

# The East Texas Employment Law Update

A Bi-Monthly Publication Dedicated to Discussing Employment Law Issues.

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## 2009 FMLA Amendments - Part Three

In the May and September 2009 issues, we discussed some of the amendments to FMLA. We are going to address the military related additions to the FMLA. This is the portion of the FMLA changes that is requiring the most change in how employers address their FMLA policies.

### **Leave to care for Service member:**

Eligible Employees are entitled to leave to care for a current member of the armed forces who is on temporary disability retired list who has a serious illness of injury incurred in the line of duty. Eligible employees cannot take the leave for former members of the Armed Forces

Serious Injury: an injury or illness incurred by the service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of his office, grade, rank or rating.

Who is eligible for leave: remember the definitions from the September 2009 issue related to spouse, son, daughter, father, mother and next of kin. They are exceedingly broad. Spouse is the most narrow. Next of Kin is defined as the nearest blood relative other than spouse, parent, son, or daughter, that has either been granted legal custody of the service member, or the service member designated them. If there is no legal custody, then the nearest relative is determined in the following order: brothers, sisters, grandparents, aunts and uncles, and then first cousins. When there is no designation and there are multiple family members at the same level, then all family members at that level are eligible for leave. An employer can require confirmation of the family relationship.

How much leave: 26 workweeks during a single 12 month period. It does not stop there. The employee can take another 26 weeks during a 12 month period if a different covered service member or to care for the same service member with a different injury. Further, if the employee takes leave to care for the covered service member and then is eligible to take leave for another FMLA reason, such as pregnancy of a spouse, then the employee is entitled to 12 weeks on top of the 26 weeks already taken. Yes, that is correct!

What Must the Employee Show to be entitled to leave: An employer may require certification from the authorized health care provider. The provider is permitted to rely upon certain Department of Defense representatives to make military determinations. The employer can require the healthcare provider to set forth:

- (1) The identification information for the health care provider, their medical practice and specialty
- (2) Whether the service member's injury was incurred in the line of duty on active duty
- (3) The date of the injury, and its duration
- (4) A description of the medical facts regarding the service member's serious health condition which FMLA leave is requested. This information must state whether the injury leaves the service member unable to perform his duties and set forth whether the member is receiving treatment
- (5) Information sufficient to establish that the service member is in need of care and the likely duration of the need for care
- (6) If the employee requests leave on an intermittent or reduced schedule basis, the medical necessity for the planned medical treatment or care and the duration of such care

The employer can require the health care provider to provide:

- (1) The name of the covered service member and the employee requesting leave
- (2) The relationship between the covered service member and the employee
- (3) Whether the covered service member is a member of the Armed Forces and his branch, rank and assignment
- (4) Whether the covered service member is assigned to a military medical facility
- (5) Whether the covered service member is on the temporary disability retired list
- (6) A description of the care to be provided to the covered service member and the leave needed to provide the care

However, an employer is required to accept a WH-385 form or invitational travel orders or authorizations in lieu of employee certification for leave of care. If the employee is need of leave beyond the order or authorization, an employer may request that the employee have a medical provider complete the WH-385 form or the employer's own form. An employer can seek authentication and clarification of an order or authorization but it cannot take advantage of the second and third opinion options under normal FMLA leave. The employer may require an employee provide confirmation of the family relationship to the injured service member. Finally, it is the employee's responsibility to provide the employer with complete and sufficient certification or FMLA leave can be denied.

*Analysis:*

## **Fenley & Bate, L.L.P.**

ATTORNEYS AT LAW

224 E. Lufkin Avenue ■ P.O. Box 450 ■ Lufkin, Texas 75902-0450  
TELEPHONE (936) 634-3346  
TELEFAX (936) 639-5874

415 N. Washington, Ste B, Livingston, Texas 77351  
TELEPHONE (936) 327-1100  
TELEFAX (936) 327-1107

EMAIL OFFICE@FENLEY-BATE.COM