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ADA/FMLA Update

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION

Two statutes that cities and many other employers deal with on a day-to-day basis, the Americans with Disabilities Act of 1990 ("ADA") and the Family and Medical Leave Act ("FMLA"), recently underwent significant changes. This paper explains the most significant changes made by the ADA Amendments Act of 2008 ("ADAAA") and the Department of Labor's regulations to the FMLA.

II. THE ADA AMENDMENTS ACT OF 2008

ADA Basics. The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

A "qualified individual with a disability" is a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

"Disability" is defined as (1) a physical or mental impairment that substantially limits one or more major life activities of such individual, (2) a record of such an impairment, or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1). These three subdefinitions are often referred to as "actual disability," "record-of disability," and "regarded-as disability."

In its regulations, the Equal Employment Opportunity Commission ("EEOC") had taken the position that "substantially limited" meant "[u]nable to perform" the major life activity or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform" the major life activity. 29 C.F.R. 1630.2(j)(ii). In making that determination, assistive devices, such as a prosthesis or medication, were taken into account in the determination of whether a person was substantially limited.

The Purpose of the ADAAA. The stated purpose of the ADAAA is to restore what its proponents saw as the original intent and scope of the ADA by reinstating a broad scope of protection. 42 U.S.C. § 12101. In addition, the ADAAA expressly overturns two "overly restrictive" Supreme Court decisions: *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). According to the proponents of the ADAAA, *Sutton* and *Toyota Motor* (i) narrowed the definition of disability, (ii) set a restrictive standard for qualifying as disabled within the meaning of the ADA, and (iii) prevented individuals that Congress intended to cover under the ADA from getting a chance to prove their case in court.

In fact, one study showed that 97% of disability cases were decided in favor of the employer. Under the old ADA, individuals with the following impairments were deemed to be not "disabled": amputated limbs, bipolar disorder, depression, diabetes, epilepsy, fractured spine, HIV, loss of vision in one eye, loss of use of one arm, multiple sclerosis, and post-traumatic stress disorder.

ADAAA's Legislative History; Lack of Regulations. The ADAAA was signed on September 25, 2008, and became effective January 1, 2009. The ADAAA is not retroactive, however, so it will not affect employment decisions made prior to January 1, 2009.

The statute was widely supported by members of Congress and by business groups such as the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Society for Human Resources Management. Because, As discussed below, the ADAAA significantly increases compliance and litigation burdens and expenses for employers, the support of employer-advocacy groups is surprising. One possible explanation for that support is that the enacted version of the ADAAA represents a compromise between employee-interest groups and employer-interest groups. For example, an early draft of the ADAAA classified <u>any impairment</u> as a disability.

As of the date of this paper, no interpretive regulations have been released. On December 11, 2009, the EEOC Commissioners split 2-2 on whether to approve a set of proposed rules that the EEOC's Office of Legal Counsel had been working on since August. Under the EEOC's rules, a tie vote is the same as a "no," meaning the proposed rules were not presented to the public for comment. The votes ran along party lines: the two Republican Commissioners voted in favor of releasing the rules, and the two Democrats voted against. Reportedly, the sticking point for the Democratic commissioners was that a public meeting on the content of the proposed regulations was premature, as they were not yet finished. The details of the draft regulations are unknown, and it is still unclear as to whether the regulations are objectionable on substantive grounds or just incomplete.

When the EEOC does make new regulations, it will publish them and allow public comment for 60 days before the regulations may take effect. If the Commissioners remain deadlocked, it make take an appointment from President Obama to break the tie. Because it is anticipated that President Obama will fill those vacancies with employee advocates, the next set of regulations will be more likely to appease the disability-rights groups who objected to swift approval of the current version of the ADAAA.

Seven Major Changes to the ADA. The following paragraphs set out the specific changes made by the ADAAA. The bottom line, however, is that more employees will be covered by the ADA, often for conditions that are not apparent to the employer.

