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CLIENT ALERT

FINAL FMLA REGULATIONS ISSUED BY THE DEPARTMENT OF LABOR

On November 17, 2008, the U.S. Department of Labor (“DOL”) issued final regulations interpreting the Family and Medical Leave Act (“FMLA”). The new regulations address the recent amendments to the FMLA that expanded the FMLA for employees whose family members are in the military. (See our Client Alert dated February 5, 2008 available at www.putneylaw.com). The new regulations also address inconsistent interpretations of the FMLA by some federal courts. The regulations will go into effect on January 16, 2009.

Some of the more notable changes in the regulations are:

Employer Notice Obligations. The new regulations substantially change the way in which employers must provide notice to employees.

- *General Notice:* Covered employers must post a general FMLA notice, even when they have no eligible employees. Employers who do not have an employee handbook must also provide the general notice to each employee when he or she is hired. Electronic-only posting is permitted where all employees and applicants have access to electronic information. Paper copies must be posted in locations that are readily visible to employees who do not have access to computers, and to applicants who apply through non-electronic means.
- *Eligibility Notice and Rights & Responsibilities Notice:* After receiving notice of an employee’s request for leave, employers will have five business days to notify the employee of his or her eligibility for leave. If the employee is not eligible, the notice must state at least one reason why the employee is deemed not eligible. The employer must simultaneously provide a notice of “Rights and Responsibilities,” detailing the specific expectations and obligations of employees and explaining any consequences of their failure to meet those obligations.

- *Designation Notice:* Once an employer has obtained sufficient information to determine whether an employee's leave will be protected by the FMLA, the employer must notify the employee of the designation within five business days. If an employer who grants FMLA leave will require a fitness-for-duty certification to return to work, it must provide notice of that requirement with the designation notice.

The new regulations include prototype notices that employers may use to satisfy the above requirements. Such prototypes are available on the DOL's web page. (See, www.dol.gov/library/forms/).

Employee Notice. Employees must provide at least 30 days' advance notice if the need for leave is foreseeable; otherwise, employees must provide notice as soon as practicable. The regulations specify that "as soon as practicable" generally means the same or the next business day. The regulations further clarify that an employee needing FMLA leave must still follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances. If the employee fails to provide timely notice without reasonable excuse, or fails to follow the employer's usual notice and procedural requirements for calling in absences or requesting leave, the employer may delay the leave.

Light Duty Work. The regulations clarify that an employee's right to FMLA leave and job restoration are not affected by light duty assignments. Instead, the employee's right to job restoration is tolled during the period of light duty work. At the conclusion of the light duty assignment, the employee has the right to be restored to the position he or she held at the time FMLA leave commenced or, alternatively, the employee may use the remainder of his or her FMLA leave entitlement. However, the employee's right to restoration while on light duty expires at the end of the 12-month leave year.

Qualifying Exigency. Employees may take up to twelve weeks of leave for a "qualifying exigency" arising out of the fact that a spouse, child or parent is on active duty in the armed forces or is called up for active duty. The regulations define a "qualifying exigency" by referring to a number of events for which employees may use FMLA leave:

- Short-notice deployment;
- Military events and related activities;
- Childcare and school activities;
- Financial and legal arrangements;
- Counseling;
- Rest and recuperation;
- Post-deployment activities; and
- Additional activities agreed to by the employer and employee.

Serious Health Condition. The new regulations retain the six definitions of serious health condition, but add guidance on some regulatory matters. One of the definitions of serious health condition includes a condition that involves more than three consecutive, full calendar days of incapacity plus two visits to a health care provider. The regulations state that the two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity; the first such visit must take place within seven days of the first day of incapacity.

A serious health condition also includes a condition that is accompanied by more than three consecutive full calendar days of incapacity plus continuing treatment by a health care provider. The new regulations clarify that the first visit to a health care provider must occur within seven days of the first day of incapacity. The regulations also define “periodic visits” as at least two visits to a health care provider per year.

Medical Certification. The new regulations specify that the employer’s representative contacting the health care provider for medical certification must be a health care provider, human resource professional, leave administrator, or 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. When the duration of an employee’s or family member’s condition is described as “lifetime” or “unknown,” the final regulations allow an employer to request recertification of an ongoing condition every six months in conjunction with an absence.

Fitness-for-Duty Certifications. Employers may enforce policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. The new regulations allow an employer to require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job. Also, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work from FMLA leave.

Production and Attendance Bonuses. The regulations 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 the employer does not do so in a discriminatory way. Similarly, bonuses or payments that are predicated on achievement of a specific goal, such as perfect attendance, hours worked or products sold, may be denied if the employee has not met the goal due to FMLA leave, provided that the employer treats employees on non-FMLA leave the same way.

Waiver of Rights. The regulations codify the DOL’s position that employees may voluntarily settle or release their FMLA claims without approval of the DOL or a court.

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If you should have any questions regarding these new regulations, please contact us.

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