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EXPANSION OF THE FAMILY AND MEDICAL LEAVE ACT FOR FAMILIES AND CAREGIVERS OF MILITARY PERSONNEL

On January 23, after a month-long delay caused by a presidential veto of the legislation because of language relating to Iraqi assets, the updated fiscal year 2009 Defense Authorization bill (H.R. 4986) has been sent to the President for his signature. Section 585 of the bill will expand the Family and Medical Leave Act of 1993 ("FMLA") to provide: (1) up to 12 weeks of leave for employees who have a family member called up to or engaged in active military duty; and (2) up to 26 weeks of leave for employees who are serving as a caregiver to a family member who was injured or became ill while on active military duty. The legislation, which was attached as a rider to a larger bill regarding national defense, is called The Support for Injured Servicemembers Act ("the Act"). The Act was co-sponsored by Senators Christopher J. Dodd and Hillary Rodham Clinton, and received widespread bipartisan support in both the House and the Senate.

This amendment to the FMLA impacts all employers who are already subject to the provisions of the FMLA, as detailed herein.

1. Active Duty Leave

The Act's active duty leave provision provides up to 12 weeks of FMLA leave for an employee with a spouse, son, daughter or parent who: (1) is on active duty in the Armed Forces in support of a contingency operation; or (2) has been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. A "contingency operation" is an action or operation against an opposing military force.

An employee may take active duty leave for "any qualifying exigency" related to the family member's call-up, and the leave may commence as soon as an individual receives notification of being called to active duty. The term "any qualifying exigency" was not defined, and will likely be clarified in future regulations published by the Department of Labor ("DOL"). Similar to the Uniformed Services Employment and Reemployment Rights Act ("USERRA") general rule that an employee provide his or her employer with advance notice that he or she will be absent for uniformed services, the FMLA's active duty leave provision directs employees to provide notice to their employers of a foreseeable leave as soon as is reasonable and practicable.

2. Caregiver Leave

The Act provides up to 26 weeks of FMLA leave during a single 12-month period for a caregiver (which is defined as a spouse, son, daughter, parent or nearest blood relative) of a recovering servicemember, to care for that individual. The recovering servicemember must be a member of the Armed Forces (including the National Guard and Reserves) who is undergoing medical treatment, recuperation or therapy, is in an outpatient status, or is on the temporary disability retired list, for a serious injury or illness. A serious injury or illness is one incurred while in active duty that may render the person unable to perform the duties of the member's office, grade, rank or rating.

The caregiver protection provides more than double what is provided when an employee takes "traditional" FMLA leave. Senator Dodd has explained that this is because staff members at Walter Reed Medical Center have stated that six months is the average length of time an injured service member needs to become self-sufficient. Employees are entitled to only one 26-week leave period to care for a wounded servicemember during the employee's employment. The leave may be taken on an intermittent or reduced-schedule basis, but all 26 weeks must be used during a single 12-month period.

There are no statistics available as to how many service members have suffered qualifying injuries during Operation Iraqi Freedom or Operation Enduring Freedom (Afghanistan), triggering caregiver leave protections. However, Department of Defense January 2008 statistics indicate that since March 2003, 16,744 service members were injured but able to return to duty within 72 hours, and 14,117 service members were injured and unable to return to work within 72 hours. These statistics do not encompass service members who have fallen ill while on active duty. It is evident that not all of the 14,117 injured individuals have sustained injuries that would trigger the caregiver leave protections, but it is certain that the caregiver leave protections have the potential to pull a substantial number of employees out of the workforce for FMLA caregiver leave.

3. The Act Only Applies to Employers Subject to the FMLA and Employees Who Meet the FMLA's Eligibility Requirements

The FMLA applies to any employer who employs at least 50 part-time or full-time employees for each working day during 20 or more workweeks of the current or previous calendar year. The coverage also includes joint employers and successors. The FMLA also applies to all public agencies and most federal and state government employers, even if the entity has fewer than 50 employees. In order to be eligible for FMLA leave employees: (1) must have at least 12 months of service with the employer (the 12 months need not be consecutive); (2) must have worked at least 1,250 hours during the 12 months preceding the start date of the leave; and (3) must be employed at a site where a company employs at least 50 employees, or the company employs 50 employees within a 75-mile radius of that work site.

The Act does not change which employers are subject to the FMLA's requirements, nor does it change FMLA employee eligibility requirements. Rather, it expands the types of leave afforded, as detailed above. In other words, an employee who has worked for the company only 800 hours in the past 12 months has not met the basic FMLA eligibility requirements and therefore, will not be entitled to either of the Act's new protections.

Conclusion

These changes to the FMLA expand the circumstances under which an employer will be entitled to an unpaid, but job protected leave, so as to cover families, relatives and caregivers of non-employee military personnel. In reviewing obligations under these new FMLA amendments, employers would be well advised to also review obligations under USERRA. For instance, employers should be cognizant of the fact that USERRA applies to virtually all public and private employers, regardless of the number of employees. This is also an ideal opportunity to ensure that your workplace has posted the USERRA DOL poster, in a location where other employee notices are posted, such as a lunchroom. Posters for non-federal (state and private) as well as federal executive agencies are available at <http://www.dol.gov/vets/programs/userra>.

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If you have any questions regarding this significant amendment to the FMLA or its potential impact on your workplace, please contact Evan J. Spelfogel at (212) 351-4539 or espelfogel@ebglaw.com, or Tracey A. Cullen at (212) 351-3744 or tcullen@ebglaw.com, in EBG's New York office.

Tracey Cullen is the co-author, with Dean Silverberg, a Member of the Firm in the Labor and Employment practice group at the Firm's New York office, of the Employer's Guide to Military Leave Compliance, published by Thompson Publishing Group (2007).

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

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