400 South Fifth Street, Suite 200
Columbus, Ohio 43215-5492
(614) 221 1216 PH
(614) 221 8769 FX
www.downesfishel.com

Presentation to:
American Payroll Association

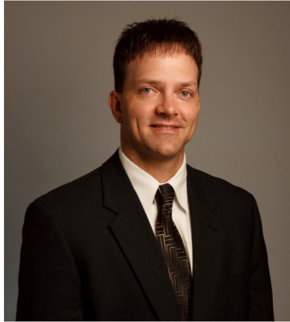
The FLSA and FMLA: Four Letter Laws that Make You Want to Use Four Letter Words.

A REVIEW AND UPDATE OF THE MOST RECENT CHANGES AND DECISIONS

PRESENTED BY: BRAD E. BENNETT, ESQ.
COLUMBUS, OHIO

This material is intended solely for informational and presentation purposes only and in no way should be construed as offering or providing legal advice.

INTRODUCTION – BRAD E. BENNETT



Brad E. Bennett is an attorney with the law firm of Downes Fishel Hass Kim LLP. Mr. Bennett handles cases in Federal and State courts and various administrative agencies. He represents clients in all aspects of civil litigation, labor and employment law, collective bargaining, civil service law, human resource compliance and audits, public sector agency administration, construction law, and small business consulting and formation. Brad is certified as a Specialist in Labor and Employment Law by the Ohio State Bar Association and is a sought after speaker and trainer who frequently conducts training and seminars throughout Ohio. Mr. Bennett is a recipient of the prestigious Burton Award, acknowledging effectiveness in legal writing. Brad has previous experience in human resources management and is an adjunct professor of employment law for the Keller Graduate School of Management and DeVry University. Mr. Bennett is a member of the Ohio and Columbus Bar Associations, as well as the Society for Human Resources Management ("SHRM") and Human Resources Association of Central Ohio ("HRACO"). Brad received his law degree, *cum laude*, from Capital University Law School and his Bachelor of Science from Ohio University.

DOWNES FISHEL HASS KIM LLP

Downes Fishel Hass Kim LLP defends business entities, public officials, and the owners and boards of these entities, and private individuals. The philosophy of the firm is to provide services that promote the development of systems and human resource management to maximize the goals and direction of the organization and to avoid and minimize conflict. This may include employee and supervisory training, the development and implementation of policies and procedures, and consultation. Vigorous representation is the first concern with consideration to both the short and long term effects. Services are provided to unionized, non-unionized, and mixed unionized/non-unionized clients. The firm's perspective is pro-management.

The firm also represents clients in pretrial, trial and appellate stages of litigation in both federal and state court and related administrative matters. Our litigation practice includes the defense of discrimination and harassment suits, Constitutional matters, professional partnerships and small business litigation, corporate dissolutions and shareholder disputes, wrongful termination, wage and hour, Family Medical Leave, Fair Labor Standards Act, and other civil actions.

The firm's defense philosophy is proactive, while maintaining a balance between appropriate defenses without unnecessary discovery or discovery disputes. The firm focuses on both the short-term and long-term impact of litigation. A concerted effort is placed on determining issues of liability as early as possible in litigation, allowing the client to make informed decisions concerning case resolution. The firm is flexible as to services based on clients' needs and wishes. The attorneys regularly work in conjunction with all levels of management staff, legal advisors, officers, and directors providing advice, background information, research and/or consultation on specific issues.

The FLSA: a review of the recent changes and decisions

A. *Healthcare Reform Legislation "Reforms" the FLSA*

1. **Automatic Enrollment in Health plans**: If you have 200 or more full-time employees
   a. New Section 18A added to the FLSA
   b. Must be given notice and opportunity to "opt-out" of the healthcare plan.
   c. Effective IMMEDIATELY
2. **Required Employee Notices**
   a. New Section 18B added to the FLSA
   b. Requires employers to provide detailed notice to employees at time of hire of the significant provisions of the Act regarding the health care exchanges. Such as:
      1) Existence of the exchange;
      2) That employees may be eligible for a premium tax credit if employer's share of the total cost of benefits is less than 60 percent of such costs;
      3) That, it the employee purchases a policy through the exchange, they may lose the employer contribution to any health benefits offered by the employer (except as may be required by a voucher)
   c. Requires each State to establish an exchange by January 1, 2014 whereby individuals and small businesses may purchase insurance under "qualified" plans that provide certain government mandated standards of coverage.
   d. ****Not effective until MARCH 1, 2013*
3. **Whistleblower and Non-Discrimination Protection**
   a. New Section 18C added to the FLSA
   b. Prohibits employers from taking any adverse action against employees because they:
      1) Received a premium tax credit or subsidy for a health plan;
      2) Provided information to employer or government regarding a violation, act or omission "reasonably believed" to be a violation of title I of the Act (covering the exchange and employer mandates)
      3) Testified or is about to testify in proceedings regarding such violations;

4) Assisted or participated (or is about to participate) in such proceeding;

5) Objected to or refused to perform any activity or task "reasonably believed" to be such a violation.

c. Effective IMMEDIATELY

4. **Lactation Breaks.** Health Care Reform amends the FLSA to require reasonable lactation breaks.

a. New Section 7 (r) added to the FLSA.

b. DOL issued Fact Sheet #73 as additional guidance.

c. Effective IMMEDIATELY.

