

## FAMILY AND MEDICAL LEAVE ACT EXPANDED

For the first time since 1993, the Family and Medical Leave Act (“FMLA”) has been expanded to provide for leave in additional circumstances and for longer durations. Previously, eligible employees could take 12 weeks of unpaid, job-protected leave during any 12-month period for the birth or care of the employee’s newborn child; for the placement of a child with the employee for adoption or foster care; to care for an immediate family member with a serious health condition; or for the employee’s own serious health condition. On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 (“Act”), which allows eligible employees to take unpaid leave under two additional circumstances and expands the amount of leave available to an eligible employee in one of these circumstances.

The first additional circumstance in which an eligible employee is entitled to leave under the Act is “[b]ecause of any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.” The language of the amendment indicates that “qualifying exigency” shall be defined by regulations issued by the Secretary of the Department of Labor, although it is unclear when such regulations will be issued by the Department of Labor. An eligible employee would be entitled to up to 12 weeks of unpaid leave based on this circumstance during any 12-month period and must provide the employer with as much notice as is reasonable and practicable if the need for leave is foreseeable. (The employee is only entitled to a maximum of 12 weeks under this circumstance and the previously available circumstances for FMLA leave). An employer can require certification of an employee’s eligibility for this type of leave. As with the other circumstances permitting FMLA leave, an employer can require an employee to exhaust any other available leave, including vacation leave, personal leave or family leave, concurrently with the 12 weeks of FMLA leave.

The second additional circumstance in which eligible employees will be entitled to unpaid leave under the amendment is for “the spouse, son, daughter, parent, or next of kin of a covered servicemember...to care for the servicemember” who has suffered an injury or illness in the line of duty in the Armed Forces. An eligible employee may take a total of 26-weeks of leave during any single 12-month period (including any FMLA leave taken under other permissible circumstances); a husband and wife working for the same employer may take a combined total of 26 weeks to care for the wounded servicemember. This leave may be taken in increments of the shortest time periods tracked by the employer’s payroll system. An employer may require an employee to exhaust any other available leave, including vacation leave, personal leave, family leave, or medical or sick leave, concurrently with the 26 weeks of FMLA leave.

We recommend that all employers immediately become knowledgeable about the FMLA amendments under the Act. In addition, covered employers should update their FMLA policies and forms to address the additional circumstances in which eligible employees may take leave and the various durations.

## “NO MATCH” REGULATION UPDATE

On October 10, 2007, Judge Charles Breyer of the U.S. District Court for the Northern District of California issued a preliminary injunction against the enforcement of the “no-match” letter regulations proposed by the Department of Homeland Security (“DHS”). In their current form, these regulations could potentially subject employers to federal civil and criminal penalties based on their “constructive knowledge” of an employee’s illegal status via receipt of a no-match letter from the Social Security Administration. In response to Judge Breyer’s decision, DHS has initiated a two-pronged approach designed to make the regulations operative as soon as possible.

First, DHS is working to promulgate revised regulations that will directly respond to the concerns raised by Judge Breyer resulting in the issuance of the preliminary injunction. Judge Breyer’s reasons for issuing the injunction included: (1) the regulations failed to supply a reasoned analysis for DHS’s position that a no-match letter is sufficient, by itself, to amount to constructive knowledge of an employee’s unauthorized status; (2) DHS exceeded its authority by opining as to the applicability of the anti-discrimination provisions of federal immigration law to the regulations; and (3) DHS did not conduct a final flexibility analysis (which is required for the promulgation of certain regulations). While at this point it is unclear how DHS will revise the regulations, it is likely that DHS will attempt to provide the additional analysis that was determined to be lacking and remove its discussion as to the effect of employer compliance with the safe-harbor provisions on the anti-discrimination provisions of federal immigration law. DHS anticipates the revised regulations will be completed no later than March 2008, at which point DHS will likely petition Judge Breyer to lift the preliminary injunction. Additionally, DHS has made it clear that it is not abandoning the regulations as they currently exist. On December 4, 2007, DHS filed a Notice of Appeal with the Ninth Circuit Court of Appeals seeking a reversal of Judge Breyer’s preliminary injunction. In a statement issued by DHS Secretary Michael Chertoff, he indicates that this two-pronged response to Judge Breyer’s preliminary injunction is designed to reflect DHS’s firm commitment to eliminate any obstacles and ensuring that the no-match regulations become operative as soon as possible.

If you have questions about the expansion to the FMLA, “no match” regulations or would like assistance in reviewing or revising existing policies and forms, please contact a member of Koley Jessen’s Employment Law and Labor Relations Practice Group.

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