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New Federal Family and Medical Leave Act and Military Leave Final Regulations Become Effective January 16, 2009

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Independent schools have until January 16, 2009, to review and revise their policies, procedures, postings, forms, and notices to ensure compliance with the new federal Family and Medical Leave Act ("FMLA") and Military Leave regulations. Enacted in 1993, the FMLA provides eligible employees with up to twelve weeks of unpaid leave within a twelve-month period. To be eligible, an employee must work at a location with fifty or more employees within a seventy-five mile radius, must have worked for the school for a total of twelve months (or one academic year, in the case of certain school employees), have worked at least 1,250 hours within the twelve-month period immediately preceding the FMLA leave, and have a qualifying need for FMLA leave due to the employee's own serious health condition, the birth, adoption, or placement in foster care of the employee's child, or the need for the employee to care for the employee's spouse, parent, or child with a serious health condition.

On November 17, 2008, the federal Department of Labor ("DOL") published new FMLA final regulations, which take effect on January 16, 2009, and contain several significant revisions to the existing federal regulations and expand the regulations to cover the military family leave rights created by recent statutory amendments to the FMLA. While they may not entirely satisfy either employers or employees, the new regulations do help to clarify and correct some areas of confusion under the original regulations, including the following:

- **Qualifying Need for Leave** – The new regulations utilize the original regulations' 6 categories of covered "serious health conditions," but add specific criteria to the definitions of "chronic condition" and "continuing treatment" for a period of incapacity. They also note that an employee who is the non-spouse father of an expected child is not entitled to family leave to care for the expectant mother.
- **Leave Increments** – Under the existing regulations, schools can track FMLA leave in the shortest increment of time the school's payroll system is capable of tracking. The new regulations do not permit tracking FMLA leave in increments shorter than those used to track other forms of leave. In addition, schools may not track FMLA leave in increments greater than one hour, may not deduct more FMLA leave than actually taken, and may not deduct FMLA leave for time actually worked by the employee. However, the new regulations provide an exception allowing schools to designate an entire workday as FMLA leave even if the employee would have been able to work part of a day, but it was physically impossible for the employee to work a partial shift to the nature of the job. For example, a bus driver assigned to drive students on an all day out-of-town trip could not perform this job after reporting to work mid-shift.
- **Holidays** – The new regulations address a question of great interest in the independent school community: whether holidays falling during an employee's FMLA leave count against the employee's FMLA time. Schools may count such holidays against an employee's FMLA time only if the employee is on FMLA leave for the entire workweek in which the holiday occurs. Schools may not deduct FMLA leave for a holiday, even if the employee is absent on the holiday, if the employee is not absent due to FMLA leave for the entire workweek.
- **Use of Paid Leave** – The new regulations continue to allow schools to permit or require employees to use paid leave concurrently with FMLA leave, but now give schools the right to require the employee who elects to use paid leave to follow the terms and conditions normally applicable under the type of leave used, as established by the school's policies and procedures. If the school is requiring the employee to use paid leave against the employee's preference, the school cannot require the employee to follow the normal procedures for the use of that paid leave.
- **Job Bonuses and Other Rewards** – The new regulations specifically permit schools to withhold bonuses, such as perfect attendance awards, if an employee does not meet the requisite standard for receiving the award due to his/her FMLA absences, provided that absences due to any other type of leave would similarly disqualify the employee.
- **Employer's Notice Obligations** – The new regulations emphasize schools' obligations to clearly communicate employees' rights and responsibilities under the FMLA. They now provide employers five business days, absent extenuating circumstances, to provide employees with written FMLA notice, following the school's acquisition of enough information to determine that the need for leave qualifies for FMLA. A school may provide notice at a later time, provided that the employee is not harmed by the delay in notice. Under the new regulations, schools must provide employees with a general notice about the

FMLA, a notice explaining the employee's eligibility for FMLA leave, a notice of employee rights and responsibilities, including any requirement for a return-to-work certification, and a notice designating the leave as FMLA leave.

- **Employee's Notice Obligations** – The new regulations support schools' rights to require 30 days' notice for foreseeable leave, unless impracticable, and to request that an employee who fails to provide such notice explain why it was not practicable to do so. As noted above under "Paid Leave," they permit schools to require employees absent due to FMLA leave to follow the school's regular policies and procedures regarding reporting absences and requesting leave, absent extenuating circumstances.
- **Certification** - The new regulations address several areas of employer frustration under the prior regulations, including the procedure for addressing an incomplete certification, the conditions under which the school may request recertification, and the limited conditions under which a school representative (other than the employee's direct supervisor) may have contact with the employee's health care provider. Additionally, they create new certification forms, including separate forms for the certification of the employee's own serious health condition and for the certification of the serious health condition of the employee's covered family member.
- **Release of FMLA Claims** - Addressing court rulings which challenged the enforceability of settlement agreement provisions waiving the right to pursue FMLA claims, the new regulations explicitly permit employees to settle past FMLA claims without the involvement of the DOL or a court.
- **Leave Due to Family Member's Service-Related Injury** - An eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member may take up to 26 workweeks of FMLA leave in a single twelve-month period to care for the service member who became seriously ill or injured while on active duty. The 26-workweek limit applies only to the employee's leave to care for that service member for that particular injury. If another service member who is a covered family member of the eligible family member becomes seriously ill or injured while on active duty, and/or if the same service member suffers another serious illness or injury while on active duty, the employee will have another 26 workweeks of leave available for each additional service member or new active duty illness or injury. While employers have the option of choosing how to calculate the 12-month period for tracking other types of FMLA leave, the twelve-month period for tracking military caregiver leave begins when the employee begins taking military caregiver leave.
- **Exigency Leave Due to Family Member's Military Service** – An eligible employee may take up to 12 weeks of FMLA leave in a twelve-month period due to a "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent 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. "Qualifying exigency" includes: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where agreed to by the employer and the employee.

Impact of the New Regulations on Independent Schools

In many schools, the majority of the burden for bringing independent schools into compliance with the new regulations will fall on business managers, human resource professionals, and other administrators with responsibility for managing leave on a School-wide basis. However, a school's ability to comply with the FMLA depends on whether necessary information reaches those who administer FMLA leave in a timely manner. Often, a school's failure to provide timely FMLA notice is a result of the FMLA administrator being unaware of the employee's absence.

To address this potential communication gap, and to begin preparation for the new regulations, schools should:

- Identify the person/position responsible for administering FMLA;
- Review attendance tracking and reporting procedures to ensure that the FMLA administrator receives relevant information in a timely manner;
- Review existing FMLA policies and procedures for compliance with the new regulations; Review the forms and notices used for FMLA and military leave and implement new posters, forms, and notices, consistent with the new regulations; and
- Train supervisors and managers on their responsibilities under the school's FMLA processes, and the acts prohibited by the FMLA.

The final regulations published by the DOL are available at <http://www.dol.gov/esa/whd/fmla/finalrule.pdf>.

If you have questions regarding family and medical or military leave, or other legal issues please contact one of the Venable lawyers with whom you work. Venable's independent school lawyers have wide experience representing independent schools in all legal issues facing independent schools including family, medical, and military leave-related matters.

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