B. *HIRE Act of 2010 ("Hiring Incentives to Restore Employment Act")*

1. **Tax Exemption**: Granted employers a tax exemption for the 6.2 percent Social Security (FICA) payroll contribution for every new "qualified employee" hired between February 3, 2010 and January 1, 2011.

a. "*Qualified Employee*" = "unemployed" for 60 days prior to accepting unemployment. Cannot be hired to replace another employee unless that employee voluntarily quit or was fired "for just cause." Cannot be "related" to the employer as defined in the Tax Code.

b. "*Unemployed*" = having worked less than 40 hours during preceding 60-day period.

2. **Tax Credit**: Employers may also earn an income tax credit equal to 6.2 percent of paid wages for every new qualified employee who is retained for 52 consecutive weeks.

a. This will be taken on the employer's 2011 income tax.

3. **Form W-11**: Must have qualified employees complete an IRS form W-11 and must keep signed form in case IRS ever questions entitlement to the exemption or credit.

C. *FLSA's Child Labor Regulations Undergo Change*

1. **Non-Agricultural:** DOL final Rule was effective July 19, 2010.

a. Expands, clarifies and details both the prohibited and permitted jobs for 14-and-15 year olds.

1) <u>Expanded tasks</u> 14-and-15 year olds can perform: office work; intellectually or artistically creative in nature work; most restaurant tasks; most retail tasks (like cashier, stock work, clean-up); errand/delivery work by foot/bicycle/public transit; work in advertising, teaching, banking, information technology; most gasoline service station

tasks; and under certain circumstances, work in and out of places that use power-driven machinery to process wood products.

a) 15-year olds ONLY can also work as lifeguards at pools and water parks

2) Newly prohibited tasks: door-to-door sales; peddling (except for charitable organizations/public agencies); poultry catching and cooping; promotional activity like sign waving (unless directly outside employer's business)

3) Clarifications*:* rules regarding when youth may ride inside/outside passenger compartments of motor vehicles; types of materials and situations in which youth may load/unload motor vehicles; provisions regarding meat coolers and freezers.

a) Hours of work: clarifies that the 3-hour limit on employment on school days includes Fridays. Clarifies also that "school hours" for prohibition of work during school hours are determined by local school district where minor resides even if they do not attend public school.

b. Adds prohibitions to the Hazardous Occupation Orders (HO) for all workers under 18-years old.

1) Logging/Swimming (HO 4): expands this prohibition to include most forest firefighting, forestry services, and timber tract management

2) Power-Driven Hoisting Equipment (HO 7): expands types of prohibited equipment, expands definition of types of equipment, and removes the previous exception allowing minors to operate some hoists less than one-ton capacity.

3) Meat Processing/Power-Driven Meat Processing Plants (HO 10): expands prohibition to include poultry slaughtering, as well as work in establishments that manufacture/ process meat or poultry products; also clarifies that youth may not clean power-driven meat processing equipment, even if an adult assembles and dissembles the equipment.

4) Balers and Compactors, and Paper Processing Machines (HO 12): expands prohibition to include the operation and loading of all balers and compactors, including those not designed or used to process paper.

5) Band Saws, Circular Saws, and Guillotine Shears (HO 14): expands prohibition to include chain saws, reciprocating saws, wood chippers, and abrasive cutting discs. The prohibitions of this HO apply regardless of the material being processed by the prohibited equipment.

c. Increased penalties for violations:

1) GINA Penalties: The DOL also adopted regulations that implemented the child-labor civil penalty changes contained in GINA. These added penalties of up to $50,000 for each violation that results in death/serious bodily harm of any employee under 18. Penalties may be doubled up to $100,000 if the violation is repeated or willful.

2. **Agricultural**: D.O.L. now is in the process of amending these regulations – nothing officially proposed yet.

D. *Recent Case Law*

1. **General Stats**.

FLSA cases filed in federal courts rose almost 23% in the second quarter of 2010 and represent a leap of 25% from the first quarter of 2009. From January 1 - June 30, 2010, there was a total of 3,230 FLSA cases filed.

