ASSOCIATION OF CORPORATE COUNSEL

TITLE: **FMLA Update – Preparing for Military Leave & Other FMLA**

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PRESENTED BY: **ACC's Employment & Labor Law Committee**

SPONSORED BY: **Jackson Lewis LLP**

FACULTY: **Frank Alvarez,** Partner, Jackson Lewis LLP
Linda A. Whittaker, Associate General Counsel, Employment Practices Division – Compliance & Training, Wal-Mart Stores, Inc.

MODERATOR: **Kevin J. Mencke,** Senior Counsel—Employment & Labor, International Paper Company

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Kevin Menke: Thank you, Sandy. Today's webcast is the FMLA update, Preparing for Military Family Leave and Other FMLA Changes. This is presented by the ACC Employment and Labor Law Committee, and our committee – our committee sponsor, Jackson Lewis.

Today's panel – very honored to be with this distinguished panel. We have with us Frank Alvarez, who's a partner in the White Plains, New York Jackson Lewis office, and he is the head of the firm's National Disability Leave and Health Management Practice Group. So he does a lot of work in this area. Also with us, we have Linda Whittaker, who is the Associate General Counsel for the Employment Practices Division Compliance and Training for Wal-Mart stores, certainly the largest employer in the world, and I think they have a few leaves to deal with on a daily basis.

My name's Kevin Menke. I'll be your moderator today. I'm Senior Counsel, Employment and Labor with International Paper Company. Two things I want to tell you before we start going through the slides is, one, at the end of this presentation, we'd appreciate it if you'd fill out the evaluation for the conference or for the webcast, and that's the first link on your links there for the webcast. And also, if you wish to submit a question at any time during the webcast, you can do

so by typing it in the box in the lower left-hand corner of your screen, and then click on the send button, and towards the end of the presentation, we will try to – try to answer as many of those questions that we can within the time allotted. This is a 60-minute webcast, and let's go ahead and begin.

What we're going to talk about today are the FMLA – recent FMLA developments, certainly, the Military Family Leave amendments that were signed by President Bush on January 28 of this year and that became effective immediately upon signing. There's really two types of military family leave that come under those amendments, and we're going to talk about both the service number family care leave that's in effect now and has been since January 28, and then the qualifying exigency leave that is supposed to be effective upon issuance of FMLA regulations, but the DOL wants us to try to comply now, and we'll talk more about that, as well. Towards the end of the webcast, we're also going to review the proposed changes that came out from the Department of Labor for the FMLA regulations long overdue, and we're all anxiously looking forward to those. There's still a couple of days left to submit comments to the DOL, and those are due by April 11 of this week, and then we hope to see final regulations by the end of the year.

So let's go ahead and start now talking about the Military Family Leave amendments, and to do so, we wanted to tee up a scenario, something that might come to your attention any day of the week now, and to help set that up for us, Linda Whittaker is going to go through that for us.

Linda Whittaker: Thanks. This – I'm just going to read this quickly, because I think the details are important, and if this hasn't happened to you, I'm afraid it may very soon. Early one morning, your phone rings. The HR voice at the other end of the line says we have an issue. Never a good sign, by the way. I need your help. Our employee, (Lou), just came in my office. (Lou's) spouse is being deployed to Iraq, and (Lou) claims to be entitled to take time off for all kinds of things that don't qualify for a leave of absence under any of our personal leave policies.

(Lou) is a five-year employee, and you know what – we've been kind of slow this year, so (Lou) took some time off voluntarily. Remember, he also took some time off last year for a broken leg and missed about four weeks while on FMLA leave. So (Lou) only worked about 1,246 hours in the past 12 months. Anyway, (Lou's) spouse's unit is going to have this deployment ceremony next week about 100 miles from here. Then, (Lou) says, time off will be needed to arrange childcare for their four kids. Now, their oldest kid is 18, so that doesn't make sense to me.

Besides that, (Lou) wants to take time off to take care of banking and to take the kids to family counseling that they're going to do, what with the spouse gone and all. (Lou) also wants to take time off to care for (Lou's) brother, who was in Afghanistan, but now is state side. The brother got sick or was injured. I really don't know which. (Lou) says the brother is getting therapy, but I don't know if it's in the hospital or staying with (Lou). I haven't asked for medical certification because it's a brother, not an immediate family member like our policy says. (Lou) says no one else can take care of the brother, as the brother's children are too young and the brother's wife has checked out of the picture.

(Lou) says all this stress is making it hard to concentrate at work. Maybe (Lou) should get a doctor to sign off on an FMLA leave for (Lou) due to stress. What do you think? How can we help (Lou)? What happens if (Lou's) spouse is injured and (Lou) wants time off to care for the spouse then?

These are all things you're going to think about as we go through our conversation and our training today. As you're hearing this, you've probably been taking notes, and you're probably groaning, and if this call happened to you this morning, you're thinking thank goodness I'm going to this webcast this afternoon because we're going to look at all of these issues, and if you're like me, you're also thinking where is the number for the PR folks because I need them right now.

Kevin Menke: Thanks, Linda.

Before we get into some of the juicy facts in this scenario, let's turn to Frank, and Frank, if you could take us through some of the key points about the new military leave requirements.

