

*Employee Management:
Rights and Benefits*

Chapter 8

The New FMLA Rules: Employer Opportunities and Obligations

On November 17, 2008, the Department of Labor (DOL) published new regulations to implement the 2008 “military leave” amendments to the Family and Medical Leave Act (FMLA). The new rules became effective on January 16, 2009, and also make significant changes to the original FMLA regulations and forms. Generally, the new rules (29 Code of Federal Regulations [CFR], Part 825) allow employers the opportunity to obtain more information from employees and healthcare providers regarding FMLA requests, but employers will also assume new obligations to inform employees of their FMLA rights. An online version of the new regulations and the DOL’s accompanying commentary—all 700 pages—is available at www.dol.gov/esa/whd/fmla/index.htm.

Significant changes include:

Military family leave. Section 585(a) of the National Defense Authorization Act of 2008 (NDAA) amended the FMLA to provide two new leave entitlements. A new form also exists to certify this leave (Form WH-385).

- **Military caregiver leave:** Eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a single 12-month period to care for a covered service member with a serious illness or injury incurred in the line of military duty.
- **Qualifying exigency leave:** Twelve weeks of FMLA leave is available to eligible employees when a military family member is on active duty serving in the National Guard or Reserves (29 CFR §825.127).

Eligible employee. The new regulations retain the same essential definition for *eligible employee*. An eligible employee generally is one whose employer employs 50 or more employees within a 75-mile radius, and who has been employed for at least 1,250 hours and for one continuous year before the beginning of the requested leave. When there is a break in service of seven years or more, however, the time prior to the break is not counted toward the 12-month requirement unless the break is due to military service or where the employer agrees to count the prior service voluntarily (§825.110).

Serious health condition. The new regulations retain the original broad definition (“...an illness, injury, impairment or physical or mental condition that involves inpatient care ... or continuing care by a healthcare provider ...”) except:

- A serious health condition involving “continuing treatment” by a healthcare provider now requires the employee to make an in-person treatment visit with a healthcare provider within seven days of the first day of incapacity and a follow-up visit within 30 days of the first day of incapacity (except for extenuating circumstances).
- A chronic serious health condition requires at least two visits to a healthcare provider per year. (§825.115).

Employer notice requirements. The new regulations impose new requirements on employers to notify employees of FMLA-related rights and the regulations contain three new form notices to employees. (§825.302 and 825.303).

- **General notice:** Employers must display a new poster of FMLA rights in the workplace (Form WH-1420). The new regulations allow electronic posting of the general FMLA notice provided all employees and applicants have access to the electronic posting.
- **Notice of eligibility & rights and responsibilities:** Upon receiving an employee's request for leave, employers now have five business days to notify the employee regarding eligibility for FMLA leave. If the employee is ineligible, the notice must state at least one reason and must include a notice of FMLA rights and responsibilities (Form WH-381).
- **Designation notice:** Once the employer has sufficient information to determine if the leave is FMLA qualifying, it must notify the employee of the designation within five business days. With this designation, the employer must also advise the employee if it will require a fitness-for-duty certification to return to work, as well as provide a list of essential job functions if the employer will require certification of the employee's ability to perform the essential job functions (Form WH-382).
- **Penalties:** An employer's failure to comply renders it liable for monetary losses as a result of such failure (§825.301).

Employee notice requirements. The new regulations also make changes to employee notice requirements (§825.302 and 825.303):

- **Compliance with employer policy:** Employees must now comply with an employer's usual and customary notice/procedural requirements for requesting leave. The new regulations permit an employer to delay FMLA leave if an employee fails to provide timely notice without reasonable excuse. Additionally, employers may deny FMLA leave if an employee fails to respond to an employer's reasonable inquiries for sufficient information to determine whether the requested leave is FMLA qualifying.
- **Timing:** The revised regulations continue to require employees to provide at least 30 days' notice if the need for leave is foreseeable and, if not foreseeable, as soon as practicable. The new regulations define "as soon as practicable" as the same or the next business day.

Medical certification. The new regulations significantly change the process of medical certification and allow employers to obtain better medical information verifying an employee's need for leave. New forms for this purpose can be found at Appendix B of the new regulations.

- **Timing:** The new regulations require the employer to request certification within five days of an employee's notice of the need for leave. Employees must provide a completed certification within 15 days.
- **Content:** The new regulations provide two new certification forms (380-E and 380-F). Changes include a requirement to identify the healthcare provider's specialization, medical facts regarding the patient's condition, and whether intermittent or reduced schedule leave is medically necessary.
- **Incomplete and insufficient certifications:** If the certification is returned to the employer incomplete, the employer must notify the employee in writing of the deficiency, and the employee has seven days to cure it or the leave may be denied.
- **Authentication of certification:** The new regulations allow an employer's healthcare provider, HR professional, leave administrator, or management official—but *not* the direct supervisor—to contact the employee's healthcare provider directly to authenticate or clarify the certification (§825.307).

