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CLIENT ALERT
SUMMARY OF CHANGES TO FMLA REGULATIONS

Dear Client:

On November 17, 2008, the Department of Labor ("DOL") published its final rule to update the regulations under the Family and Medical Leave Act ("FMLA"). The final rule both updates the current regulations and adds new regulations that address the new types of military family leave, which were added to the FMLA on January 28, 2008. These final regulations become effective January 16, 2009.

In the attached summary, we highlight many of the new regulations. If you require assistance in updating your policies, procedures or forms, please contact us.

Sincerely,

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SUMMARY OF CHANGES TO FMLA REGULATIONS

1. Employer Penalty – The following provision has been deleted: if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, then the leave does not count against an employee’s FMLA entitlement. This deletion comes in response to the United States Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, which held that this penalty provision may result in employees being provided FMLA leave beyond the statutory 12-week entitlement. The new regulations permit retroactive designation provided that it does not cause harm or injury to the employee.

2. Light Duty—An employee’s time spent performing light duty work no longer counts towards the employee’s FMLA entitlement of 12 weeks of protected leave. However, an employee’s right to job restoration ceases at the end of the applicable 12-month FMLA leave year.

3. Settlement of FMLA Claims—The DOL’s position that employees are permitted to voluntarily settle FMLA claims without DOL or court approval has been reinforced. However, future waivers of employees’ FLMA rights continue to be prohibited.

4. Serious Health Condition Definitions—Two regulatory terms regarding a serious health condition (“SHC”) have been defined. The phrase “treatment two or more times” by a health care provider (“HCP”) in the definition of “continuing treatment” means that the two treatments must occur within a 30-day period. Also, the phrase “periodic visits” for a chronic condition under the definition of “continuing treatment” is defined as at least two visits per year to a HCP for treatment.

5. Substitution of Leave—The terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave, including, for example, paid vacation, personal leave, family leave, paid time off or sick leave. “Substitution” has been defined in the regulations; it means that the unpaid FMLA leave and the paid leave provided by an employer, and accrued pursuant to established policies of the employer, run concurrently.

An employer, when providing notice of FMLA eligibility, must make the employee aware of any additional requirements for use of paid leave. The employee remains entitled to unpaid FMLA leave if she/he chooses not to meet the terms and conditions of the employer’s paid leave policies (e.g., using leave only in full day increments or completing a specific leave request form).

An employer may designate leave taken pursuant to a disability plan or workers' compensation absences as FMLA and count the leave against the employee's FMLA entitlement. Because leave taken pursuant to a disability plan and workers' compensation absences are not unpaid, the provision for substitution of paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits or workers' compensation benefits.

If public employers require or employees of public employers request and are permitted to use compensatory time off for an FMLA-qualifying absence, the time taken may be counted against the employee's FMLA leave entitlement.

6. Attendance Awards—An employer may disqualify an employee from a bonus or award based on the achievement of a goal that is not met because of the employee's FMLA leave. However, an employer cannot disqualify only those individuals on FMLA-qualified leave and allow other employees on non-FMLA leave to receive such an award without violating the FMLA's non-discrimination requirement.

7. Employee Notice Requirement--An employer may require employees to follow the employer's usual and customary call-in procedure for requesting leave, absent unusual circumstances. If an employee fails to properly notify the employer of an absence, the employer may delay or deny the leave where there are no unusual circumstances that justify the failure. The employee must provide sufficient information to make the employer aware that the absence may be FMLA-protected.

8. Medical Certification Process—An employer's timeframe for requesting a medical certificate is five days, not two days, from the receipt of the employee notice. If an employer deems a medical certification to be incomplete or insufficient, the employer will have to specify in writing what information is lacking and then give the employee seven calendar days to cure the deficiency. If the deficiencies are not cured, the employer may deny the leave as set forth in the regulations.

After the employee has an opportunity to cure deficiencies, direct contact between the employer and HCP is permitted for clarification or authentication of a medical certificate as long as HIPAA requirements are met. The contact can be made by only a human resources professional, a health care professional or a management official, but not the employee's supervisor. Employers are not permitted to ask HCPs for information that goes beyond the information required by the certificate. An employee/family member may be required to authorize the release of relevant medical information

regarding the condition for which leave is sought from the employee's/family member's HCP to the second or third opinion provider.

The regulations permit employers to request recertification every six months in connection with an absence. An employer may seek the same information in recertification as in the original certification. An employer may provide the HCP with a record of the employee's absence pattern and ask the HCP if the SHC and need for leave are consistent with such a pattern.

9. Fitness-for-Duty Certifications—The employer may contact directly the employee's HCP as set forth above. Such contact is allowed only after the employee has been afforded the opportunity to cure any deficiencies with the certificate. An employer will be allowed to require that a fitness-for-duty certification address the employee's ability to perform the essential functions of his/her job. Also, an employer will be able to require a fitness-for-duty certification every 30 days when the employee takes intermittent leave during that period when reasonable job safety concerns exist.

