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January 26, 2009

To: Clients and Friends

Re: **New FMLA Rules Now in Effect**

New Family and Medical Leave Act (FMLA) regulations are now in effect and bring a host of changes for both employers and employees.

The FMLA covers Companies if they employ at least 50 employees in a 75 mile radius. It also covers all public employers, regardless of the number of employees they employ. To be eligible to take such leave, an employee must have worked for the employer for at least 12 months (although they need not be consecutive months) and 1250 hours.

On November 17, 2008, the Department of Labor published new regulations covering the FMLA and addressing new military family leave entitlements for employees. The new rules change several areas that have given employers headaches over the years. The effective date of the rules was January 16, 2009.

The Department of Labor says many of the changes were designed to improve communication between employers and employees. The rules, for example, include clarifications and new requirements on how and what employers communicate to employees. The rules also include clarifications and new requirements on when and how employees notify their employer of a need for FMLA.

Here are summaries of 11 important revisions included in the new rules.

1) **Employee Notice:** The final rule states that when an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

2) **Employer Notice:** The final rule consolidates all employer notice requirements into a "one-stop" section of the regulations to clear up some conflicting provisions and time periods.

The new regulations contain a new general notice prototype. Employers covered by the FMLA must post a general FMLA notice even when they have no FMLA-eligible employees. If an employer has no handbook or other written materials, it must provide the general notice to new employees upon being hired.

Absent extenuating circumstances, the time frame for an employer to respond to an employee's request for leave is extended from 2 business days to 5 business days of the employee's request for leave or of the employer acquiring knowledge that the leave may be FMLA qualified.

Through a rights and responsibilities notice, employers are required to provide written notice detailing the specific expectations and obligations of the employee, including the use of paid leave, and explaining any consequences of a failure to meet those obligations. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided.

A list of essential job functions must be provided with the designation notice if the employer will require that the fitness-for duty certification address the employee's ability to perform the essential functions of the position.

Only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis.

In situations in which the amount of leave to be taken is not known at the designation stage (e.g., when unforeseeable intermittent leave will be needed), the employer is to inform the employee of the number of hours counted against the FMLA leave entitlement only upon employee request, and no more often than every 30 days if FMLA leave was taken during that period.

Employer may notify the employee of the hours counted against the FMLA leave entitlement orally and follow up with written notification on a pay stub at the next payday (unless the next payday is in less than one week, in which case the notice must be no later than the subsequent payday).

The updated rule contains technical changes to be consistent with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide Inc*. In light of the Supreme Court's decision in *Ragsdale* , the department stated that an employee isn't automatically

FMLA-eligible just because employer fails to provide the required eligibility notices to employees or provides incorrect information. The rule clarifies that if an employee suffers individual harm because the employer fails to follow the notification rules, the employer may be liable.

3) **Medical Certification:** Under the previous version of the FMLA rules, an employer could not directly contact an employee's health care provider to obtain clarification of the employee's medical certification or leave request; only the employer's health care advisor could contact the employee's health care provider. In the final rule, the Department adopted a change that allows employers to contact the employee's healthcare provider directly. An employer may contact the employee's healthcare provider for two purposes only: To clarify and to authenticate the medical certification. The employer may request no additional information beyond that included in the certification form

In response to privacy concerns expressed by employees, the Department added a requirement to the final rule that specifies the employer's representative contacting the employee's healthcare provider must be a human resource professional, a leave administrator, or a management official, ***but in no case may it be the employee's direct supervisor***.

The revision also specifies that the employee is not required to permit his or her healthcare provider to communicate with the employer. However, if the employee denies the employer permission and doesn't otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. However, prior to making any contact with the healthcare provider, the employer must first provide the employee an opportunity to resolve any deficiencies in the certification.

4) Fitness for Duty Certification: The final regulation also clarifies that employers may require a fitness-for-duty certification to address an employee's ability to perform essential job functions. However, if the employer does have such a requirement, the employer must provide the employee with a list of those essential job functions no later than the "designation notice" and specify in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions.