Frank Alvarez: Sure. Thanks, (Kevin).

First of all, I always like to start by focusing what these amendments are all about. We're talking about amendments to the FMLA. There was a lot of discussion while the bill was going – working its way through Congress, that maybe this should be part of (UCARA), but it's not. It's part of the FMLA, and that's a critical piece to recognize because, as you administer these leaves, it's critical to remember that the existing FMLA rules apply unless they (wrote) otherwise.

And one thing I highly recommend for everybody who's listening is to go to this link that's referenced on this slide because the Department of Labor has printed the amendment out in such a form that you can see in bolded language where the new provisions fall, and it's going to be very important, as you'll see as we go through this webcast, because the qualifying exigency leave falls under a separate section, then the Service Member Family Care Leave Provision, and it makes a big difference in terms of how you kind of administer leaves.

So start with that, and then next start with the understanding that, with limited exception, these amendments become effective upon signing by President Bush. That's a bit confusing because while the amendments are effective immediately, by the very language in the amendment, the qualifying exigency leave does not become enforceable until the Department of Labor issues regulations defining the meaning of any qualifying exigency. So the law's in effect, but by the virtue of what the law says, qualifying exigency leave is not yet in effect. So we're looking forward to the Department of Labor's proposed revisions to the FMLA regulations because they see comments on many aspects of the amendments, and they should help us understand what it is – these lead entitlements really involve in a much better way.

The next thing I'll just reference is that, to clarify that there's two new types of leaves. The first is the qualifying exigency leave. As I said, it's not yet in effect yet, but we're going to spend a lot of time talking about it because once it comes into effect, I think it's going to be a pretty challenging provision to administer in many ways because of its vagueness and because of, you know, its breadth. The qualifying exigency leave is – provides for 12 weeks of leave, and this leave provision you can find in section 102(a)(1)(E) of the FMLA, which is important to know because section 102(a)(1) currently contains all the other types of leave that you're used to dealing with, the birth/adoption of the child, the serious illness of an employee or they have covered family member. So this is – just think of this as another type of leave. It's 12 weeks, and it's just another type of FMLA leave you add to the your policy that's existing right now.

Then we get to service member family care leave, which is a 26-week leave entitlement, much different, and you can find that in section 102(a)(3) of the leave – of the FMLA. Now, for all of these – both of these leaves, you would continue to provide Group Health benefits during the period of leave, you'd continue to provide intimate leave where it's necessary, and you continue to have job restoration requirements to the same or equivalent position at the conclusion of the leave.

The next slide that we have here kind of, I think, brings it together in the sense that when you analyze these two lead provisions, what I like to think of is that there's essentially three issues that you should be exploring for each leave entitlement. Whether it's qualifying exigency leave or service member family care leave, first you're going to ask yourself what's the family – do we have the requisite family relationship? On the qualifying exigency leave, the family relationship really must be that the employee – that the service member is a spouse, son or daughter or parent of the employee. Under service member family care leave, the family relationship can be a little bit broader. The employee can be the spouse, son, daughter or next of kin of the service member. So, you know, that gets to a little bit different administration requirement.

You also want to consider what the military status of the service member is. On the qualifying exigency leave, all you have to have is somebody that is on – the service member's on active duty or being called to active duty. With service member family care leave, the member – the service member has to be a member of the armed forces who is undergoing medical treatment, recuperation, therapy, is in outpatient status or is on temporary disability retire list for a serious illness or injury. So that's going to be the requisite military status of the service member, and when we get to talk a little bit about certifications, these are the types of things that you're going to be fleshing out through certifications at some point.

The last issue is the connection of leave between the service – the connection of the need for leave that the employer's requesting to the service member's military service. On the qualifying exigency leave, the reason for leave is going to be to address qualifying exigencies arising out of the active duty or call to active duty. So there's going to need to be a nexus of some sort between the need for leave and the active duty, and with service member family care leave, it's pretty simply that the employees needed to care for the covered service member.

So that provides a bit of an analysis, and I think it's helpful to sort through the two lead entitlements in that way.

Kevin Menke: Thanks, Frank. I particularly like this chart. It's helpful to separate the two leaves out.

Linda, I guess at Wal-Mart, I think you have a few leaves to deal with each year. Can you kind of talk us through, you know, how you would deal with (Lou) today, you know, if an employee like (Lou) came forward, you know, as – from the practical aspect of applying this as, you know, an in-house counsel in a – in a large employer.

Linda Whittaker: Sure, (Kevin). Thank you, and I would say that we have hundreds of thousands of requests for leave a year, and to my knowledge, we haven't had this request yet. So that's kind of remarkable, I think. But having said that, you know, we'll see what happens by the time the broadcast is over.

What we do now is the first thing we would look at is whether (Lou) is, in fact, eligible for FMLA leave because we keep in mind that this is FMLA, and we did voluntarily go ahead and change our policies and procedures to encompass the qualifying exigency leave at the end of January, when it went into effect, and the way we look at eligibility, the way I teach it and the way it helps me think about it is eligibility are like the stair steps going up to a door, and the door is opened by the qualifying circumstances, you know, to give it the proper family relationship. Is this, for instance, a serious health condition, and the door will open for a certain period of time or in a certain way, depending on the kind of leave it is. So in this case, the first thing we'd look at is has (Lou) been employed for 12 months total? Yes. Has (Lou) been employed – has (Lou) worked 1,250 hours in the last 12 months as of the moment we're talking to HR? No, but probably by this time tomorrow, yes. And finally, does (Lou) have FMLA time available? And that's important for the qualifying exigency leave because it's a total of 12 weeks, and (Lou) has already used up four weeks. So we think (Lou) has eight weeks left.