10. Joint Employers—Professional employer organizations that contract with client employers to perform administrative functions with no hiring, firing or supervision are not joint employers.

11. Eligible Employee—The eligibility requirement of 12 months of service does not need to be consecutive service; however, employment prior to a continuous break in service of seven (7) years or more need not be counted. Two exceptions apply: a break in service resulting from the employee's fulfillment of military obligations and period of approved absence/leave, such as for education or child-rearing, where a written agreement or collective bargaining agreement exists to rehire the employee.

When an employee is on leave at the time he/she meets the 12-month eligibility requirement and has worked at least 1,250 hours prior to the leave, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave.

An employee is entitled to credit for FMLA eligibility purposes for the months and hours that the employee would have worked during the 12 months preceding the start of the leave but for his or her qualifying active duty uniformed service.

12. Holiday During Leave – If an employee needs less than a full week of FMLA leave and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee’s FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. However, if an employee needs a full week of leave in a week with a holiday, the hours the employee does not work on the holiday will count against the employee’s FMLA entitlement.

13. Overtime—If an employee would normally be required to work overtime but cannot because of FMLA leave, the overtime hours that the employee would have been required to work count as FMLA leave. However, if overtime is voluntary, the overtime hours not worked because of FMLA leave do not count against the employee’s FMLA leave entitlement.

14. Leave Increments—The new regulations confirm that an employer may track FMLA leave using an increment no greater than the shortest period of time that the employer uses to track other forms of leave, as long as the increment used for the FMLA leave is not greater than one hour, and as long as the employee’s FMLA leave balance is not charged for time the employee works or for more than the amount of actual leave taken.

15. Military Family Leave/Qualifying Exigency—Up to 12 weeks of leave is allowed for a qualifying exigency arising out of the fact that the employee’s spouse, child or parent is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation. Such active duty or call/order to active duty is made only to members of the National Guard or Reserve components or a retired member of the Regular Armed Forces or Reserve. Accordingly, an employee may not take exigency leave if his/her spouse, child or parent is a member of the Regular Armed Forces. Leave may be taken only for one or more of the following qualifying exigencies: 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 that arise out of active duty or a call to active duty status as long as the employer and employee agree that the leave shall qualify as an exigency, including agreement on the timing and duration of such leave.

An employer may require an employee to provide a copy of the covered military member’s active duty orders the first time the employee requests exigency leave. This information needs to be provided to the employer only once for each separate call to active duty. An employer may require that

leave for a qualifying exigency be supported by a certification from the employee that sets forth: (a) a statement or description, signed by employee, of facts supporting the leave request and including information on the type of qualifying exigency and any available documentation, such as a copy of certain meeting announcements or documentation confirming an appointment with a counselor or school official; (b) the approximate date the qualifying exigency commenced or will commence; (c) if the request is for a single, continuous period of time, the beginning and end dates for the absence; (d) if the request is for intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency; and (e) if the qualifying exigency involves meeting with a third party, contact information for whom the employee is meeting and a brief description of the purpose of the meeting.

The DOL included a “Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave (WH-384)” in Appendix H to the final regulations. As of the date of this letter, the DOL has not published this form on its website. No information may be required beyond that specified by the regulation. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the meeting is scheduled to verify the meeting/appointment. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered servicemember is on active duty or call to active duty status.

16. Military Family Leave/Caregiver Leave—Up to 26 weeks of leave in a single 12-week period is allowed for an eligible employee to care for a current member of the Regular Armed Forces, National Guard or Reserve who has a serious injury or illness incurred in the line of duty or active duty for which he/she is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is on the temporary disability retired list. An eligible employee must be the spouse, child, parent or next of kin of a covered servicemember. “Next of kin” is defined as the nearest blood relative, other than the spouse, child or parent of the covered servicemember in the following order of priority unless the servicemember has specified another blood relative in writing: blood relatives who have been granted legal custody of the servicemember; siblings; grandparents; aunts and uncles; and first cousins. All family members at the same level of relationship are considered next of kin and may take FMLA leave, either consecutively or simultaneously.

The single 12-month period of leave begins on the first day the eligible employee takes FMLA to care for a covered servicemember and ends 12 months after that date, regardless of the employer’s method used to determine the 12-month period for other types of FMLA leave. This leave entitlement is to be applied on a per-covered servicemember, per-injury basis. When an employee takes leave to care

for more than one servicemember or for a subsequent injury or illness of the same covered servicemember, the employee is limited to no more than 26 weeks of leave in each single 12-month period if the 12-month periods corresponding to the different leaves overlap. Leave is forfeited if 26 weeks are not used within the single 12-month period.

An employee is entitled to a combined total of 26 weeks of leave for any FMLA-qualifying reason during the single 12-month period; however, the employee is never entitled to more than 12 weeks of leave for one or more of the types of FMLA leave other than care of a covered servicemember. If leave qualifies as leave to care for a covered servicemember and leave to care for a family member with a SHC during the single 12-month period, the employer must designate such leave as leave to care for a covered servicemember first. This leave must not be designated and counted as both types of leave.