Why the increase? The FLSA and Ohio wage-hour laws are "fee-shifting" statutes, meaning employee legal fees are paid if the Employer loses. Therefore, there is an incentive for a plaintiff's attorney to sue because there is a decent chance of a payday. Second, these laws contain a lot of gray area and employers who are striving to comply in good faith will often unintentionally run afoul of the myriad rules and regulations. Lastly, but not of least importance, the ability for plaintiffs to gain conditional certification in a FLSA class action case is common because not much "proof" is needed. Then the burden shifts to the employer to de-certify the class (which is not often done) or, as often happens, settle the case to avoid more plaintiff attorney fees.

Note: It is now more important than ever to be proactive. Self-audits or internal audits of compensation practices, classification decisions and analyses and working time issues must be conducted by HR or labor counsel. If something is wrong, it should be fixed immediately to stop a running liability. With the stakes in these cases very high, with the burdens of proof (at least initially) for plaintiffs rather modest and the fee shifting component, it is better to be safe than sorry.

2. **U.S. Supreme Court Holds that ORAL Complaints Can Form Basis for Retaliation Claim.**

The Supreme Court has reviewed the Seventh Circuit's decision in Kasten v. Saint-Gobain Performance Plastics (7th Cir., 2009) wherein the Court of Appeals held that an oral complaint alleging a violation of the FLSA was not "protected conduct" under the FLSA's retaliation provision.

The Facts: Employer provided Kasten with a series of progressive disciplinary steps for not following proper procedures, ultimately ending in his termination of employment. Kasten sued under the FLSA claiming that he was actually fired in retaliation for verbal

complaints he made to his supervisors and a HR representative that the location of the time clock violated the FLSA.

The Statute: Section 215(a)(3) of the FLSA, "[i]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has ***filed any complaint*** or instituted or caused to be instituted any proceeding under or related to this chapter . . ." (emphasis added)

The Decision: The Supreme Court held (6-2) that the scope of the statutory term "filed any complaint" includes oral, as well as written, complaints. The Court found that the FLSA itself provided little guidance on the issue. Instead, they looked to the "intent" of the statute, the interpretations provided to it by the DOL and how other agencies, such as the EEOC, interpreted the term "filed." Since those agencies have held oral complaints were sufficient and the intent of the statute was to protect employees who complain about violations, the Court concluded that oral complaints constitute "filing a complaint." The Court refused to consider the Employer's second issue, which was that the term "complaint" involves only complaints to the Government Agency, not the employer because it was not raised in the employer's brief. In his dissent, however, justice Scalia opined that the "complaint" mentioned in the statute does refer only to those filed with the government – not the employer.

The Impact: Employers may see a sharp rise in retaliation lawsuits based upon alleged verbal comments only. The classic "he said/she said" situation will unfold with much less chance of being successful at summary judgment. The alleged verbal report seems to subject such cases to a triable issue of fact for a jury.

3. **The DOL Changes Course on "Donning and Doffing" But 6th Circuit Immediately Weighs In.**

Administrator's Interpretation No 2010-2: On June 16, 2010, the Obama administration changed the Bush administration's previous opinion letters concerning the meaning of "clothing" under Section 3(o) of the FLSA

a. Section 3(o) says that time spent "changing clothes or washing at the beginning or end of each workday" is excluded from compensatory time under the FLSA if the time is excluded pursuant to the "express terms or by custom or practice" under a collective bargaining agreement (CBA)

b. The DOL Interpretation reversed over 8 years of precedence by stating that the "clothing" exemption "does ***not*** extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job." (emphasis added) The Interpretation rejected the 2002 Opinion as being unreliable to the extent that it relied upon the dictionary definition of "clothes."

c. Further, the new Interpretation states that Section 3(o) clothes changing can also constitute a "principal activity" that may start the continuous workday. When so found, "subsequent activities, including walking and waiting, are compensable."

DOL History with this Issue:

a. 1997: Opinion letter found that the time spent putting on, taking off and cleaning protective equipment utilized in the meat packing industry did ***not*** constitute "clothes" under Section 3(o);

b. 2001: Reiterated the position taken in the 1997 letter;

c. 2002: Administrator opined that "clothes" under Section 3(o) ***did*** include protective equipment typically worn by meat packing employees (relying upon the definition of "clothes" found in the 1982 editions of two dictionaries);

d. 2007: Reiterated position of the 2002 letter.

