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## *FOR YOUR INFORMATION*

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News For School and Municipal Clients

### **Expanded Family Medical Leave Act Rights for the Families of Servicemembers**

Military members injured in the line of duty are surviving at a much greater rate than in the past. Many service men and women leave active duty and spend time recuperating in short and long term care. In recognition of this new reality for military families, President Bush signed into law the National Defense Authorization Act of 2008 ("NDAA"). The NDAA provides for new leave entitlements in the current Family Medical Leave Act ("FMLA") and adds new terms to the FMLA statutory definitions. This article examines the NDAA amendment, with particular focus on the new military caregiver entitlement, which took effect on January 28, 2008.

Generally speaking, the FMLA requires that covered employers provide eligible employees with up to 12 weeks of unpaid leave during a 12-month period to be used for the birth or adoption of a child, for the employee's serious health condition, and for the serious health condition of the employee's spouse, daughter, son or parent. The NDAA expands the maximum amount of leave an eligible employee is entitled to take when the leave is for the purpose of caring for a spouse, child or parent who is wounded while serving in the armed forces. The NDAA's military caregiver amendment requires covered employers to provide up to 26 weeks of

unpaid leave for an employee who is the spouse, daughter, son, parent, or "next of kin" of a "covered servicemember."

"Next of kin" is a new term, defined as the "nearest blood relative." In addition, the NDAA defines "covered servicemember" as "a member of the Armed Forces, including a member of the National Guard or Reserves, 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." Furthermore, the definition of "covered servicemember" in the NDAA does not refer to a "serious health condition," which continues to apply to traditional FMLA claims. Instead, the NDAA establishes the term "serious injury or illness," which is defined as "an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade rank or rating."

For purposes of the 12-month period, the FMLA allows employees to choose between a calendar year, a fiscal year, or a rolling 12-month period. The NDAA does not specify whether the 12-month period should be calculated from the date of the servicemember's injury, the date on which it

is determined that the injury qualifies as a “serious injury or illness,” the date on which the employee is needed to care for a seriously injured servicemember, or some other date. In addition, it remains unclear as to how employers are to reconcile the 12-month period for military caregiver leave to the employer’s regular FMLA leave year in the event that different 12 months periods are used.

The NDAA also adds a new “qualifying” reason to take traditional FMLA leave, which will take effect when the Secretary of the U. S. Department of Labor (“DOL”) issues final regulations defining “any qualifying exigency.” The NDAA provides that an eligible employee may take up to 12 weeks of unpaid leave if the employee’s spouse or child is on active duty in the military or is a reservist who faces recall to active duty if a “qualifying exigency” exists. It is unlikely that every exigency will constitute a “qualifying exigency.” Therefore, it is expected that an employee may be required to show a nexus between his or her need for leave and the servicemember’s active duty status in order to qualify for the 12 weeks of unpaid FMLA leave.

Many questions arising out of the NDAA will be answered by the FMLA regulations promulgated by the DOL, which are expected to be published in final form later this calendar year. On February 11, 2008, the DOL issued these regulations in proposed form. The DOL will receive comments on the proposed regulations until April 11, 2008. The regulations may be reviewed on the DOL’s

website or obtained by requesting a copy from the local DOL office.

On February 11, 2008, the DOL also distributed a Notice Poster that covered employers may use to notify their employees about the NDAA and the new leave rights it provides to eligible employees. This Notice Poster is available in electronic form on the DOL’s website. It may be printed from the website or obtained by requesting a copy from the local DOL office.

Employers must be aware that leave under the FMLA, as amended by the NDAA, may be in addition to similar family leave available under state law. Currently in Wisconsin, in addition to (but often running concurrently with), the leave available under the federal FMLA, covered employers must provide up to 6 weeks of leave for the birth or adoption of a child to eligible employees, up to 2 weeks of leave for the employee’s serious health condition, and up to 2 weeks of leave for the serious health condition of the members of the employee’s immediate family. Legislation to amend the Wisconsin Family Medical Leave Act to offer military family leave is currently pending before the Wisconsin Senate and Assembly.

By its express terms, covered employers must act now to be in good faith compliance with the new rules provided by the NDAA. In particular, covered employers should provide notice to their employees about the NDAA and the new leave rights provided thereunder. Furthermore, upon request, employers must grant eligible employees up to 26 weeks of FMLA leave to care for a servicemember injured in the line of duty.

*If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.*

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