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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 Regulations

E-Verify Mandatory for Federal Contractors

Starting January 15, 2009, certain federal contractors and subcontractors will be required to use the E-Verify system to verify the eligibility of their employees to legally work in the United States. Federal contracts and solicitations issued on or after January 15, 2009 will include a clause requiring federal contractors to use E-Verify.

Final Rule on Family and Medical Leave

The Department of Labor issued its final rule on the Family and Medical Leave Act on November 17, 2008 implementing the military leave amendments signed into law by President Bush and updating the regulations. The Department of Labor said that the final rule will improve communication between employees, employers, and health care providers to make the law operate more smoothly, and provide needed clarity for both

workers and employers about their responsibilities and rights under the FMLA.

On January 28, 2008, President Bush signed the National Defense Authorization Act into law which added two provisions to the FMLA, expanding the Act to assist service members and their families. The new active duty leave created an additional basis for an employee to take FMLA leave. Specifically, this new reason for FMLA leave created by Congress 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. While Congress created this new category for leave, it did not define the term "qualifying exigency." These new regulations define "qualifying exigency" to include: (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 employees.

The other military-related provision was a new FMLA service member family leave program. It specifically 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 leave program including "covered service member," "next of kin" and "serious injury or illness" as it applies to a member of the Armed Forces. The new FMLA caregiver leave is **available only during a single 12-month period**.

The fact sheet prepared by the Department of Labor summarizing the new rule and highlighting the changes can be found at <http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf> The final rule, including the new forms and the Notice to Employees of Rights Under FMLA can be found at <http://www.dol.gov/esa/whd/fmla/>

The new rule which becomes **effective on January 16, 2009** also includes a number of technical regulatory changes to reflect current law following Supreme Court and appellate court decisions. The new rule includes new optional forms: Form WH-381, Notice of Eligibility and Rights and Responsibilities; Form WH-382, Designation Notice; Form WH-384, Certification of Qualifying Exigency for Military Family Leave; and Form WH-385, Certification for Serious Injury or Illness of Covered Service member for Military Family Leave. The final rule also improves the exchange of medical information by updating

the Department's optional Form WH-380 (Forms WH-380-E and WH-380-F) to create separate forms for the employee and covered family members and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification.

Employers with 50 or more employees will need to revise their FMLA policies to reflect the final rule.

Pending Legislation

New Employment Legislation Anticipated in 2009

Now that the election is over, employers need to be prepared for potential major changes in labor and employment laws resulting from the election of a democratic majority in both houses and a democratic president. The following bills introduced in 2007 and 2008 but blocked by republicans are likely to be passed in 2009.

The **Employee Free Choice Act** will shortcut the union organizing process by

- eliminating the employer's ability to communicate with employees,
- doing away with the secret ballot election, and deciding to unionize, based on the signing of cards, that the employees want to be represented by the union.

Employers could become unionized before they even realize a union campaign has begun because they may get no notice of a union campaign. Under the bill, collective bargaining must begin within ten days after receiving a written request from the union. The bill gives the parties 90 days to reach an agreement before a mediator can be brought in. If the mediator does not resolve the outstanding issues within 30 days, the issues go to binding arbitration. Any first agreement reached under this bill will remain in effect for

two years. New and increased civil penalties against employers (but not unions) are added by the bill. Employers who discriminate, discharge, threaten to discharge, or engage in any other unfair labor practice while employees are seeking representation and until a first agreement is reached can face civil penalties not to exceed \$20,000 for each violation in addition to back pay and two times the back pay amount as liquidated damages.

Thus, pro-active employers will want to take at least the following steps:

- Educate supervisors to lawfully identify union-organizing activity such as a sudden lack of communications with normally friendly employees, employees asking unusual questions or seeking information about employer's policies, unusual activity among groups of employees before or after working hours, small groups congregating;
- Educate supervisors to respond to employees appropriately within applicable legal restrictions;
- Educate supervisors to listen to employees' complaints about terms and conditions of employment and then advise management about what they hear;
- Prepare supervisors to educate employees about the potential changed significance of signing union authorization cards; and
- Review employee handbooks and other employment policies to ensure that they are compliant with the NLRA and cases interpreting it.