- ***Mitigating measures out (42 U.S.C. § 12102(4)(E)(i)).*** One of the most significant changes is that when deciding whether an individual is disabled, courts no longer may consider the ameliorative effects of mitigating measures, such as medication, hearing aids, prosthetic limbs, or learned behavior. Thus, if a person has a condition that is fully controlled by medication or the effects of the condition are not substantially limiting because of the use of an assistive device, that person likely is not disabled under current law but will be disabled under the amendments. The only exception is that courts still may consider the ameliorative effects of eyeglasses and contact lenses.

  Example: James works for ABC, Inc. as an engineer. He is a diabetic. With regular insulin injections, he functions normally in everyday activities. Is James "disabled"?

Answer: Yes. Under the ADAAA, an employee who has diabetes should now be considered in his non-medicated state; the effects of insulin injections may not be considered.

- ***"Major life activities" defined and expanded (42 U.S.C. §12102(2)).*** As previously explained, to be considered "disabled" under the ADA, an individual must be substantially limited in a "major life activity." The ADAAA includes a non-exhaustive list of "major life activities," something previously left to EEOC regulations. And the ADAAA definition is broader than the EEOC's definition; it includes a number of activities not listed in the EEOC's regulation, including lifting, reading, communicating, eating, sleeping, standing, bending, concentrating, and thinking. Moreover, the ADAAA specifically includes "major bodily functions" such as immune system, normal cell growth, respiratory, circulatory, reproductive, bowel, bladder, neurological, brain, and endocrine functions.

  Each of these activities have been recognized as 'major life activities' by certain courts, but employers and employees were forced to litigate the issue each time because there was no clear-cut rule from one jurisdiction to the next. Now there is.

  Example: Becky works at ABC, Inc. as a human resources manager. She has a medical condition that significantly limits her ability to bear children. Is she "disabled"?

  Answer: Yes. Under the ADAAA, reproductive functions are a "major bodily function" and thus now considered a major life activity.

- ***Episodic conditions (42 U.S.C. § 12102(4)(D)).*** The ADAAA provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." In other words, individuals who suffer from impairments that are episodic or in remission (such as asthma or cancer) are now covered by the ADA even if their medical conditions are not active.

  Example: Roshan works in the recruiting department of ABC, Inc. He survived a bout with cancer in 2006. Since then, his cancer has been in remission, and he has been in excellent health. In 2009, he calls HR to complain that his supervisor has nicknamed him "Survivor." When questioned about the nickname, the supervisor responds, "How can Roshan complain about disability discrimination? He's not disabled. He's in better shape than I am." How should the HR representative respond?

  Answer: A well-trained HR representative would recognize that the ADAAA does not look only at Roshan's current health when deciding whether he is disabled. Because Roshan would be disabled if his cancer were not in remission, he is considered "disabled" under the ADAAA. The manager's nickname could be cited as evidence of dislike of disabled employees.

  Bonus points: An experienced HR manager would also (1) carefully document any counseling or disciplinary action taken against Roshan's manager and (2) follow up with Roshan in a few weeks to make sure his manager has stopped using the nickname. That

documentation and follow-up would provide great evidence that ABC, Inc. took prompt, remedial action in response to Roshan's complaint.

- ***Strict interpretation rejected (42 U.S.C. § 12101(b)(4)-(6)).*** Although with the one exception discussed below the Act retains the requirement that an impairment must be "substantially limiting," it rejects Supreme Court precedent requiring plaintiffs to meet a high standard to show that their condition is "substantially limiting." It also rejects an EEOC regulation providing that an individual must show that he or she is "significantly restricted" in the performance of a major life activity before the impairment is considered substantially limiting. Congress directs courts to interpret the term "disability" and its components broadly in favor of coverage.

  In fact, Congress said the primary focus should be on whether the defendant employer has complied with its duties under the law, not whether the plaintiff individual has a disability. Of course, this approach is circular. If the plaintiff is not disabled, the employer has no duties under the ADA. Nevertheless, this provision of the ADAAA is yet an other sign that employers must be prepared to defend their employment-related decisions on grounds other than "the individual is not disabled."

