

## **National Defense Authorization Act: FMLA leave to assist members of the military and their families**

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**Ohio Association of County Boards of MR/DD**  
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## **Introduction**

- ◆ National Defense Authorization Act (“NDAA”) signed January 28, 2008
- ◆ Two important amendments to Family and Medical Leave Act of 1993
  - One amendment went into effect immediately
  - Second amendment is dependent upon regulations from Department of Labor

## NDAAs

### ◆ New qualifying event for FMLA leave:

- Current qualifying events:
  - ◆ Because of the birth of a son or daughter of the employee and in order to care for such son or daughter
  - ◆ Because of the placement of a son or daughter with the employee for adoption or foster care
  - ◆ In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition
  - ◆ Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee

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## NDAAs

### ◆ New qualifying event: Any "qualifying exigency."

- An eligible employee is entitled to 12 workweeks of leave because of any "qualifying exigency" arising out of the fact that the employee's spouse, child, or parent 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."

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## NDAA

### ◆ Qualifying Exigency:

- Only available to spouses, children or parents of active-duty service members
- NDAA does not define what constitutes a “qualifying exigency”
  - ◆ Left up to DOL
  - ◆ Early 2009
- Not effective until regulation is promulgated
  - ◆ DOL has nevertheless encouraged employers to provide employees with leave for this undefined event

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## NDAA

### ◆ Servicemember Family Leave:

- Allow eligible employees to care for a family member who has been injured in the line of duty as a member of the Armed Forces
- Up to 26 weeks of unpaid FMLA leave over a single 12-month period
  - ◆ Effective as of January 28, 2008

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## NDAAs

### ◆ Servicemember Family Leave:

- Available to different type of employee
  - ◆ A spouse, child, parent, or next of kin of a covered service member
    - “Next of kin” is the nearest blood relative of the covered service member

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## NDAAs

### ◆ Servicemember Family Leave:

- ◆ “Covered servicemember” means 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
  - “Serious injury or illness,” in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating

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## NDAAs

### ◆ Servicemember Family Leave:

- If an employee has some *other* FMLA-qualifying event during a 12-month period (for example, the birth of a child, or the employee's own serious health condition), his/her total amount of FMLA leave during that 12-month period is limited to 26 weeks
- If the service member's recovery from the serious injury or illness lasts longer than the initial 12 months ("single 12-month period"), an eligible employee does not refresh the 26 weeks of Servicemember Family Leave
  - ◆ Additional 14 weeks (for a total of 26 weeks) is a one-time benefit, and the employee would not be eligible for an additional 26 weeks of Servicemember Family Leave in a subsequent 12-month period

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## NDAAs

### ◆ FMLA requirements

- Employees must be otherwise eligible for leave under the FMLA
- The employer may require a certification by the service member's health care provider

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## NDAAs

### ◆ FMLA requirements

- As with other types of FMLA leaves that are necessitated by a serious health condition, the 26 weeks of Servicemember Family Leave may be taken intermittently or on a reduced leave schedule
- The leave is unpaid although an employee may elect to substitute, or the employer may require substitution of, paid vacation, personal, family, medical or sick leave for any part of the 26 weeks (although an employer need not provide paid sick leave or paid medical leave in any situation where the employer's policy would not normally allow for paid leave)

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## NDAAs

- ◆ DOL sought input on proposed regulations until April 11, 2008
- ◆ Foregoing might appear easy, but major issues yet to be decided
- ◆ Fall into a number of categories that generally impact FMLA leave

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## NDAA

### ◆ Regulations

- Does 30-day notice or “as soon as practicable” notice requirement apply or another standard?
  - ◆ Not sure I see a problem here: question is what to do if employee does not follow
- Qualifying exigency:
  - ◆ Most likely will be non-medical
  - ◆ Childcare or financial planning, attendance at pre-deployment meetings and support sessions, seeing a family member off to service or welcoming the family member back home, or for any other issues that may arise as a result of immediate deployment