Light-duty work. An employee unable to perform the essential functions of a job due to his/her serious health condition may not be required to take light duty work. The new regulations prohibit an employer from charging periods of light-duty work against an employee's FMLA entitlement. During any period of light-duty assignment, the employee's FMLA restoration rights are temporarily suspended (§825.220).

Waiver of FMLA rights. The new regulations specifically permit employees to settle and release past or potential FMLA claims without approval of the DOL or a court of competent jurisdiction (§825.220).

The changes to the FMLA regulations and forms are significant. Employers must immediately review the regulations and promptly take actions to implement the changes including: 1) revise existing FMLA policies to incorporate the changes; 2) train human resources and supervisory employees regarding the changes and the impact of such changes in their duties; and 3) implement the new and revised forms. Failure to do so will expose employers to unnecessary FMLA liability and relinquish an opportunity to use the new tools to better manage protected leave under the FMLA.

—by Gary S. Batke, an attorney with the Columbus office of Bailey Cavalieri LLC.

Asserting Employers' Rights To Manage Employee Leave

One of the most challenging issues facing employers is how to effectively manage employees' absences in a way that maximizes productivity on the one hand and minimizes the potential for legal liability on the other. The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide eligible employees with 12 weeks of unpaid leave for:

- maternity and paternity leave;
- the employee's serious health condition;
- an immediate family member's serious health condition; or
- qualifying exigency leave (when certain family members are called for or are on active duty in support of a contingency operation).

The FMLA also requires employers to provide military caregiver leave—up to 26 weeks' leave to care for covered family service members suffering from certain serious injuries or illnesses.

Even employers not covered by the FMLA may be required by the Americans with Disabilities Act to provide a leave of absence in certain circumstances as a reasonable accommodation of an employee's disability. State law also may require employers not covered by the FMLA to allow employees to take maternity leaves.

The FMLA requires employers to determine when an employee is permitted to take time off. Employers' challenge is to lawfully limit employees' time off to only what the law requires. Following are some ways that employers can address this challenge:

- Develop a written policy. Employers must have a policy in an employee handbook that complies with the FMLA. The policy should correctly define who is and who is not eligible for leave under the FMLA and the circumstances under which leave can and cannot be taken. The policy also should list the employee's obligations for requesting leave and verifying the need for leave. To prevent an employee from stacking paid leaves provided by the employer on top of unpaid leaves provided by the FMLA, the policy should state that the employee may have to take paid leave, such as vacation or paid sick leave, at the same time as the unpaid family or medical leave.
- Determine whether the employee is eligible. Not all employees are eligible for leave under the FMLA because they may not have worked long enough or enough hours for the employer. When an employee requests time off, the employer first should determine whether or not the employee is actually eligible for leave under the FMLA.
- Request medical information. The employer should require the employee to have his or her doctor give the employer the information needed to correctly determine whether or not the employee has a health condition that entitles the employee to the leave.
- Notify the employee that the leave is family or medical leave. If the employer determines that the employee is eligible for the leave and the leave qualifies under the FMLA, within five business days after having enough information to determine whether leave qualifies as FMLA leave, the employer must notify the employee in writing of that determination, even if the employee is entitled to take paid time off under the employer's sick leave policy or some other policy. Otherwise, the leave may not count against the employee's 12-week leave allotment.
- Do not count FMLA-qualifying absences as "occurrences" under no-fault attendance policies. The FMLA prohibits employers from penalizing employees for using the leave the law allows them to use. The U.S. Department of Labor takes the position that policies that assess "points" against employees for absences regardless of the reason violate the

law when an employee is assessed a point for an absence he or she was allowed to take under the FMLA.

- Make sure managers are trained about the kinds of absences that count as FMLA-qualifying absences and the circumstances under which the managers should contact a human resources professional or administrator who is acquainted with the employer's obligations under the FMLA.
- Realize that, even if an employee is not eligible for leave under the FMLA, and even if the employer is not large enough to be covered by the FMLA, the employer still may be obligated to allow the employee to take time off if the condition is a disability under the ADA and the time off is a reasonable accommodation.

Employees' rights under the FMLA and the ADA are not without limits. To effectively manage employees' absences, employers should learn not only what rights the law gives to employees, but also, what rights the law does *not* give to employees.

—by D. Lewis Clark Jr., an attorney with the Columbus office of Squire Sanders & Dempsey, LLP. Updated by attorney Amy Ruth Ita, formerly with Squire Sanders & Dempsey, LLP, and now with the Columbus office of Barnes and Thornburg LLP.

Privacy in the Workplace: Laws Govern E-Mail, Locker Searches, Drug Testing, Etc.

Q: Do employees have any rights to privacy on the job?