The Sixth Circuit Weighs In. *See* Franklin v. Kellogg Company (6th Circuit, August 31, 2010)

a. The Court considered the new DOL Interpretation and surveyed the DOL's previous Opinion Letters on the issue. The Court was clearly annoyed at the way the Agency "flipped flopped" on this issue over the years. As a result, the Court provided absolutely no deference to the opinions.

b. *Holding One*: Protective gear ***is*** within the meaning of "clothes" as properly set forth in the 2002 Opinion. The new DOL Interpretation regarding the definition of "clothes" is "inconsistent with the language of the statute." The Court rejected the Administrator's position that the definition of "clothes" provided in the dictionary was unreliable. The Court pointed out that the Court itself has a long, rich history of referring to the dictionary for a word's normal and customary meaning.

c. *Holding Two*: Whether or not the time spent changing clothes is compensable does not impact the determination as to whether such can be a "principal activity" which starts the workday. Here, the Court said the changing of clothes started the workday so that every activity thereafter had to be paid (even walking to the time clock after changing)

d. The Court, therefore, agreed with part of the new interpretation and disagreed with the other part.

What Do We Take From This? In Ohio -

a. *Union-employees*: If practice or CBA states that time spent changing clothes does not constitute working time, then it is unpaid.

b. *ALL employees*: If changing clothes is found to be a principal activity, all time thereafter (even walking to the job or time clock) must be paid.

E. *Pending Bills Impacting Wage and Hour Law*

1. **Payroll Fraud Prevention Act** (S 770). Reintroduced April 8, 2011. Amends FLSA to require persons to keep records of non-employees who perform labor or services for remuneration and provides a special penalty for persons who misclassify employees as independent contractors.

   a. Imposes civil penalties under the FLSA for misclassification of employees (up to $5,000 for willful or repeat violations)

   b. Mandates that State unemployment insurance agencies conduct audits to identify employers who are misclassifying employees.

   c. Directs the DOL to conduct audits focusing on industries that that frequently misclassify employees.

   d. Allows the DOL and the IRS to share information on cases involving misclassification of employees.

2. **Paycheck Fairness Act** (S 797). Reintroduced on April 13, 2011. This was originally introduced in 2009 in both the house and senate but stalled. Was reintroduced in 2010 during the lame duck session at the insistence of the White House which is urging the Bill's passing. Now it has been introduced again. This Bill would amend the FLSA to increase penalties for violating the Equal Pay Act (EPA) as well as:

   a. Expand damages under the EPA to include potentially unlimited compensatory and punitive awards;

   b. Prevent employers from relying on the "factor other than sex" affirmative affirmative defense in wage discrimination cases. Under this bill, an employer would be required to show that <u>any</u> wage discrepancy is caused by a *bona fide* factor other than sex, such as education, training and experience, *and that* this factor is job-related and consistent with business necessity. An employee could rebut this claim by showing that an alternative employment practice exists that could achieve the same business purpose;

   c. Incorporate anti-retaliation provisions into the FLSA that would protect employees who have made a complaint, filed a charge, testified or otherwise assisted in an investigation or proceeding related to an unfair wage complaint. ***The provisions would also protect employees who have inquired about or discussed theirs or their coworkers' wages.***

3. **No Social Security for Illegal Immigrants Act of 2011** (HR 787). Introduced February 17, 2011. Amends the Social Security Act to exclude from creditable wages and self-employment income any wages earned by aliens performed in the United States while the alien was legally unauthorized to be employed.

4. **Davis-Bacon Repeal Act** (HR 745). Introduced February 16, 2011. Repeals the Davis-Bacon Act which requires locally prevailing wage rate to be applied to classes of laborers and mechanics working under federally-financed or assisted construction contracts.

5. **WAGES Act** (HR 631). Introduced February 10, 2011. Amends the FLSA to establish a base minimum wage for tipped employees of at least:

   a. $3.75/hr beginning 90 days after enactment of Act;

   b. $5.00/hr beginning one year after enactment;

   c. Three years after enactment, 70% of the wage in effect under the FLSA but no less than $5.50/hr.

6. **Living American Wage Act of 2011** (HR 283). Introduced January 12, 2011. Amends the FLSA to have DOL establish a formula increasing the minimum wage at least once every four years. Requires minimum wage to be at a rate 15% higher than federal poverty threshold for a family of two.

F. ***Changes and Proposed Administrative Rules at U.S. DOL***

1. **Recent Changes**

   a. New DOL fact statement available entitled, "Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues." It does not contain any "new" law, just helpful guidance for employers in tough economic times.

   b. Changing the form of providing guidance to Employers. DOL will no longer provide guidance in the form of opinion letters on specific factual scenarios under the FLSA. Instead, it will be issuing "Administrator Interpretations" of wage and hour laws/regulations useful to a broad range of employers.

   c. DOL's current emphasis: Audits involving Independent Contractor designation.

2. **Employer Compliance Plans Proposed**. In 2009, during a time when many employers were imposing layoffs, furloughs, and hiring freezes, the DOL began hiring more investigators—a *lot* of them! It initially hired 250 (representing a staff increase of more than one third) The number later climbed to 350 new investigators in 2010. In a downsizing economy, Employment lawyers initially did not understood what this was all about. Now we do:

a. The DOL recently announced its intent to require "mandatory wage and hour compliance plans." This will require employers to take affirmative steps to get their wage and hour systems into compliance *before* an audit or worker complaint. Employers must also document those steps and keep their workers regularly apprised along the way. The 350 investigators have been hired to help enforce this new plan—and they are only one of the many new ways the DOL has elected to step up its enforcement power.

