing FMLA poster.

Finally, employers should provide training to HR staff, supervisors and managers who are involved in FMLA administration on the additional rights now provided under the FMLA.

Willis' Legal and Research Group and HR Partner can provide assistance with FMLA compliance and administration. For information on how Willis can help, please contact your local Willis representative.

SAMPLE FAMILY AND MEDICAL LEAVE POLICY

The following pages contain a sample policy that is provided only to serve as a starting point for compliance with some new federal Family and Medical Leave Act (FMLA) provisions. There are several areas where more than one compliance option is available, and an employer using this sample will need to make its own choices among those options. This sample policy generally takes the approach most favorable to the employer when options are available.



The policy adopted to comply with the FMLA, and the corresponding disclosures to employees, should be coordinated with state and local laws and an employer's existing policies on leaves of absence, paid days off, and returns to work. In addition, an employer will need to reevaluate policies on employee benefits and consider how to handle the premium payment and benefit restoration issues that arise under the FMLA. In addition, an employer should consider preparing job descriptions for use by physicians and practitioners who will be certifying whether an individual's health condition is such that FMLA leave would apply.

Reasons for FMLA: Employees who have worked for the Company for at least 12 months and at least 1,250 hours during the prior 12 months may take unpaid leave for the following reasons:

1. Birth and/or care of a child of the employee;
2. Placement of a child into the employee's family by adoption or by a foster care arrangement;
3. Care of the employee's spouse, child or parent who has a serious health condition;
4. Inability of the employee to perform the functions of the employee's position due to a serious health condition;
5. A qualifying exigency arising out of the spouse, child or parent of the employee's active duty or call to active duty in the Armed Forces in support of a contingency operation (a contingency operation is an action or operation against an opposing military force) ; or
6. Care of the employee's spouse, child, parent, or next of kin (nearest blood relative) who has incurred an injury or illness in the line of duty while on active duty in the Armed Forces, provided that such injury or illness may render the spouse, child, parent, or next of kin medically unfit to perform duties of his/her office, grade, rank or rating.

An eligible employee is entitled to up to 12 weeks of unpaid FMLA leave in a 12 month period for reasons 1-5 above. An eligible employee may take up to 26 weeks of unpaid FMLA leave during a single 12 month period to care for an injured or ill servicemember. Leave to care for an injured or ill servicemember, when combined with other FMLA qualifying leave, may not exceed 26 weeks in a single 12 month period.

Calculation of Amount of FMLA Leave: Any FMLA leave taken by an employee during the preceding 12 month period will be used to determine the amount of available leave pursuant to the Family and Medical Leave Act.

Birth, Care or Placement of Child: The right to FMLA leave for the birth, care and/or placement of a child into an employee's family may only be taken within the 12 months after the date of the birth or placement of the child. In the case of unpaid leave for the birth, care or placement of a child, intermittent leave or working a reduced number of hours is not permitted, unless both the employee and the Company agree.

Spouses Working for the Company: If both spouses are employed by the Company, the combined leave for either birth, care and/or placement of a child, or to care for the employee's parent with a serious health condition shall not exceed 12 weeks. The combined leave for spouses working for the Company is limited to 26 weeks when leave is to care for an injured or ill servicemember, or such leave is taken in combination with leave for either birth, care and/or placement of a child, or to care for the employee's parent.

Intermittent Leave: In the case of unpaid leave for serious health conditions, the leave may be taken intermittently or on a reduced hours basis only if such leave is medically necessary. FMLA leave may also be taken intermittently or on a reduced hours basis for reasons relating to a family member's Armed Forces active duty or when an employee needs to care for a family member who has incurred an injury or illness while on active duty. Where an employee requests intermittent leave or leave on a reduced hours, the Company has the option, in its sole discretion, to require the employee to transfer to a temporary alternative job for which the employee is qualified and which better accommodates the intermittent leave or reduced hours leave than the employee's regular job. The temporary position will have equivalent pay and benefits as the employee's regular job.

Paid Leave and FMLA Leave: Employees are required to use their available sick and vacation time during the unpaid FMLA leave period. NOTE: That portion of the FMLA leave of absence which is vacation time and/or sick days will be with pay according to the Company's policies regarding vacation time and sick days. The employee will be notified orally, within two business days from the date the Company learns that the leave is for FMLA reasons, that the vacation time and sick days will be counted towards the FMLA leave.

Notification by Employee: When the necessity of leave is foreseeable due to the expected birth or placement of a child, the employee must provide the Company at least 30 days notice of the employee's intention to take leave. If the date of birth or placement of a child requires the employee's leave to begin in less than 30 days from the date of notice to the Company, the employee must provide such notice as soon as practical.

Where the need for leave is for reasons relating to a family member's Armed Forces active duty and such leave is foreseeable, the employee must give notice as soon as is reasonable and practicable.

Where the necessity for leave is due to a family member's or an employee's own serious health condition and is foreseeable based on planned medical treatment, the employee must:

- Give at least 30 days notice, or as soon as practical if treatment starts in less than 30 days; and
- Consult with the Company and make a reasonable effort to schedule the treatment so as not to unduly disrupt the operation of the Company, subject to the approval of the health care provider.

Where the need for leave is unforeseeable, the employee must give notice as soon as practical. Any leave request based on a family member's or employee's own serious health condition must be supported by certification from a health care provider. The employee must provide a copy of the certification to the Company in a timely manner. (Fifteen calendar days will be allowed to provide the certification.) The Company will use Form WH-380 for certification from the health care provider. All appropriate information must be provided on Form WH-380. Failure to provide the certification in a timely manner will result in denial of the leave until the certification is provided. The Company will notify the employee if the certification form is incomplete and the employee must provide the additional information.