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## NDAA

### ◆ Regulations: Definition of son or daughter

- ◆ Under the current FMLA regulations, a son or daughter must be either under the age of 18 or above the age of 18 but incapable of self-care because of some mental or physical disability
- ◆ May be a problem and DOL is considering changing this for purposes of military leave

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## NDAA

- ◆ Regulations: Definition of “next of kin”
  - Provided by the law, but does that mean only person
  - Department of Defense says next of kin includes the following:
    - ◆ Unremarried surviving spouse
    - ◆ Natural and adopted children
    - ◆ Parents

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## NDAA

- ◆ Regulations: Next of kin:
  - ◆ Remarried surviving spouse (except those who obtained a divorce from the service member or who remarried before a finding of death by the military)
  - ◆ Blood or adoptive relatives who have been granted legal custody
  - ◆ Brothers or sisters
  - ◆ Grandparents
  - ◆ Other relatives of legal age in order of relationship to the individual according to civil laws
  - ◆ Persons standing in loco parentis to the service member

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## NDAAs

- ◆ Regulations: Definition of “serious injury or illness” provided by the amendment
  - Different than “serious health condition”
  - DOL sought comments on whether certification provided by Dept. of Defense or Veterans Affairs would be sufficient to establish that the service member has a serious injury or illness.
  - DOL also questions whether an injury or illness that does not manifest itself until after the member has left the military should be covered by the FMLA amendment

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## NDAAs

- ◆ Regulations: Treatment, recuperation and therapy
  - DOL thinks any applies
  - Sought comments on whether should just be that provided by Armed Forces
  - Would likely reduce number of eligible employees

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## NDAAs

- ◆ Regulations: Single 12-month period
  - Statute implies only a one-time benefit within single 12-month period
  - DOL questions whether this means only time during employment and whether it applies to multiple service members
    - ◆ Inconsistent with other parts of FMLA, and difficult for families with two children/parents in the military

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## NDAAs

- ◆ Regulations: Single 12-month period
  - What about calculation of 12-month period?
    - ◆ Date of service member's injury, date of determination of a serious injury or illness, or date a family member is needed to care for the service member
    - ◆ FMLA leaves up to employer now: is a change necessary?

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# NDAA

## ◆ Regulations:

- Designation of leave: FMLA or military?
- Certification:
  - ◆ Still required, but what does it mean?
    - Serious injury or illness
    - Qualifying exigency: who will do that?
      - Would military orders suffice?
      - Since not defined, hard to determine what the certification should be

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## Questions ???

Thanks for attending!

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**OHIO ASSOCIATION OF COUNTY BOARDS  
OF MENTAL RETARDATION  
AND DEVELOPMENTAL DISABILITIES**

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FMLA leave to assist members  
of the military and their families**

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**MAY 23, 2008  
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## ISSUE

On January 28, 2008, President George W. Bush signed the National Defense Authorization Act (“NDAA”). This new law contains two (2) important changes to the Family and Medical Leave Act of 1993 (“FMLA”) that grant additional bases for FMLA leave to eligible employees with a family member serving in the Armed Forces of the United States. We will address below each of these changes, and the new definitions applicable to each change.

## DISCUSSION

### **A. New qualifying event for FMLA leave**

Historically, the FMLA allowed an eligible employee to take FMLA leave for the following reasons:

- (1) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (2) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (3) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (4) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

The NDAA adds a new qualifying event: any “qualifying exigency.” Under the NDAA, an eligible employee<sup>1</sup> is entitled to twelve (12) workweeks of leave because of any “qualifying exigency” arising out of the fact that the employee’s spouse, child, or parent 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.”<sup>2</sup>

Even though it is part of the same amendment to the FMLA, leave for a “qualifying exigency” is only available to spouses, children or parents of active-duty servicemembers. In contrast, as we will see below, the NDAA authorizes

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<sup>1</sup> FMLA eligibility remains the same. An eligible employee is one that has worked for the employer for a total of 12 months (which does not have to be consecutive) and has worked at least 1,250 hours over the previous 12 months.