- ***"Regarded-as" disabilities (42 U.S.C. § 12102(3)).*** As discussed above, the ADA covers not just people with actual substantially limiting impairments but also people who are "regarded" by an employer as having a substantially limiting impairment. The purpose of the "regarded-as" provision is to prohibit employers from acting based on myth, fear, and stereotype rather than actual medical concerns. Under the old ADA, the "regarded-as" definition was difficult to satisfy because it required that an employer mistakenly perceive an employee (or applicant) as having an impairment that was substantially limiting. An employee (or applicant) who was regarded by a company as being limited in an insubstantial way — such as being unable to perform a particular job — did not fall under the "regarded-as" definition.

  The ADAAA fundamentally changes the regarded-as standard. Now, an individual will meet the test if he or she is subjected to a prohibited act because of an actual or perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." It remains to be seen how the EEOC will elaborate on the new standard, but interpreted literally it seems almost boundless. If a person need not be perceived as limited by the impairment, and the standard covers not only perceived (*i.e.* mistaken) impairments but also real impairments, then there will be little need for anyone to try to meet even the new, expanded actual-disability standard. The only exception is that the impairment for purposes of the regarded-as provision must be one that is not transitory (lasting six months or less) and "minor" (an undefined term).

  Example: Toby works for ABC, Inc. as a janitor. On January 2, 2009, he takes medical leave for back surgery. He returns a month later, but in a light-duty position because he is under a 15-pound weight-lifting restriction. On March 1, 2009, his doctor releases him to return to work without restrictions. Despite the full release, Toby's boss is still concerned about Toby's recent back surgery and keeps Toby on light duty for another month, over Toby's protest. Did Toby's supervisor regard him as disabled?

Answer: Probably not. Toby's supervisor only regarded him as having an arguably minor impairment (lifting less than 15 pounds) and only as having that impairment for less than six months. Keep in mind, though, that the new, broad application of the "regarded as" section of the ADA will require employers to be especially cautious in their dealings with employees who have or may have any type of impairment. An employer must refrain from making snap judgments or assumptions about whether an employee's impairment is "minor" or "trivial."

- ***Accommodation and regarded-as disabilities (42 U.S.C. § 12201(h)).*** Although a few minor provisions are written as though they are sensitive to employer concerns, the only true employer-friendly provision of the ADAAA is a section specifically providing that the duty of reasonable accommodation does not extend to an individual who is covered only by the regarded-as provision of the ADA. The courts had been divided on that issue under the current law.

- ***Vision testing (42 U.S.C. § 12113(c)).*** The ADAAA amends the ADA provision governing the use of qualification standards or other criteria in employment screening to prohibit using such criteria based on an individual's uncorrected vision unless the particular criteria is job-related and consistent with business necessity.

The Bottom Line. Employers should expect more disability-discrimination lawsuits and a tougher legal battle defending them. By greatly expanding the group of persons who are considered disabled and expressly requiring that courts broadly interpret the new standard for disability, the ADAAA both increases the number of persons who can sue under the ADA and makes it tougher for employers to get cases dismissed on the ground that the employee or applicant cannot prove that she was "disabled."

Suggested Steps. To reduce the risk that an employer will run afoul of the modified ADA, an employer should assume that an employee with a medical or mental condition is disabled under the ADA and act accordingly. Employers should review their ADA policies if they have one, as well as internal guidelines or policies on how to handle accommodation requests. Human resources personnel and managers must understand that the reach of the ADA is much broader than before ADAAA and what that means in terms of day-to-day handling of employee health-related issues. Employers will be engaging in the interactive accommodation process more often, and thus must be sure they do it correctly. And now, more than ever, it is imperative to ensure appropriate supporting documentation is maintained for disciplinary action and termination.

III. THE NEW FMLA REGULATIONS

Introduction. On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"). Among other things, the NDAA amended the Family and Medical Leave Act ("FMLA") by providing two new types of leave to employees who are otherwise eligible to take FMLA leave: (1) leave to care for family members who have been injured in the line of duty ("Caregiver Leave") and (2) leave to handle urgent family matters that arise because a family member is on active duty status or has just been called to active duty status in the National Guard or Reserves ("Exigency Leave"). 29 U.S.C. § 2612(a).

