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FMLA Update

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FMLA UPDATE

For almost two years, the United States Department of Labor has been working on new regulations regarding the Family and Medical Leave Act (FMLA). Proposed regulations were issued in February of 2008, and numerous comments were received on the rules. Final rules have now been published and will take effect on January 16, 2009. In addition to updating FMLA policies and forms and requiring more effective communication, the rules also provide the first administrative guidance regarding the National Defense Authorization Act, which allows employees to take FMLA leave because of a “qualifying exigency” arising out of a family member being on active duty in the armed forces and which grants unpaid military caregiver leave of up to 26 weeks. The following bullet points explain some of the recent changes.

- **Notice Obligations**

Employers that do not have an employee handbook or similar written materials describing benefits and leave must provide the general FMLA notice to each employee when he or she is hired. Where a workforce is comprised of a significant number of workers who are not literate in English, the employer continues to be obligated to provide general notice in a language in which the employees are literate. If all employees have access to electronic information, electronic posting of the notice is permitted.

- **Eligibility Notice and Rights and Responsibilities Form**

The new rules provide employers with five (5) business days in which to notify employees of their eligibility to take FMLA leave. A new form, Form WH-381, is now required. The “rights and responsibilities” form details the expectations and obligations of employees and explains the consequences for failure to meet the obligations. The form must provide information of any requirement to provide medical certification, the right to substitute paid leave, the process for paying premiums for continuing benefits, and job restoration rights upon expiration of FMLA leave. The notice should also include the medical certification form, if the employer requests employees to complete these forms.

- **Designation Notice**

After the employer obtains sufficient information to determine whether the leave is covered by the FMLA, the employer has five (5) business days (instead of the current requirement of two (2) business days) to notify the employee that the leave is designated as FMLA leave, unless extenuating circumstances exist.

- **Definition of Serious Health Condition**

The new regulations revised the definition of a “serious health condition” so that an employee has been incapacitated for more than three (3) calendar days must have made two (2) visits to the healthcare provider, the first visit must occur within seven (7) days of the first day of the incapacity and the second visit must occur within 30 days, unless there is a specific order by

the physician and extenuating circumstances, such as inability to obtain an appointment. Extenuating circumstances are judged on a case-by case basis. Further, to qualify as a chronic, serious health condition, the employee must visit a healthcare provider at least twice a year.

- **Medical Certifications**

If the employee's initial medical certification is incomplete or insufficient, the employer must designate, in writing, what information is missing and give the employee seven (7) days to cure the deficiency before denying the request or asking for a second certification. Any contact with the employee's healthcare provider must be via the human resources department, leave coordinator, healthcare provider, or other management level employee, but under no circumstances can it be the employee's direct supervisor. Employers may require a healthcare provider to specifically address any return to work or fitness for duty certification and state whether the employee can perform the essential functions of his or her job. Employers can also require an employee to provide a fitness for duty certification before the employee may return to work from an absence while on intermittent leave, if the employer has reasonable concerns about the employee's ability to safely perform a job. The employer must notify the employee of these fitness for duty requirements at the time FMLA duty commences.

- **Light Duty**

When an employer places an employee who is on FMLA leave on light duty, the time spent on light duty does not count against the employee's FMLA leave entitlement. When an employer and employee do agree to a light duty arrangement, this agreement is not a waiver of the employee's rights under the FMLA and the employee's right to restoration of the original job is held in abeyance while the employee performs light duty.

- **New Forms**

The Department of Labor updated a number of forms to assist employers. These forms are included as appendices to the regulations: (1) WH-380E - Certification of Healthcare Provider for Employee's Serious Health Condition; (2) WH-380F - Certification of Healthcare Provider for Family Member's Serious Health Condition; (3) WH Publication 1420 - Notice to Employee of Rights under FMLA; (4) WH-381 - Notice of Eligibility and Rights and Responsibilities; (5) WH-382 - Designation Notice; (6) WH-384 - Certification of Qualifying Exigency for Military Family Leave; and (7) WH-385 - Certification of Serious Injury or Illness of Covered Service Member for Family Medical Leave.

- **Military Qualifying Exigency**

The new regulations define the categories of qualifying exigency leave arising out of a family member being on active duty in the armed forces: (1) short-notice deployment (when there is an impending call or order to active duty with seven or less calendar days prior to the date of deployment); (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation (which is limited to five days of leave to spend time with a member of the military who is on short term

rest and recuperation); (7) post-deployment activities (such as arrival ceremonies and reintegration briefings); and (8) additional activities to address other events that arise out of the covered military member's active duty or call to active duty status, provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of the leave. Exigency leave is limited to a total of 12 weeks.

- **Military Caregiver Leave**

Additionally, employees are allowed up to 26 weeks of unpaid FMLA military caregiver leave for relatives of seriously injured or ill members of the armed forces. Military caregiver leave is available to more than spouses, parents and children (the individuals entitled to most FMLA leave) and is available to the service member's "next of kin". The regulations permit covered service members specifically to designate in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. The covered service member's spouse, parent, son or daughter are excluded from the "next of kin" definition because they are already entitled to leave for this purpose. If no designation of another blood relative as next of kin is given, then the nearest blood relative is determined in the following order: those with legal custody of the service member, brothers and sisters, grandparents, aunts and uncles, first cousins. If there are multiple family members with the same level of relationship to the covered service member, all such family members shall be considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously. An employer may require documentation of specific family relationship in order to consider eligibility for FMLA. This may include a birth certificate, court document, or other item. The employer may not require an affidavit or notarized information or a tax return as this is deemed to be an inappropriate invasion into person privacy.

- **Amount of Leave**

Military caregiver leave applies per service member. An eligible employee may be entitled to take more than one period of 26 work weeks of leave if the leave is to care for different covered service members or to care for the same person with a subsequent serious injury or illness. The maximum amount with any 12 month period is 26 weeks.

The only way that total leave of more than 26 weeks is available is if the employee is pregnant and is entitled to an additional eight weeks of unpaid leave under the Iowa statute.

Please do not hesitate to contact any member of the Davis Brown Labor & Employment Law Department with any questions about the new regulations or to have your policies and forms reviewed and revised.