FINAL REVISED FMLA REGULATIONS

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FINAL REVISED FMLA REGULATIONS

On November 17, 2008, the United States Department of Labor (DOL) issued a new set of Final Regulations updating its Family and Medical Leave Act ("FMLA") Regulations. The new regulations adopt many of the changes set forth in the DOL's proposed regulations issued in February 2008. This paper discusses many of the changes made in the new regulations, which take effect January 16, 2009.

The FMLA is a complicated law. This paper is not intended to be a complete discussion of all aspects of the FMLA; it is a general discussion of the most important changes made by the new regulations. We hope that the information provided in this paper will help you become more familiar with the new regulations, but it is not a substitute for reviewing the text of the regulations.

This material is intended as an informational guide only; it is not intended as legal advice and no action should be taken in reliance on the information contained in this material. Experienced labor and employment counsel should be consulted prior to making significant employment decisions.

1. Exclusion of Some PEOs from Definition of Joint Employer (§ 825.106)

Sections 825.106 and 825.111(a)(3) of the previous regulations governed employer coverage and employee eligibility in the case of joint employment and set forth the responsibilities of the primary and secondary employers. The DOL amended § 825.106(b) by inserting a new paragraph to clarify how the joint employment rules apply to Professional Employer Organizations (PEOs). (§ 825.106(b)(2)).

According to the regulations, the determination of whether a PEO is a joint employer depends on the economic realities of the situation, and must be based on all the facts and circumstances. PEOs that contract with client employers merely to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are not joint employers with their clients.

If, however, in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or if the PEO benefits from the work that the employees perform, that PEO might be a joint employer with the client employer, depending upon all the facts and circumstances.

According to § 825.116(d), in determining whether an employer has a sufficient number of employees for FMLA coverage, in cases where a PEO is a joint employer of a client employer's employees, the client employer is only required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

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In joint employment relationships, only the "primary" employer is responsible for giving required FMLA notices to employees, providing FMLA leave, and maintaining health benefits required by the FMLA. Pursuant to the new regulations, where a PEO is a joint employer, the client employer usually would be the "primary" employer. (§ 825.106(c)).

2. Definition of "Public Agency" (§ 825.108)

The new regulations revise the definition of "public agency" to conform to that used in the Fair Labor Standards Act.

3. Revisions to Eligibility Provision (§ 825.110)

a. Hours Worked Prior to a Seven Year Break in Service

To be eligible for FMLA leave, an employee must have worked for an employer for at least 12 months, must have been employed for at least 1,250 hours of service during the 12 months preceding the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. The prior regulations provided that the 12 months of employment do not have to be consecutive.

New § 825.110(b)(1) provides that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted. The new regulations create two exceptions to this rule: (1) a break in service resulting from the employee's fulfillment of military obligations; and (2) a break in service such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

Section 825.110(b)(4) states that nothing prevents an employer from considering employment prior to a continuous break in service of more than seven years when determining if an employee meets the 12-month employment criterion, provided the employer does so uniformly with respect to all employees with similar breaks in service.

b. Hours Spent on Military Leave

Section 825.110(c)(2) states that an employee returning from fulfilling his or her National Guard or Reserve military obligation must be credited with the hours-of-service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service. According to the regulation, the employee's pre-service work schedule generally can be used to calculate the hours that the employee would have worked during military service. This revision codifies the protections and benefits offered by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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c. Clarification of Eligibility that Occurs While on Leave

Prior § 825.110(d) stated that eligibility determinations (that is, whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months) must be made as of the date the leave commences. According to the DOL, this language led to confusion when employees who have worked 1,250 hours, but have not fulfilled the 12 months of employment requirement, begin a block of leave. Thus, the new regulation states: "An employee may be on "non-FMLA leave" at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be 'FMLA leave.'"

4. Worksite of Employees Working for a Secondary Employer for More than One Year (§ 825.111)

The prior regulations provided that for the purposes of determining an employee's eligibility, when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The DOL modified this provision by adding "unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees." (§ 825.111(a)(3)). The DOL made this revision in light of the Tenth Circuit's 2004 decision in *Harbert v. Healthcare Services Group, Inc.*, which held that the current regulation's definition of worksite as applied to an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious.

5. Serious Health Condition (§ 825.113)

The final regulations make no changes to proposed paragraphs (a), (b) and (c) of § 825.113, which reorganized, but did not change, the prior regulations' definitions of serious health condition and continuing treatment.

Paragraph (d) of § 825.113 lists conditions that are not ordinarily considered serious health conditions. The only change made by the final regulations was to delete the delete the phrase "resulting from stress" from the last sentence of proposed paragraph (d). In the preamble to the final regulations, the DOL stated that the objective test defining what constitutes a serious health condition under the FMLA (in both the proposed and final versions of §§ 825.113(a), 825.114, and 825.115) is the controlling regulatory standard, and the list of common ailments such as colds and flu (in proposed and final § 825.113(d)) is helpful as identifying ailments that ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria.

6. Continuing Treatment (§ 825. 115)

New § 825.115 addresses what constitutes a serious health condition involving continuing treatment by a health care provider. The new regulation defines continuing treatment as a

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"period of incapacity … of more than three consecutive, **full** calendar days … that also involves: treatment two or more times **within 30 days of the first day of incapacity, unless extenuating circumstances exist**, by a health care provider … or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider." The new regulations added the words in bold. The new regulations also provide that the requirement of treatment by a health care provider means an in-person visit. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

The proposed regulations added the requirement that treatment "two or more times" by a health care provider occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist. The new regulations adopt this requirement. The new regulations also clarify that the determination of whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period must be made by the health care provider, not the employee.

The new regulations also define "extenuating circumstances" as "circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider" and note that whether a given set of circumstances are extenuating depends on the facts of the situation.

The new regulations made no changes to proposed paragraph (b) (addressing pregnancy or prenatal care). In paragraph (c), which discusses chronic serious health conditions and the requirement of periodic visits for treatment, the new regulations adopt the definition in the proposed regulations that the term "periodic" means twice or more a year. The new regulations made no changes to proposed paragraphs (d) (addressing permanent or long-term conditions) and (e) (addressing conditions requiring multiple treatments), which incorporated language from the prior regulations.

7. Leave for Pregnancy or Birth (§ 825.120)

A new single section addresses FMLA rights and responsibilities relating to pregnancy and the birth of a child. The new regulations combine language from several sections to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy and the mother's serious health condition following the birth of a child.

The section restates that both the mother and father are entitled to FMLA leave for the birth of their child and for bonding with the child for the 12-month period following the child's birth. The regulations further provide that an employee's entitlement to leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken for a longer period, this longer period of leave does not qualify as FMLA leave.

As in the prior regulations, the new section states that a mother and father who are employed by the same employer and are both entitled to FMLA leave may take only a combined 12 weeks of leave for birth of their child or to care for the child after birth, for placement of a child with the

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