3. **New Proposed Rule**. The DOL's Wage and Hour Division will soon publish a "Notice of Proposed Rulemaking," forecasted for June 2011, which will make three big changes to the FLSA recordkeeping regulations:

a. Communication to Employees. Employers will be required to communicate to their workers how their pay is to be calculated and why. If an employer has deemed a worker to be excluded from the FLSA's coverage (*e.g.,* volunteers, independent contractors), or exempt from because they met one of the white collar (*e.g.,* administrative, professional, executive, etc.) exemptions, this information will need shared with workers.

b. Openness and Transparency. The DOL has indicated that adopting a climate of openness and transparency will reduce the number of errors. One proposal to make this "openness" happen includes making some of the required communication to employees occur within paychecks in the form of "wage statements" that summarize how many hours an individual has worked and how their wages were computed including overtime, compensatory time, and why.

c. Maintenance. Employers will be required to maintain this information on file. This is so they may be quickly provided to DOL enforcement personnel if an investigator ever conducts an audit or inspection of the employer.

4. **Bridge to Justice Program**. Many employers may ask, "How will the DOL, even with the addition of 350 new investigators and the pending changes, possibly catch all problems?" The Department anticipated this reaction, and responded with a proposed new program called the "Bridge to Justice."

a. The DOL has called the Bridge to Justice an "unprecedented collaboration" between it and the American Bar Association (ABA). Workers who cannot obtain immediate assistance from a DOL investigator will be referred to wage and hour attorneys through the ABA's Lawyer Referral and Information Service.

b. In some instances, the DOL may investigate a worker's complaint, and, if it finds a violation, either prosecute the matter itself *or* supply the worker with a Bridge to Justice referral. The worker may receive a list of the violations and back wage calculations from the DOL investigation, which he or she may share

with their legal counsel or the employer. If this regulation is adopted as proposed, it is unclear whether the DOL's information will be admissible in FLSA litigation, or whether it will simply be a very useful guide to plaintiffs' attorneys in preparing their cases for litigation.

5. **What Will These Possible Rules Mean for Employers?** Going forward, Employers cannot merely assume that their workplaces are in compliance, or ignore this area of law because no one has complained about it. Instead, they will have an affirmative obligation to get into compliance, document their analyses, and share this information with their employees. Just failing to take these affirmative steps alone will be a violation of the law. Employers should recognize the importance of these developments and begin getting their wage and hour houses in order now.

The FMLA: a review of the recent changes and decisions

A. *Generally*

1. The Family and Medical Leave Act ("FMLA") requires covered employers to provide eligible employees with up to twelve (12) weeks of leave "per year" for certain family and medical situations, with restoration for the employee to the same or a similar position upon return to work.

    a. <u>Possible Methods of Calculating the Year</u>

        1.) Calendar year;

        2.) Any fixed twelve (12) month period (anniversary, fiscal year, etc.)

        3.) Twelve (12) month period measured forward from date initial leave commences

        4.) Rolling twelve (12) month period measured backward from the date the leave commences

2. **The 2009 National Defense Authorization Act ("NDAA")**

    a. Mandated that employees may also use up to twenty six (26) weeks of FMLA leave during a twelve month period in order to care for a "next of kin" who is a military service member suffering from a "serious illness" received in the line of duty.

        1.) <u>Next of Kin</u> = "nearest blood relative" other than a spouse, parent or child, with priority given to blood relative who have been given legal custody, followed by brothers, sisters, grandparents, aunts and uncles,

and first cousins. The service member also may designate the next of kin in advance

b. It also provides the FMLA's standard 12 weeks of leave during a twelve month period for a "qualifying exigency" related to an immediate family member's call to active duty in the military.

B. *Qualifying Reasons for Taking Leave*

1. The following are the reasons employees may utilize FMLA:

a. upon the birth of an employee's child and in order to care for the child;

b. upon the placement of a child with an employee for adoption or foster care;

c. when an employee is needed to care for a family member who has a serious health condition; or,

d. when an employee is unable to perform the functions of his position because of the employee's own serious health condition.

e. to care for a "next of kin" who is a military service member suffering from a "serious illness" received in the line of duty

f. for a "qualifying exigency" related to an immediate family member's call to active duty in the military.

2. **General Rule for Colds and Flu** – The Department of Labor has advised that a cold or flu could be considered a serious health condition for purposes of the FMLA if the situation meets the other criteria outlined for a serious health condition. However, the C.F.R. states that under normal conditions, flu and colds don't normally constitute a serious health condition. *See* Miller v. AT&T, 250 F. 3d 820 (4th Cir. 2001).

