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2008 Starts with Family and Medical Leave Act Developments

The year has started out with a flurry of activity regarding the Family and Medical Leave Act ("FMLA"). Employers should take note of these developments to ensure that they are prepared to fully comply with the FMLA.

Expansion of the FMLA for Military Families

In the first amendment to the Family and Medical Leave Act since its passage in 1993, on January 28, 2008 President Bush signed the National Defense Authorization Act, which included provisions that expand FMLA leave available for military families. The amendments provide additional FMLA time off in specified circumstances for family members of service men and women. The circumstances in which FMLA leave is available for military families are as follows:

> **Qualifying Exigency Provision:** Under the amendments, employers are required to provide up to 12 weeks of unpaid, job-protected leave to eligible employees because of a "qualifying exigency," which arises "out of the fact that a spouse, a son, a 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 amendment does not define the term "qualifying exigency," but directs the Department of Labor ("DOL") to draft regulations defining the term. The DOL has indicated that the "qualify exigency" provision will not be effective until the Agency's regulations are issued, but has, nonetheless, encouraged employers to provide this type of leave to qualifying employees.
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> **Caregiver Leave for Injured Servicemember Provision:**The new amendments also allow eligible employees who are the spouses, children, parents, or next of kin of a servicemember to take one leave of **up to 26 weeks** under the FMLA to care for a servicemember who incurred an injury during military service when that injury results in the servicemember being unable to perform his or her duties. The leave may be taken on an intermittent or reduced-schedule basis, but all 26 weeks must be used during a single 12-month period. The DOL has indicated that the Caregiver provision had immediate effect on **January 28, 2008**.

What Employers Should Do
To comply with the FMLA amendments, employers should:

- Review and update FMLA policies and procedures.
- Train Human Resource personnel so that they are aware of and understand the new FMLA provisions.
- Watch for new FMLA posters that should be issued soon containing the new provisions.

The text of the FMLA amendments can be found at the following link: http://www.dol.gov/esa/whd/fmla/

DOL Announces New FMLA Regulations to be Issued

In another significant FMLA development, the DOL announced on January 24, 2008 that it is drafting new regulations to implement changes to the FMLA. The DOL has not provided specifics on the changes that it intends to propose. It is anticipated, however, that in addition to providing guidance on the military family expansion provisions of the FMLA, the changes will also include modifying the FMLA regulations to require that employees request FMLA leave in advance. Currently, employees in most cases can miss work for two days before they must request FMLA leave. Based on comments by DOL officials, it appears unlikely that the Agency will make the type of expansive changes suggested by employers during the period that DOL accepted comments on the FMLA regulations last year.

Supreme Court may address Validity of Releases under the FMLA

In another FMLA development, the U.S. Supreme Court is considering whether to review the case of *Progress Energy v. Taylor*, which presents the issue of whether employee releases of FMLA claims are enforceable. In *Progress Energy*, the 4th Circuit Court of Appeals, which covers Maryland, Virginia, West Virginia and North and South Carolina, declared release of FMLA claims to be invalid. However, the 5th Circuit Court of Appeals, which covers Texas, Louisiana and Mississippi, has held that FMLA claims can be prospectively released. The split between these federal circuit courts creates uncertainty for employers in the rest of the country about whether FMLA claims can or cannot be released as part of the type of standard severance agreement that thousands of employers use on a regular basis.

On January 14, 2008, the U.S. Supreme Court sought the advice of the U.S. Solicitor General on whether the 4th Circuit Court was correct in holding that the FMLA precludes the release of FMLA claims. This is often seen as a prelude to the Court taking the case. The DOL has already taken the position, which was rejected by the 4th Circuit, that the FMLA does not preclude the release of prospective claims under the Act. Many interested parties have submitted briefs to the Supreme Court supporting review of this issue, including, Butzel Long, which submitted a brief on behalf of the Society for Human Resource Management and the College and University Professional Association for Human Resources urging the Supreme Court to consider the case to bring clarity to this issue for employers.

What Employers Should Do
Consult with counsel to ensure that standard severance agreements are drafted to properly address potential issues with the release of FMLA claims.

Administering the FMLA has presented many challenges for employers. In 2008, the DOL and the Supreme Court have the opportunity to provide some guidance and clarification for employers trying to manage this complicated statute. Butzel Long can assist employers in preparing and revising FMLA policies and addressing other FMLA issues.

If you have questions regarding the Family and Medical Leave Act, would like assistance in revising a FMLA Policy, or for more information, please contact contact the author of this E-News bulletin as indicated below or your Butzel Long attorney.

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