

# Employment Law Seminars

2008-2009

## Employee Leaves: New Rights, Recurring Challenges

### **Lynnwood**

Wednesday, September 17, 2008  
Embassy Suites Hotel  
20610 44<sup>th</sup> Avenue West  
Lynnwood, WA 98036

### **Tacoma**

Thursday, September 18, 2008  
La Quinta Inn & Suites Tacoma  
1425 East 27<sup>th</sup> Street  
Tacoma, WA 98421

### **Seattle**

Wednesday, September 24, 2008  
The Rainier Club  
820 Fourth Avenue  
Seattle, WA 98104

### **Bellevue**

Thursday, September 25, 2008  
The Bellevue Club  
11200 SE 6<sup>th</sup> Street  
Bellevue, WA 98004

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## Our Presenters

**Nancy Williams** has been practicing in the area of labor and employment law for more than 25 years. She counsels employers and represents them in litigation on equal employment opportunity, discipline, and discharge, and a wide variety of other employment issues. Nancy is an active member in the American Bar Association and Washington Bar Association, especially in the labor and litigation areas. She is also a frequent speaker at events highlighting what employers should know when dealing with employment law. Nancy is a trustee of the King County Bar Association and a member and past chair of its Labor and Employment Law Section. Nancy is also the Office Managing Partner for Perkins Coie's Seattle office and firmwide Personnel Partner.

**Marti Downey** helps defend employers in litigation matters arising from federal laws such as the National Labor Relations Act, the Civil Rights Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, and the Americans with Disabilities Act. She also represents clients in alternative dispute resolution proceedings such as arbitration and mediation, involving issues such as labor-management relations, hiring, contracts, employee termination, and handbooks.

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# EMPLOYEE LEAVES: NEW RIGHTS, RECURRING CHALLENGES

By Nancy Williams and Marti Downey

## I. INTRODUCTION

In this election season, we hear many proposals for expanding employee leave rights. Obviously, there are many reasons why workers, particularly those with children have responsibilities that may need attention during working hours. Thus, legislators have proposed permitting leaves for family commitments as wide-ranging as attending a parent-teacher conference to caring for a wounded family member back from the battle zone. And, as we'll relate in this session, new laws have recently taken effect at both the state and federal levels, for which there is broad support.

We all understand the need and desire to be supportive of workers and their families. At the same time, accommodating multiple leaves can be a challenge for employers. Our session with you will describe your new obligations under both federal and Washington law. The federal Family and Medical Leave Act ("FMLA") has been around for years, but we find that our clients still have many questions about its application. So we'll spend the second part of the session on addressing questions that frequently arise, including some that you have asked.

Welcome to our new round of Breakfast Briefings and to our discussion of the wonderful world of employee leave issues!

## II. NEW RIGHTS

### A. FMLA AMENDMENTS: LEAVE FOR MILITARY FAMILIES<sup>1</sup>

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act ("NDAA") for FY 2008, Pub. L. 110-181, creating the first expansion of the FMLA's coverage in 15 years. Section 585(a) of the newly enacted NDAA amended the FMLA to grant leave to relatives of military personnel. The amendment creates two new categories of FMLA leave: (1) "active duty family leave" and (2) "injured service member leave," and provides two new leave entitlements to eligible specified family members:

- (1) Up to 12 weeks of leave for qualifying exigencies arising out of a covered family member's active military duty, and
- (2) Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from a serious illness or injury. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave.

The new law contains numerous provisions requiring the DOL to promulgate regulations defining statutory terms and establishing standards regarding numerous aspects of the new leave requirements, including the methods of certification employers can use to verify that an

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<sup>1</sup> For your reference, a copy of the Department of Labor's (the "DOL") FMLA Fact Sheet is attached hereto as Appendix A. The Fact Sheet may also be accessed via the DOL's website at: <http://www.dol.gov/esa/whd/regs/compliance/whdfs28.pdf>.

employee's family member is on active duty. In response, the DOL published a Notice of Proposed Rulemaking ("NPRM") identifying the issues to be resolved and requesting comments to aid it in promulgating final regulations.

## **1. "Active Duty" Family Leave**

The first new category of FMLA leave applies to employees who have a family member who has been called to or is on active duty in the armed forces. These employees may take up to 12 weeks of leave when they experience a "qualifying exigency" arising out of the fact that a spouse, parent or child is on or has been called to active duty. Employers can require certification that the employee's family member is on active duty.

