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Significant New Legislation and Regulations Affecting Employers and Threats on the Horizon

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Federal FMLA Expanded to Include Leave to Family Members of Military Personnel

On January 28, 2008, President Bush signed into law the National Defense Authorization Act ("NDAA"), which includes an expansion of the Family and Medical Leave Act ("FMLA") to cover family members of military service personnel.

This law provides for new or expanded FMLA leave under two circumstances. First, employers must now provide up to 26 weeks of leave in any 12-month period to an employee who is the spouse, parent, child, or next of kin of an injured service member to care for that individual while he or she is recovering. A recovering service member is defined as a member of the Armed Forces who suffered an injury or illness while on active-duty that may render the person unable to perform the duties of the member's office, grade, rank or rating. This change is effective immediately.

The NDAA also provides that employers with 50 or more employees must provide 12 weeks of leave due to a "qualifying exigency" arising out of active military duty (or notice of impending call or order to active duty) of an employee's spouse, parent, or child. Regulations concerning this change are expected to be issued in the next few weeks to clarify terms such as "qualifying exigency." This provision will not take effect until after final regulations are issued by the Secretary of Labor.

Further Changes to the FMLA Regulations Appear Imminent

On February 11, 2008, the Department of Labor released the long-awaited proposed revisions to the Family and Medical Leave Act ("FMLA"). If adopted, the new regulations would alter some of the FMLA procedures. Employers and employees now have 60 days, or until April 11, 2008, to consider and make comments to the proposed changes.

Some of the proposed changes include the regulations concerning what constitutes a serious health condition under 29 C.F.R. § 825.114. First, there is a proposed clarification to the time period within which an employee must have two visits with a medical provider when there have been three consecutive days of incapacity. The proposal would require two visits to a medical provider occurring within 30 days of incapacity. Currently, the time period is undefined. Second, the new regulation would provide that employees with chronic health conditions must demonstrate they have seen a doctor at least twice per year. Current regulations call for "periodic visits," but leave the term undefined.

The new regulations also include a new rule that would require employees to follow the employer's workplace call-in procedures if they want to take unscheduled, intermittent leave. Employees can currently take unscheduled, intermittent leave and then designate it as FMLA-qualifying within two days of the absence. Such an approach will only be permitted in the case of emergencies under the new regulations.

There are also proposed changes to the medical certification process. The major change in the proposed regulations is that employers will be able to contact medical providers directly to obtain clarification or authentication of documentation. Under the current rule, that communication may take place only between a health care provider who works for the employer and the employee's health care provider, with the employee's consent. While the employee's consent will still be required, the contact would be permitted directly between the employer and the physician. The proposed regulations will also clarify how often an employee must recertify a serious health condition. If the condition lasts for more than a year, the employer would be permitted to request an annual recertification. For conditions that are described as "lifetime" or "unknown," the employer may ask for recertification at least every six months in conjunction with an absence.

Although these changes do not correct all of the difficulties responding to FMLA leave regulations and curbing fraud, the proposed regulations constitute a positive step that will make it somewhat easier for employers to administer their FMLA policies.

Changes to Wisconsin Fair Employment Act passed by the Wisconsin Senate; fate in Assembly uncertain.

On January 31, 2008, SB-165 passed the Wisconsin State Senate. The bill authorizes the filing circuit court actions for compensatory and limited punitive damages under the Wisconsin Fair Employment Act ("WFEA").

Currently, claims brought under the WFEA must be filed with the Department of Workforce Development and are adjudicated before an administrative law judge employed by the State of Wisconsin. Damages are limited to the recovery of back wages, reinstatement (or front pay where reinstatement is unfeasible) and attorney's fees.

Under the Senate bill, the panoply of available remedies would be increased to include compensatory damages (pain and suffering, emotional distress, etc.), as well as limited punitive damages. These new provisions would provide for remedies much closer to the remedies available under the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA").

The bill would have a significant adverse impact on Wisconsin employers, as there are several significant differences between the WFEA and its federal counterparts. One major difference is that the federal laws apply only to employers that have at least 15 employees (or 20 for the ADEA), while the WFEA applies to all employers employing at least one individual. This means that even the smallest Wisconsin employers could be saddled with expensive employment litigation in which an employee could potentially recover significant damages. The proposed change would also mean that several protected classes of individuals, which are not protected under federal law (i.e., arrest and conviction record, use of lawful product, sexual orientation, etc.), would be entitled to file actions in circuit court and potentially recover compensatory and punitive damages. This change could be devastating to some Wisconsin employers.

The Senate bill also directed the Secretary of the Department of Workforce Development to appoint a committee to study the issue of wage disparity between men and women and between minority group members and non-minority group members and to recommend solutions and policy alternatives.

The bill's fate in the Assembly is uncertain, but Republican Assembly members are expected to mount a strong opposition to the bill, and at this point in time, its passage remains unlikely. We encourage all employers to contact their Assembly member and urge them to oppose SB 165.

Illinois Human Rights Act Now Permits Employees to Sue Employers in Illinois State Courts.

For claims brought after January 1, 2008, the Illinois Human Rights Act ("IHRA") has been modified to increase the access of employees to Illinois state courts in employment discrimination lawsuits.

Just as with federal anti-discrimination laws, the IHRA prohibits workplace discrimination on the basis of race, color, religion, sex, national origin, age, disability, and military status. The IHRA also protects employees against discrimination on the basis of ancestry, marital status, sexual orientation, or unfavorable discharge from military service.

Prior to the modifications, complaints of discrimination were administrative matters addressed primarily by the Illinois Department of Human Rights ("IDHR") and the Illinois Human Rights Commission ("IHRC"). Employees did not have a right to a jury trial in Illinois circuit court and were only permitted access to state court for appellate review of an IHRC final order.

Discrimination claims filed with the IDHR after January 1, 2008, may now proceed to trial on the merits in Illinois state court if: (1) the IDHR does not complete its investigation into the complaint within 365 days, (2) the IDHR dismisses the claim of the employee for lack of substantial evidence, or (3) the IDHR finds substantial evidence of discrimination.

Employers will likely see an increase in administrative claims brought by employees under the IHRA as a result of these changes. Furthermore, as an employee can now bypass an administrative hearing under the IHRA if the employee so chooses, employers will see an increase in Illinois state court litigation relating to the IHRA. Proceedings in state court are far more involved than the abbreviated administrative proceedings under the IHRA, and employers are exposed to increased compensatory damages in state court actions.