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February 5, 2008

CLIENT ADVISORY

FMLA Expansion for Military Families

On January 28, 2008, President Bush signed into law the National Defense Authorization Act of 2008, which, among other things, expands the Family Medical Leave Act (FMLA) to include "Active Duty Leave" and "Caregiver Leave." Specifically, FMLA-eligible employees will now be entitled to leave for the following additional reasons:

- **Active Duty Leave** – Employees are entitled to up to 12 weeks of unpaid leave when a spouse, son, daughter or parent has been called or ordered to active duty in the Armed Forces. Leave may be used for "any qualifying exigency" arising out of the family member's active duty or call to duty.
- **Caregiver Leave** – Employees are entitled to up to 26 weeks of unpaid leave in a 12-month period (that is 26 weeks total, not 26 weeks plus 12 weeks of FMLA leave for other reasons) to care for an injured or ill relative who suffered a "serious injury or illness" in the line of active-duty. In addition to spouses, children and parents, a service member's "nearest blood relative" or "next of kin" also will be eligible for this type of leave. An illness or injury resulting from active duty will be qualified as "serious" when it renders the service person medically unfit to perform the duties of his/her office, grade, rank or rating.

The Department of Labor (DOL) has released guidance stating that the "active duty" provision of the new law will not be effective until final regulations have been issued to define "any qualifying exigency." In the interim, the DOL is encouraging employers to provide such leave to qualifying employees on a voluntary basis. The "caregiver" provision of the law takes effect immediately.

Additionally, an employee may elect, or an employer may require, the substitution of any of the employee's accrued paid vacation leave, paid time off, personal leave, family leave, or medical or sick leave for any part of the 26-week period provided to care for the injured service member.

As is the case with other leaves subject to the FMLA, the employer is not required to provide paid time off in any situation in which the employer would not normally provide such paid leave.

Employers should review and amend their leave of absence policies to acknowledge this substantial change to the FMLA. As the new law does not amend the Uniformed Services Employment and Reemployment Rights Act (USERRA), it applies only to employers with 50 or more employees. Under USERRA, every employer, regardless of size, is required to grant military leave and protections to all eligible employees.

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