Employment Law ALERT
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Employers Urged to Review Their Employee Leave Policies in Anticipation of the Flu Season, Including Possible Widespread H1N1 Virus Activity

With the approach of flu season (including a possibility of increased H1N1 – "swine flu" – virus activity), now is a good time for employers to review their employee leave policies, both for compliance with applicable state and federal laws, and to be certain they understand how to apply these policies and laws when an employee is unable to work for sickness-related reasons – e.g., due to the employee's own illness or disability, or due to the illness of a family member.

Laws that may be applicable to D.C. area employers when an employee is sick, or when an employee needs to care for a sick family member, include:

Family Medical Leave Act (FMLA): The FMLA applies to all employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year. Thus, employers with less than 50 employees now may still be covered if they had 50 employees during the requisite period. The FMLA may apply to "joint employers" – i.e., separate entities that may be deemed a single employer due to common management, central control of employment matters and/or common ownership/financial control. If the combined number of employees of joint employers satisfies the 50 employee test, then each employer will be subject to the FMLA. To be eligible for leave under the FMLA, an employee must:

- Have worked for the employer for at least 12 months (may be non-consecutive);
- Have worked for at least 1,250 hours during the 12-month period immediately preceding the commencement of leave; and
- Work at a location where the employer employs at least 50 or more employees working within 75 miles of that worksite.

An eligible employee is entitled to up to 12 weeks of unpaid leave during any 12-month period, when the employee is unable to work either due to his/her own "serious health condition" or to take care of a spouse, child or parent with a serious health condition.

In general, a serious health condition is an illness, injury, impairment or physical or mental condition that requires (a) an overnight stay in a hospital, hospice or residential medical facility, or (b) continuing treatment by a health care provider that includes any of the following:

(1) a "period of incapacity" (i.e., inability to work, attend school, or perform other daily activities) of more than 3 consecutive days and any subsequent treatment or period of incapacity relating to the same condition, that involves treatment either two or more times within 30

days of the first day of incapacity, or at least one time which results in a regimen of continuing treatment;

(2) any period of incapacity due to pregnancy or prenatal care;

(3) any period of incapacity or treatment for such incapacity due to a "chronic" serious health condition;

(4) a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's or the terminal stages of a disease); or

(5) any period of absence to receive multiple treatments (including any period of recovery) for (i) restorative surgery after an accident or other injury, or (ii) a condition that would likely result in a period of incapacity of more than 3 days in the absence of medical intervention or treatment (e.g., chemotherapy for cancer, physical therapy for severe arthritis, or dialysis for kidney disease).

The FMLA regulations are complicated and detailed, and include many additional requirements and conditions, including notice requirements for both the employer and employees. Every employer that is subject to the FMLA should have someone responsible for understanding the law and ensuring compliance.

D.C. Family Medical Leave Act (DC FMLA): The DC FMLA differs from the federal FMLA in several respects:

- *Employee eligibility*: Eligible employees are those who have been employed by the same employer for 1 year, without any break in service, and who have worked for at least 1000 hours during the 12-month period immediately preceding the request for leave.

- *Length and scope of leave available*: The DC FMLA provides for up to 16 weeks of unpaid leave during any 24-month period in *two separate* situations:

  (1) An employee may take up to 16 weeks of leave to care for a family member with a serious health condition. The term "family member" is defined broadly to include: (i) a person to whom the employee is related by blood, legal custody or marriage; (ii) a child who lives with the employee and for whom the employee permanently assumes parental responsibility; and (iii) a person with whom the employee shares a mutual residence, and with whom the employee maintains a committed relationship.

  (2) An employee with a serious health condition may take a separate leave of up to 16 weeks for the employee's condition.

The term "serious health condition" generally has the same definition under the DC FMLA as under the federal FMLA.

District of Columbia Sick & Safe Leave Act: This act requires D.C. employers to accrue paid leave for employees who work in the District that can be used for absences due to:

- illness, injury or medical condition of the employee;

- obtaining professional medical diagnosis or care for the employee (including preventive medical care);

- caring for a family member (including a domestic partner) who has an illness, injury or medical condition, or who needs professional medical diagnosis or care; or

- seeking or obtaining social or legal services (including counseling) for an employee or family member who is the victim of stalking, domestic violence or sexual abuse.

The amount of leave required to be accrued depends on the size of the employer and ranges from 3 to 7 calendar days per year.

Maryland Flexible Leave Act: This act applies to employers who have 15 or more employees, who are engaged in business in Maryland, and who provide leave with pay under the terms of a collective bargaining agreement or an employment policy. Under this law, Maryland employees may use any available earned "leave with pay" (including sick leave, vacation time and compensatory time) for the illness of a child, spouse or parent. Employees who earn more than one type of leave with pay may elect the type and amount of leave to be used.

Americans with Disabilities Act (ADA): Whenever an employee is unable to work due to an illness or disability, employers should consider whether the ADA requires the employer to accommodate the employee by providing leave or taking other measures. Even when the FMLA is not applicable or does not provide a right to leave, the ADA may require leave or other accommodations.

Fair Labor Standards Act (FLSA): In order to be covered by certain exemptions from the FLSA's overtime requirements, an employee must (among other things) be paid on a "salary basis." Department of Labor regulations restrict an employer's ability to make deductions from an exempt employee's salary when that employee is absent from work due to sickness or disability. Pursuant to the regulations:

- An employer may make deductions from pay when an exempt employee is absent from work for one or more ***full days*** due to sickness or disability, *only* if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability (e.g., sick leave, paid time off, or a short-term disability plan).

- Deductions for ***full-day*** absences may be made before the employee has qualified under the plan, and also after the employee has exhausted the leave allowance thereunder. Deductions for partial-day absences are *not* permitted.

- An employer is not required to pay a full salary for weeks in which an exempt employee takes unpaid leave under the FMLA. Under those circumstances, an employer may pay a proportionate part of the full salary for time actually worked.

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