If this – if we had gotten this call in January or before January, we would've looked at – we would have said, you know, (Lou) is not entitled to leave under the FMLA for this circumstance, for the deployment, but we would've been sure to check state leaves. As I'm sure you're all aware, there's been a dramatic increase in states granting some kind of military family leave, not to the extent that these amendments do, but those are the – that's the other place we would've looked before January, and hopefully by next January we will have something concrete to look at in terms of reg.'s. But at this point, we're just sort of doing the best we can.

So again, we'd start with the basic FMLA analysis, getting up those steps to see if the door would open, and then we would look at the reason for the leave to see if the door would open, and (Frank's) going to be talking about what are the reasons for leave under qualifying exigency. What makes it a qualifying circumstance for an exigency leave?

Kevin Menke: I think that's good. Frank, if you could take us through the next couple of slides on that issue.

Frank Alvarez: First of all, I'm not certain if I mentioned it earlier. While the qualifying exigency leave is not yet in effect by virtue of the terms of the statute, the Department of Labor has encouraged employers to provide this type of leave to its employees, and therefore, I think, many – the people who are listening there have to make a decision as to whether that's something you want to do, you know, within your own culture and within your own resources whether you think it's going to be something you're able to handle. So hopefully leaving this webcast you'll have a little more information to understand what you might be voluntarily providing.

With qualifying exigency leave, the big question is what is a qualifying exigency. That's what we're waiting for instruction from the Department of Labor on, and there are really two main options. The first, at one end of the spectrum, is to address urgent one-time issues. The other end of the spectrum is to address routine everyday life occurrences. I think there's some – inside from legislative history, and then we have a list that was included in a document release with the proposed Department of Labor FMLA regulations, and I want to go through each of those because I think they offer some insight.

First, the legislative history. This was the Altmire-Udall amendment to the National Defense Authorization Act for 2008, and in these – the following our quotes that are included in the Department of Labor's document that accompanied the proposed regulations, and you'll see that it's pretty broad in many of the instances of leave it suggests. What this legislation does is allow

for family members of our brave men and women serving in the guard and reserve to use family and medical leave time to see off, to see the deployment or to see the members return when they come back, and to use that, importantly, to deal with economic issues and get the household economics in order. It goes on to say we'll allow military families to use family and medical leave time to manage issues such as child care and financial planning that arise as a result of the deployment of an immediate family member. Those are the statements of Representative Altmire.

Representative Udall had the following statement, "For every soldier who is deployed overseas, there is a family back home faced with new and challenging hardships. The toll extends beyond emotional stress from raising a child to managing household finances to day-to-day events. Families have to find the time and resources to deal with the absence of a loved one. The Altmire-Udall Amendment would allow spouses, parents or children of military personnel to use Family Medical Leave Act benefits for issues related directly to the deployment of a soldier."

And then there was one other statement that I thought was very interesting from Representative George Miller, and this, again, was also cited by the Department of Labor, "Under this amendment, family members can use the leave to take care of issues like making legal and financial arrangements and making child care arrangements or other family obligations that arise in double when family members are in active duty deployments. These deployments and extended tours are not easy on families, and two-parent households can suddenly become a single-parent household, and one parent is left alone to deal with paying the bills, going to the bank, picking up the kids from school, watching the kids and providing emotional support to the rest of the family. You have got to deal with these deployment preparations."

So that's the legislative history. The Department of Labor has provided a list of examples of qualifying exigency leave, and they include making arrangements for child care, making financial and legal arrangements to address the service member's absence, attending counseling related

to the act of duty of the service member, attending official ceremonies or programs where the participation of the family member is requested by the military, attending to farewell or arrival arrangements for a service member, and attending to affairs caused by the missing status or death of a service member. But they've asked these questions. The Department of Labor has asked these questions, the following questions, and they're hoping to get comments on them with – and as (Kevin) said, that comment period closes on Friday, April 11. First of all, should this list be exclusive? Should this be a per se list of covered situations so that it's automatically if you fall within this list, it's covered, but it might not be exclusive. It could cover other things, and what proof is required connecting it to the service member's active duty. As we put on the chart before, if you need to make arrangements for child care, it's not – it shouldn't be covered unless that need arises out of the covered service member's call to active duty or presence on active duty. So there still needs to be a nexus, and companies are going to be left trying to figure out those how to – how to best go about getting information to confirm that the absence qualifies.

Kevin Menke: Thanks, Frank. I guess now we've gotten this – well, nonexhaustive list of what a qualifying exigency might be. Linda, can you turn us back to the scenario? You've already told us now that (Lou) qualifies for at least eight more weeks of leave, you think, because he's already used up four weeks of other FMLA leave. Now, from the facts in the scenario, how would you look at the qualifying exigency leave?

