

# CWS CLIENT ALERT!

## Two New Employment Law Changes

### Family and Medical Leave Act

#### Newest FMLA Changes Expand Military Family Leave

In 2008, the FMLA was amended to add two types of military family leave available to eligible employees: (1) Military Caregiver Leave and (2) Qualifying Exigency Leave. Recently, President Obama signed The National Defense Authorization Act of 2010 (NDAA) which expands both of these FMLA military family leave provisions. Below is a brief overview of the changes to the FMLA. The changes were easy to miss because they were appended to a defense appropriation bill.

#### Military Caregiver Leave

An eligible employee may take FMLA leave (up to 26 weeks in a 12-month period) to care for a family member injured in the line of duty while on active duty in the military which includes all of the Armed Forces, the National Guard and the Reserve. The military caregiver leave expansion affects two aspects of Military Caregiver Leave. The first aspect is the service status (currently serving or veteran) of the employee's injured family member. The second is the type of injury to the military family member (basis) that qualifies the employee for the leave.

**Service Status:** One interpretation of the former law was that an eligible employee was only entitled to FMLA leave to care for a family member who was injured in the line of duty while on active duty in the military if the employee's family member was a current member of the military.

The new FMLA amendments make clear that an eligible employee may also take military caregiver leave to care for a family member who is a veteran so long as that veteran was a member of the military at any time during the five (5) years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy for a serious illness of injury incurred in the line of duty.

**Basis for Leave:** The type of injury or illness qualifying an employee to take military caregiver leave has been expanded to include the aggravation of existing or pre-existing injuries obtained in the line of duty while on active duty. The earlier FMLA regulations interpreting military caregiver leave excluded "aggravation" as a covered injury.

#### Qualifying Exigency Leave

This type of leave pertains to leave (up to 12 weeks per FMLA year) needed by an eligible employee may take qualifying exigency leave to care for family matters related to the employee's military family member's call to active duty. Examples of "family matters" could include arranging for childcare, attending military events, making financial/legal arrangements, and other such activities. Under the original law, this type of leave was interpreted by some to apply any to employees whose family members were members of the Reserve or National Guard. The new law clearly provides coverage for families of members of the regular Armed Forces who are deployed to a foreign country.

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### Consequences for Employer Failure to Comply with FMLA

An employee may bring civil action against an employer alleging FMLA violations which under certain circumstances, could result in a damage award equivalent to the employee's lost wages, benefits, and other compensation, plus interest. In the case of a willful violation of the FMLA, the penalty could result in an award equivalent to 12 (or 26 weeks of pay and benefits. Additionally, the court may grant equitable relief (such as reinstatement to the job); the employee's attorney's fees, expert witness fees, and other costs related to the litigation. Penalties may also be assessed for failure to post FMLA notices.

### What's a FMLA-covered employer to do?

The new FMLA provisions are already effective so employers' FMLA policies must be revised to reflect the new law and disseminated to employees. If you have any questions, or need assistance in revising your FMLA policy to reflect these changes, please contact us.

## Genetic Information Nondiscrimination Act (GINA) Employment Provisions Take Effect

Recently, the employment provisions of the Genetic Information Nondiscrimination Act (GINA) went into effect. GINA, which applies to companies with 15 or more employees, prohibits a covered employer from using an employee's "genetic information" as a basis for employment decisions. An employee's "genetic information" is broadly defined to include any information regarding an employee's or an employee's family member's genetic tests or the manifestation of a disease or disorder in employee's family member. The new law also prohibits retaliation against an employee for opposing violations of GINA or participating in such actions.

GINA also restricts a covered employer's acquisition of genetic information with some limited exceptions (a common example is genetic information contained in an employee's FMLA certification form). A covered employer must treat any genetic information it obtains as confidential medical information and keep it on separate forms in a separate file. Logically, the new law also prohibits a covered employer's disclosure of genetic information. There are some exceptions to the nondisclosure provision, such as, for example, compliance with a court order, upon employee's request or related to employer's compliance with the FMLA.

If GINA applies to your company, we recommend that your Equal Employment Opportunity policy be revised to reflect this new federally protected class of individuals. Additionally, employers are required to update their EEO Posters to comply with the new law. Updated posters are available from the Equal Employment Opportunity Commission.

