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LEGAL ALERT

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NEW FMLA REGULATIONS ANNOUNCED BY THE DEPARTMENT OF LABOR

by Rebecca Winterscheidt and Ashley Kasarjian

On November 17, 2008, the Department of Labor ("DOL") published final regulations expanding the Family and Medical Leave Act ("FMLA"). The regulations address the military leave amendments enacted by President Bush in January 2008 and also clarify and modify the existing regulations. The regulations take effect January 16, 2009. It is imperative that all employers covered by the FMLA consider these regulations in connection with their existing FMLA policies, procedures and handbook provisions accordingly.

HIGHLIGHTS OF THE NEW REGULATIONS

- MILITARY FAMILY LEAVE: There are two new qualifying reasons for employees to take leave:

  (1) Eligible employees are entitled to 12 workweeks of leave because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation. Covered military members for purposes of this section only include individuals in the Reserves or retired members of the regular Armed Forces or Reserves. The following categories constitute a qualifying exigency: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities that are agreed to by the employer and employee.

JOIN US FOR A WEBINAR

Snell & Wilmer L.L.P.'s Labor & Employment Group will be hosting a Webinar on Friday, December 5, 2008, at 10:00 a.m. Phoenix time, on these important new changes to the FMLA regulations. If you are interested in participating, contact Michelle Richards at 602.382.6049, or marichards@swlaw.com.

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(2) Eligible employees are entitled to 26 workweeks of leave in a single twelve-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. This leave may be taken to care for a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of active duty for which he or she is undergoing medical treatment, recuperation, or therapy, or is otherwise in outpatient status or on the temporary disability retired list. Additionally, an employee may have multiple family members who qualify as the next of kin, and they may take FMLA leave either consecutively or simultaneously.

- 12 MONTH REQUIREMENT FOR ELIGIBILITY: Under the original regulations the 12 months an employee must have been employed did not have to be consecutive months. Therefore, a person could potentially have met the 12 month requirement by having worked three months 10 years ago and just nine months currently to meet the 12 month requirement if both periods were with the same employer. Under the new regulations, employment periods prior to a break in service of seven years or more do not need to be counted in determining whether the employee has been employed by the employer for at least 12 months. However, the time worked prior to a break in service of seven or more years must be counted if the break is due to the employee's fulfillment of National Guard or Reserve military service obligations, or a written agreement exists concerning the employer's intention to rehire the employee.

- NOTIFICATION TO EMPLOYEE: An employer now has five business days (absent extenuating circumstances) from when the employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, to notify the employee of his or her eligibility to take FMLA leave. If the employee is not eligible, the employer must provide at least one reason for ineligibility. In addition, the employer must provide the employee a notice of his or her rights and responsibilities and a designation notice. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12 month period.

- RETROACTIVE DESIGNATION: If an employer does not timely designate leave as required under the FMLA, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. However, the best practice is to make every effort to timely designate leave.

- COMMUNICATION WITH HEALTH CARE PROVIDERS: An employee may choose to provide the employer with authorization allowing the employer to communicate directly with the health care provider. The employer may contact the health care provider for purposes

of clarification and authentication of an incomplete or insufficient certification. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, may the employee's direct supervisor contact the employee's health care provider.

- PERIODIC TREATMENT: The term "periodic visit" for chronic serious health conditions means visiting a health care provider at least twice per year for the same condition. The term was previously undefined.

- PAID LEAVE: FMLA leave is still unpaid leave. However, the regulations clarify that an employer may require employees to use paid leave (if available) concurrently with the unpaid FMLA leave. However, neither the employer nor the employee may require the concurrent use of paid leave when leave is also taken pursuant to a disability benefit plan or workers' compensation. The required designation notice must inform the employee if the employer requires paid leave to be substituted for unpaid leave.

- PHYSICAL IMPOSSIBILITY EXCEPTION TO INTERMITTENT LEAVE: When it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

- RECERTIFICATION: Even if a medical certification indicates that the employee will need leave for a period in excess of six months (i.e. for a lifetime condition), the employer is permitted to request recertification every six months in connection with an absence.

- WAIVER OF RIGHTS: Employees cannot waive, nor may employers induce employees to waive, their prospective rights under the FMLA. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct.

- PERFECT ATTENDANCE AWARDS: Employers can now deny perfect attendance awards to employees who do not have perfect attendance because of taking FMLA leave so long as the employer treats other non-FMLA employees the same way.

- HOLIDAYS AND TEMPORARY CLOSURES: For purposes of determining the amount of leave used by an employee, the DOL has clarified that the fact that a holiday occurs within the week taken as FMLA leave has no effect – the week is counted as a full week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and

employees generally are not expected to report to work for one or more weeks, the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.

- NEW FORMS AND POSTERS: The DOL has provided new sample forms and posters that employers may utilize. These documents will be available at: www.wagehour.dol.gov.

  (1) WH-380E – Certification of Health Care Provider for Employee's Serious Health Condition;

  (2) WH-380F – Certification of Health Care Provider for Family Member's Serious Health Condition;

  (3) WH Publication 1420 – Employee Rights and Responsibilities Poster;

  (4) WH-381 – Notice of Eligibility and Rights & Responsibilities;

  (5) WH-382 – Designation Notice;

  (6) WH-384 – Certification of Qualifying Exigency for Military Family Leave; and

  (7) WH-385 – Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave.

The above represents only some of the many changes to the existing FMLA regulations. **To learn more, sign up for our upcoming Webinar on Friday, December 5, 2008 at 10:00 a.m. Phoenix time. RSVP to marichards@swlaw.com.**

For more information about the FMLA regulations, please contact Rebecca Winterscheidt at 602.382.6343 or Ashley Kasarjian at 602.382.6544.

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