This bill does not apply to the public sector workplace that is governed by state law.

Paid Sick Leave: In 2007 legislation was introduced guaranteeing all working Americans seven (7) paid sick days per year to use for their own or a family member's medical needs (the Healthy Families Act).

Since the passage of the Family & Medical Leave Act, Senator Kennedy has tried to garner support to expand the FMLA to smaller employers and to require employers to pay employees for the time off. 2009 is likely to be the year for this legislation.

Equal Remedies Act (S. 1928): Senator Edward Kennedy introduced legislation in 2007 that would repeal the caps on damages added by the Civil Rights Act of 1991. The Act currently limits compensatory and punitive damages in discrimination cases under Title VII and the Americans with Disabilities Act to between \$50,000 and \$300,000 depending on the size of the employer. Senator Kennedy cited perceived inequities between the damages limit contained in the Civil Rights Act of 1991 and damages that can be recovered based on race or national origin brought under the Civil War era civil rights statute §1981 as a reason for the bill. This legislation will likely be introduced again in 2009.

Ledbetter Fair Pay Act (H.R. 2831): In 2007, the House of Representatives passed the Ledbetter Fair Pay Act in an attempt to reverse a U.S. Supreme Court decision that limits the time workers have to file claims against employers for pay discrimination. The Court essentially held that a pay decision made years earlier did not create a continuing violation of Title VII and could not support a lawsuit filed now because it was untimely. This bill did not pass in 2007, was reintroduced in 2008 with modifications and will be reintroduced in 2009. In fact, Lilly Ledbetter for whom the legislation is named addressed her concerns at the Democratic National Convention.

Penalties for Misclassifying Employees as Independent Contractors: The Employee Misclassification Prevention Act (H.R. 6111) was introduced in May. The bill would amend the Fair Labor Standards Act and impose penalties on employers who misclassify

workers as independent contractors. The maximum fine would be \$10,000 per violation if an employer repeatedly or willfully fails to accurately classify workers. The bill would also require employers to give notice to individuals classified as independent contractors (a) of their classification, (b) that if misclassified, they are entitled to wages and other labor protections, and c) directing them to the Department of Labor if they suspect they have been misclassified. State unemployment compensation agencies would be required to conduct audits and establish penalties for employers who violate the law. This proposed legislation is in the early stages.

Other legislation would prohibit sexual orientation discrimination by an amendment to Title VII of the Civil Rights Act; amend the Equal Pay Act to remove caps on compensatory and punitive damages and either eliminate completely or make it much more difficult for employers to assert defenses; and prevent employers from requiring employees to agree to arbitrate future employment disputes as a condition of employment.

Discrimination Cases

Court Held Grandfather Stood in Loco Parentis to Granddaughter

A school system payroll supervisor had taken FMLA leave to care for his granddaughter because his daughter who lived with him was a student and member of the Army Reserve expecting to be called into service. Prior to taking his FMLA leave, the supervisor received a poor performance review stating he needed to show significant improvement and placing him on a performance

improvement plan. During his FMLA leave, the employer sent a letter advising the supervisor that his contract would not be renewed because he failed to complete his PIP. The supervisor sued alleging the school system interfered with his right to FMLA leave. Upholding the denial of the school system's summary judgment motion, the Appellate Court said that a jury could find the supervisor stood in loco parentis to his granddaughter while on FMLA as he provided substantial financial support and care for her. Further, the court held that the supervisor easily demonstrated a prima facie case of retaliation and that the reason alleged for terminating him was a pretext for discrimination. *Martin v. Brevard County Public Schools*, No. 07-11196 (11th Cir. 2008)