On November 17, 2008, the Department of Labor ("DOL") issued regulations that both implemented the NDAA and significantly modified the then-existing FMLA regulations that apply to all types of FMLA leave. The revised regulations became effective on January 16, 2009, and mark the first major revisions to the FMLA regulations since they were issued in 1995. They require immediate employer action to revise policies and forms, provide specific information directly to employees, and replace the currently used FMLA poster with a new one. The full text of the new FMLA regulations and accompanying commentary is contained at 73 Federal Register 67934 *et seq*., which can be found on the DOL's website at: http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763. Below is an explanation of the significant changes made by the NDAA and the new regulations.

***New Types of Leave*.** As mentioned above, the NDAA authorized eligible employees to take two additional types of leave: Caregiver Leave and Exigency Leave.

- ***Caregiver Leave (29 U.S.C. § 2612(a)(3))*.** An eligible employee who is the spouse, son, daughter, parent, or "next of kin" to a "covered servicemember" may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. For purposes of this type of leave, a "covered servicemember" is a current member of the Armed Forces, including members of the National Guard or Reserves, or those on the temporary disability retired list, who have a "serious injury or illness" incurred in the line of duty. 29 U.S.C. § 2611(16). The statute defines "serious injury or illness" as an injury or illness incurred by the servicemember in line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating. 29 U.S.C. § 2611(19).

  Caregiver Leave is broader than other types of FMLA leave in at least three ways. First, unlike other types of FMLA leave (which authorize leave for up to 12 weeks), eligible employees on Caregiver Leave may take up to 26 workweeks of leave during a single 12-month period. Second, a serious health condition, a "serious injury or illness" need not necessitate inpatient care or continuing treatment by a health care provider. Finally, eligible employees may take Caregiver Leave to care for their "next of kin," which the statute defines as "the nearest blood relative." Prior to the enactment of the NDAA, FMLA leave did not extend to "next of kin."

- ***Exigency Leave (29 U.S.C. § 2612(a)(1)(E); 29 C.F.R. § 825.126)*.** Eligible employees with a spouse, child, or parent on active duty or call to active duty status in the National Guard or Reserves may use up to 12 weeks of leave to take care of certain qualified exigencies. "Qualifying exigency" means the following issues or events that arise from the fact that the covered military member is on active duty or called to active duty status in support of a contingency operation: (1) addressing any issues that arise from the fact that a covered military member receives notice of an impeding call or order to active duty less than eight days before deployment; (2) attending certain military events and activities related to the active duty or call to active duty status, such as attendance at official ceremonies or family support or assistance programs and informational briefings; (3) arranging for alternative childcare; (4) providing childcare on an urgent, immediate need basis; (5) enrolling in or transferring to a new school or daycare; (6) attendance at school or daycare meetings due to circumstances arising from the active duty or call to active

duty status, such as disciplinary meetings, parent-teacher conferences, or meetings with school counselors; (7) arranging financial and legal affairs; (8) attending counseling provided by someone other than a healthcare provider where the need for the counseling arises from the active duty or call to active duty status; (9) spending time (up to five days) with a covered military member who is on rest and recuperation leave during the period of deployment; (10) attending post-deployment arrival ceremonies and reintegration briefings and events for 90 days after the end of the active duty status; (11) addressing issues that arise from the death of a covered military member while on active duty status; and (12) addressing other events that arise out of the covered military member's active duty or call to active duty status, provided that the employer agrees that such leave qualifies as Qualifying Exigency Leave and agrees to both to timing and duration of such leave.

***Other FMLA Changes*.** In addition to implementing Caregiver Leave and Exigency Leave, the new regulations made the following changes to the then-existing FMLA regulations:

- ***Serious health condition (29 C.F.R. §§ 825.113-.115).*** The new regulations add guidance on whether an illness or injury qualifies as a "serious health condition" entitling an employee to FMLA leave. Specifically, the rules clarify when and how often the employee (or covered family member) must have visited a health care provider for the illness to be considered a "serious health condition." For example, one of the old definitions of "serious health condition" requires an employee to have more than three consecutive, full calendar days of incapacity plus "two visits to a health care provider." The new rules clarify that those two visits must occur within 30 days of the beginning of the period of incapacity, and the first visit to the health care provider must take place within seven days of the first day of incapacity. In addition, the new regulations clarify that for a chronic condition to qualify as a serious health condition, the condition must require at least two visits per year to a health care provider.