Linda Whittaker: Well, it sounds – there are a couple of issues that aren't addressed, and I'll tell you what we're going to end up doing with them until we have better information. There's no certification. You know, the last question, what proof is required connecting it to the service member's active duty, right now we don't have any, and the examples cited by the DOL really, in a way, set people up to conform to those specific examples. (Lou) says I need time off to make child care arrangements. Well, that's clear. What if (Lou) then says, you know, my arrangements fell through, and I need time off to take care of the kids. That doesn't seem to be covered. But – so those are the kind of fine-line distinctions that I would submit to you, you don't want to be making,

and I don't know what kind of certification we're going to be able to get for these things. You know, do we get military orders so that we know that the military service member is actually being deployed to an area that is, what do they call it, a contingency operation. We don't know that we'll be able to do that. So in (Lou's) case, what we would do at this time is take (Lou's) word for it and provide (Lou) with an intermittent leave as a qualifying exigency for things like going to the bank, making those kind of arrangements, making the child care arrangements, probably taking the kids to counseling. All of those things we would consider qualifying circumstances, and at this point, we're not asking for certification, even to the point of knowing that (Lou's) spouse was actually deployed.

Kevin Menke: Interesting. So you don't even have some kind of form that you would have an employee sign and say, hey, I need (leave) to go arrange childcare?

Linda Whittaker: Yes, we have a request for leave.

Kevin Menke: OK.

Linda Whittaker: And we would want them to detail the reason, but beyond that, we're not …

Kevin Menke: Right, there's no …

Linda Whittaker: … giving military orders or certifications that this is what they're actually using it for.

Kevin Menke: A lot of questions.

Linda Whittaker: A lot of questions.

Kevin Menke: Not a lot of answers. Well, thanks for taking us through the qualifying exigency leave, and remember that's – the DOL wants us to try to comply, and there's – we're waiting for regulations on that. There are certainly other issues that have come up related to the Military Family Leave, and Frank, if you can take us through a few more of those.

Frank Alvarez: OK, first of all, this next slide talks about the son or daughter issue. Note, the existing FMLA definition of son or daughter doesn't work. Right now, the FMLA requires the son – defines the son or daughter to be someone who is 18 or under or over 18 and capable of self-care due to a physical/mental disability. You're not going to have many people who are under 18. You could have some who are 17 who are enlisting with their parents' permission, but you're not going to have all that many, and you're clearly not going to have people who are over 18 and capable of self-care due to a physical/mental disability who are deploying for active duty. So the son or daughter doesn't really work, the definition of it here. So the amendments do not change the definition, and the DOL regulations are going to have to address this. We're not exactly certain how they're going to do it, but I don't see how they could do justice to the – to the law unless they recognize that this is essentially an oversight.

Next of kin is a new term that we talked about earlier, and all the statute tells us is that it means the nearest blood relative of a service member. Now, keep in mind that other relatives, including a spouse or a parent or a child, son or daughter, could – are already allowed to take leave to care for a service member, and again, the next of kin definition really only applies to service member family care leave. So who we're really likely to be talking about as next of kin is probably going to be brothers, sisters, aunts, uncles, grandparents. But some questions remain – can more than one person be the next of kin? What if the – is this really – if it's just one person, what if that one person is unwilling or unable to provide care? These are issues that the Department of Labor is looking for comments on, and we hopefully will get more guidance.

The next issue is the duration of service member family leave. Pretty big issue, here, because we're talking about 26 workweeks during a 12-month period. But the statute says that this leave shall only be available during a single 12-month period. Now, this is pretty critical because most people are thinking that this means that you get one block of 16 weeks of leave. But – and moreover, during the single 12-month period, the statute says that employers are only entitled to a combined total of 26 workweeks of FMLA leave for any purpose. So it becomes pretty important how you calculate the single 12-month period, and the statute also makes clear that while you have that combined total limitation during the single 12-month period, it doesn't apply in any other 12-month period.

So the question you get to is how do you calculate the single 12-month period, and there is a number of ways that you might be able to do that. I – the potential methods may include beginning the day – the first day the person takes leave for that purpose. I am – my bias is that that is the reason – that is the method that makes the most sense, but it could also begin the data service member is injured. It could begin the data service member's determined to have a serious injury or illness when you go through some sort of medical certification process. It could begin the day the employee gives notice of the need for leave for this purpose.

There has been some talk about other issues or approaches to determining the 12-month period because people have raised the notion that you might use a rolling method or a calendar method or an anniversary method already for calculating the 12-month period for other forms of FMLA leave, those leaves that are under section 102(a)(1) of the statute. But I don't think that makes much sense. If you think about rolling method, it creates multiple 12-month periods with the notion that at the end of the 12-month period, you kick into a new 12-week entitlement of leave. That's not going to be the case, or it doesn't appear to be the case when you're talking about a single period, or 26 weeks of leave for service member family care leave. A calendar method also could diminish the rights to 26 weeks if you took at close to the end of the calendar period. Same thing with an anniversary period.

So there are some challenges in using those methods. The lingering questions that exist about this are significant. There's – I think we have two – we have two slides full of lingering questions. Are employees entitled to only 26 weeks of leave for service member family leave, or are they entitled to more than one period? Could employees take leave to care for a spouse and a parent or a child who are covered service members in the same 12-month period?

