SANZONE & MCCARTHY, LLP

THE EMPLOYMENT LAW ALERT

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Family and Medical Leave Act Amended to Provide Leave for Military Families

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 ("NDAA"), which, among other things, amends the Family and Medical Leave Act of 1993 ("FMLA") to provide leave for families of military personnel. There are two key provisions under this amendment. First, employers who are otherwise covered by the FMLA will be required to provide up to 12 weeks of unpaid leave per year for a "qualifying exigency" connected to the active duty status of an employee's spouse, son, daughter or parent. The second provision requires employers to grant eligible family members leave up to 26 weeks to care for a covered armed services member who is injured while on active duty. The new law became effective immediately.

Qualifying Exigency – The "qualifying exigency" leave provision requires an employer to provide an employee up to 12 weeks of unpaid FMLA leave for "any qualifying exigency" (as will be defined by regulations to be promulgated by the Secretary of Labor) 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. Employers may require written certification before granting such leave. Until the regulations are published, it will remain unclear as to what constitutes a "qualifying exigency" and what types of certification can be requested by employers.

Caretaker Leave – Employers also are now required to provide eligible employees up to 26 workweeks of leave to care for a family member who is an injured or disabled service member. Specifically, an employee may be eligible to take up to 26 weeks of FMLA leave to care for a spouse, son, daughter, parent or next of kin (defined as "nearest blood relative") who is a covered service member unable to perform his or her duties and who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. This type of FMLA leave is available only during a single 12-month period.

All other relevant provisions of the FMLA will be applicable to any employee who takes this type of FMLA military leave, including the employer's obligation to restore the employee who takes such leave to the same or similar position upon his or her return from leave.

As a result of this change to the FMLA, employers covered by the FMLA (those with more than 50 employees within a 75-mile radius) will need to revise or add an addendum to their existing FMLA policies, including those contained in employee handbooks. The amendment to the FMLA complements several state statutes (including those in California, Illinois, Indiana, Maine, Minnesota, Nebraska and New York) which also provide similar, but not identical, types of military leave to eligible employees. Some of these state statutes apply to employers with less than 50 employees. As a result, employers may need to have both a revised FMLA policy as well as a state specific policy, where applicable.

It is unclear when the regulations implementing the amendment to the FMLA will be published by the Department of Labor. In the interim, employers are encouraged to consult with legal counsel if any such qualifying FMLA military leave is requested by an employee.

Should you have any questions about the amendment to the FMLA or would like assistance drafting an appropriate addendum to your current FMLA policy, please contact our office.