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To: Our Clients and Friends
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Subject: CLIENT FYI

From time to time I prepare articles containing general advice about human resources management and legal issues that I believe will be timely and valuable to my clients. Sometimes I come across interesting articles that I believe might be useful for employers.

As a token of my gratitude to clients and friends for their business and referrals over the years, I would like to share these general interest employment law and human resources management articles with you. Please feel free to share them with your fellow executives, managers and supervisors. If you have a friend or colleague whom you believe would benefit from these, please send me their name, company and email address and I will be happy to email a copy to them in your behalf. If you have any questions about anything in the article, or about any subject dealing with Employment and Labor Law and human resources management, please contact me at the address above.

This first edition of **Client FYI** concerns a recent expansion of the Family and Medical Leave Act ("FMLA").

Best wishes,

Michael A. Caldwell

FMLA Benefits Expand Due to War

The Family and Medical Leave Act ("FMLA") covers all public employers, and all private employers who employ at least 50 employees either within a single facility, or within a 75 mile radius. The FMLA requires employers to allow up to 12 weeks of unpaid leave to an employee who is unable to work due to pregnancy, birth, or adoption of a child, placement of a foster child, or to care for the "serious health condition of the employee, the employee's child, spouse or parent. Employees are not entitled to take FMLA leave until they have worked for an employer for 12 months, and within the past 12 month period, have worked at least 1250 hours.

On January 28, 2008 President George Bush signed the National Defense Authorization Act of 2008, an appropriations bill that included provisions that immediately extend unpaid leave

under the Family and Medical Leave Act to employees who have a family member injured while on active military duty, or who must tend to other exigent circumstances arising from active military service. Two types of unpaid leave have been added to those already provided under the FMLA.

- 1. Up to 6 months to care for an injured veteran.** The most generous extension provides an employee whose family member returns from active duty with a serious injury up to 26 weeks of unpaid leave to care for the veteran undergoing medical treatment, recuperation, or therapy for a "serious injury or illness" incurred in the line of duty. Military regulations provide that injuries incurred "in the line of duty" are not limited to combat injuries. In fact, they can include non-combat injuries such as car accidents, and even non-combat-related illnesses like cancer, if they arise while a service member is actively serving. Family members caring for injured service members are likewise entitled to twenty-six weeks leave per year. This requirement took effect immediately when the President signed the Act. That leave is available only one time during an employee's tenure with the employer. The family member may have served in the regular armed forces, National Guard, or reserves. The injury must prevent the person from performing the duties of his or her office, grade, rank, or rating. Also, once the injured person comes home, there are few medical restrictions for the employee to qualify for leave: The veteran can be receiving medical treatment, recuperating, undergoing therapy, or in outpatient status. And, the veteran receiving the leave need not be a member of the employee's own immediate family; being the "next of kin" or nearest blood relative is sufficient.
- 2 "Qualifying exigency" leave.** The second type of leave authorized by the amendments provide that an employee may now take up to 12 weeks' leave annually for what the law terms a "qualifying exigency" arising from the active duty of the employee's spouse, child, or parent. What is such an exigency? That's up to the Department of Labor to define, as it reportedly has done in proposed regulatory changes to all of FMLA that were sent to the Office of Management and Budget several days before Bush signed the military appropriations bill. Initial expectations were that the proposal might appear in the *Federal Register* as soon as mid-February, but we still haven't seen it, and what's in it will remain a mystery until then.

Both of the leave periods listed above run concurrently with other types of leave available under the FMLA. So, for example, an employee who has taken twelve weeks of leave for a "qualifying exigency" will be entitled to fourteen additional weeks rather than twenty-six-weeks to care for an injured family member in the same year. Also, because the Act amends the FMLA,

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and not the Uniformed Services Employment and Reemployment Rights Act (USERRA), these provisions apply only to employers with 50 or more employees at a single location, or within a 75 mile radius.

Meanwhile, here are two suggestions about what a qualifying exigency might be: If a young woman is called to active duty and you employ her father, he might request a couple of weeks' leave to spend with her and help her get ready. Or, let's say you employ the wife of a man serving in Iraq or Afghanistan. If he is given leave but cannot take it in the United States, she might ask for leave to join him wherever he is taking a break.

Are there any requirements? The family member on or returning from active duty must have been involved in what the law calls a "contingency operation." It notes that such an operation is designated by the Secretary of Defense as one in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or an opposing military force. If an employee requests leave to be with an immediate family member called to active duty or already performing it, the employer can require not only as much notice as the employee receives of the exigency, but also certification of active duty. And, at the option of either employee or employer, any accrued paid vacation, personal leave, or sick leave may be substituted for leave under FMLA.

Coordinate with FMLA Laws in Your State

While Georgia has not enacted its own version of the FMLA, now that the 2008 military appropriations bill has extended leave rights under FMLA to some family members of those in the uniformed services, organizations with employees in any of seven states will need to check the provisions of those state laws. Whichever law is more beneficial to the employee will prevail. Here's a summary of the statutes in the seven states that have enacted their own FMLA laws:

California: Employers with 25 or more workers must give up to 10 days' leave to someone whose spouse is on leave from active duty. Definitions of the types of service and conflicts are similar to those in the federal law.

Illinois: Employers with between 15 and 50 workers must provide up to 15 days' leave to the spouse or parent of someone called to active duty for more than 30 days. Those with more than 50 employees must provide up to 30 days' leave.

Indiana: Employers with 50 or more workers must give 10 days' leave a year to the spouse, parent, grandparent, or sibling of a soldier on active duty for over 89 days.

Maine: Employers with 15 or more workers must grant up to 15 days' leave to employees

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whose family members are called to active duty. An employee whose spouse, domestic partner, parent, or child is injured or killed in active duty is entitled to unpaid leave.

Minnesota: All employers must give up to 10 days' leave to a worker whose immediate family member is injured or killed in active service. Employees whose immediate family member is called to active duty must also be given unpaid leave if the employer can do so.

Nebraska: Employers with between 15 and 50 workers must grant up to 15 days' leave while deployment orders are in effect for a spouse, son, or daughter. Employers with more than 50 workers must give up to 30 days. In either case, the deployment must be for at least 179 days.

New York: Employers with 20 or more workers must grant an employee whose spouse has been deployed up to 10 days' unpaid leave. The employee must work at least 20 hours a week, but there is no minimum length of service for eligibility.

If your company is covered by the FMLA, you will need to amend your FMLA policy statements in your personnel manuals, employee handbooks, and in any communications to employees about their FMLA leave rights. We can assist you, if you desire.

Until the Department of Labor issues regulations specifying the requirements relating to “qualifying exigency” leave, employers should be cautious and consult with counsel about any questions relating to leave connected with military service.

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