So there's multiple relations, and God forbid if somebody has the need for multiple periods of leave, can they get more than one 26-week period of leave, provided they still somehow remain an eligible employee? Could the 26-work-week entitlement be calculated per injury of covered service member so a single service member might require two periods of leave? Could the single 12-month period apply to employees if they work for a second employer? So do you get one bite at this and that's it? Should the employer be – ever be entitled to take more than 26 work weeks of leave during a single 12-month period – should the employee, excuse me, ever be entitled to take more than 26 weeks of leave during a single 12-month period, and that might happen depending upon how you calculate the 12-month period because somebody could have – take leave immediately before they get notice that they need leave for – to care for a covered service member. The service member family leave also qualifies for leave under section 102(a)(1) to care for the parent, spouse or child with a serious health condition. Do you – does the employee choose to designate the leave as qualifying under 102(a)(1), or can they preserve their rights to 26 weeks of service member family leave, or does an employer get to choose that? If they – if there's a designation can be – can it be changed retroactively? And finally, how do employers reconcile the requirement that section 102(a)(1) leave not be limited in any other 12-month period if employers use different methods to calculate the 12-month periods for 102(a)(1) leave and 102(a)(3) leave? These are all difficult questions, and hopefully we'll get some more guidance from the Department of Labor when they issue their final regulations.

Kevin Menke: Great, Frank, and everybody, you thought we were going to answer your questions, and we gave you a whole list of new questions that we don't have the answers to. Let's – after a fast regard through that, Frank, let's – Linda, if we can turn back now to the scenario from the perspective of the service member family care leave, I think (Lou) needed to take care of his brother who was in Afghanistan. I mean how would you look at that?

Linda Whittaker: Well, we would – there are a couple of issues that are raised that are really incorporated into these lingering questions, and I'll throw in a couple of others. It's sort of like a lost – that scenario reminds me of a law school exam or the call you get everyday, either one, and the question is, is (Lou) the next of kin to (Lou's) brother, and because next of kin is nearest blood relative, (Lou) may or may not be the next of kin, and does nearest blood relative mean within a certain degree of consanguinity or not? We also have – and how are we going to know that, because that's certainly not defined. If I tell you that it's my cousin and I'm their nearest blood relative, at this point we're going to take your word for it, and what we're going to have happen in our environment is that the next phone call I get will be from (Lou's) brother's wife, who also works for us, who says that she is, in fact, you know, the spouse and will be needing time off. And with my luck, the kids also work for us, and perhaps the brother's parents, as well, and so we've got the issue of, depending on your workforce, you may have multiple folks who are – who believe they are entitled to this leave, which, again, can be taken intermittently to care for the same next of kin.

And the other issue we have is, of course – and it's raised by these lingering questions – is what happens if the – (Lou's) spouse is injured, and that goes right to is it a serious health condition? If so, do you calculate it that way, or do you do the service member care leave? We are going to err on the side of giving the employee whichever benefit will provide them with the most time. And another question that's raised is what certification are we going to require for this – for the brother, for instance, to show that the brother, in fact, has a service related illness or injury and that it's serious. The only form we have currently is the DOL certification for a serious health

condition, which is not defined in the same way, so it's really not going to give us the information we need. All of those – at this point, we are acting on faith, and we very much look forward to reg.'s which hopefully will help us.

Kevin Menke: Linda, keeping that – you know, that train of thought, can you look at the next slide about, you know, how do we figure this combined leave total under service member family care leave. Slide 23 has an example.

Linda Whittaker: Because we think these things are running concurrently, at this point, absent some better information, we would assume that the – an employee who's taken 20 weeks of FMLA to care for a covered service member, that that would encompass their 12 weeks of entitlement.

Kevin Menke: So you'd say they are ((inaudible)) use it up as far as regular 12-week FMLA leave?

Linda Whittaker: Yes, that's the way we would look at that at this point.

Kevin Menke: OK.

Linda Whittaker: And then we've got another scenario, too …

Kevin Menke: Yes, the next slide.

Linda Whittaker: Yes. Where the employee has taken four weeks of FMLA for their own serious health condition, and then they request 26 weeks to care for a covered service member, we're certainly within a single 12-month period here, however we try to look at it, and we would consider that because our understanding is that these things run concurrently, you've already used four weeks, so we would believe that you've got 22 weeks left.

Frank Alvarez: Got you. And I mean – I think we would do the same, but I guess if you took the one perspective from Frank that you started from, I don't know, when they first request this …

Linda Whittaker: The leave.

Frank Alvarez: … leave, then you might say, well, they actually get 26 weeks, and if – and if I may, if you go back, (Kevin), just to the slide before this, slide 23, I think it illustrates some of the, you know, what we're – what we're grappling with. Even under this initial scenario, if you think about the leaves in terms of, you know, what provision of the law they fall under, this here, in this scenario, the person takes 20 weeks of FMLA leave for a covered service member. Many people look at that as saying that that's a leave under 102(a)(3) in the statute, and they're entitled to 26 weeks of that, and that 26 – while there's a 26-week tap during a single 12-month period, he had not necessarily exhausted the 26 weeks, this cap, and at this point in time, there's – he has not taken any leave under 102(a)(1) to care because of his own serious health conditions. So some will argue that you can get six weeks under this scenario, and I think we're anxiously awaiting some further guidance from the Department of Labors to precisely this type of scenario.