The legislation does not define "qualifying exigency," but rather directs the DOL to promulgate regulations to define the term. In its February 11, 2008 NPRM the DOL expressed an initial view that "not every exigency necessarily will entitle a military family member to leave." 73 Fed. Reg. at 7928.<sup>2</sup> The DOL's initial view is that there must be a nexus between the employee's need for leave and the military family member's active duty status. The NPRM also indicates that it is the DOL's initial view that qualifying exigencies should be limited to nonmedical related exigencies. Qualifying exigencies will likely include events such as:

- (1) Making arrangements for child care;
- (2) Making financial and legal arrangements to address the service member's absence;
- (3) Attending counseling relating to the activity duty;
- (4) Attending ceremonies where the participation of the family member is requested by the military;
- (5) Attending to farewell or arrival arrangements for the service member; and
- (6) Attending to affairs caused by the death or missing status of the service member.

The provision of NDAA Section 585(a) of the NDAA that creates this category of FMLA leave will not become effective until the DOL issues final regulations defining the term "any qualifying exigency." The DOL, nevertheless, encourages employers to provide this type of leave to qualifying employees.

## **2. "Injured Service Member" Family Leave**

The second category of new military leave applies to employees with a family member who has been injured in the line of duty. To be entitled to this leave, an employee must first work at least 1,250 hours within the 12 months prior to taking leave. Employees are entitled to injured service member leave if they are the "spouse, son, daughter, parent, or next of kin" of a "covered service member" who has a "serious injury or illness." "Next of kin" is defined as the "nearest blood relative" of the service member. Qualifying employees are entitled to a total of

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<sup>2</sup> The DOL's February 11, 2008 NPRM on the FMLA may be found at Vol. 73, No. 28, pages 7876-8001 of the Federal Register, <http://www.dol.gov/esa/whd/fmla/fedregnprm.pdf>.

26 weeks of leave (including 12 weeks of traditional FMLA leave) in each 12-month period. To be a "covered service member," the relative must:

- (1) Be a member of the armed forces, National Guard, or reserves;
- (2) Suffer from an illness or injury incurred on active duty that may render him or her medically unfit to perform the duties of his office, grade, rank or rating (i.e., a "serious injury or illness"); and
- (3) Must be undergoing medical treatment, recuperation or therapy, be in outpatient status, or be on the temporary disability retired list as a result of the serious injury or illness.

The provision of NDAA Section 585(a) that creates this category of FMLA leave became effective on January 28, 2008.

## **B. PROPOSED FMLA REGULATIONS**

On February 11, 2008, just two weeks after President Bush signed into law the amendments discussed above, the DOL announced a comprehensive set of proposed changes to the regulations implementing the FMLA. This is the first comprehensive update to the FMLA rules since they were issued in 1995 following passage of the FMLA in 1993. The DOL's proposal would replace all the existing FMLA rules with a new set of rules with new titles, revised wording and somewhat different numbering. Many of the proposed changes involve fairly subtle refinements to or clarifications of the existing FMLA rules. However, several of the proposed changes could have significant operational impact on employers and have already attracted comments, both positive and negative, from members of Congress. The following are some of the more notable changes proposed by the DOL.

- ❖ Currently, one scenario that qualifies as a "serious health condition" under the FMLA is a period of incapacity for more than three days, combined with receiving treatment from a health care provider on two or more occasions. Courts have had differing interpretations of when the two or more treatments must occur. The proposed rules would require that the two or more treatments occur within 30 days of the start of the period of incapacity, unless extenuating circumstances exist.
- ❖ Currently, another scenario that qualifies as a "serious health condition" is a chronic health condition that requires "periodic visits" to a health care provider. The proposed rules would require that the employee visit a health care provider at least two times per year in connection with the chronic condition.
- ❖ The existing rules allow an employee taking FMLA leave for an unforeseeable reason to give notice to the employer up to two days after the leave starts. In the case of leave used on an intermittent basis for partial-day or single-day absences, this means that the employee can take such leave on an unscheduled basis without notifying the employer that the absence is an FMLA leave until after he or she returns to work. Under the proposed rules, employers could require employees taking unscheduled intermittent leave to follow generally applicable reporting requirements for absences, such as requiring notice of the need for leave at least prior to the start of the work shift in all but the most extraordinary circumstances.

- ❖ The existing rules provide that only a health care provider working for the employer (not a member of management or human resources) may contact the employee's health care provider to authenticate or obtain clarification of a medical certification. The proposed rules would allow any representative of the employer to make such contact and would require the employee to give permission to his or her health care provider to talk directly to the employer.
- ❖ The existing rules bar an employer from requiring a fitness-for-duty exam for employees taking intermittent leave. The proposed rules would allow an employer to require a fitness-for-duty exam for an employee taking intermittent leave where reasonable safety concerns exist regarding the employee's ability to perform his or her job duties based on the employee's serious health condition.

It is important to keep in mind that the revisions proposed by the DOL are just that, mere proposals, and that the 1995 rules remain in effect for now. The comment period closed on April 11, 2008, and the final rules that will emerge at the end of the year may be significantly different from this proposal. However, employers may want to consider how these proposed rules, along with the new FMLA leaves created for employees with family members in the military, will impact their employee leave practices and begin planning for changes.

