

## The New and Improved (?) FMLA

David N. Michael

*Employment E-lert*

On January 28, 2008, President Bush signed legislation amending the Family and Medical Leave Act (FMLA) to provide expanded leave benefits to persons who have immediate family members in the armed forces. Shortly thereafter, the Department of Labor also proposed revising a number of the regulations issued under the FMLA. The net effect of these two actions is the most sweeping change to the FMLA since it was enacted in 1993.

The most notable change arising from the January 28<sup>th</sup> amendments to the FMLA is the addition of what is referred to as "servicemember family leave." A servicemember is defined as a member of the Armed Forces, including a member of the National Guard or Reserves. Leave of up to 26 weeks (*i.e.*, 14 weeks longer than traditional 12-week FMLA leave) is available if the servicemember has suffered a serious injury or illness in the line of duty *and* is undergoing medical treatment (including recuperation or therapy), is in outpatient status, or is otherwise on the temporary disability retired list. The leave is available to an employee who is a spouse, child, parent or next of kin and needs time off to care for the injured servicemember. "Next of kin" is a new FMLA concept and is defined as "the nearest blood relative of that individual."

There are some important caveats that should be noted with respect to the extended 26-week leave provision. First, this expanded leave is only available during a "single 12-month period." Second, the 26 weeks of leave are the maximum that can be granted during a 12-month period, meaning that an additional 12 weeks cannot be tacked on even if there is another qualifying event that would normally invoke the traditional 12-week leave allowance. Finally, spouses who take advantage of servicemember family leave must aggregate their leave, and their combined leave may not exceed 26 weeks during a 12-month period.

In addition to creation of the servicemember family leave, the newly-amended FMLA provides for leave in the event of a "qualifying exigency" arising out of a family member's active duty status or impending call to active duty. An employee is eligible for this leave if s/he is the spouse, son, daughter, or parent of the person called to active duty. While the amendments to the FMLA do not otherwise define what constitutes a "qualifying exigency," the Department of Labor is expected to provide a definition when it issues its final regulations (presumably covering reasons such as arranging for child care and attending counseling related to a servicemember's call to active duty). Until the Department of Labor issues those regulations, the qualifying exigency leave provisions will not be effective.

On February 11, 2008, the Department of Labor (DOL) published proposed revisions to the regulations issued under the FMLA (regulations are rules made by a government agency that implement or explain the agency's

view on the underlying law; regulations are not, however, laws). These proposed regulations come as a result of DOL studies, court rulings, and public feedback on the existing FMLA regulations. In an effort to refine the proposed regulations, the DOL is accepting comments on them for a 60-day period. Among the proposed revisions are changes to the definition of a serious health condition, the use of unscheduled intermittent leave, and the certification process. A new provision on perfect attendance policies has also been added.

The changes to the regulations concerning a serious health condition include two aspects. The first is semi-annual doctor recertification for employees with chronic illnesses (in place of current regulations that require "periodic visits" without further explanation). The second aspect is a requirement that employees who miss 3 days of work due to incapacitation must visit their doctor twice within a 30-day period (in place of current regulations which leave the time period for those two visits undefined but which have been interpreted as requiring two visits within the 3 days missed).

Employers have long complained about the burden of complying with the FMLA's provision on intermittent leave. The proposed regulations take a step towards addressing these complaints by placing a new burden on employees to follow their employers' workplace call-in procedures in order to take such leave. This proposed change is significant because the previous procedure allowed employees to take leave without notice and then, within two days of the absence, designate the time off as FMLA leave. That procedure is now reserved only for emergency situations.

With respect to the medical certification process, the most significant proposed change would allow employers to directly contact medical providers for clarification and/or authentication of a serious health condition (in place of a healthcare professional calling on the employer's behalf). The proposed regulations also allow employers to deny a perfect attendance bonus to employees exercising FMLA leave if it treats employees taking non-FMLA leave similarly.

The DOL contends that the proposed regulations are designed to provide needed clarity and improve the flow of information and emphasizes that the proposed changes will not cause employees to lose FMLA protection if they were already eligible under the current regulations. However, until these proposed regulations are finalized, it is too early to tell if they will be an improvement for employers.