- ***Substitution of paid leave (29 C.F.R. § 825.207).*** Although FMLA leave is unpaid, either the employer or the employee may chose to substitute the employee's paid leave for FMLA leave. The result is that the employee's leave will be paid and the employee's paid leave bank or entitlement will be reduced by the amount of FMLA leave. The new rule explains that when paid leave is substituted, the employee must comply with the employer's normal rules applicable to the paid leave. If the employee fails to do so, the leave need not be paid, but the employee's entitlement to unpaid FMLA leave remains. The new regulations also codify the DOL's position that because leave covered by a disability benefit plan or by workers' compensation is not unpaid, neither the employer or the employee may require the substitution of paid leave. The employer and employee may, however, agree to use the employee's paid vacation, sick, or other leave to make up the difference between the employee's regular pay and the benefits provided under the disability plan or through workers' compensation.

- ***Employee notice (29 C.F.R. §§ 825.302-.304).*** Employers will be relieved to learn that the final rule imposes more stringent absence-reporting requirements on employees. The existing rules had been interpreted to allow some employees to be absent from work without any notice or explanation for up to two full business days before providing notice

of their need for FMLA leave, even if they could have given notice sooner. Employers complained to the DOL that such sudden, unexplained absences disrupted their operations. In response to those concerns, the new rules provide that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances. An example of such an unusual circumstance is where an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number but when the employee calls no one answers and the voice mail box is full.

- ***Employer notice (29 C.F.R. §§ 825.300-.301).*** In addition to the general information notices discussed below, an employer must provide three specific types of notices to an employee who has requested FMLA leave, or who the employer learns may be absent for an FMLA-qualifying reason. First, the employer must notify the employee whether he or she is eligible for FMLA leave and if not must provide at least one reason for the employee's ineligibility. Second, the employer must notify the employee of his or her rights and responsibilities in connection with the leave. Third, after the employer has the information needed to make an FMLA determination (including any required certification), the employer must notify the employee whether the leave will be designated as FMLA leave. The DOL has replaced its "Employer Response to Employee Request for FMLA Leave" form with two forms. The first combines the eligibility notice and rights and responsibilities notice, and the second is the designation notice. Those forms may be obtained at the link listed above.

- ***Medical certification and health care provider communication (29 C.F.R. §§ 825.305-.310).*** New rules now govern how often an employer may request medical certification and also restrict access to medical information. If an employer receives an incomplete or insufficient certification, it must notify the employee in writing of the problem, state what information is necessary to correct it, and give the employee seven days to do so. An employer may contact an employee's health care provider (a term that now includes a physician assistant) for clarification or authentication purposes. Under the old rules, such contact is very limited. The new rules expand permissible contact to allow contact to be made by an employer's health care provider, human resources professional, leave administrator, or manager, except that the employee's direct supervisor can never contact the employee's health care provider. Employers may ask the employee's health care provider only for the information required by the certification form. In addition, if the employer's questions will involve individually identifiable health information protected by HIPAA, as often will be the case, then the employer may ask the health care provider for the information only if the employee has signed a HIPAA release form, which employers may request but not require. Of course, depending on the circumstances, an employer may be permitted to deny FMLA leave to an employee who has refused to permit the employer to obtain needed information from his or her health care provider because the refusal results in a lack of necessary information.

- ***Medical recertification for conditions of indefinite duration (29 C.F.R. § 825.308(b)).*** Under the old rules, an employer normally cannot ask for medical recertification until the minimum duration specified in the original certification has expired. That limitation was problematic for conditions of indefinite duration, such as conditions expected to exist

during the employee's lifetime. The new rules allow employers to seek recertification every six months in connection with an absence.