Linda Whittaker: The other thing that you'd be doing is giving six weeks of – I look forward to it too, just to argue, because that's what I do for a living.

Frank Alvarez: Yes.

Linda Whittaker: But then you're really giving six more weeks of military family care leave, but you're giving it for serious health conditions for the individual, and I don't see how, given that these leaves are supposed to be …

Frank Alvarez: Combined, I guess.

Linda Whittaker: Combined, so to speak, I don't – I don't – I guess it's a good – we'll see, we'll see.

Frank Alvarez: Yes, we'll see, and it's – we'll see if they count it under each provision of the law, and they look at the law as their – as their own entitlement, subject only to the cap of 26 weeks during this – in this single 12-month period, and if they do that, it could result in it being more leave being available in this instance.

And in the second – in the next scenario, again, just – so everybody understands, the – if, in fact, the leave period, the single 12-month period starts on the first day that the person takes leave for the – to care for a covered service member, then arguably that person is still entitled to a 26-week entitlement because, you know, the counting or the cap of 26 weeks and the entitlement of 26 weeks has not begun to run until that first day of leave, and that's where it's all important for us to understand how you begin to calculate when the single 12-month period starts. And again, we're waiting to see some things on that.

Kevin Menke: You know, I'll just say, as an employer, it's that second one that is harder for me to swallow. You know, now you're giving them 30 weeks to me. I can sort of see the previous example, you know, of where you – which did you start using? Maybe you just started using your military leave, and you still have, you know, under the combined total, six weeks left of the other kind of FMLA leave. I can see that, and …

Frank Alvarez: And the argument that people, I think, will make is that there – that there is that provision in the law that says there should not be any other limitation on the amount of leaves that somebody can take in any other 12-month period. So, yes, to me, that requires you to put brackets around the dates and figure out whether you're within or you're outside of that 12-month period, and we'll have to see how it gets fleshed out.

Kevin Menke: Well, good discussion. In the last few minutes, so that we can have some time for questions at the end, I'm sure we've left a lot of unanswered questions of the military leave, but we've kind of at least gone through a lot of the issues, hopefully enlightened you a little bit. For the last couple of minutes here of the presentation part, we want to turn to the proposed changes to the FMLA regulations. And before frank goes through that, I just want to point out that part of the materials available on the ACC Web site and one of the links here is a great 20-or-so page article that Frank wrote about the much-anticipated proposed revisions to the FMLA regulations, and it goes through in detail all of the different issues with – that are outlined in the proposed reg.'s. But if – Frank, if you could take us through some of those issues now, quickly.

Frank Alvarez: Sure, and with a big emphasis that these are proposed changes and we'll have to see what happens, but again, in the spirit of providing all of the listeners with an update, we wanted to at least have everybody understand where we stand today on April 9. As of today, what we're looking at in terms of proposed changes, first of all, we just kind of hit some of the highlights here. On serious health condition, one of the main ways you can prove that is through absence plus treatment. You've been out for more than three consecutive days and been seen by a healthcare provider, and the proposed reg.'s clarify that you need to be seen by the healthcare provider within 30 days so that you can't extend that beyond 30 days. Another way to prove serious health condition is to have a chronic condition, a chronic serious health condition, which requires periodic visits to a healthcare provider, and again, the proposed reg.'s tried to clarify that periodic visits mean at least twice a year.

The use of accrued paid time is something that's very big in FMLA administration, very challenging, and the proposed rates say that the employers may enforce their normal rules for taking accrued pay time, regardless of whether FMLA's being run concurrently. That centrifies things a lot. It also – and I think this is a major, you know, clarification. You know, it clarifies that we can supplement paid FMLA basically during STD or worker's compensation. So you can allow people to use their accrued paid time to supplement the benefits they're getting during STD

and worker's compensation (post) currently under section 825.207(d) of the reg.'s that that's not permissible. You also may be able to give employees notice of rights to use approved paid leave. You must give – excuse me, employees notice of rights to use accrued paid leave and the consequences of failure to comply with companies' policies applying to the use of such leave.

In addition, we have an increased emphasis that I would say on the general notice obligations for employees, one of the themes is that employers have to do a better job of informing employees of what their rights and obligations are under the leave, under the FMLA, and in return, employees have to do a better job of notifying employers when they're seeking leave, and one of the ways they do that – accomplish that in the proposed reg.'s is that if your policy for FMLA is not in your handbook, it must be distributed every year.

There also are changes to the forms, the notice forms that the Department of Labor has. Right now, we have the (WH-381) form, and that's really being split into two forms. The first form is called an eligibility notice. The second form is called a designation notice, the concept being when you have a notice that somebody may need leave, and they may be an eligible employee subject to providing some written medical documentation from their healthcare provider, you'll issue the eligibility notice. This is essentially going to be in place of a preliminary or provisional designation, and then once you get all the information back that allows you to confirm that the leave qualifies, you'll issue a new designation notice.

There are also new medical certification forms, which I think, by and large, are an improvement, maybe not everything we need or want. But they give additional information than what we have right now. So the (WH-380) form will be revised. And there's also additional time to issue eligibility and designation notice the more we used to. We've gone from two business days to five business days.