A: Yes. As a general rule, employees are entitled to a “reasonable expectation of privacy” and to be free from wrongful intrusion into their private activities. This standard, however, requires considering all the circumstances surrounding the employer’s conduct. In particular, courts will examine how and why an employer took its actions. Moreover, an employee will have to prove that the employer’s actions resulted in mental suffering, outrage or shame, and that the employee was a person of “ordinary sensibilities.” In other words, the standard is based on the perception of a “reasonable person” and not an overly-sensitive employee.

When applying the reasonable expectation of privacy standard, courts vigilantly protect against conduct by an employer that intrudes on the privacy of an employee’s body. Thus, employers have been found liable for violating employee privacy rights when surveillance cameras have been placed in employee restrooms. In addition, bodily searches frequently will cross the line from permissible to impermissible intrusions. But if a legitimate business purpose exists for such a search, employers will not be found liable for privacy invasions. An example of such a legitimate purpose would be searching a prison guard to ensure nothing is smuggled to prisoners.

An employee’s reasonable expectation of privacy can be substantially reduced by well-communicated employer policies. By unmistakably notifying employees that they are subject to monitoring, surveillance, inspections, searches, and testing necessary to enforce company rules and policies concerning conduct and performance, employers can substantially diminish an employee’s privacy rights.

Notwithstanding an employer’s efforts to create policies that permit wide-ranging intrusions into employee privacy, some lines cannot be crossed. Employers should exercise special care concerning an employee’s medical information and other confidential matters. That special care should include policies that restrict access to the information so that only those with a legitimate business need will know about it.

Q: What rules must I follow if I want my employees to take drug tests?

A: The first rule should be to consult with your legal counsel. The legal and business considerations behind submitting employees to drug tests are quite complex. Generally, the rules vary depending on whether the employer is the government or a private employer, and whether the employer is a party to a collective bargaining agreement.

Public employers frequently are bound by the same or similar laws prohibiting private employers from unlawfully discriminating against employees. Employees subjected to drug testing commonly complain that they are selected on an unlawfully discriminatory basis. Thus, all employers should ensure that any drug testing is conducted on some basis other than age, disability, sex, race, national origin, ancestry, or religion. Public employers, however, must also make sure that drug testing comports with the Fourth Amendment to the United States Constitution. This means that, unless unusual circumstances exist, a public employer must have a reasonable suspicion of drug or

substance abuse based on specific grounds for conducting the drug test that can be articulated. The most common exceptions to this rule arise when the public employee holds a position that affects public safety or security. In these cases, the government may perform drug testing under less rigid standards of selection.

Drug testing by Ohio employers must comport with the state's statutes and common law. Generally, these laws require that drug testing be administered on a nondiscriminatory basis. Some laws, however, address more specific issues related to drug testing. For example, one statute prohibits employers from requiring applicants or employees to pay the cost of the drug testing. In addition, Ohio statutes limit what medical records relating to the drug tests may be released by the employer. If the employer is subject to the U.S. Department of Transportation regulations, those regulations may *require* drug testing of employees and specific methods of testing. Indeed, the regulations include procedures for collecting urine samples, transporting the samples to testing laboratories, evaluating test results, providing quality control measures for laboratories, keeping records, and using certified laboratories.

Finally, employers with collective bargaining agreements may be subject to unique rules arising from the collective bargaining agreement that addresses drug testing. The National Labor Relations Board has held that, before an employer may implement an employee drug testing program, the employer must first bargain with the union because drug testing is a mandatory subject of bargaining. Thus, subsequent testing must comply with the terms set forth in the collective bargaining agreement.

Q: Do employees have any privacy rights concerning their off-the-job activities?

A: Most employees in Ohio are considered *at-will* employees whose employers can terminate their relationship for no reason or any lawful reason. Therefore, discipline or discharge for purely private activities off the job is often *not* considered wrongful. It is, however, a developing area of the law. Whether an employer can monitor off-duty conduct often depends on the employer being able to show a legitimate business purpose for the monitoring, and that the behavior being monitored was connected in some way to the employee's job. For example, an employer who requires an employee to refrain from smoking cigarettes outside of the work place or work hours might not be violating the employee's privacy since there is a legitimate business interest in containing health care costs. Or an employer who disciplines a school bus driver for an off-duty DUI violation might be thought to have a legitimate work-related reason for doing so. Even if a termination is not considered wrongful, the Ohio Department of Job and Family Services (ODJFS) may be required to award the employee unemployment benefits. Generally, the ODJFS does not award benefits to employees terminated for just cause. Under ODJFS standards, a termination may be found to be "without just cause" if there is no *actual* connection to the employee's job.

Q: I'm concerned about the kinds of e-mail my employees are sending. Am I legally allowed to read and/or pass along the contents of their e-mail messages?

