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The New FMLA Regulations A Priority for 2009

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You have just returned to work and are now staring at the mound of projects waiting for you on your desk. Where to start? Your Family and Medical Leave Act (FMLA) policy should be at the top of your list. The Department of Labor has recently issued new regulations which significantly revise the FMLA. These regulations, which take effect on January 16, 2009, affect nearly every part of the FMLA. Aside from the military provisions which provide leave to employees to care for a covered service member or to prepare for a qualifying exigency (both of which will be covered in detail by a subsequent 60 Second Memo), some of the important changes are as follows:

- **Eligibility.** In determining an employee's eligibility, past service up to seven years must now be included. Once an employee is deemed eligible for a certain FMLA qualifying

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leave, the employee remains eligible through the twelve-month period for any additional leave taken for which the employee was previously deemed eligible. In other words, eligibility is not reassessed each time an employee takes leave unless the employee's status has changed. Notice of eligibility must be provided within five business days of the request.

- **Designation.** Within five business days after an employer has obtained enough information to determine whether an absence is FMLA-qualifying, the employer must provide the employee notice of the designation, including how much time off (hours, days, and weeks) will be counted as FMLA. Employers are no longer required to provisionally designate leave as FMLA pending a final determination.
- **Certification of serious health condition.** The regulations increase the time frame for an employer to request certification from two to five business days. Employers may also obtain information about an employee's inability to perform essential job functions or the type of care an employee will provide a family member. FMLA certification can also be required even when the employee is substituting paid leave.
- **Employer must detail certification deficiencies.** Before denying leave based upon an incomplete certification, an employer must notify the employee of the additional information needed and give the employee seven calendar days to submit the additional information. If the employee still fails to submit a complete certification, the leave may be denied.
- **Contacting the healthcare provider.** An employee's permission is no longer needed to contact the health care provider to authenticate and, in some cases, to clarify a certification of a serious health condition. The employer's representative contacting the provider must be a human resources representative, leave administrator or manager, but may not be the employee's direct supervisor. However, if the employer seeks anything from a health care provider beyond clarification or authentication, then the employee must authorize the disclosure. If the employee denies permission, and does not otherwise provide the necessary information, the employer may deny the FMLA leave.
- **Serious health condition is redefined.** Under the new regulations, the period of incapacity must be at least three consecutive *full* calendar days. Thus, if an employee leaves work early, that partial day of absence will no longer count as one of the three days. In addition, when an employee seeks treatment from a health care provider, that first visit must take place within seven days of the first day of incapacity; any second visit must occur within 30 days of the first day of incapacity and be at the direction of the healthcare provider. The visits also must be in-person; a

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telephone call, email or text message will not suffice. Similarly, a chronic condition now requires at least two visits per year to a healthcare provider.

- **New forms.** Accompanying the regulations are several new forms. The certification of a serious health condition form has been significantly revised. There is also a new form for the certification of a serious health condition of a family member, as well as designation of leave and eligibility and rights and responsibilities forms and forms related to the military leave provisions.

As the new regulations are voluminous, this memo touches on only a fraction of the changes. Employers should become familiar with all of the new requirements and accordingly revise their entire FMLA process to ensure compliance with the new rules. This may also mean that employee handbooks have to be updated. Further, all applicable staff must also be trained adequately to implement these changes. It is advisable to confirm with your legal counsel that you have made all necessary adjustments in order to be in compliance with the new regulations.

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