HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws. Hunton & Williams LLP provides legal services to corporations, financial institutions, governments and individuals, as well as to a broad array of other entities. Since our establishment more than a century ago, Hunton & Williams has grown to more than 1,000 attorneys serving clients in 100 countries from 19 offices around the world. While our practice has a strong industry focus on energy, financial services and life sciences, the depth and breadth of our experience extends to more than 100 separate practice areas, including bankruptcy and creditors' rights, commercial litigation, corporate transactions and securities law, intellectual property, international and government relations, regulatory law, products liability, and privacy and information management.

New FMLA Regulations Effective January 16, 2009

On November 17, 2008, the U.S. Department of Labor ("DOL") published its final rule implementing amendments to regulations interpreting the Family and Medical Leave Act ("FMLA"). The amended regulations have two purposes — to clarify several aspects of the 15-year-old law and to implement military family leave provisions added by the National Defense Authorization Act ("NDAA") earlier this year. The regulations become effective January 16, 2009.

Under the FMLA, employees may take up to twelve weeks of unpaid leave in any year for, among other things, a "serious health condition," or to care for a family member with a "serious health condition." The NDAA amended the FMLA to expand leave opportunities for members of the armed forces and their relatives in two primary ways: (1) military caregiver leave and (2) qualifying exigency leave.

Under the military caregiver leave provisions, eligible employees who are closely related to a service member are entitled to 26 workweeks of leave in a 12-month period to care for a service member with a serious illness or injury incurred while on active duty. Qualifying exigency leave, on the other hand, grants eligible employees with a covered military family member serving in the National Guard or Reserves 12 workweeks of leave for "any qualifying exigency" stemming from such active duty.

Against this backdrop, the amended regulations:

- Define "qualifying exigency" 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 not encompassed in the other categories but agreed to by the employer and the employee. The regulations also provide employers with DOL forms that may be used for certifications required under the military leave provisions.
- Provide that time employees spend performing "light duty" work does not count toward that employee's FMLA leave. This rule overturns at least two court rulings that time spent performing "light duty" work may be counted as FMLA leave.
- Codify an existing rule that an employee may voluntarily settle or release FMLA claims without the approval of the court or DOL.
- Clarify the definition of a "serious health condition." Under the current regulations, there are six types of conditions that qualify as a serious health condition. The new regulations keep each of the definitions, but clarify three:
  - First, to meet the definition requiring that an employee have a condition involving more than three consecutive days of

incapacity plus "two visits to a health care provider," the employee must make two visits within the 30 days beginning with the initial date of incapacity and the first visit must occur within the first seven days of the incapacity.

- Second, to meet the definition that requires an employee have a condition that involves more than three consecutive days of incapacity plus continuing treatment, the first visit to a health care provider also must occur within seven days of the first day of incapacity.

- Finally, to qualify as an employee with a "chronic serious health condition," an employee must make at least two visits to a health care provider per year.

- Reiterate that an employee may elect to use or an employer may require use of paid time off concurrently with unpaid FMLA leave and eliminate procedural distinctions between the use of paid vacation or personal leave versus paid medical or sick leave as a substitute for FMLA leave.

- Provide that employers may deny "perfect attendance" awards to employees who do not have perfect attendance due to FMLA leave, as long as the employer treats employees taking non-FMLA leave the same.

- Consolidate multiple provisions on employer notice and provide that an employee needing FMLA leave must follow the employer's usual call-in procedures for reporting an absence unless unusual circumstances exist. An employee's consequences for failing to provide proper notice remain the same. This new requirement of employees is intended to enhance employer planning for employee absences.

- Allow employers to have direct contact with employees' medical providers in order to clarify or authenticate documentation of a serious health condition. However, the employer's representative communicating with a health care provider must be a health care provider, a human resource professional, a leave administrator or a management official, but may under no circumstances be the subject employee's direct supervisor. Under the new regulations, if an employer deems a medical certification incomplete or insufficient, the reasons must be stated in writing and the employee must be given seven days to cure any deficiency.

- Allow employers to require a fitness-for-duty certification before an employee on intermittent FMLA leave may return to work.

The DOL predicts that the final regulations will improve communications between employees, employers and health care providers and will provide greater clarity regarding employee leave. If you have any questions, please do not hesitate to contact any of our attorneys listed below.

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