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Labor & Employment Client Advisory

Time to Update your Handbook: FMLA Amended to Extend Leave to Families of Soldiers

On January 28, 2008, President Bush signed into law the National Defense Authorization Act ("NDAA"). Among other things, the NDAA amends and expands the Family and Medical Leave Act ("FMLA") to allow two new types of leave for employees who are relatives of members of the Armed Forces ("servicemembers"). First, the law was modified to provide certain leave benefits to family members caring for service members injured in active duty military service. Second, the law provides for leave for employees whose spouse, son, daughter, or parent is called to active duty service where there is a "qualifying exigency." Please note that although the new law expands the types and duration of available FMLA leave, it does not change the existing definition of which employers are actually covered by the FMLA.

Leave for Caregivers of Servicemembers.

This amendment allows an eligible employee who is the spouse, son, daughter, parent, or "next of kin" of a covered servicemember to take up to **26** work weeks of leave to care for that servicemember. A covered servicemember is defined under the statute as 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 on the temporary disability retired list, for a serious injury or illness incurred in active military duty. The use of the term "next of kin" in the caregiver provision is significant since it is a far broader term than the close family relationships covered under the other provisions of the FMLA.

The new law explains that while the 26 weeks may be taken intermittently or on a reduced leave basis, all of the 26 weeks of leave must be used during a single 12-month period. During this 12-month period, the maximum amount of FMLA leave to which an employee may be entitled, for any reason, is 26 weeks. That is, a single employee may not combine a caregiver leave of 26 weeks with a leave needed for the employee's own serious health condition to exceed the 26 week total.

Employers should note that this provision went into effect on January 28, 2008, the date when the NDAA was signed into law.

Qualifying Exigency Leave

The new FMLA amendments also implemented a new basis for entitlement to the 12 weeks of leave traditionally associated with the FMLA. In addition to leaves for birth, adoption, the employee's own serious health condition, or caring for a son,

daughter, mother or father with a serious health condition, the law now provides that employees may take up to 12 weeks of leave for any "qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on or has been called to active duty in the Armed Forces in support of a "contingency operation." Basically, this form of leave is designed to cover an employee's need for leave caused by the deployment (or preparations for deployment) of the employee's spouse, child or parent for certain military operations.

This qualifying exigency leave is not immediately effective, but will be effective as soon as the Department of Labor ("DOL") issues regulations defining and implementing procedures for qualifying exigency leave. The DOL, on February 11, 2008, issued proposed regulations amending various FMLA regulations and requesting public input on regulations implementing the statutory changes discussed in this Client Alert, including the definition of qualifying exigency. Comments are due by April 11, 2008, and the expectation is that the DOL will issue final regulations shortly thereafter.

Required Employer Actions

Because the servicemember caregiver provision of the FMLA amendments are effective immediately, all employers who are covered by the FMLA (generally, those who employ 50 or more employees, including full-time, part-time and temporary employees), must be cognizant of the new leave entitlement and ensure that eligible employees are allowed the necessary leave. Further, and critically, employers should take prompt action to modify their written FMLA policies and postings to reflect the changes in the law. Of course, covered employers without FMLA policies should also take the opportunity to adopt a comprehensive FMLA policy.

If you have any questions about the amendments to the FMLA, or how it may impact your business, please contact David Rapuano, Esquire of Archer & Greiner's Labor and Employment Department, at 856-795-2121.

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