A: Generally, the law favors the employer in matters of privacy when it involves use of the employer's equipment, such as computers and phones. Even when there is no written policy, a court would likely decide that the employee should not expect messages generated in the workplace to be regarded or protected as private. Even though there is a federal law protecting e-mail messages from interception and disclosure, the law provides exceptions for the provider of that service, which is usually the employer. However, an employer that intercepts messages for non-business purposes may be liable to the

employee for an invasion of privacy. Moreover, although the monitoring may be lawful, repeating or disclosing the message may not. Perhaps the best way to ensure that employee e-mail messages can be lawfully read is for the employer to regularly and effectively communicate a documented policy to employees that makes clear the right of the employer to monitor e-mail.

Q: Can I search my employee's desk or locker?

A: Only under certain circumstances. Employees of privately-owned companies are generally thought to have a reasonable expectation of privacy in their offices, desks and lockers, especially when employees are permitted to use their own locks. That right may be negated, however, if the employer has a written policy stating that such areas may be searched, or if access to such areas is generally available to other employees or personnel. Public employees enjoy the benefit of the United States Constitution's Fourth Amendment prohibiting "unreasonable searches and seizures." Consequently, a public employer must go to greater lengths to justify a search. In certain circumstances, a public employer may need a warrant to conduct a search.

—by Gregory A. Gordillo of Gordillo & Gordillo LLC in Cleveland, and Maribeth Deavers of Critchfield Critchfield & Johnston LTD in Mt. Vernon.

Laws Govern Surreptitious Telephone and Video Tape Recording

Q: I recently learned that one of our vendors has regularly been tape recording telephone conversations with our purchasing department without our knowledge. Is that legal?

A: Yes. Ohio law allows telephone conversations to be tape recorded as long as one party to the conversation knows and consents to its being recorded. The law does not, however, allow the tape recording to be used for an improper purpose. For example, the vendor cannot use the tape recording to extort money or bribe your employees. Also, the vendor is not permitted to tape record a conversation between two other people without their permission.

Q: Do the same rules apply to cellular telephone conversations?

A: As with regular phone conversations, you can record any cellular phone conversation in which you participate as long as you do not use the recording for an improper purpose. Federal law, however, makes it a crime to intercept and/or publish a cellular phone conversation between other people without the consent of all parties to the conversation.

Q: What about the police? Can they tap our phones?

A: Only if they have obtained a search warrant signed by a judge—or if you give them permission.

Q: Can we tape record our employees' telephone conversations at work without telling them?

A: The answer may depend on what the particular employee's job is but, generally, employers cannot record their employees' telephone conversations without first letting them know they are going to do so. This may be a topic to cover in an employee handbook.

Q: What about videotaping our employees' activities in our building? Can we do that without telling them?

A: Again, it is always prudent to let your employees know that their activities at work may be recorded. You have to be careful not to videotape private activities of your employees; for example, you should not place cameras in the restrooms.

—by Kenneth A. Zirm of the Cleveland law firm, Ulmer & Berne LLP.

Protecting Against Sexual Harassment Lawsuits

Ten years ago, the U.S. Supreme Court issued two very important rulings on cases that offered employers all over the country a blueprint for protecting themselves against sexual harassment claims. These cases, one involving a Florida lifeguard whose supervisors touched her inappropriately and made offensive remarks and the other regarding a Chicago salesperson who refused a supervisor's unwelcome and threatening advances, are as valid and important today as they were when they were decided a decade ago.

Employers would be wise to revisit the high court's decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*. While the central issue in these cases involved vicarious liability of employers for sexual harassment by supervisors, the court used the decisions to clarify what constitutes sexual harassment and to outline what employers should do to defend against sexual harassment claims.

Specifically, in cases where no tangible employment action—such as discharge, demotion or undesirable reassignment—has occurred, the court said, an employer can defend itself by proving that:

- it exercised reasonable care to prevent and correct promptly any sexually harassing behavior;
- the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This affirmative defense, the court said, is not available for sexual harassment that culminates in a tangible employment action.

Faragher and *Burlington* offer practical advice. Combined with other court rulings and guidelines previously issued by the U.S. Equal Employment Opportunity Commission, it makes the steps an employer should take to protect against lawsuits quite clear.

First, the employer should adopt a written policy prohibiting sexual harassment. While the Supreme Court seemed to suggest that employers with small workforces might not need them, we believe all employers would be well advised to have formal policies. We recommend that the policy be part of a broader anti-harassment policy that also prohibits racial harassment and illegal discrimination generally. The policy should define harassment, clearly state that it is prohibited, set forth a complaint procedure, and make it unmistakably clear that persons properly using the policy will be protected against retaliation.

Second, the policy should be publicized to all employees. This includes posting the policy, including it in personnel manuals, and training employees about the policy and how it will be enforced. One of my clients periodically includes a copy of the policy with employees' paychecks so no one can later claim he or she was unaware of it.

