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ALERT

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DEPARTMENT OF LABOR ISSUES REVISIONS TO FAMILY MEDICAL LEAVE ACT REGULATIONS

The United States Department of Labor ("DOL") issued its long-awaited revised Family Medical Leave Act ("FMLA") regulations on November 14, 2008. These regulations, many of which the DOL has characterized as clarifying, will become effective on January 16, 2009. A common theme among the revisions is a requirement of more communication among employers, employees and health care providers.

The more important revisions made in the final rules are outlined below. For a fuller analysis, please see the FMLA Revisions Law Report.

1. Serious Health Condition – The definition of "serious health condition" remains unchanged. However, several clarifications are included in the new rule. Among them are: (a) minor illnesses currently identified in the regulations as examples of non-serious conditions are no longer automatically disqualified as serious health conditions; (b) the "continuing treatment" requisite for serious health conditions is redefined to include at least two treatments within 30 days of the period of incapacity, absent extenuating circumstances and where multiple visits to health care providers is the basis for leave; and (c) "periodic visits" for chronic conditions now requires treatment at least twice per year.

2. Intermittent and Reduced Schedule Leave – The new regulations require a "reasonable effort" on the part of the employee, (rather than a mere "attempt") to schedule intermittent leave so as not to disrupt operations. Further, the medical certification form will require intermittent leave to be designated as "medically necessary" by the provider.

3. Medical Certification – The changes made by the new regulations include: (a) where deficiencies in medical certifications are perceived, the employer must identify each and give the employee 7 days to correct; (b) leave may be denied after the employee is given a chance to cure the certification, but fails to do so or refuses to cooperate in the certification process; (c) the employer, through HR or a manager other than the employee's supervisor, may contact the provider *after first seeking clarification from the employee*, but only for clarification or authentication of the certification; and while the employee need not permit the provider to respond, failure to clarify through the provider or otherwise can result in denial of leave; (d) certification forms are revised to make them easier for health care providers to complete and to give employers a better understanding of the employee's limitations in the workplace; (e) new means for using information developed in any concurrent workers compensation and Americans with Disabilities Act proceedings are provided; and (f) a separate certification form now exists for family members.

4. Joint Employment – Professional Employer Organizations ("PEOs") are now specifically addressed. PEOs that merely perform administrative functions specifically are not joint employers under the FMLA. However, the PEO may hire, fire, assign, or direct and control the employees, that PEO would be deemed a joint employer.

5. Eligible Employees – The 12 months of employment needed to be eligible for FMLA leave need not be consecutive, but any service that precedes a continuous break of 7 years will not be counted.

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6. Calculation of Leave – The DOL has clarified the calculation of leave in different scenarios. In calculating an employee's leave entitlement for employees with varied schedules, employers will now use a weekly average over the 12 months preceding leave. Also, when employers place injured or ill workers on light duty, the time on light duty doesn't count against the employee's FMLA leave entitlement. The new regulations clarify that "substitution" simply means that employer paid leave programs, such as PTO, sick time, vacation, etc., "run concurrently" with FMLA. Further, the new regulations clarify that an employer may count overtime that the employee would have been required to work during leave toward an EE's FMLA leave. Finally, the employer must calculate the intermittent or reduced schedule leave using an increment no greater than the shortest period of time that employer uses to account for use of other forms of leave provided it is not greater than one hour.

7. Bonuses –The new regulations clarify that employees on FMLA are ineligible for bonuses that would have been earned if the employee were actively employed. This makes it possible for employers to reward employees for "perfect attendance" without having to give bonuses to employees on FMLA.

8. Releases – The regulations now specifically permit releases of past or existing FMLA claims without court or DOL approval. However, as always, it remains unlawful to prospectively release FMLA rights.

9. Notices –The regulations organize employer notice requirements into four sections—General Notice, Eligibility Notice, Rights and Responsibilities Notice, and Designation Notice. Employee leave requests still need not mention the FMLA, but the new rule requires an employee to indicate: (a) inability to perform functions of the job (or a family member's inability to participate in regular daily activities), (b) the anticipated length of the absence, and (c) whether the employee (or family member) will visit a health care provider.

10. Standard Forms – The DOL plans to revise several standard forms to reflect the revisions. These include the WH-380E and WH-380F medical certification forms, the Publication 1420 notice of rights, the WH-381 model notice of eligibility to employees, and a new WH-382 model "designation" notice.

11. Regulations Implementing Military Family Leave Amendments – The rule also interprets and implements the Military Family Leave Amendments enacted earlier this year. It clarifies the meaning of a qualifying exigency and how to calculate military leave entitlement, and confirms that during the "single 12-month period" leave cannot be designated and counted as both leave to care for a covered service member and leave to care for a family member with a serious health condition. The rule also states that employees are not obligated to provide notice to employers when they first become aware of a covered family member's active duty or call to active duty status. The obligation to provide notice of leave for a qualifying exigency is triggered when the employee first seeks to take such leave. Finally, optional WH-385 Form was created for use in obtaining medical certifications of Military Caregiver Leave. ◆

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