## **C. NEW LEAVES UNDER WASHINGTON LAW<sup>3</sup>**

### **1. Family Military Leave**

Washington's new Family Military Leave is similar to the leaves for family of members of the armed forces recently added to the FMLA, discussed above. Under the new Washington law, an employee whose spouse is being called into active duty for the armed forces or who will be, or is, deployed during a period of military conflict, is entitled to up to 15 days of unpaid leave of absence from work. The employee may take the 15 days of leave before the deployment of the military spouse or when the military spouse is on a leave from the deployment. For each new deployment of the military spouse, the employee may take another Family Military Leave of up to 15 days.

The employee must give notice to his or her employer of the intent to take the Family Military Leave within five business days of receiving official notice of the call or order to active duty or deployment, or within five business days of official notice of the military spouse's upcoming leave from the deployment. To be eligible, the employee must work an average of at least 20 hours per week for the employer. The Family Military Leave is only available during a period when Congress has declared war, the President has declared war by executive order, or when military reserves have been called to active duty. The Family Military Leave law went into effect on June 11, 2008.

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<sup>3</sup> The Washington State Department of Labor and Industries ("L&I") has provided a number of resources to aid employers in complying with their obligations under Washington family leave laws. Copies of L&I's "Washington State Family Leave Q&A" and Family Leave Laws Table are attached hereto as Appendices B and C, respectively. Additional materials may be accessed via L&I's website at: <http://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/default.asp>.



Of note to public employers, this same law also extended the length of paid leave available to public employees who serve in the Washington National Guard or the armed forces reserves. These public employees are now entitled to 21 days (increased from 15 days) of paid leave each year, which must be in addition to any vacation or sick leave available to the employee, for military training or active duty.

## **2. Domestic Violence/Sexual Assault Leave**

The second new type of leave is Domestic Violence/Sexual Assault Leave. The law creating this leave was signed by the governor on April 1, 2008, and takes effect immediately. This unpaid leave is available to employees who are victims of domestic violence, sexual assault or stalking. It is also available to employees with a family member (child, spouse, parent, parent-in-law, grandparent or person with whom the employee has a dating relationship) who is a victim of domestic violence, sexual assault or stalking. The leave may be taken in blocks or intermittently, and the amount of leave that an employee may take is restricted to a "reasonable" amount, but is not specifically limited as to time or length under the law.

Domestic Violence/Sexual Assault Leave may be taken for the following purposes:

- ❖ To seek law enforcement or legal assistance or to prepare for or participate in any legal proceeding related to domestic violence, sexual assault or stalking;
- ❖ To seek health care treatment for physical or mental injuries from domestic violence, sexual assault or stalking, or to attend to such health care treatment for a family member;
- ❖ To obtain (or assist a family member in obtaining) services from a domestic violence shelter, rape crisis center or other social services;
- ❖ To obtain (or assist a family member in obtaining) mental health counseling related to domestic violence, sexual assault or stalking; or
- ❖ To participate in safety planning, to temporarily or permanently relocate, or to take other actions to increase the safety of the employee or family member relating to domestic violence, sexual assault or stalking.

Employees must give notice to their employers of the need for this leave no later than the end of the first day the employee takes the leave. Employers may require verification to support the need for the leave, which can take the form of police reports, court documents or the employee's own written statement of the need for the leave.

For both types of new leaves, the L&I is granted enforcement authority. Also, employees have the right to directly sue employers in court for violations of both new leave laws.

## **III. RECURRING CHALLENGES**

For more than 15 years, we have helped employers navigate the nuances of employee leave laws. Drawing on that experience, we would like to provide you with practical guidance on a few of the trickier leave questions that continue to arise as managers and human resource professionals work to ensure compliance with state and federal obligations. To kick off our

discussion, we've listed three common questions. We'll also be commenting on questions that you submitted in response to our recent survey.

1. How does Washington's pregnancy disability law interrelate with the FMLA?
2. What happens if an employee has not been employed for a full 12 months when a requested FMLA leave is to commence, but will pass the 12-month point during the requested period of leave?
3. If an employee has taken a full 12 weeks of FMLA leave and is unable to return to work, may we terminate his or her employment?

**APPENDIX A: U.S. DEPARTMENT OF LABOR FACT SHEET #28: THE FAMILY  
AND MEDICAL LEAVE ACT OF 1993**

**APPENDIX B. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES:  
WASHINGTON STATE FAMILY LEAVE ACT QUESTIONS & ANSWERS**

**APPENDIX C. WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES:  
PROTECTED FAMILY LEAVE LAWS TABLE**