Employee Benefits: During FMLA leaves of absence, the Company will continue to pay its portion of the health insurance premiums and the employee, if applicable, must continue to pay his or her share of the premium. Failure of the employee to pay his or her share of the health insurance premium may result in loss of coverage. If the employee fails to timely pay the employee's share of health insurance premium, the employee will have a grace period of 30 days. At least 15 days before the expiration of the grace period, the Company will mail a written notice to the employee informing the employee of the date the insurance will expire if the employee's share of the premium is not paid. The Company may, at its option, pay the employee's share of the premium and will recover that cost from the employee. If the employee does not return to work after the expiration of the leave, the employee will be required to reimburse the Company for payments of the health insurance premiums during the FMLA leave, UNLESS the employee does not return because of the presence of a serious health condition of the employee or the employee's family member, or circumstances beyond the control of the employee.

Accrual of Employment Benefits: During the leave, the employee shall not accrue employment benefits such as vacation pay, sick pay, pension, etc. Employment benefits accrued by the employee up to the day on which the FMLA leave of absence begins will not be lost.

Employee's Reporting Requirements: The Company may require an employee on FMLA leave to report periodically on his or her status and the intention of the employee to return to work, and also periodic recertification of the medical condition. The Company will notify the employee in writing of its initial requirement for medical certification. The Company will advise the employee of its need for additional medical certification either verbally or in writing. The interval for subsequent certification should be at least 30 days, or beyond the initial period of incapacity set forth in the original medical certification, whichever is greater, unless circumstances have changed significantly or the Company receives information that casts doubt about the employee's stated reason for the absence. If the Company receives a complete medical certification, it will limit its inquiries to the health care provider for clarification and authenticity. If the employee is covered by workers' compensation, the Company will follow workers' compensation procedures.

An employee taking leave due to the employee's serious health condition is required to obtain certification that the employee is able to resume work prior to the return from any FMLA leave.

Restoration of Employees Returning From FMLA Leave: Employees who return to work from FMLA leave of absence within or on the business day following the expiration of the approved FMLA leave are entitled to return to their job or an equivalent position without loss of benefits or pay in accordance with the FMLA.

FMLA Leave Procedure: Applications for FMLA leave of absence must be submitted in writing and signed by the employee's immediate supervisor. Applications should be submitted at least 30 days before the leave is to commence or as soon as possible if 30 days notice is not possible. Appropriate forms should be submitted to Human Resources to initiate a FMLA leave and to return the employee to active status.

Each employee taking leave which meets the requirements for FMLA leave will be provided the "Employer Response to Employee Request for Family or Medical Leave" form (Form WH-381). The Company will inform the employee of its response either to the employee's request for FMLA leave or upon learning that the employee's absence from work is for a FMLA reason within two business days. If the employee is not eligible for FMLA leave, the employee shall be informed of that fact.

All medical documents, including the medical certificates, shall be maintained in the employee's separate confidential medical file. All other documents shall be maintained in the employee's personnel file. The Company will keep a record of all FMLA leave on its payroll records designated FMLA for every hour taken.

FMLA leave will run concurrently with all FMLA qualifying leaves, including but not limited to, workers' compensation and short-term disability.

KEY CONTACTS

US BENEFITS OFFICE LOCATIONS

Atlanta, GA
404 224 5000

Austin, TX
800 861 9851

Baltimore, MD
410 527 1200

Birmingham, AL
205 871 3871

Boston, MA
617 437 6900

Cary, NC
919 459 3000

Charlotte, NC
704 376 9161

Chicago, IL
312 621 4700

Cincinnati, OH
513 762 7855

Cleveland, OH
216 861 9100

Columbus, OH
614 766 8900

Dallas, TX
972 385 9800

Denver, CO
303 218 4020

Detroit, MI
248 735 7580

Farmington, CT
860 284 6147

Florham Park, NJ
973 410 1022

Ft. Worth, TX
817 335 2115

Grand Rapids, MI
616 954 7829

Greenville, SC
864 232 9999

Houston, TX
713 961 3800

Jacksonville, FL
904 355 4600

Knoxville, TN
865 588 8101

Las Vegas, NV
702 432 7100

Long Island, NY
516 941 0260

Los Angeles, CA
213 607 6300

Memphis, TN
901 248 3100

Miami, FL
305 373 8460

Milwaukee, WI
414 271 9800

Minneapolis, MN
763 302 7100

Mobile, AL
251 433 0441

Naples, FL
239 659 4500

Nashville, TN
615 872 3700

New Orleans, LA
504 581 6151

New York, NY
212 915 5422

Omaha, NE
402 391 1044

Orange County, CA
949 885 1200

Orlando, FL
407 805 3005

Philadelphia, PA
610 964 8700

Phoenix, AZ
602 787 6000

Pittsburgh, PA
412 586 1400

Portland, OR
503 224 4155

Roswell, NM
505 317 3397

St. Louis, MO
314 721 8400

San Diego, CA
858 678 2000

San Francisco, CA
415 981 0600

San Jose, CA
408 436 7000

San Juan, PR
787 725 5880

Seattle, WA
206 386 7400

Tampa, FL
813 281 2095

Washington, DC
301 530 5050

Wilmington, DE
302 477 9640

Employee Benefits Alert is produced by Willis' Legal & Research Group. The information contained in this publication is not intended to represent legal or tax advice and has been prepared solely for educational purposes. You may wish to consult your attorney or tax adviser regarding issues raised in this publication.