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Family and Medical Leave Upheaval:
We are marching, but we don't have a map.

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As of January 28, 2008 there have been significant changes and potential changes to the Family and Medical Leave Act which fall into three basic categories:

- A change relating to the provision of care for service members which is in effect and enforceable as of January 28, 2008 (26 weeks of leave per year);
- Exigent circumstances leave for active duty armed services family members which is technically in effect but won't be enforced until such time as the Department of Labor issues regulations to define exigent circumstances (12 weeks of leave per year); and
- Proposed changes to the Family and Medical Leave Act as a whole which are currently in an open comment period.

WHERE ARE WE AND WHAT DO YOU NEED TO DO?

1. **Care of Service Member.** In relationship to changes relating to the care of a service member, HR departments should be amending their family and medical leave policies to include a separate section for this new category of family and medical leave. The Department of Labor has indicated that no additional regulations will need to be issued in relationship to the care of a service member portion of the changes signed into law under the National Defense Authorization Act (NDAA). However, we would anticipate some additional definitions, particularly in relationship to the nature and type of certification which will be needed or issued for care of a service member. This portion of the regulation provides in pertinent part that:

> The spouse, child, parent, or next of kin (nearest blood relative) of an active duty service member may receive up to twenty-six (26) work weeks of unpaid leave in a twelve (12) month period to provide care for an injured service member. In order to be eligible, the service member must have been injured while on active duty and have a serious injury or illness or otherwise be on the temporary disability retired list for such serious illness or injury.

2. **Leave for exigent circumstances**. The NDAA also provides for up to twelve (12) weeks of family and medical leave for the spouse, child, or parent of a service member and, presumably, a service member, who has been called to active duty. The Department of Labor and the statute itself have indicated that this section is not yet enforceable as the Department of Labor has issued no regulations regarding what is and is not an exigent circumstance or what might be "any qualifying exigency". The

Department of Labor has drafted proposed regulations relating to exigent circumstances which are in an open comment period until April 11, 2008. At such time, the DOL will review comments and, potentially, make changes to the proposed regulations. Those regulations will then need to be reviewed again by the Office of Management and Budget for approval and may be subject to an additional comment and revision period. However, the Department of Labor has strongly suggested that employers begin immediately making exigent circumstance leave available to employees if the employer has a reasonable belief that an exigent circumstance may exist. In providing examples for exigent circumstances, the Department of Labor has listed such things as time needed to:

- Make childcare arrangements
- Handle financial or legal preparations to address a military member's absence from the home, i.e., power of attorney
- Attending official ceremonies or programs for active duty military members where families are invited
- Attending farewell or arrival events for active duty military members
- Matters relating to the missing status or death of a service member

Note: Exigent circumstance leave will be particularly difficult for an employer to manage, document and certify.

Leave under both of these sections may be taken either consecutively or intermittently. An intermittent leave can present a particularly complex set of circumstances for employer management. Exigent circumstance leave is likely to affect substantially more employees than leave for a seriously ill or injured service member, be more difficult to document and create more internal ill will with employees who are requested to 'pick up the slack" for FML absences.

General note for both types of leave: For leaves related to the care of an ill or injured service member as well as exigent circumstance leave, the employee must otherwise qualify for family and medical leave and all requirements under FML policies are still applicable. The employee is not entitled to more than twenty-six (26) weeks of combined leave within any twelve (12) month timeframe. This twelve (12) month timeframe may still be calculated either on a calendar or rolling year basis. One example would be an employee who utilized twelve (12) weeks of family and medical leave for his/her own medical condition; that person would not be entitled to more than fourteen (14) weeks for the care of a service member.

II. PROPOSED GENERAL CHANGES TO THE FAMILY AND MEDICAL LEAVE ACT

Since its initial publication, the Family and Medical Leave Act has not had significant regulatory change with exception of the changes referenced above as part of the National Defense Authorization Act. Employer and employee complaints as well as conflicting case law has accumulated over the years, particularly in relationship to certification, intermittent leave and leave relating to the care of an ill family member. The Department of Labor has now (finally) made proposals for significant changes to the regulations. These proposals are within an open comment period which runs through mid-April. Of particular note in the new proposals are the following:

- A clarification of the call in rule which would make it a requirement that an employee taking unscheduled intermittent leave follow the employer's published call in procedures.

- In defining serious health condition, the regulations would require than an employee have two (2) visits to a medical provider occurring within thirty (30) days of incapacity to qualify for a serious medical condition. This is a significant change from current practices. Courts have typically held that the visits must occur within the three (3) day trigger period of incapacity.

- In order to substantiate a chronic health condition which frequently requires intermittent leave under the existing terms of the regulation employees must demonstrate that they have seen a

doctor a minimum of twice a year for treatment of that chronic health condition.

- In terms of obtaining appropriate medical certification, the regulations now propose that the employers may directly contact the employee's medical provider to obtain clarification and authentication of documentation. The employee would be required to give consent under HIPAA. Failure to give consent would be a certification violation and would result in leave being denied.

- Revisions also include expansion of regulation relating to fitness for duty or functional capacity evaluations which would allow the employer to require an FCE for both consecutive and intermittent leave.

- Record keeping and notice requirements would expand. One example is that employers would be required to notify employees taking intermittent leave every 30 days of the amount of leave the employee has remaining.

The proposed regulations do not address an area of great concern to most employers which is the management of intermittent leave. While allowing for additional certification as well as specifically referencing and approving functional capacity evaluations, the regulations leave in place the intermittent leave policies which allow for intermittent leave in the smallest increment of time calculated by the employer which means in effect that intermittent leave may be counted for as little as 5 minute intervals.

Don't Make Changes Now on Proposed Regs

With the exception of leave relating to covered service members, in general we want final rules before making significant or substantive changes to FMLA policy in relationship to these proposed regulatory issues. Multiple groups have commented, both pro and con, on the regulations which will probably undergo additional substantive changes. The National Partnership for Women and Families has decried portions of the regulation for weakening the Family and Medical Leave Act and is lobbying for paid leave. Multiple senators, including Hillary Clinton and Ted Kennedy, have expressed significant concerns relating to the certification provisions which would allow direct communication with an employee's health provider and national associations relating to business and industry including SHRM and others have expressed ongoing concern regarding the DOL's failure to address the problems raised by intermittent leave and the difficulty of managing certain types of leave entitlement and certification.

If you have any questions about these requirements or this issue, please contact Jo Ellen Whitney at 515-288-2500 or via e-mail at JoEllenWhitney@DavisBrownLaw.com.

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