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LEGAL ALERT



Legal Alert: DOL Issues New Final FMLA Regulations

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On November 17, 2008, the United States Department of Labor issued a new set of Final Regulations updating its Family and Medical Leave Act ("FMLA") Regulations. Although Ford & Harrison LLP is preparing an extensive analysis of the new regulations, some of the more important features include: **Military Related FMLA Leave** The new regulations interpret provisions of the recent amendments to the FMLA statute providing for certain military related leave. In particular, the regulations address what constitutes a "qualifying exigency leave" under the FMLA's military leave provisions. Specifically, the regulations provide that members of the National Guard and Reserves can take qualifying exigency leave in circumstances that fall under one of the following categories: short-notice deployment; military events and related activities; child care and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities agreed to by the employer and employee. **Definitions of Serious Health Condition** Although the new regulations retain the same definitions of "serious health condition" as prior regulations, they provide further guidance on some of those definitions. For example, the new regulations address the definition of serious health condition that requires an employee to be incapacitated for more than three calendar days plus "two visits to a health care provider." The new regulations require that the two visits occur within thirty days of the beginning of the period of incapacity. Furthermore, the first visit to a healthcare provider must occur within seven days of the first day of incapacity. The regulations also clarify the definitions of serious health condition requiring incapacity of more than three calendar days and continuing treatment by a healthcare provider. Under the new regulations, the employee's first visit to a healthcare provider must occur within seven days of the first day of incapacity. Additionally, the new regulations provide that for chronic serious health conditions, the employee must visit a healthcare provider at least twice per year. **Employer Notice** The new regulations require employers to provide employees with a general notice about the FMLA, an eligibility notice, a rights and responsibilities notice, and a designation notice. **Employee Notice** The new regulations provide that employees must give notice of unexpected FMLA leave according to their employer's usual and customary call-in procedures, absent unusual circumstances. In general, this means that employees must report an absence before the start of their shift, if the employer has a policy requiring them to do so. **Medical Certification** The new regulations limit which individuals from the employer may have contact with an employee's healthcare provider, and preclude the employee's direct supervisor from ever making such contact. If an employer deems a medical certification incomplete or insufficient, the new regulations require the employer to specifically designate in writing what information is missing, and give the employee seven

days to cure the deficiency. The new regulations also provide that employers may request a new medical certification each leave year for conditions that last longer than a year. ***Fitness for Duty*** The new regulations expand the information that an employer may require in a fitness for duty certification. An employer may now require that the certification specifically address whether the employee can perform the essential functions of his or her job. Also, if an employer has reasonable concerns about an employee's ability to safely perform a job, the employer can require an employee to provide a fitness for duty certification before the employee may return to work from an absence while on intermittent leave. **Employers' Bottom Line:** The new regulations become effective January 16, 2009. Employers should utilize this time period to provide training on the new regulations and establish procedures for compliance once they become effective. If you have any questions regarding this Legal Alert or the new regulations, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Tim Bland, in our Memphis office, at tbland@fordharrison.com or 901-291-1514.