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NEW AMENDMENTS TO THE FMLA: FAMILY MILITARY LEAVE ENTITLEMENTS

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Once again, Congress has expanded the types of leave to which employees may be entitled under the FMLA. Accordingly, employers must modify their existing FMLA policies to comply with this new law.

The regulations implementing the Family and Medical Leave Act (FMLA) were substantially revised in January 2009. Those revisions imposed certain new obligations on employers and created military leave entitlements for family members of military servicemembers who were injured in the line of active duty and for "qualifying exigencies" arising from a call to active duty.

On October 28, 2009, President Obama signed the Defense Department authorization bill for fiscal year 2010, which included new amendments to these provisions of the FMLA. These amendments expand the scope of the FMLA's military leave entitlements. Employers will need to revise any existing FMLA policy to ensure compliance with the amended FMLA provisions.

Changes Affecting "Qualifying Exigency" Leave

The military leave entitlement for a "qualifying exigency" previously applied to the spouse, son, daughter, or parent of an employee on active duty (or who has been notified of an impending call to active duty) in the National Guard or Reserves "in support of a contingency operation." Under the amended statute, this FMLA leave entitlement has been expanded to cover the spouse, son, daughter, or parent of a servicemember who is a member of the regular Armed Forces. In addition, the entitlement no longer applies to a call to duty "in support of a contingency operation." Instead, it applies to a call to "covered active duty," which is defined as deployment to a foreign country under certain statutory provisions.

Changes Affecting "Military Caregiver" Leave

Under the pre-amendment statute, an employee could take up to 26 weeks of unpaid leave to care for a parent, spouse, child, or next of kin, who was a member of the Armed

Forces (including National Guard and Reserves) and who was injured while on active duty. This provision has been expanded to allow for leave to care for a servicemember whose pre-existing injury or illness was "aggravated by service in the line of duty on active duty in the Armed Forces."

Additionally, the amendments create a new leave to care for "a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy." The definition of a "serious illness or injury" has similarly been revised to cover a veteran's "qualifying (as defined by the Secretary of Labor) illness or injury." Because the Secretary of

Labor has not issued regulations defining what constitutes a veteran's qualifying injury or illness, this new leave entitlement is not yet effective. However, we recommend that you update your policy now to ensure that you remain in compliance with the law.

What You Need to Do

- Employers should carefully review existing FMLA policies to determine if they need to be revised to comply with the amended statute's military leave provisions.
- If you have not already revised your FMLA policy and forms to reflect the January 2009 regulations, you should contact counsel as soon as possible to ensure that you are in compliance with all applicable

provisions and are meeting your obligations. Also, if you are not familiar with the posting and distribution requirements that went into effect in January, you should contact counsel to learn more about your obligations in this respect.

- Post the new FMLA poster when it becomes available from the Department of Labor (DOL).
- Make sure that you are using the revised FMLA forms issued by the DOL after the January 2009 revisions to the regulations. If an employee requests Qualifying Exigency or Military Caregiver leave, check to see if the DOL has issued new forms reflecting the October 2009 amendments. (The new forms are not yet available.)

If you have any questions about the FMLA amendments, please call any of the following members of the firm's Employment & Labor practice group: William I. Greenbaum, Amy Komoroski Wiwi, or Joy N. Eakley in the New Jersey office at 973.597.2500 or Alice B. Stock in the New York office at 212.262.6700. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

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