- ***Employees who become eligible during leave (29 C.F.R. § 825.110(d)).*** Under the new rules, if an employee with less than 12 months of service — and thus ineligible for FMLA leave — takes leave under the employer's applicable leave policies for what would be an FMLA-qualifying reason, the leave will become FMLA leave once the employee crosses the 12-month service requirement even if he or she remains on leave. The employee then will be entitled to the full 12 weeks' of FMLA leave in addition to whatever amount of non-FMLA leave he or she has already taken.

- ***Light duty (29 C.F.R. § 825.220(d)).*** The new rules clarify that time spent performing "light-duty" work does not count against an employee's FMLA leave entitlement, rejecting a contrary interpretation that some courts had adopted. The employee's right to restoration must be held in abeyance while the employee performs light-duty work. This change means that employers may not charge FMLA time to employees who return to work, but only on a light-duty assignment.

- ***Perfect attendance awards and bonuses (29 C.F.R. § 825.215(c)(2)).*** The new rules change the treatment of perfect-attendance awards. Employers may now deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave as long as the employer treats employees taking non-FMLA leave the same way. Bonuses are treated similarly: if a bonus is based on the achievement of a specified goal such as hours worked or products sold, the employer may deny the bonus to an employee who has failed to meet the goal due to taking FMLA leave as long as the employer treats employees taking non-FMLA leave the same way.

- ***PEOs (29 C.F.R. § 825.106(b)(2)).*** The new rules specifically address commonly recurring issues involving professional employer organizations (PEOs). The regulations specify that when a PEO simply performs administrative functions such as payroll, benefits, regulatory paperwork, and employment policy updating work, the PEO is not considered a joint employer with its client company. In addition, the client company typically would be responsible for giving the required FMLA notices. Moreover, although employees who are jointly employed by two employers must be counted by both employers for determining FMLA coverage of the employer, the new rule explains that even when a PEO is a joint employer, the client company is only required to count the PEO's employees if the client company jointly employs those other employees. Thus, if a company uses a PEO for more than the administrative functions mentioned above but has only 40 employees, the company would not be required to count the PEO's other employees or employees of other clients of the PEO and would not be covered by the FMLA.

- ***Employer general informational requirements (29 C.F.R. § 825.300).*** In addition to the specific notices an employer must provide to an employee when a potential FMLA-leave situation arises, the new regulations provide for two types of general notice. First, there is a new form of poster containing general information about the FMLA that employers must post at a location where it can be readily viewed by both employees as well as

applicants for employment. Second, if an employer has any employees who are FMLA-leave eligible, the employer also must provide the same general notice (*i.e.*, the same information contained in the poster) to each employee by including the notice in an employee handbook or other policies or guidance to employees concerning leave or other benefits or by distributing a copy of the general notice to each new employee upon hire. There are provisions in both situations for the notice to be "posted" and distributed electronically. The information that must be contained in the new notice almost certainly is not contained in most employers' current FMLA policies. For example, an employer's FMLA policy must now advise employees that they may "file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer" and provide contact information for the DOL. A link to the poster appears above and can be used to comply with the second type of notice as well. In addition, if the employer's workforce contains a large portion of workers who are not literate in English, the employer must provide both types of general notice in a language in which those employees' are literate. The DOL has provided a form with the general notice in Spanish on its website at http://www.dol.gov/esa/whd/regs/compliance/posters/fmlaspan.htm.

Practical Steps. Because the NDAA and the new regulations have already taken effect, employers who have not already done so should take immediate action to comply with the revised FMLA. First, employers that have not already done so should immediately post the new FMLA notice poster, a copy of which can be obtained for free on the DOL's website at: http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf. Second, employers should revise their existing FMLA notice forms. The DOL prepared new prototype forms that replace the forms many employers currently use. Employers should consider customizing the forms, however, as the prototypes omit certain permissible inquiries and contain numerous ambiguities. The DOL prototype forms can be obtained from the DOL's final FMLA regulations page at: http://www.dol.gov/esa/whd/fmla/finalrule.htm. Third, employers must modify their FMLA policies to reflect the new regulations, including the insertion of the same information contained in the poster in the policy itself. Finally, employers should educate their human resources staff about the changes to the FMLA to ensure compliance with the new rules.