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Alert

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FMLA and Warn Act Changes

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FMLA Amended for Benefit of Service Members

Effective January 28, 2008, an eligible employee of an employer subject to the provisions of the federal Family and Medical Leave Act shall be entitled to take up to 26 weeks of family leave during a 12-month period of time to care for a member of the Armed Forces suffering from a serious injury or illness. The amended law provides that a serious injury or illness “in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating.” An employee eligible to take such leave has been further defined as a spouse, son, daughter, parent or next of kin (the nearest blood relative of that service member). As such, a brother or sister or grandparent may now be entitled to take time off under the Family and Medical Leave Act to care for a family member who was injured servicing our country.

The new law also provides that an eligible employee shall be entitled to 12 weeks of leave during a 12-month period of time because of “any qualifying exigency” arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty in the Armed Forces in support of a contingent operation. Although creating this new category of time during which an employee may be entitled to take a leave from work, the new law does not define the term “qualifying exigency.” Instead, the law provides that a qualifying exigency shall be determined by regulation adopted by the Secretary of Labor. Although such regulations are supposedly being drafted, no regulations defining “qualifying exigency” have been proposed or adopted to date. Stay tuned for further information in that regard.

Employers should be aware that the procedures for taking a leave to care for an injured or seriously ill Armed Forces member are not significantly different from what would otherwise be required for a more traditional family and medical leave. The employer may require that the employee seeking leave submit a certification issued by a health care provider for the Armed Forces family member attesting to the serious injury or illness of the Armed Forces member. The employee is also required to provide the employer with advance notice when capable of so doing. The employee is entitled to take intermittent leave. And the employer may (*cont’d* ➔)

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require the employee to substitute any accrued vacation leave, personal leave, or sick leave for the leave provided under the FMLA.

In short, the FMLA was amended to provide family members of servicemen and servicewomen injured in combat more time to care for the injured soldier or sailor without fear of losing their job. Employers should amend their FMLA policies to reflect this change in the law.

New Jersey Adopts its Version of The Federal Warn Act - - The “Millville Dallas Airmotive Plant Job Loss Notification Act.”

Since 1988, federal law—the Worker Adjustment and Retraining Notification Act or “WARN Act”—has required employers with 100 or more fulltime employees to provide 60 days advance notice to its workforce of a mass layoff or a plant closing affecting 50 or more employees. If an employer failed to abide by the provisions of the WARN Act, the employer could be liable for back pay and benefits to each employee for each day of a violation. The employer’s liability would therefore be calculated for the period of the violation (or failure to provide adequate notice) up to a maximum of 60 days. If employees were forced to file a lawsuit to enforce their rights under the WARN Act, the Courts were also authorized to award the employees attorneys’ fees as costs of the litigation.

Effective December 20, 2007, New Jersey enacted its own version of the Warn Act. Like the federal law, the New Jersey statute is applicable to employers who employ more than 100 fulltime employees. If the employer ceases operations resulting in the termination of employment of 50 or more fulltime employees, or the employer conducts a mass layoff, the employer is obligated to provide 60 days advance notice of the shut

down of operations to the affected employees, to the Commissioner of Labor and Workforce Development of the State of New Jersey, to the chief elected official of the municipality where the employer operates his business, and to any collective bargaining units of the employees.

It must be noted that the employer penalties for failing to abide by the statutory mandates of the state law can be significantly greater than those provided under federal law. Under the new state law, employers who fail to abide by the notice requirements will be obligated to pay each employee affected by the termination of employment severance pay equal to one week of pay for each full year of employment. The affected employee is to be paid at the greater of his final regular rate of pay or the average regular rate of the employee’s compensation during the employee’s last three years of employment. State law also provides for an award of attorneys’ fees and costs to employees forced to bring a legal action to enforce their new found rights.

Employers contemplating plant closures must therefore be cautious and take appropriate steps to comply with both the federal and state plant closure notice requirements. Failure to do so could result in significant financial penalties being imposed upon the employer.



The material in this Employment Alert is for information purposes only and is not intended as legal advice. If you have any questions concerning this Alert, please contact John H. Schmidt, Jr. (jschmidt@lindabury.com). For biographical information on our attorneys, see our web site at www.lindabury.com.