<sup>2</sup> A contingency operation" is a military operation that (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (2) results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

Servicemember Family Leave for an injured service member’s “next of kin,” in addition to spouses, children or parents.

Strangely, the NDAA does not define the term “qualifying exigency.” Rather, Congress authorized the Secretary of the Department of Labor to promulgate administrative regulations that will define what constitutes a “qualifying exigency.” Until this definition is promulgated, however, the entitlement to leave for a “qualifying exigency” will not take effect. Nevertheless, despite the fact that no such definition yet exists, the Department of Labor has urged employers to give this type of leave when appropriate.

## **B. More leave for family members of a member of the Armed Forces**

The NDAA also creates a new category of FMLA leave called “Servicemember Family Leave,” to allow employees to care for a family member who has been injured in the line of duty as a member of the Armed Forces. An eligible employee is given up to 26 weeks of unpaid FMLA leave—more than twice the normal 12-weeks allowed under FMLA—over a single 12-month period.

“Servicemember Family Leave” entitles an eligible employee who is a spouse, child, parent, or next of kin<sup>3</sup> of a covered service member<sup>4</sup> to a total of 26 workweeks of leave during a 12-month period to care for the covered service member. The amendment entitles an employee to a combined total of 26 weeks of FMLA leave during a *single* 12-month period. The amendment is somewhat limiting though:

(3) **SERVICEMEMBER FAMILY LEAVE.** — Subject to section 103, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a **single** 12-month period.

(4) **COMBINED LEAVE TOTAL.** — During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period. (Emphasis added).

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<sup>3</sup> “Next of kin” is the nearest blood relative of the covered service member.

<sup>4</sup> The term “covered servicemember” means 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 term “serious injury or illness,” in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.

The underlined terms mean:

- If an employee has some *other* FMLA-qualifying event during a 12-month period (for example, the birth of a child, or the employee's own serious health condition), his/her total amount of FMLA leave during that 12-month period is limited to 26 weeks.
- If the servicemember's recovery from the serious injury or illness lasts longer than the initial 12 months ("single 12-month period"), an eligible employee does not refresh the 26 weeks of Servicemember Family Leave. That is to say, the additional 14 weeks (for a total of 26 weeks) is a one-time benefit, and the employee would not be eligible for an additional 26 weeks of Servicemember Family Leave in a subsequent 12-month period.

### **C. Conditions for taking leave**

Most conditions that apply to other types of FMLA leave also apply to Servicemember Family Leave. Specific conditions include:

- Employees must be otherwise eligible for leave under the FMLA;
- The employer may require a certification by the servicemember's health care provider;
- As with other types of FMLA leaves that are necessitated by a serious health condition, the 26 weeks of Servicemember Family Leave may be taken intermittently or on a reduced leave schedule;
- The leave is unpaid although an employee may elect to substitute, or the employer may require substitution of, paid vacation, personal, family, medical or sick leave for any part of the 26 weeks (although an employer need not provide paid sick leave or paid medical leave in any situation where the employer's policy would not normally allow for paid leave).

## **CONCLUSION**

Although existing FMLA eligibility and other conditions apply, county boards of MR/DD will have to be careful when providing leave as authorized by the NDAA. First, Servicemember Family Leave is available to a spouse, child, parent, or next of kin of an injured member of the Armed Forces. The addition of the “next of kin” is different than what the FMLA has historically allowed. FMLA leave for any other reason, including leave for “any qualifying exigency,” is still limited to spouse, child, or parent. Although an eligible employee may take Servicemember Family Leave for up to 26 weeks, it is only permitted in a single 12-month period. Although not yet effective, DOL has encouraged employers to provide FMLA leave to employees facing a “qualifying exigency,” but DOL does not expect to have defined such term until early 2009. County boards should use their best judgment for this particular basis for FMLA leave.