Some of the more controversial proposals that are in there right now include allowing transfers where need for intimate leave is not foreseeable. They're seeking comment on that, whether you'll be allowed to do that, also requiring notice of need for leave promptly before the start of a shift, unless it's an emergency. I've heard people from the Department of Labor say that what they're attempting to do is to move the default from one where employees can provide notice at the day – the start of a shift and still get the qualifying for FMLA leave to the default that they are not going to be qualified unless it's an emergency and if they have not provided notice of the need to leave before the start of the shift. We'll also be allowed under the proposed reg.'s, if they're adopted, to require employers to follow usual and customary leave procedures, an that's very important in (colon) procedures, who they have to call into, whether you can leave a voice mail, et cetera. Content of the employee notice calling in sick without more is not enough, and that's very, very important, and I think this goes to the notion – the notion that employees have to give more information to employers about what it actually is the reason that they're out so that they can satisfy their notice obligations under the FMLA to let an employer know that they're out for an FMLA qualifying reason. So really saying that they're sick is not going to be enough.

And then if an employee fails to provide sufficient information, the proposed reg.'s suggest that you don't have to issue deficiency notices or notes to employees confirming that they are not in compliance, and therefore are not going to be able to take FMLA leave. Finally, just a few more, the – in consistent with that, you'll have to give notice of the consequences of failing to return medical certifications promptly if employers are going to deny leave. Should the DOL seek comment on whether a seven-day extension should be provided in that. So right now, you have 15 days to provide the medical certification. If you're going to terminate somebody because – or to consider their leave unexcused because they failed to do that, must we have a seven-day extension of the time, or should we just be required to give notice of the consequences of failing to return them promptly.

And fitness (for) duty certifications – this, I think, is very important. Right now, there's a lot of safety concerns when people return to work and they're unable to – there's a reasonable basis for believing that they're unable to return to work safely. The Department of Laborers clarified in their proposed changes that employers would be – would be permitted to require more than the simple statement of the ability to return to work if there are safety concerns.

So that's all pretty helpful information. I think all in all, these proposals are a step forward for employers. They're improvement. It doesn't nearly address all the issues, and the one issue it doesn't address, which I'm sure many (issues) – many listeners are interested in, is that it does not require employees to take intermittent leave in blocks of four hours or more. Employees can still take intermittent leave in the smallest amount that is permitted to – or capable of being tracked on the employer's system.

Kevin Menke: Thanks, Frank. I agree that there's a lot of good stuff in the proposed reg.'s that helps clarify things that we need to get a little bit better control over FMLA leave. And I used to think I worked for a large employer with about 50,000 employees, but when I get on a call with Linda Whittaker and they have 1.7 billion, I feel like a mom-and-pop shop.

But we – just for listeners' interest, we have outsourced our leave administration. We did that about a year-and-a-half ago. We have a vendor, and we have a call center where people call – you know, for all types of leave, short-term disability leaves, military leaves, or FMLA leave, and so the third-party vendor now administers our leaves of absence. We still have to track it at a local facility level. But it's actually helped us get a little bit better handle on our leave management.

That concludes the formal presentation portion of our webcast today. We still have about 10 minutes for questions, and we do have a few questions. Let me remind the listeners, if you want to ask a question, you can do so by typing the question in the box in the lower left-hand corner of

your screen and then clicking on the send button. We will get that question and try to answer it during the last few minutes here of our call.

Let me go ahead and turn a couple of these questions that we received already to Frank and Linda. One question is, what about employees that ask for time off to be with their spouse when they return from deployment, you know, for rest and relaxation? So now we're not talking about getting ready to go off to deployment; they're now coming back. Do any of these leaves cover that, you know, the qualifying exigency? Does that give somebody a right to time off, Frank, maybe?

Frank Alvarez: Well, I think the spirit of the law would, as evidenced by some of the legislative history, may be broad enough to do it. But I think one thing to note, first of all, is that there are a number of states, there are eight states that have adopted military leave laws that cover precisely this situation. So don't forget about state law. But I think in terms of the qualifying exigency leave, it's unclear to me whether as a – you know, the strict reading of the statute would support it, but you know, the legislative history is one that I think is pretty broad, and I think it's going to be something that employers, unless it's absolutely clarified, end up providing more often than not. I'm interested to hear if maybe Linda has a different view.

Linda Whittaker: No, I think I agree with everything you've said, that the history and the language we see is broad enough that – you know, you don't want to have this argument on the front page of the newspaper, that, yes, you can make arrangements for child care, but you can't see your spouse, you know, we're not going to give you a three-day pass to visit with your spouse when their home from deployment. So we'd go ahead and grant it until we hear otherwise.

Kevin Menke: You know, I guess from our company's standpoint, I would hope that we would not deal with it under an FMLA type leave, but deal with it, you know, on a – some kind of other leave policy or give somebody some time off because their spouse, you know, has been deployed to

Iraq for a year or two, and hopefully that we wouldn't have to get into whether or not – you know, into a fight, well, I need – you know, you're not letting me off, and I want to be off, and I have a legal right to be off. You know, hopefully we can deal with it on a friendlier more informal basis. But, you know, we'll have to see.

