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EMPLOYERS: TAKE NOTE OF IMPORTANT CHANGES TO THE FAMILY AND MEDICAL LEAVE ACT

By: Sid Lewis

Important changes have been made to the Family and Medical Leave Act (FMLA) with respect to relatives of military personnel, and employers need to be aware of these changes that may affect their employees in one way or another.

Under the FMLA, signed into law by President Clinton in 1993, private employers with 50 or more employees are required to provide up to 12 weeks per year of unpaid family and medical leave to eligible employees, and to restore those employees to the same or an equivalent position when they return. The FMLA allows eligible employees (male or female) to take leave for the birth, adoption, or placement in foster care of a child; the care of a seriously ill child, spouse, or parent; or the employee's own serious illness. The FMLA also covers federal civil service employees, state and local government employees, and congressional employees. Public employers are covered by the FMLA without regard to the number of employees.

Employees who work for both public and private employers must meet minimum length-of-service and hours-of-work requirements in order to be eligible for FMLA leave. An employee must be employed by a covered employer at a worksite with 50 or more employees within 75 miles of that worksite. He/she must also have been employed by the same employer for at least a total of 12 months (including previous employment) and must have worked at least 1,250 hours during the 12 months preceding the leave.

If an employer provides health insurance, coverage must be maintained under the group health plan for any employee who is out on FMLA leave for the duration of the leave at the same level of coverage that would have been provided if no leave had been taken.

A covered employer must also publish an FMLA policy. One of the more important provisions in an FMLA policy is the designation of the 12-month period in which the 12 weeks of FMLA is to be calculated. The 12-month period may be on an anniversary, calendar, fiscal, or "rolling" year basis. For employers, the most advantageous 12-month period is the "rolling" 12-month period.

New FMLA Requirements: In January 2008, the FMLA was revised when Congress passed and President Bush signed the Family Leave in Connection with Injured Members of the Armed Services Act, which grants additional leave under the FMLA to relatives of military personnel. The Act creates two new categories of FMLA leave: "Active Duty Family Leave" and "Injured Service Member Leave."

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Under the Active Duty Family Leave category, eligible employees may take up to 12 weeks of leave when they experience a "qualifying exigency" arising out of the fact that a spouse, parent, or child is on or has been called to active duty. An employer may require certification that the employee's family member is on active military duty. The Department of Labor has not yet issued a definition on "qualifying exigency," but it is expected to include situations in which an employee is needed to fulfill family and child-care responsibilities for covered services members who have been called to active duty.

The Injured Service Member Leave is for eligible employees who have a family member injured in the line of duty, thus creating an entirely new type of leave with different criteria than the traditional FMLA leave. Under this provision, employees are entitled to injured service member leave if they are the "spouse, son, daughter, parent, or next of kin [i.e. nearest blood relative]" of a "covered service member" who has a "serious injury or illness."

The main difference with the traditional FMLA leave is that employees are entitled to a combined total of 26 weeks of leave (which would include any traditional FMLA leave taken) in a 12-month period, as opposed to the usual 12 weeks of leave; and the definition of a "serious injury or illness" covers a much broader range of health concerns than the definition under the original FMLA. Under this new law, a relative must be a member of the armed forces, National Guard, or reserves; suffer from an injury or illness incurred on active duty in the armed forces that may render him/her medically unfit to perform the duties of his/her office, grade, rank, or rating; and be undergoing medical treatment, recuperation, or therapy, be in outpatient status, or be on the temporary disability retired list as a result of the injury or illness. And like the original FMLA, employers may require, or employees may elect, to take armed services leave concurrently with paid leave, such as vacation, personal, or sick leave.

The Labor Department will further clarify these definitions with upcoming regulations. In the meantime, all employers should immediately revise their FMLA policies to include these new provisions. We suggest you contact the labor attorney you normally work with. In addition to a published policy, employers should make sure that the FMLA poster is conspicuously posted in the workplace, and that they have and are using, where appropriate, the FMLA Fact Sheet, the Employer Response Form, and the Certification of Health Care Provider Form, all published by the Department of Labor and available on its website, www.dol.gov.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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