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LEGAL ALERT



Legal Alert: President Signs Bill Expanding FMLA Protection for Military Family Members

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On Monday (January 28) the President signed the National Defense Authorization Act for Fiscal Year 2008, which includes, among other things, the first expansion of the Family and Medical Leave Act (FMLA) since that law was enacted in 1993. Identical provisions were included in a prior version of the law presented to the President in December 2007; however, he pocket vetoed that legislation because of concerns about provisions that would expand the ability of Americans to seek financial compensation from countries that supported or sponsored terrorist acts, including Libya, Iran and Iraq under Saddam Hussein.

The FMLA provisions contained in this law are identical to those contained in the earlier version. Specifically, the law modifies the FMLA in two ways.

- **Leave for “Qualifying Exigency”:** The law modifies the FMLA by adding a new qualifying event for the 12-weeks of FMLA leave: a “qualifying exigency” (to be determined by the Secretary of Labor) 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. When an employee requests leave for a qualifying exigency and the necessity for the leave is foreseeable, the employee must provide the employer with “reasonable and practicable” notice. Additionally, an employer may require that a request for leave for a qualifying exigency be supported by a certification that the service member is on active duty or has been called to active duty.

- **Leave to Care for Injured Servicemember:** The law also provides that the spouse, child, parent, or “next of kin” (defined as the “nearest blood relative”) of a “covered servicemember” is entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. “Covered servicemember” means a servicemember who is “undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” “Serious illness or injury,” in turn, is defined as a condition that may render the servicemember “medically unfit to perform the duties of the member's office, grade, rank, or rating.” This leave is only available during a single 12-month period, and the 26-week limit would include any leave granted pursuant to the new “qualifying exigency” provision.

Although this law was effective upon signature, it is not clear when the provisions amending the FMLA will be effective. It is hoped the DOL will issue regulations clarifying some of the concepts contained in this amendment. Nevertheless, employers are required to comply with the new provisions regardless of whether the DOL issues any regulations. Thus, employers should review FMLA policies and determine what revisions will be necessary to comply with the new requirements.

If you have any questions regarding this issue or need assistance in reviewing or revising your FMLA policies and procedures, please contact the Ford & Harrison attorney with whom you usually work or the authors of this Alert, Doug Hall, dhall@fordharrison.com or 202-719-2065 or John Lowrie, jlowrie@fordharrison.com, 303-592-8866.