



[www.cozen.com](http://www.cozen.com)

**PRINCIPAL OFFICE:**

**PHILADELPHIA**      **NEW YORK MIDTOWN**  
(215) 665-2000      (212) 509-9400  
(800) 523-2900      (800) 437-7040

**ATLANTA**      **NEWARK**  
(404) 572-2000      (973) 286-1200  
(800) 890-1393      (888) 200-9521

**CHARLOTTE**      **SANTA FE**  
(704) 376-3400      (505) 820-3346  
(800) 762-3575      (866) 231-0144

**CHERRY HILL**      **SAN DIEGO**  
(856) 910-5000      (619) 234-1700  
(800) 989-0499      (800) 782-3366

**CHICAGO**      **SAN FRANCISCO**  
(312) 382-3100      (415) 617-6100  
(877) 992-6036      (800) 818-0165

**DALLAS**      **SEATTLE**  
(214) 462-3000      (206) 340-1000  
(800) 448-1207      (800) 423-1950

**DENVER**      **TORONTO**  
(720) 479-3900      (416) 361-3200  
(877) 467-0305      (888) 727-9948

**HOUSTON**      **TRENTON**  
(832) 214-3900      (609) 989-8620  
(800) 448-8502

**LONDON**      **WASHINGTON, D.C.**  
011 44 20 7864      (202) 912-4800  
2000      (800) 540-1355

**LOS ANGELES**      **W. CONSHOHOCKEN**  
(213) 892-7900      (610) 941-5000  
(800) 563-1027      (800) 379-0695

**MIAMI**      **WILMINGTON**  
(305) 704-5940      (302) 295-2000  
(800) 215-2137      (888) 207-2440

**NEW YORK DOWNTOWN**  
(212) 509-9400  
(800) 437-7040

**500 Attorneys • 23 Offices**

**FMLA IS EXPANDED FOR THE FIRST TIME IN 15 YEARS**

*By: Debra S. Friedman, Esq.*

dfriedman@cozen.com • (215) 665-3719

Congress has expanded the scope of the federal Family and Medical Leave Act (“FMLA”) to include enhanced leave provisions for families of U.S. military personnel. This is the first expansion of the law since it was enacted 15 years ago.

**NEW LEAVE PROVISIONS**

The new leave provisions focus on two (2) concepts:

- (1) Providing eligible employees up to a total of 26 workweeks of unpaid leave during a single 12-month period to care for a parent, son, daughter, spouse or next of kin who has suffered a serious illness or injury while on active duty in the Armed Forces; and
- (2) Providing eligible employees up to 12 weeks of unpaid leave in a 12-month period for a qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, 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.

The leave to care for seriously ill or injured military personnel is broad in scope. It covers members of the Armed Forces, including members of the National Guard or Reserves, who are undergoing medical treatment, recuperation, or therapy, are otherwise in outpatient status, or are 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--is defined as 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.” “Outpatient status” includes military personnel assigned either to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

Leave arising from an immediate family member’s call to active duty is not as clearly defined. For instance, Congress has not defined “qualified exigency” and therefore employers will have to wait for the U.S. Department of Labor to clarify this term via regulations and/or guidance.

FMLA leave for an eligible employee whose parent, child or spouse is called to active duty is counted toward the employee's annual 12-week entitlement under the law. Only eligible employees caring for a family member who has suffered a serious injury or illness while on active duty in the Armed Forces are entitled to more than 12 weeks of unpaid leave in a 12-month period. In that situation, eligible employees may use up to 26 weeks of unpaid leave in a single 12-month period. Here too, however, the 26 weeks of leave is a combined total and includes any and all types of FMLA taken in a 12-month period.

In several ways, administration of the new leave provisions mirrors existing FMLA provisions. For instance, employees may take these new types of FMLA leave on an intermittent basis or reduced schedule. Moreover, if a family member's call to active duty is foreseeable, the employee must provide the employer with reasonable notice of the need for such leave. Employers also may require a healthcare certification when an employee is taking leave to care for a family member who has suffered an injury or illness while on active duty. Finally, employers may require certification that an employee's parent, spouse or child has been called to active duty when leave for that reason is requested if and when the Secretary of Labor issues a regulation requiring the certification.

#### IMPACT OF THE NEW LEAVE PROVISIONS

The legislation did not set a date on which these new FMLA provisions go into effect. Therefore, unless the U.S. Department of Labor issues guidance otherwise, it appears that the new FMLA provisions are effective as of January 28, 2008, when the President signed them into law.

This new legislation allows eligible employees time off to address some difficulties associated with their immediate family members being called to active duty and/or suffering injuries in the line of duty. Its impact on employers will vary, depending upon how many employees in the employer's workforce are eligible for and utilize these new leave provisions.

#### POTENTIAL EMPLOYER PITFALLS

Right now, the biggest potential pitfalls for employers will be:

- (1) failure to notify employees of the new leave provisions; and
- (2) denial of leave for reasons protected by this new legislation.

Employers also could run into trouble if they define the term "qualifying exigency" too narrowly in the absence of a regulation clarifying its scope. Therefore, until the U.S. Department of Labor clarifies what types of circumstances constitute a qualifying exigency related to a call to active duty, employers should play it safe and apply the term broadly.



## ACTIONS FOR EMPLOYERS TO TAKE

Employers should immediately notify their employees of the expanded scope of the law. They should not wait for regulations and/or guidelines to be issued by the U.S. Department of Labor.

Employers also must review and revise, as necessary, their written FMLA posters, policies and forms to reflect the new leave provisions.

Finally, employers should ensure that their Human Resource personnel and front line managers are aware of the new leave provisions. These employees should be trained to identify requests for all types of FMLA protected leave as employees are not required to reference the FMLA specifically, but only to put their employers on notice of the need for a protected leave under the law.

*For more information or assistance, please contact Debra S. Friedman, Esq. in our Philadelphia office at (215) 665-3719 or at [dfriedman@cozen.com](mailto:dfriedman@cozen.com).*