Third, the complaint procedure must not require that the complainant file his or her complaint with or have it handled at any stage by the accused harasser. Moreover, the complaint procedure must not be directly or indirectly controlled by the accused harasser.

Fourth, the complaint procedure must deal seriously with both the complaint and the complainant. It must be prompt, but it must also allow the employer enough time to perform a serious

investigation. When the allegations are serious enough, such as when the complainant feels physically threatened, the complaint procedure should allow some temporary remedy or protection while the employer conducts the investigation.

Fifth, the accused's rights should be fully respected, and he or she should be given full opportunity to prove or explain his or her actions.

Sixth, the complaint procedure should make it unmistakably clear that the employer will not tolerate retaliation against the individual making a good-faith complaint, even if the complaint is found to be without merit. The employer should, however, reserve the right to discipline employees making complaints they know to be false.

Finally, the employer should take disciplinary action that is appropriate for the circumstances and the complainant should be informed as to what action, if any, is taken. Appropriate corrective actions range from termination to a written warning or reprimand.

Throughout the process, the employer should keep the investigation as confidential as is reasonably possible—on a “need-to-know” basis. However, it usually is not possible to keep the investigation entirely confidential, and this should be made clear to the complainant.

At any stage of the investigation, the employer, if in doubt, would be wise to contact legal counsel. Sexual harassment is not only wrong, it can be extremely costly. Losing a lawsuit can easily cost six and possibly seven figures; winning it still costs a great deal more than avoiding it altogether. The money spent for a phone call reviewing the facts with counsel is far less than the cost of getting enmeshed in a lawsuit, win or lose.

—by Thomas H. Barnard, a shareholder with the Cleveland law firm of Ogletree Deakins Nash Smoak & Stewart PC. Reprinted by permission of Cleveland Enterprise.

The “Seven Habits” of Harassment-Free Companies

It seems like a no-brainer. Why would anyone in today’s workplace sexually intimidate or harass a co-worker? It certainly could not happen at your business!

Your employees may not always agree with or approve of one another, but at least they treat each other with respect.

Right? It is until you overhear a racy joke, see an inappropriate e-mail, watch a supervisor crowd a subordinate’s space—perhaps even manhandle him or her—or hear through the grapevine that an employee will not take another’s “no” as final. Then you start to get a bit nervous. How liable is your company for the sexual harassment actions of your employees? As an employer, you can defend yourself in a lawsuit by proving that:

- you exercised reasonable care to prevent and correct any sexually harassing behavior;
- the complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

With apologies to Stephen Covey, here are seven “habits” you, as an employer, should develop to protect your company against sexual harassment:

- 1) **Write it down.** Adopt a written policy prohibiting sexual harassment. The policy should define harassment, clearly state that it is prohibited, set forth a complaint procedure, and make it clear that persons properly following the policy will be protected against retaliation.
- 2) **Pass it around.** Post the policy, include it in personnel manuals and train employees about the policy and how it will be enforced. Periodically distribute a copy of the policy with employees’ paychecks so no one can later claim he or she was unaware of it.
- 3) **Protect the accuser.** Make sure that an employee can file a complaint without it being handled by the accused harasser. The complaint procedure must not be directly or indirectly controlled by the accused.
- 4) **Protect the accused.** The accused’s rights should be fully respected, and he or she should be given the opportunity to prove or explain his or her actions.
- 5) **Take complaints seriously.** Your response must be prompt, but give yourself enough time to thoroughly investigate. When the complainant feels physically threatened, he or she should be protected while the investigation is being conducted.
- 6) **No retaliation.** The complaint procedure should make it clear that there will be no retaliation against the individual making a good-faith complaint, even if the complaint is found to be without merit. The employer should, however, reserve the right to discipline employees knowingly making false complaints.
- 7) **Give it teeth.** You must take appropriate disciplinary action for the circumstances and the complainant should be informed as to what action, if any, will be taken. This might range from a written warning or reprimand to termination.

Throughout the process, keep the investigation as confidential as is reasonably possible—on a “need to know” basis. Your attorney can probably provide additional assistance that will help you avoid a lawsuit.

—by Thomas H. Barnard, a shareholder with the Cleveland law firm of Ogletree Deakins Nash Smoak & Stewart PC and former chair of the OSBA’s Labor and Employment Law Section.