3. **General Rules for Son/Daughter:** The definition of "son or daughter" under the FMLA includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*." *See* 29 U.S.C. §2611(12).

a. Employees who have no biological or legal relationship with a child may nonetheless stand in *loco parentis* to the child and be entitled to FMLA leave. The DOL's 2010 Interpretation of "In Loco Parentis" states that "either day-to-day care or financial support may establish an

in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts."

b. "Child" means under 18 years old or 18 and over but incapable of self-care. Exception for the military amendments ("child" must be serving in military, so 18 or over)

4. **General Rules for a Qualifying Exigency:** In its final rule, the DOL stated that the following examples constitute a "qualifying exigency" under the FMLA's military leave provision:

a. due to a short notice deployment of 7 days or less;

b. to attend military events sponsored by the military and/or Red Cross;

c. to arrange for child care and/or to attend non-routine school functions of the child of a covered military family member;

d. to take care of financial and/or legal affairs and matters for a covered military family member;

e. up to five days to spend time with a covered military service member on rest and recoupment leave;

f. to attend non-health care provider counseling arising from active duty in the military;

g. to attend ceremonies incident to the return of a covered military family member for a period of 90 days following military family member's termination from active duty;

h. any other activity arising out of a covered military service member's call or service to active duty.

C. *Recent DOL Regulatory Changes*

1. **Perfect Attendance**: The DOL's Rules now permit employers to deny perfect attendance bonuses to employees who took FMLA if employees would be ineligible for the bonus if they used other employer leave.

2. **Light Duty**: Employers are now prohibited from counting an employee's time worked during a temporary light-duty assignment (typically pursuant to a workers compensation injury) against the employee's twelve-week FMLA allotment. The new regulations specify that time worked in a light-duty assignment does not count toward an employee's FMLA leave

3. **Settlement of Claims**: The new regulations clarify some confusion in the courts as well as among practitioners as to the validity of an employee's waiver of FMLA rights in a severance or settlement agreement. The DOL's new regulations adopt the majority view that employers and employees can enter into enforceable agreements that waive an employee's right to institute litigation regarding past FMLA claims without need of DOL approval. However, future FMLA claims that may arise after the date of the agreement may not be waived.

4. **Clarification of FMLA Certification Forms:** If you need clarification of a Certification, may contract employee's doctor directly now as long as comply with HIPAA Rules. However, the employees direct supervisor cannot be the person to contact the doctor. The new regulations also permit employers to ask health care providers to address the functions set forth in a list of essential job functions (Job descriptions are now very important!) (29 CFR 825.3112(b))

5. **Intermittent Notice**: The DOL also now requires employers to inform intermittent employees every 30 days that their leave is designated and protected under FMLA and to advise employees as to the amount of FMLA taken during the 30-day period.

D. ***Recent Case Law***

1. **Employer's Internal Call-In System Does Not Conflict with FMLA**. Allen v. Butler County Commissioners, 331 Fed. Appx. 389 (6th Cir. 2009). The issue was whether an employee on FMLA leave may be terminated for violating the more strict requirements of a concurrent sick leave policy. Within a two-year period, the employee received four disciplines which resulted in varying lengths of unpaid suspension. As a consequence, the employee and the employer entered into a last chance agreement. The parties agreed that the employee's failure to comply with the employer's requirements for the use of leave, or for any other disciplinary offenses, would result in the employee's instant termination.

   After signing the last chance agreement, the employee began to use flex time after being informed by his supervisor that flex time was prohibited. Before the employer even had a chance to send him a pre-disciplinary notice for his flex time violations, the employee called off work claiming he was ill and would be seeing a doctor. The employer's sick leave policy requires individuals on paid sick leave to perform certain requirements not necessary under the FMLA, including: 1) procure a doctor's note letting his employer know when his employer could expect the employee's return; 2) call the

employer daily with updates on his condition. Over a week after the employee began missing work due to his personal illness, the employee still had not provided a doctor's note. Further, on the employee's 9th day of leave, he failed to call in his absence in violation of the leave policy. The employer fired the employee for both improper use of flex time and for violating the requirement for daily call-in while on sick leave.

The employee filed suit, claiming that the employer's sick leave policy interfered with his right to FMLA leave. The Sixth Circuit held that "an employee can be required to comply with the reasonable requirements of an employer's sick leave policy while on FMLA leave." The Court determined that the sick leave procedure merely set forth the obligations of employees who are on "sick" leave, regardless of whether the leave is pursuant to FMLA. Further, because the employee violated the last chance agreement by failing to follow call-in procedure and improperly using flex time, the Court upheld his termination.