Rubber Ducks Evidence of Employee Theft

An eviction company evicting a 70-year old hotel employee discovered vacuum packed steaks, washcloths and towels, toiletries, cleaning supplies, and a large number of rubber ducks bearing the hotel's logo among the employee's possessions. They notified the hotel and the hotel discharged him as its director of purchasing. The employee filed an age bias suit wherein he denied having stolen the items and claimed they were gifts from vendors. The hotel defended saying that even if its information was inaccurate, it sincerely believed the employee had unauthorized possession of its property when it discharged him. The court rejected the employee's contention that the hotel needed conclusive evidence that he had stolen the property. Further, the hotel fired younger employees for similar offenses. The court found no violation of the Age Discrimination in Employment Act. *Roeben v. BG Excelsior Ltd. Partnership*, No. 08-1260 (8th Cir. 2008)



DOL's Final Rule on Family and Medical Leave Providing Military Family Leave and Updates to the Regulations

- On November 17, 2008, the Department of Labor (DOL) published its final rule to implement the first-ever amendments to the Family and Medical Leave Act (FMLA), signed into law by President Bush in January 2008, which provide new military family leave entitlements and to update the regulations under the 15 year-old FMLA. The final rule will improve communication between employees, employers, and health care providers to make the law operate more smoothly, and provide needed clarity for both workers and employers about their responsibilities and rights under the FMLA leave. The Final Rule does not reduce the law's coverage for workers who need FMLA leave. Updating and clarifying the regulations will reduce uncertainty and provide greater predictability in the workplace for everyone.
- The Department of Labor engaged in an extensive, transparent, multi-year fact-finding and review process before proposing changes to the FMLA in February 2008. The final rule was developed in response to:
 - The passage of the military family leave provisions in the National Defense Authorization Act (NDAA) for FY 2008, Public Law 110-181;
 - U.S. Supreme Court and lower court cases invalidating portions of the Department's regulations;
 - The Department's 15 years of experience enforcing and administering the FMLA;
 - Discussions with various stakeholders over the past six years (including a Fall 2007 stakeholder meeting that included health care providers); and
 - The receipt and review of over 4,600 public comments in response to the 2008 Notice of Proposed Rulemaking (NPRM); the review of over 15,000 public comments in response to the Department's December 2006 Request for Information (RFI); and the publication of the June 2007 FMLA Report on the RFI.

The Final Rule is responsive to the many comments submitted to the record. The Department received numerous comments in response to the RFI and the proposed rule reflecting the value of the FMLA to employees who take leave to care for a newborn child, for an ill family member, or for their own illness. However, DOL also heard about areas where the regulations are not working well; where there is ambiguity in the regulations; and where there is increasing friction between employers and employees as a result of these problems. The final rule improves on these areas and addresses many of these concerns.

HIGHLIGHTS OF THE REGULATORY CHANGES IN THE FINAL RULE

- **Military Family Leave:** Section 585(a) of the NDAA amended the FMLA to provide two new leave entitlements:
 - 1) **Military Caregiver Leave (also known as Covered Servicemember Leave):** Under the first of these new military family leave entitlements, eligible employees who are family members of covered servicemembers will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered servicemember with a serious illness or injury incurred in the line of duty on active duty. Based on a recommendation of the President's Commission on Wounded Warriors (the Dole-Shalala Commission), this 26 workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave. This provision

also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.

- 2) **Qualifying Exigency Leave:** The second new military leave entitlement helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The Department’s final rule defines qualifying exigency by referring to a number of broad categories for which employees can use FMLA leave: (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 final rule also includes two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave.