Plan for Potential Strike When Negotiating in Collective Bargaining

In general, people are the most essential resource for businesses. Personnel costs usually account for a significant portion of a business's expenses, so there can be a lot at stake when a business negotiates a collective bargaining agreement with a union for its employees. While all participants expect an amicable resolution in collective bargaining, that does not always happen. Businesses need to plan for a potential strike early in the negotiation process. The following are some issues to consider in strike planning:

- Prioritize the functions of the business. Determine which matters must continue to be addressed and which functions can be temporarily tabled. Keep in mind that the first few days of a strike are the most difficult.
- Assign managers to handle core business functions.
- Prepare a letter to be sent to employees in the event of a strike, reminding them that they will receive no pay and benefits if they are on strike. This letter should explain the cost they will incur for health insurance, if applicable.
- Inform employees that they do not have to strike even if fellow employees choose to do so. Employees have the right to engage or refrain from engaging in strike activities. Make arrangements for employees and managers to arrive safely at work during a strike.
- Communicate with customers.
- Arrange for workplace security. Contract with a security firm if necessary. Make sure that law enforcement personnel are aware of the situation. Prepare to collect keys and to change locks and security codes if necessary. Take steps to ensure that employees' access to computers is limited if a strike appears imminent. Have duplicate keys to facilities and vehicles. Maintain backup data from computers at an off-site location.
- Prepare to address media inquiries. There should be one spokesperson for the business.
- Make suppliers and contractors aware of the strike. Make arrangements to ensure that deliveries will continue.
- Maintain a line of communication with union representatives.
- Be prepared to seek an injunction to limit the location and number of pickets.
- Determine sources of workers to fill in during the strike.
- Make sure managers understand the law's limitations. Employer representatives should refrain from making any unlawful threat during negotiations or a strike.

It is rare that either unions or employers want a strike, but it is always a possibility when employees engage in collective bargaining. Obviously, strikes can be very disruptive, but an employer can discourage a strike or minimize its impact if preparations for a work stoppage are made before a strike is imminent.

—by Marc A. Fishel, a partner in the Columbus law firm of Downes Fishel Hass Kim LLP.

Members of the Military Have Civilian Job Protections

As thousands of military reservists are called to active duty, they will leave their civilian jobs for months or even years. A 1994 law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to virtually all employers and gives reservists and other service members a wide range of job protections. Active duty, reserve duty, and required training activities in all branches of the armed forces are covered, even if the employees volunteered for duty.

Q: What obligations does USERRA impose on employers?

A: Employers must allow leaves of absence for military service, up to a cumulative total of five years for each employee. USERRA does not require paid leave, but employees can maintain their existing health care coverage for up to two years. If the military leave lasts more than 31 days, employers can shift 102 percent of the health care premium to the employee (like COBRA benefits). For shorter absences, the allocation of health care costs cannot be changed.

Pension plans and a wide range of other employee benefits also are covered by USERRA. For example, military leave time counts toward eligibility for benefits under the Family and Medical Leave Act (FMLA) according to applicable regulations.

When the military service ends, employers must provide prompt re-employment to employees who are honorably discharged. Narrow exceptions exist if re-employment is impossible, unreasonable, or would cause undue hardship to the employer.

Q: What is the “escalator principle”?

A: After World War II, the United States Supreme Court ruled that a returning soldier “does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” This principle is incorporated into USERRA.

Thus, where it is reasonably certain that an employee would have been promoted if not for his or her military leave, the employer may have to award that promotion (or another job with similar pay and status) when the employee comes back. Employers also must provide training for employees who are unqualified for the “escalator position.”

The escalator principle does not always require a promotion, however. If an employee on military leave would have been laid off along with other employees, the regulations allow reinstatement to layoff status.

Q: What are the potential penalties for violations of USERRA?

A: USERRA can be enforced through individual lawsuits. The Veterans’ Employment and Training Service (known as VETS), which is part of the Department of Labor, also investigates USERRA complaints by employees.

For proven violations, employers may have to reimburse employees for lost pay and benefits. These damages can be doubled if the violation was willful. Additionally, employers may be required to pay an employee’s reasonable attorney fees and other litigation expenses.

—by Justin D. Flamm, a partner in the Cincinnati office of Taft, Stettinius & Hollister LLP.

Accommodating Religion in the Workplace

Religion permeates our society, and the workplace is no exception. Under the same laws that prohibit race and sex discrimination, employers cannot hire, fire, or discipline based on an employee's religion. When faith conflicts with work, however, employers can face challenging decisions.

Worship services and prohibitions of Sabbath work can cause scheduling problems. Likewise, religious beliefs may clash with certain job duties. In one case, a convenience store manager's religion prohibited her from selling pornographic magazines that the store carried. Another employer faced a lawsuit over its directive that an employee stop telling customers to "have a blessed day."

Federal and Ohio laws require reasonable accommodations for religious practices and beliefs. Employees are not always entitled to the accommodation of their choice, however, and a court may find an accommodation to be "reasonable" even though the employee is unhappy with it. Accommodations are never required if they would cause the employer "undue hardship." This exception is not overly demanding; anything more than a minimal cost usually constitutes undue hardship.

Potential accommodations include revising work schedules, trading shifts with other employees, and reassigning objectionable job duties. If those efforts would increase the employer's overtime expenses or would prevent projects from being completed, the undue hardship exception may apply. For unionized employers, seniority provisions in a labor contract usually trump an inconsistent request for accommodation.

