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NOTICE TO CLIENTS

NEW FMLA REGULATIONS ARE IN EFFECT BEGINNING JANUARY 16, 2009

New regulations implementing the Family and Medical Leave Act (FMLA) will become effective on January 16, 2009. Because these new regulations *materially* change the way the FMLA has been applied, all employers who employ 50 or more employees must review and update their FMLA policies and practices to comply with the new rules.

Here are some of the important highlights of the new FMLA regulations, including those regarding military family leave.

TRADITIONAL FMLA LEAVE HIGHLIGHTS

Forms. The United States Department of Labor (DOL) created a series of new forms that employers can use for purposes of establishing an employee's right to FMLA leave. These are:

- Certification of Healthcare Provider for Employee's Serious Health Condition (Form WH-380-E).
- Certification of Healthcare Provider for Family Member Health Condition (Form WH-380-F).
- Notice of Eligibility and Rights and Responsibilities (Form WH-381).
- Designation Notice (Form WH-382).
- Notice to Employee of Rights and Responsibilities (Form WH Publication 1420).
- Certification of Qualifying Exigency for Military Leave (Form WH-384).
- Certification for Serious Injury or Illness of Covered Servicemember for Military Leave (WH-385).

These forms can be obtained from the Department of Labor's website at www.dol.gov/esa/whd/fmla/finalrule.htm.

Employee Eligibility/Covered Employer. To be eligible for FMLA leave, an employee must be employed by the employer for at least 12 months, but the months need not be consecutive. The DOL has indicated that an employer should include all periods of service toward the 12-month requirement unless the break is at least seven (7) years long. An employer is “covered” if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive) in either the current (2009) or preceding (2008) calendar year.

Serious Health Condition. An employee will be deemed to receive “continuing treatment” from a health care provider (for purpose of establishing a “serious medical condition” justifying FMLA leave) where (1) the health care provider treats the employee two or more times within 30 days of the first day of incapacity, with the first visit required to have occurred within seven (7) days after the onset of the condition; or (2) the health care provider treats the employee on at least one occasion within the first seven (7) days after the onset of the condition, and the condition requires a regimen of continuing treatment. In addition, “chronic conditions” are those requiring at least two visits to a health care provider per year.

Initial Notice. Notice of FMLA rights must be provided to each employee in either a general handbook or by distributing a copy of the FMLA notice to each new employee when hired. Employees should use the DOL’s Form Publication 1420, or create a notice that contains the same information. This general notice must also be posted by employers even when they do *not* have FMLA-eligible employees.

Additional Notices. An employer must provide two separate notices once the employer becomes aware of the need for FMLA leave. One notice provides information regarding an employee’s eligibility for FMLA leave (DOL Form WH-381 may be used for this purpose). A second notice describes the employee’s specific FMLA obligations and the consequences of failing to meet them (WH-Publication 1420 may be used for this purpose). An employer must provide these required notices within five (5) business days. Also, if the employer wishes to require a more specific fitness-for-duty certification at the end of the leave period, the employer can provide the employee with a description of the essential functions of his/her job with the second notice referenced above and require health care provider to specifically address the employee’s ability to perform those essential functions.

Medical Certifications. The DOL developed two new optional forms - DOL Forms WH-380E and WH-380F - for use in obtaining medical certifications. An employer should request a medical certification within five (5) business days from the date the employer becomes aware of the employee’s need for leave. An employee must provide the requested information within 15 calendar days of the request. If the employee fails to provide a complete and sufficient certification, the

employer must notify the employee of any deficiencies, in writing, and require that the employee respond within seven (7) calendar days.

Medical Recertification. An employer may request a new medical certification each leave year for a serious health condition that lasts beyond a single leave year. An employer also may require recertification every six months in all situations, even when the condition is chronic.

Fitness for Duty Certification. Employers may require fitness-for-duty certifications. If the employer desires the certification that the employee has the ability to perform the essential functions of his/her job, it must provide the employee with a list of the essential functions of his/her job at the time leave was designated.

Time to Designate FMLA Leave. Once an employer has obtained sufficient information to determine whether an employee's leave will be protected under the FMLA, the employer generally must designate the leave as FMLA leave within five (5) business days. In so designating, employers may use the new Designation Notice (DOL Form WH-382).

Retroactive Designation. An employer may retroactively designate leave as FMLA leave, provided the delay does not cause the employee any harm or injury.

Notice to Employer. An employee who provides less than at least 30 days notice for foreseeable leave may be required to explain the reason for failing to do so.

Denial of Bonuses. Employers can deny bonuses based upon achievement of a specified goal, such as perfect attendance or products-sold awards, to employees who do not have perfect attendance due to FMLA leave.

Damages. Damages available for interfering with FMLA rights include not only compensation and benefits lost, but also other actual monetary losses sustained.

Settlement. FMLA claims can be released and settled without DOL or court approval.

Call-In Procedures. Employers may require employees to utilize regular company call-in procedures to report FMLA absences and require that employees specifically explain the reason for leave. Simply calling in as "sick" is not sufficient notice for purposes of FMLA.

Health Care Providers. Employers may contact an employee's health care provider for purposes of clarifying or authenticating the fitness-for-duty certifications and medical certifications under certain circumstances. However, a direct supervisor *cannot* make this inquiry.

MILITARY FAMILY LEAVE HIGHLIGHTS

On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA). The NDAA amended the FMLA to extend protection to employees who require leave to care for family members injured while on active military duty or to handle a "qualifying exigency" associated with a covered military member. Here are some of the highlights of the new rules:

Duration of Leave. Eligible employees may take up to 26 work weeks of leave during "a single 12-month period" to care for a seriously injured or ill servicemember. An employee may be eligible for military caregiver leave if he or she is a spouse, child or parent of a servicemember or a servicemember's "next of kin." The "single 12-month period" begins on the first day the eligible employee takes leave and ends 12 months after that date. The employer does not have discretion on how to calculate this 12-month period, regardless of how its FMLA policy defines the 12-month period for traditional FMLA leave. The DOL developed a new Certification of Serious Injury or Illness of Covered Servicemember for Military Family Leave form (Form WH-385).

Multiple Leaves. An eligible employee may take more than one Military Caregiver Leave if the leave is to care for a different covered servicemember or to care for the same covered servicemember with a subsequent serious injury.

"Qualifying Exigency." Employers also must provide eligible family members 12 work weeks of leave for "any qualifying exigency," which includes (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities not encompassed in the other categories, but agreed to by the employer and employee. The DOL developed a Certification of Qualifying Exigency for Military Family Leave form (Form WH-384).

Who Qualifies. Qualifying exigency leave is limited to family members of reservists, members of the National Guard and retired members of the regular armed services or reserves on active duty or called to active duty status in support of a contingency operation. Refers to a Federal call to active duty, not a State call. Qualifying exigency leave is *not available* to family members of active servicemembers of the regular armed forces.

Exceptions. Generally, an eligible employee is entitled to a maximum of 26 weeks of military caregiver leave and traditional FMLA leave in a "single 12-month period." For example, an eligible employee may, during "a single 12-month period" take 16 weeks of military caregiver leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn.

CONCLUSION

The regulations substantially change the way employers and employees will handle FMLA leave, meaning that policies, forms and practices will have to be modified substantially and quickly to comply with the new requirements.

If you need assistance to comply with these new and extensive regulations, please do not hesitate to contact our office.

Very truly yours,

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