Here's another question, can next of kin include significant others? What about states which recognize civil unions?

Frank Alvarez: Well, to me, the problem with including significant others on the next of kin is that the statute speaks to blood relatives, and the department – what I've heard is that almost every branch of the military service has a different definition of next of kin. So there's a fair amount of confusion as to what's the best way to define next of kin. I've heard that the Department of Labor may be considering allowing employers to look to state law in the states in which they're operating to see if there's a definition there that makes sense, and if that's the case, then we'd have to see whether, you know, the state law definition includes significant others, especially in states which recognize civil unions. But again, because it's a blood relative, you know, and that's in the statute, there may be some difficulty in reaching that far.

Kevin Menke: You know, and I guess people – or commentators of – and I think in your paper you refer to some people are looking to the Department of Defense definitions of next of kin, and I haven't studied that, but my guess is that they don't include significant others, you know, with their other policies related to that kind of thing.

Linda Whittaker: Well, and this – I think that blood relative puts parameters on it that would exclude – well, if not exclude – and frankly, we would find another way to give you leave, is what we would do, but I don't – I'm not sure that under the federal law, that someone who wasn't an actual blood relative would qualify. I think the problem for – in looking at state law for help with the definition is

that, you know, many of us are in 50 states, and that's going to be just unwieldy, impossible to administer.

Kevin Menke: Yes, that's a good point. I think we're in 42, so.

Linda Whittaker: I feel your pain.

Kevin Menke: Another question, do you recommend that companies amend their FMLA policies now or wait for the rules to be promulgated?

Frank Alvarez: Well, my view on that is that you, as of this moment, since the passage of the law on January 28, 2008, have an ongoing obligation to provide general notice to employees of what their rights and obligations are under the FMLA, and as we speak right now, there is a right to the service member family care leave piece of the amendment. So I think – you know, what I tell our clients is that I think you should be doing something as soon as practicable to amend your policies to speak to that piece of the leave.

Now, I don't believe you have to get into all the nitty-gritty of that element, but I think you need to put employees on notice that they are entitled to take it. I think right now we don't have all the answers, so you couldn't really develop a policy that's that broad. But I think as I've heard one person from the Department of Labor say, you have to do the best you can right now because it's a leave entitlement that exists. So my recommendation would be to amend it right now to certainly reference that, and then if you're making a decision to voluntarily comply with a qualifying exigency piece, that you'd want to articulate and explain what you mean by that sooner rather than later. But if you're not, then I don't see any reason why you have to mention qualifying exigency leave at this moment.

Linda Whittaker: And we, obviously, decided to go ahead and put both qualifying exigency in service member family care into our policies, and because of the way our policies are setup, that meant that we had to revise about 22 policies because we also do state specific policies for leave of absence. We also had to change our leave of absence packet to provide notice of the right to leave, and everybody knows we got a new poster. But we had to do the changes in a lot of guides, in a lot of different places, so I'm not saying that it's easy to do, but we also didn't want to be fighting about this with service member family members about why can't I take this leave? I've got the legal right to the leave, but it's not in your policy. We must not matter to you, and obviously, these folks matter very much to us, and we wanted to try to (codify) that as quickly as we could. So I would recommend doing it and just take your best shot at it. That's all any of us can do.

Kevin Menke: That's a good point. I'm impressed that – for our company the change of policy takes, you know, a long time, even though we have the best intentions. But that's impressive.

Linda Whittaker: I'll tell you a personal story. I happened to be on an airplane when the law was signed into – was signed by the president, and by the time my plane landed, I had more than one email that said when are you going to get this updated. So, you know, yes.

Kevin Menke: … everywhere.

Linda Whittaker: … everywhere. We've got this call for it.

Kevin Menke: Let me – we have maybe one more minute, one more question. Slide 10 states that job restoration is required. Does the exception for job elimination or reduction in force still apply? I think so, but Frank?

Frank Alvarez: Yes, I don't see any reason why it wouldn't.

Kevin Menke: OK. You know, there's several more questions, and what I can tell everyone is that we will download all of the unanswered questions, and the panel here will try to go through them and send the answers along to the ACC so that they can be posted with this presentation. Also, if you wanted to – you know a friend that didn't get to listen in, and you want them to hear this webcast, the webcast has been recorded and will be posted with the materials on the Web site. I believe it will be available for a year following this webcast.

I want to thank everybody for their participation, especially thank our panelists, Jackson Lewis partner Frank Alvarez and Wal-Mart associate counsel Linda Whittaker. I really appreciate your time and effort in putting this together. It was very informative to me, and hopefully everyone else.

One thing – I also want to remind everyone, if you would please complete the evaluation form, which is the first link there on your screen, we'd appreciate knowing what you think and what else are other types of webcasts you would like to hear from the Employment and Labor Law Committee. And finally, I'll let you know that on Tuesday, May 13 at 2:00 p.m. Eastern Time, the Employment and Labor Law Committee will sponsor its next webcast, which will be on the Sarbanes-Oxley whistle-blower claims. You know, where are we now after about five years of having these claims available?

Thanks again, everybody. Thanks, Frank and Linda. And everyone, you can now disconnect from this webcast. Thanks.

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