An employer's skepticism about the validity of a particular organized religion or religious belief seldom changes the legal analysis. Because faith is such a personal matter, courts rarely pass judgment on sincerely held beliefs. The legal definition of "religion" is broad, and it extends far beyond mainstream churches. In one extreme example, a court ruled that a white supremacist group was a religion under federal law.

The *employer's* religion also may cause conflict. Several companies have been hit with large verdicts for trying to impose management's religious beliefs on employees with different beliefs (or no beliefs at all). An exception exists for religious organizations, such as a parochial school that considers religion when hiring teachers.

Reasonableness and undue hardship are fact-sensitive legal standards, so an employer receiving a request for religious accommodation should consider ways to resolve the employee's conflict. Although religious practice may yield to business necessity in many cases, employers should consult with counsel before rejecting an accommodation.

—by Justin D. Flamm, a partner in the Cincinnati office of Taft, Stettinius & Hollister LLP.

Over-the-Counter Drugs Covered by Health Care Flexible Spending Accounts

The Treasury Department and the IRS issued a ruling, effective beginning in 2003, stating that over-the-counter drugs can be paid with pre-tax dollars through health care flexible spending accounts (health FSAs). As a result of this ruling, employees now can exclude employer reimbursements for non-prescription medications from their gross income for tax purposes.

Under current tax law, as under the old law, taxpayers are not required to consider reimbursements of prescription medical expenses for themselves or their dependents as gross income. However, under the old law, reimbursements for over-the-counter expenditures could not be excluded from gross income. As a result of the new ruling, an employee can now exclude employer-reimbursed expenses for both prescription *and* non-prescription medications from gross income for tax purposes, as long as these expenses are substantiated.

The ruling states that antacids, allergy medicine, pain relievers, and cold medicine purchased without a physician's prescription are considered expenditures for medical care. Therefore, an employee's expenditure for these items may be reimbursed under an employer's health FSA and excluded from the employee's gross income. However, the ruling does not cover the purchase of dietary supplements, which are considered "merely beneficial" to a person's general good health and therefore, cannot be reimbursed or excluded from gross income.

The IRS made this ruling in response to the increasing availability of non-prescription drugs. This has caused concern because, while over-the-counter drugs are generally less expensive than prescription drugs, the actual cost of over-the-counter drugs to most consumers is often greater than the consumer's co-payment for prescription drugs covered by insurance. This ruling will result in savings to consumers with access to health FSAs who purchase over-the-counter drugs.

The principles of the ruling apply to all types of employer-sponsored benefit plans that provide pre-tax health care benefits. Therefore, this ruling applies to health reimbursement arrangements and self-insured medical reimbursement plans.

There are a few issues that employers must consider before reimbursing employees for purchases of over-the-counter drugs. First, an employer may have to amend its plan documents to allow such reimbursements. Second, since plan participants must substantiate their expenses for medical care, necessary changes in administrative procedures may raise the cost of the plan. Finally, due to the broad definition of "medicine and drugs" and lack of clear IRS guidance, plans should adopt specific definitions as to what constitutes a medicine or drug.

—by Jason Rothman, an attorney with the Cleveland firm of Jackson Lewis LLP.

Health Reimbursement Arrangements (HRAs)

In 2002, the IRS sanctioned a plan for reimbursing employee and dependent medical expenses called a *health reimbursement arrangement* (HRA). An HRA is an arrangement that: 1) is paid for solely by the employer (it cannot be paid for by reducing employees' salaries or through a Section 125 cafeteria plan); 2) reimburses the employee for his or her own medical care expenses and those of the employee's spouse and dependents; and 3) provides reimbursements up to a maximum dollar amount for a plan year.

The following highlights significant characteristics of HRAs.

- An employee who is covered by an HRA may exclude reimbursed expenses from his or her gross income. Also, the employer's contributions to an HRA are tax deductible.
- An HRA must be paid only with employer dollars and cannot be paid for through employee salary reductions.
- An HRA may only be used to reimburse employees for medical expenses.
- HRAs allow the unused portion of plan coverage to be carried over to subsequent plan years without limitation, as opposed to health care flexible spending accounts (FSAs) that are subject to the use-it-or-lose-it rule (*i.e.*, amounts not used at the end of a plan year are forfeited).
- An HRA may cover current and former employees (including retirees) and their spouses and dependents. A surviving spouse and dependents may also be covered.
- HRAs may be provided to cover expenses not covered under the employer's customary group health plan (such as physician co-pays, vision exams, and over-the-counter drugs).
- Employers may provide both an FSA and an HRA. The same expense cannot be reimbursed under both the HRA and the FSA.
- Employers must comply with various federal laws including ERISA, HIPAA, COBRA, and IRS non-discrimination rules when providing HRAs.