This decision confirms that employers may implement reasonable call-in procedures to police abuse of sick leave, so long as those call-in procedures do not interfere with employee rights under the FMLA.

Note: The DOL's New Rules clarify that employees ***must*** comply with an employer's usual paid leave call-in procedure before taking unscheduled, intermittent leave under the FMLA except in cases of emergency. The rule makes it clear that an employee covered under FMLA is not entitled to any paid benefits that they would not normally be entitled under the employer's paid leave policy.

2. **Employer Has Duty to Inquire of Employee's Need for FMLA**. In Stimpson v. UPS, 351 F. App'x 42, 47 (6th Cir. 2009), employee was in a car accident and phoned his supervisor within 24 hours of the incident and advised him of this fact. Stimpson also claimed to have advised a different supervisor that he would not report to work until he healed. Stimpson was not offered FMLA for his injury. The Court concluded that "a reasonable employer would inquire further upon learning that a car had struck an employee to determine if FMLA leave was necessary."

Note: Remember, the employee does not have to use the magic words "I am requesting FMLA." It is the employer's obligation to designate leave as FMLA.

3. **"Incomplete" Medical Certification Not the Same as a "Negative" Certification.** In Verkade v. U.S. Postal Service, 2010 WL 2130616 (6th Circuit, May 27, 2010), the Court rejected the trial court's decision that the USPS could rely on prior incomplete medical certifications as negative certifications in order to deny Verkade's request for FMLA leave. The Court found that an incomplete medical certification is not the same thing as a negative certification.

   The difference is important because an employer may rely on a negative certification to deny an employee's request for FMLA leave. A "negative certification" is one that is complete, but that "facially demonstrates that the absence was not FMLA-qualifying." *Stoops v. One Call Commc'ns, Inc.*, 141 F.3d 309, 311 (6th Cir. 2006). For example, a certification that indicated that the employee would not need to be absent from work is a "negative certification." The certifications in *Verkade* were not invalid, however. They were, however, incomplete and lacked sufficient information to make a determination whether the condition was FMLA-qualifying.

   Note: The decision teaches that employers may not rely on incomplete certifications as "negative certifications" to deny FMLA leave.

4. **Employers Are Justified in Denying Leave Based Upon Altered FMLA Certification Form**. In Smith v. The Hope School, 2009 U.s. App. LEXIS 6985 (7th Cir. March 30, 2009), Smith suffered injuries as a result of two physical altercations with DD students. Thereafter, she became apprehensive about working with students. Her primary physician, Dr. Vasconcelles, provided a note restricting her to light duty and assignments that did not require her to be around DD residents. The School transferred Smith into a different department that did not work directly with students. As a result of a student approaching her in her new position, Smith left work citing fears for her safety. Smith was subsequent provided medical certification forms in the event she wanted FMLA leave to cover her absence. She provided the forms to Dr. Vasconcelles.

   Smith picked up the FMLA paperwork from Vasconcelles' office. The paperwork supported her request for FMLA leave. After securing the FMLA paperwork, Smith altered the medical certification in several ways. She added to the description of her condition "plus previous depression." Neither Vasconcelles nor any other doctor had diagnosed or treated Smith for depression. Smith also backdated the FMLA form several days. She also filled out a separate "Attending Physician's Statement" in its entirety, listing diagnoses of muscle tension, chronic headaches, and depression."

   Smith provided the form to Hope School. The School subsequently confirmed its suspicion that the form had been materially altered. The School denied Smith's request for FMLA leave and terminated her for incurring unexcused

absences in violation of School policy. She was not fired for altering the FMLA form.

Smith sued alleging that her termination violated the FMLA. The district court awarded summary judgment to the School finding that Smith's alteration of the certification form invalidated her application for leave under the FMLA. As such, the School did not interfere with her FMLA rights or retaliate against her for asserting them. Smith appealed the decision. The Seventh Circuit affirmed the award of summary judgment to the School. The court rejected Smith's argument that the School was bound to read the false conditions out of the certification before determining whether the true medical condition supported her request for FMLA leave. The court opined that Smith's proposed rule would "have the effect of encouraging applicants to dress up an application for leave by adding non-existent conditions." The court held that "where an employee adds to a medical care provider's certification form a condition that she has not been diagnosed with, without the knowledge or approval of her physician, an employer can deny her request for FMLA leave."

The court also rejected Smith's argument that she did not "intend" to obtain leave by fraud but was merely trying to be thorough. According to the court, "[w]here multiple forms purporting to contain a physician's diagnosis were in fact altered or filed out completely by a patient who knew that the physician has made no such diagnosis, we concluded that Smith was presenting false certification paperwork and thus was not entitled to FMLA leave."

