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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

New Legislation

Expanded Family & Medical Leave for Families of Military Personnel

On January 28, 2008, President Bush signed the National Defense Authorization Act into law which adds two provisions to the FMLA, expanding the Act to assist service members and their families. The FMLA changes do not include an effective date, however, it should be considered to be effective immediately. Enforcement is not expected until the Department of Labor issues regulations.

One provision, the "active duty leave," requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave a year for a *qualifying exigency* connected to the active duty status of an employee's spouse, son, daughter or parent. The other provision entitles eligible family members to take up to 26 weeks of unpaid leave to care for a wounded service member ("caregiver leave").

The active duty leave creates an additional reason (*qualifying exigency*) for an employee to take FMLA, joining the current reasons of (1) the birth of a child and to care for such child; (2) the placement of a child for adoption or foster care; (3) caring for a spouse or immediate family member with a "serious health condition"; and (4) the employee's own serious health condition causing them to be unable to perform the essential functions of the job. The new reason is for a *qualifying exigency* that arises from the fact that the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call or order to active duty. Congress did not define the term *qualifying exigency* and has directed the Secretary of Labor to issue regulations to determine what constitutes such an exigency. Until we receive some guidance from the Department of Labor, it is a good idea to be flexible when the leave is requested. It is expected that the definition for a *qualifying exigency* will include overseas assignments, recalls to active duty

and troop mobilizations, among others. Out of an abundance of caution, employers should interpret the term broadly and grant any leave that sounds reasonable.

The "caregiver leave" provides that an eligible employee may take up to 26 weeks of FMLA leave to care for a spouse, son, daughter, parent or next of kin ("nearest blood relative") who is a covered service member. The service member must have a "serious illness or injury" incurred while on active duty that may render the member unable to perform the duties of his or her office, grade, rank or rating and for which the member is: (1) undergoing medical treatment, recuperation or therapy; (2) an outpatient; or (3) on a temporary disability retired list. The provision also defines several key terms of this new leave program including "covered service member," "next of kin" and "serious injury or illness" as it applies to a member of the Armed Forces.

Employees must still provide reasonable notice, when the need for leave is foreseeable. Employees must be permitted to take the leave on an intermittent or reduced leave schedule and paid leave may be substituted for the FMLA unpaid leave. Employers should be prepared to revise their FMLA policies. The Department of Labor will also need to provide a new poster. Until the Department of Labor revises the poster and develops the regulations, employers should inform employees who are known to have family in the military of the new law and their rights. We will update you as more information becomes available.

Harassment

Spurned Lover Harassed Coworker Because of Sex

Plaintiff former employee appealed from a district court decision granting defendant employer summary judgment. The employee

alleged that her employer exposed her to a hostile work environment created by the sexually harassing behavior of her coworker and former paramour in violation of Title VII of the Civil Rights Act of 1964 and the Maine Human Rights Act. The appeal focused on the third and sixth prongs of the test for a claim of hostile work environment sexual harassment; specifically, whether the harassment was "based upon sex" and, if so, whether the employer could be held liable. The coworker sent sexually degrading, gender-specific epithets to his former lover at work. The Appellate court said that this conduct could lead a reasonable jury to conclude that the harassment was based on her sex, even though there were no allegations or evidence of sexual advances, or physical touching. Given the undisputed facts, however, no reasonable jury could conclude that the employer's response was not prompt and appropriate. Faced with allegations of sexual harassment between former lovers, the court said the employer acted reasonably in addressing the employee's complaints with progressive discipline of the coworker and ultimately firing him. *Forrest v. Brinker International Payroll Company*, 102 FEP Cases 533 (1st Cir. 12/19/07)

Family and Medical Leave

Flight Attendant Ineligible for FMLA

A Continental Airlines flight attendant alleged she was entitled to FMLA leave on an intermittent leave basis due to her pregnancy. The court of appeals held that an FMLA claim cannot be maintained by someone who is not an "eligible employee" under the Act which requires an employee to work at least 1250 hours in the 12 months preceding her request for leave. Although the airline did not keep track of the actual hours the flight attendant spent performing additional duties outside of the flight time, the employer adequately established that the

flight attendant worked only 1128 hours in the prior 12 months. The employer compiled her pay registers detailing each flight worked and added the time required under the labor contract for check in, debriefing, training time, and ground time. The court rejected the flight attendant's calculations based on her own recollection. *Staunch v. Continental Airlines, Inc.*, 2008 U.S. App. LEXIS 196 (6th Cir. 1/7/08)

Labor Relations

Employer's Non-Solicitation Policy Upheld

A newspaper publisher did not violate federal labor law by maintaining a policy prohibiting employees' use of its email system for non job-related solicitations. (Employers are encouraged to have a non-solicitation policy and to consistently enforce it in all aspects of the workplace, including computer emails.) In this case, the employer had a non-solicitation policy but allowed solicitation for charitable participation. An employee used the company's email to solicit support for a union. The employer issued the employee a written warning for each violation of its email policy. In response, the union filed an unfair labor practice charge alleging that the policy was unlawful and was discriminatorily enforced against the employee. The National Labor Relations Board rejected the union's claim that the policy was unlawful. It found that employers have a basic property right regarding their email systems and have legitimate reasons for controlling use of their systems, including maintaining efficient operations, preserving server space, protecting against computer viruses, preventing the dissemination of confidential information, and avoiding company liability

for employees' inappropriate emails. Further, the Board found that an employer may permit charitable solicitation, those of a personal nature (such as the sale of a car) and personal invitations. However, an employer may not permit non-charitable solicitations or invitations for a third party organization, yet bar union-related solicitations. The key in this case was that the employer enforced its policy evenly across the board—there was no evidence it had permitted unauthorized emails without taking appropriate disciplinary action. *Register-Guard*, 351 NLRB No. 70 (12/16/07)

Disabilities

Refusal to Allow Return From Medical Leaves Resulted in Settlements with EEOC

The Equal Employment Opportunity Commission reported several settlements with employers that refused to allow employees to return to work after a medical leave. The consistent pattern in the cases was that the employers required the employees to remain on leave until they could return without restrictions. The Americans with Disabilities Act requires employers to permit employees to return to work following a medical leave when a reasonable accommodation would permit them to perform the essential functions of the job. Non-essential functions which the employee cannot perform must be temporarily adjusted or eliminated to permit the employee to work. In each of the cases, the employers were found to have imposed unnecessary restrictions on the employees and to have interfered with their rights under the ADA.