Employers who want to provide medical coverage to employees on a tax-advantaged basis should consider an HRA. They allow employers to lower their rates while getting the quality of care that only larger groups usually can provide, while enabling employees to accumulate money for future health care needs such as retirement health care expenses and dependent claims (even after death). Employers looking to adopt an HRA plan should carefully consider all the requirements noted above, especially if they wish to offer an HRA in addition to a cafeteria plan that offers an FSA. HRA plan documents will need to be carefully drafted to meet these requirements.

—by Jason Rothman, an attorney with the Cleveland firm of Jackson Lewis LLP.

Accountable Business Expense Reimbursement Plans

Most employers do not expect employees to cover business expenses. Typically, employers will reimburse employees for business expenses. However, there are important tax issues to consider determined based on whether the reimbursement arrangement is an *accountable plan* or *non-accountable plan*.

To be an accountable plan, an employer's reimbursement arrangement must require the following:

- 1) Expenses must have a business connection and must be incurred while performing services as an employee of the employer.
- 2) The employee must adequately account to the employer for the expenses within a reasonable period of time.
- 3) Any excess reimbursement or allowance must be returned to the employer within a reasonable period of time.

To "adequately account" for expenses, an employee must give the employer a written record. The employee must record each expense at or near the time it was incurred. The employee also must provide evidence of the business expense (such as receipts, cancelled checks, and bills).

The definition of "reasonable period of time" depends on the facts and circumstances of the situation. The IRS has issued safe harbors treating certain actions as taking place within a reasonable period of time (*i.e.*, adequately accounting for an expense within 60 days).

If an employer's reimbursement arrangement is an accountable plan, the employer should include the reimbursements in Box #12 of the Form W-2. If the employer does this, the employee will not have to pay income or employment taxes. Furthermore, the employer will not have to pay employment taxes on the reimbursed amount.

A non-accountable plan is a reimbursement or expense allowance arrangement that does not meet all three requirements of an accountable plan. Any reimbursement paid to any employee under a non-accountable plan must be reported in Box #1 of the employee's Form W-2 as taxable wages. The employer must withhold income taxes and employment taxes for reimbursements made under a non-accountable plan. Furthermore, the employer must pay the employer's portion of payroll taxes on those amounts.

Reimbursing employees for business expenses under an accountable plan is better for both employers and employees from a tax perspective than reimbursing employees under a non-accountable plan. An employer's properly adopted and memorialized (*e.g.*, through minutes) employee expense reimbursement accountable plan allows employees to avoid income and employment taxes on reimbursements and allows the employer to be exempted from its portion of employment taxes.

—by Jason Rothman, an attorney with the Cleveland firm of Jackson Lewis LLP.

Auditing Your Employee Benefits

Providing employee benefits to employees and retirees is critical to the success of any company. But while employee benefits are necessary to attract and retain strong employees, they are also one of the fastest growing elements of a company's cost structure. Here are some points you should consider to maximize benefits while reducing costs.

Weigh pension plan versus 401(k) plan. Every day, fewer companies offer traditional defined benefit pensions to employees because the employer bears on-going cost risks. Most employers, however, offer 401(k) plans to allow employees to prepare for retirement. A 401(k) plan allows an employer to fix its cost, while the employee bears the gains and losses. The employee benefits from a 401(k) account by having a readily portable benefit when moving to a new job.

- 1) **Shop for health benefits.** Employers need to “shop the market” to reduce costs to employers and employees. The fees charged for managing self-insured plans need to be weighed against the costs of buying insurance. Using consultants or participating in chamber-sponsored plans can help employers to obtain better benefits at lower costs.
- 2) **Structure plans to address health benefit cost increases.** Health care costs have risen faster than inflation generally. Employers need to avoid open-ended promises of health care “for life,” either in individual employment agreements or in collectively bargaining. Such promises can result in unsustainable cost structures. Instead, employers should retain the right to “modify, amend or terminate” benefits plans.
- 3) **Consider coordinating retiree health costs with Medicare.** When providing retiree health benefits, employers should consider coordinating benefits with Medicare. The Equal Employment Opportunity Commission recently ruled that this practice is not age discriminatory. Employers can transfer health costs for age 65 and older retirees to the federal government while providing benefits to younger retirees. Such coordination is not available, however, for active employees.
- 4) **Update your plan documents.** Make certain that your plans are regularly updated to remain compliant with the Employee Retirement Income Security Act (ERISA), the *Internal Revenue Code*, the Health Insurance Portability and Accountability Act (HIPAA), and other federal laws that apply to many benefits plans.
- 5) **Review and follow your plans.** If you are an employer, determine whether the benefit provided is worth the cost. If you are a trustee or fiduciary, read the plan documents; you need to know what your plans provide so you can implement them properly.

Keep in mind that, although employee benefits involve substantial costs, they are critical to most employees. Controlling and monitoring costs will benefit both you and your employees.

—by Jack F. Fuchs, a partner in the Cincinnati office of Thompson Hine LLP.