5) **Military Family and Caregiver Leave:** In January 2008, President Bush signed a law that allows employees to take leave because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces in support of a contingency operation.

In the new regulations, a qualifying exigency leave is limited to service members called up to duty in National Guard and/or Reserves, and certain retired members of service (not regular career service or state). The rule defines "qualifying exigencies" as: (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 where the employer and employee agree to the leave.

The new law also allows eligible employees to take up to 26 workweeks for leave during a single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a military service member recovering from an injury or illness suffered while on active duty in the armed forces. Under the new regulations for military caregiver leave, the definition for a “covered military member” for service member caregiver leave is broader than for qualifying exigency leave. Caregiver leave extends to regular career service military personnel, as well as those in the National Guard or Reserves. In addition, the 12 month period used to calculate this type of leave is calculated differently than the 12 month period used for other types of FMLA leave. Note: Several states have passed legislation allowing employees leave to spend time with deployed or recovering family members in the military. Therefore, it is important to review the rules in your states whenever there is a request for military family leave.

6) **Serious Health Condition:** While the rule retains the six individual definitions of "serious health condition," it adds guidance on some areas. First, it clarifies that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a healthcare provider, the two visits must occur within 30 days of the period of incapacity. The first visit must occur within 7 days of onset of incapacity. Second, it defines "periodic visits to a healthcare provider" for chronic serious health conditions as at least two visits to a healthcare provider per year.

7) **Intermittent Leave:** The final rule clarifies that employees who take intermittent FMLA leave have a statutory obligation to make a “reasonable effort” to schedule such leave so as not to disrupt unduly the employer's operations . This is a change from the old regulations. Old regulations said that the employee had to “attempt” to do so only.

The rules clarify that temporary transfers are allowed for employees taking planned intermittent leave only (the department declined to expand temporary transfers to unplanned, unscheduled or unforeseeable intermittent leave).

The final rule also clarified that accounting for leave need not be in the smallest increments that the employer's timekeeping system can handle, but rather in the smallest

increments the employer accounts for in other types of leave, provided it is not greater than one hour. This is a change from proposed regulations.

The new rules prohibit employers from charging employees for period of time that they are working (e.g., stop working ½ hour before end of shift, cannot be charged for one hour of leave).

8) **Gaps in Service:** The final rule adds a new paragraph that addresses the requirement that employees are eligible to take FMLA leave only if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The final rule states that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted.

9) **Light Duty:** Under the final rule, time spent in "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to job restoration is held in abeyance during the light duty period. If an employee is voluntarily doing light duty work, he or she is not on FMLA leave.

10) **Perfect Attendance Awards:** The final rule changes how perfect attendance awards are treated to allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because he or she took FMLA leave--but only if the employer treats employees taking non-FMLA leave in an identical way.

11) **Substitution of Paid Leave:** An employee's right to substitute accrued paid leave is limited by the terms and conditions pursuant to which the applicable leave is accrued, as long as those terms are non-discriminatory, the rules clarify. An employer may limit substitution of paid sick, medical or family leave to those situations for which the employer would normally provide such paid leave (e.g., such policies may restrict the use of paid leave only to the employee's own health condition or to specific family members). Employers must allow substitution of paid vacation, personal leave, or "paid time off" for any situation covered by the FMLA. In all cases, however, the normal procedural rules subject to which the leave was accrued apply--unless waived by the employer--regardless of the type of paid leave substituted.

For example, if an employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, employees would have no right to use less than a full day of paid sick leave regardless of whether the sick leave was being substituted for unpaid FMLA leave. Similarly, if an employer's paid personal leave policy requires two days' notice for the use of

personal leave, an employee seeking to substitute paid personal leave for unpaid FMLA leave would need to provide two days' notice. Employers, of course, may choose to waive such procedural rules and allow an employee's request to substitute paid leave in these situations, but they are not required to do so. Additionally, employers may choose to waive procedural requirements even in the absence of an employee request to do so.

The Department has designed a new Employment Rights Poster for the FMLA, and new forms to cover all of these communications and employers are well-advised to utilize the forms that the Department has created.

We would be happy to supply our clients with such forms upon request.