- **The Ragsdale Decision/Penalties:** The final rule includes a number of technical regulatory changes to reflect current law following the U.S. Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, which invalidated a penalty provision of the regulations. *Ragsdale* ruled that the current regulation’s “categorical” penalty for failure to appropriately designate FMLA leave, which in that case would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute’s remedial requirement that an employee demonstrate individual harm. Several other courts have also invalidated similar categorical penalties in other notice provisions of the current regulations. The final rule therefore removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.
- **Light Duty:** At least two courts have held that an employee uses up his or her 12 week FMLA leave entitlement while on a “light duty” assignment following FMLA leave. Under the final rule time spent performing “light duty” work does not count against an employee’s FMLA leave entitlement and that the employee’s right to restoration is held in abeyance during the period of time the employee performs light duty (or until the end of the applicable 12-month FMLA leave year). If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.
- **Waiver of Rights:** The final rule codifies the Department’s longstanding position that employees may voluntarily settle or release their FMLA claims without court or Department approval. Although this is not a change in the law, the clarification is needed because a recent Fourth Circuit decision interpreted the Department’s regulations as prohibiting employees from either prospectively or retroactively waiving their rights. Prospective waivers of FMLA rights continue to be prohibited under the final rule.
- **Serious Health Condition:** The final rule retains the six individual definitions of serious health condition while adding guidance on three regulatory matters. One of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.” Because the current rule is open-ended, the Tenth Circuit has held that the “two visits to a health care provider” must occur within the more-than-three-days period of incapacity.

Under the final rule, the two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity. A second way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule clarifies here also that the first visit to the health care provider must take place within seven days of the first day of incapacity. Thirdly, the final rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year since that provision is also open-ended in the current regulations and potentially subjects employees to more stringent requirements by employers.

- **Substitution of Paid Leave:** FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. This is called the “substitution of paid leave.” The current regulations apply different procedural requirements to the use of vacation or personal leave than to medical or sick leave. Complicating matters even further, the Department has treated family leave differently than vacation and personal leave. Accordingly, under the final rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic “paid time off”). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer’s conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.
- **Perfect Attendance Awards:** The final rule changes the treatment of perfect attendance awards to allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way. This addresses the unfairness perceived by employees and employers as a result of requiring an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave.
- **Employer Notice Obligations:** The final rule consolidates all the employer notice requirements into a “one-stop” section of the regulations and reconciles some conflicting provisions and time periods under the current regulations. Further, the final rule clarifies and strengthens the employer notice requirements in order to better inform employees and allow for a better exchange of information between employers and employees. Employers will be required to provide employees with a general notice about the FMLA (through a poster, and either an employee handbook and upon hire); an eligibility notice; a rights and responsibilities notice; and a designation notice. In order to ensure employers are able to better inform employees under the new notice provisions, the final rule extends the time for employers to provide various notices from two business days to five business days.
- **Employee Notice:** The final rule modifies the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days *after* an absence, even if they could have provided notice more quickly. Lack of advance notice (*e.g.*, before the employee’s shift starts) for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations. The final rule provides that an employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances. The final rule also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave.

- **Medical Certification Process (Content and Clarification):** The final rule, which is the result of significant stakeholder feedback (including a Fall 2007 meeting at the Department on medical certifications) recognizes the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees' health care providers. Further, in response to specific concerns raised by employees about medical privacy, the Department has added a requirement to the final rule that specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, *but* in no case may it be the employee's direct supervisor. Further, employers may *not* ask health care providers for additional information beyond that required by the certification form. The final rule also improves the exchange of medical information by updating the Department's optional Form WH-380 to create separate forms for the employee and covered family members and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification.

In addition, the final rule specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency. These changes will improve FMLA communications, protect the privacy of workers, and help ensure that the employees who need leave will get it and not be subject to repeated requests for additional information or be denied FMLA leave on a technicality.

- **Medical Certification Process (Timing):** The final rule codifies a 2005 DOL Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The final rule also clarifies the applicable time period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because many stakeholders have indicated that the current regulation is unclear as to the employer's ability to require recertification when the duration of a condition is described as "lifetime" or "unknown," the final rule restructures and clarifies the regulatory requirements for recertification. In all cases, the final rule allows an employer to request recertification of an ongoing condition every six months in conjunction with an absence.
- **Fitness-For-Duty Certifications:** The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. This is called a "fitness-for-duty" certification. The final rule makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.