Note: In the usual case, the employer fires the employee for dishonesty for submitting a false medical certification. Here, the School terminated Smith for taking leave to which she was not entitled, not falsification. The court found that by altering the FMLA medical certification Smith failed to provide an adequate medical certification in support of her request for FMLA leave. She did not establish that she had a serious health condition. As a result, her leave was both unprotected by the FMLA and unexcused.

The lesson for employee's: DO NOT EVER add or modify anything to the health care provider's information on the FMLA medical certification. If you do not think the information is complete bring it to the attention of the health care provider. Let them modify the form. If they refuse to modify the form, either live with it or get another health care provider.

5. **Good Evaluations Prior to FMLA and RIF = Evidence of FMLA Retaliation.** In Cutcher v. Kmart Corporation, 6th Circuit, No. 09-1145, February 1, 2010, the 6th Circuit held that an employee's appraisal score, given during a Reduction in Force (RIF) review, that was significantly lower than an annual performance review score given only 20 days earlier might support a jury's finding that the true reason for the employee's layoff was her requested FMLA leave..

Cutcher was hired by Kmart as a part-time employee in 1984 and eventually moved to a "full-time hourly associate" (FTHA) position. Between 2001 and 2003, Cutcher was rated as "exceptional" by her supervisor. In 2004, Cutcher's rating dropped to "exceeds expectations" which was the second highest possible rating, with a total numerical score of 20 out of 22. On November 15, 2005, Cutcher again was rated as "exceeds expectation" with a rating of 18 out of 22.

In early November 2005, Cutcher submitted FMLA forms to HR, informing the company that she would be off work for six weeks after undergoing surgery. At the same time, Cutcher completed forms for short-term disability leave, and commenced paid leave effective December 5, 2005.

On December 21, 2005, the company announced a nation-wide RIF, wherein Cutcher's location laid off six FTHAs. The RIF guidelines required each store to complete an Associate Performance Recap form for each FTHA. That form included the same categories as did the annual performance evaluation review, and considered the employee's most recent appraisal rating in calculating the employee's score for purposes of the RIF. The form's instructions also required an explanation if there was a significant change in the RIF score as compared to the employee's annual appraisal.

Although Cutcher's pre-RIF annual evaluation was enough to avoid layoff, her performance was re-evaluated, and that score placed her close to the bottom of the rankings. On her RIF evaluation, in a "comment" section, Cutcher was noted as "Poor customer and associate relations. LOA." The store's manager indicated that "LOA" simply indicated that Cutcher was on a Leave of Absence at the time of the RIF evaluation, and that her layoff would be delayed until her return. Cutcher, in fact, was terminated upon her return from leave on January 23, 2006, and her position was given to another FTHA who received a higher ranking.

Cutcher filed suit in federal court, claiming interference with, and termination in retaliation of, her FMLA leave. Although the district court granted Kmart's motion for summary judgment, the Sixth Circuit reversed that decision, holding that the fact that there had been no prior complaints against Cutcher, and that an "LOA" note had been written next to her name created issues of material fact for the jury as to the reason for her RIF rating score.

Note - The real issue was the lack of documentation for the company's reasons for the RIF ranking. While the company argued that Cutcher's performance had been declining, there was absolutely no documentation indicating a concern about that performance. While the individual who conducted Cutcher's annual review in early November testified that she "often scored associates higher on annual appraisals than they deserved" because she "did not like confrontation," she also admitted that she was not aware of any specific problems with Cutcher's performance between the annual evaluation and the RIF ranking.

Employers need to recognize that, when it comes to performance evaluations, honesty is the best policy. Had the supervisor been more direct and documented a declining performance, such documentation would have eliminated the basis of Cutcher's FMLA claim. Supervisor training on this issue is a must.

CONCLUSION

The FLSA and FMLA are truly two of the toughest employment laws that management has to navigate. Continual training, legislative and administrative monitoring, and due diligence are critical to ensuring that these "four letter laws" do not make you say "four letter words." Having a plan in place to ensure continual compliance with both laws is a must. The following are some suggested action plans:

***Action Plans*:**

1. Conduct an internal FLSA Audit ***now***, specifically focusing on Independent Contractor compliance, exempt employee status, and recent Child Labor changes.
2. Add a Lactation Break policy to your HR policy manual.
3. Ensure you are complying and will be in compliance by all effective dates with the Healthcare Reform changes.
4. Take advantage of the HIRE Act tax advantages.
5. Be aware of the current status of "donning and doffing" and move time clocks closer to locker rooms/changing areas if possible so as to be incompliance if clothes changing may be considered a principal activity starting the work day.
6. Train Supervisors that an oral complaint regarding the FLSA should be investigated and "moved up the chain of command" quickly.
7. Conduct an internal FMLA/HR Audit ***now***, specifically focusing on ensuring your poster, notices and FMLA policy are in compliance with the recent changes.
8. Keep pulse of the status of the proposed legislative and regulatory changes.