A husband and wife eligible for FMLA leave who work for the same covered employer may be limited to a combined total of 26 weeks of leave during the single 12-month period if leave is taken for the birth, adoption or foster care placement, care after birth or placement of the employee's child, care of the employee's parent with a SHC or care of a covered servicemember.

An employer may require an employee to obtain a certification from an authorized HCP of the covered servicemember. The DOL included a "Certification of Qualifying Exigency for Military Family Leave (WH-384)" in Appendix G to the final regulations. As of the date of this letter, the DOL has not published this form on its website. An employer may seek authentication and/or clarification of the certification under the applicable regulations; however, second and third opinions and re-certifications are not permitted for leave to care for a covered servicemember. An "invitational travel order" ("ITO") or "invitational travel authorization" ("ITA") must be accepted as sufficient certification in lieu of the optional form for the duration of time specified in the ITO or ITA. An employer may require confirmation of the covered family relationship with the servicemember when an employee supports the leave request with an ITO or ITA. If the employee fails to provide complete and sufficient certification, FMLA leave may be denied.

17. New Forms

Employer Form: Posting/Handbook. The DOL included a "Notice to Employees of Rights Under FMLA (WH Publication 1420)" in Appendix C to the final regulations. As of the date of this letter, the DOL has not published this form on its website. In addition, the general notice posting

requirement can be satisfied through electronic posting. The new regulations clarify that all covered employers, even those without any eligible employees, must post the general FMLA notice. In addition, employers with eligible employees must include an FMLA policy in their handbooks or written benefit materials. The handbook must at a minimum include the information contained in the employer's general notice posting.

Employer Form: Notices of Eligibility and Rights and Responsibilities. The DOL included a "Notice of Eligibility and Rights & Responsibilities (WH-381)" in Appendix D to the final regulations. As of the date of this letter, the DOL has not published this form on its website. The time for employers to provide eligibility notices has been extended from two to five business days after the employee requests leave or the employer acquires knowledge that leave may be for an FMLA-qualifying reason. The employer must inform employees whether they are eligible for leave and, if not, the reason for ineligibility (e.g., has not worked the requisite 12 months). If the employee's eligibility status has changed by the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different qualifying reason, the employer must notify the employee of the change in eligibility status within five business days.

Employers also must provide notice to the employee of his/her rights and responsibilities. This notice must be provided every time the eligibility notice is provided. The rights and responsibilities notice must address: leave designated and counted as FMLA leave and the 12-month period for FMLA entitlement; requirements to furnish certification of a SHC, serious injury or illness or qualifying exigency and consequences of failure to meet requirements; substitution of paid leave; premium payments to maintain health benefits; "key employee" status; benefits during FMLA leave and job restoration; and the employee's potential liability to pay health insurance premiums if he/she fails to return to work.

Employer Form: Designation Notice. The DOL included a "Designation Notice (WH-382)" in Appendix E to the final regulations. As of the date of this letter, the DOL has not published this form on its website. The time for employers to send out designation notices also has been extended from two to five business days, which must be met when the employer has enough information to determine whether the leave is for a FMLA-qualifying reason. If the employer determines that leave will not qualify as FMLA leave (for example, the employee has exhausted all available FMLA leave), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for

unpaid FMLA leave or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this requirement at the time of designating the FMLA leave.

If the employer will require a fitness-for-duty certification for the employee to be restored to employment, the employer must provide notice of this with the designation notice. Similarly, if the employer wants the certification to address the employee's ability to perform the essential functions of his/her job, the designation notice must indicate this and include a list of essential job functions.

If the amount of leave needed is known at the time of designation, the employer will have to inform the employee of the number of hours, days or weeks that will be counted as FMLA leave.

Employer Form: Certification Regarding Serious Health Condition. The DOL has developed two optional forms for use in obtaining medical certification – one form seeking certification from an HCP for an employee's SHC ("Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)") and one form seeking certification from an HCP for a family member's SHC ("Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)"). As of the date of this letter, the DOL has not published these forms on its website. If an employer requires a certification, the HCP must provide: contact information of the HCP; approximate date on which the SHC began and probable duration; statement of medical facts regarding the condition for which FMLA leave was requested; information that either establishes that the employee cannot perform the essential functions of his/her job and likely duration, or establishes that the family member needs care and the estimate of frequency/duration of care; if intermittent or reduced schedule leave is requested, information necessary to establish medical necessity for intermittent/reduced schedule leave and estimated duration.

Employee Forms Regarding Certification for Military Family Leave. See Sections 15 and 16 above.

IMPORTANT NOTICE AND DISCLAIMER

The information herein reflects the views of the author. The information should be construed as general guidelines and not interpreted as legal advice. The materials should serve as a general reference to facilitate more thorough research and analysis with the assistance of a competent professional who would have an opportunity to consider the facts of any particular situation.