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**EMPLOYMENT: NEW REGULATIONS ON THE FAMILY AND MEDICAL LEAVE ACT AIMED AT ADDRESSING MANY PROBLEMATIC ISSUES**

By Lynn P. Schonberg

The Family and Medical Leave Act (FMLA) applies to businesses that employ 50 or more employees. It guarantees 12 work weeks of unpaid leave for eligible employees who suffer from serious health conditions, whose immediate family members suffer from serious health conditions, or for pregnancy-related conditions or adoptions. Under the FMLA, employees are eligible for such leaves once they have been employed for at least 12 months and have worked at least 1,250 hours in the 12 months just prior to the leave.

In our recent Client Alert, we notified you that the FMLA was amended on January 28 to provide for two new types of leave to address the needs of employees who have family members serving in the Armed Forces. A full account of this new law and the changes can be found on our website ([www.rbslaw.com](http://www.rbslaw.com)) under "Latest News" dated February 20, 2008.

As a result of the new military leave law, the Department of Labor (DOL) issued a Notice of Proposed Rulemaking on February 11 concerning the new leave law, as well as many other issues that have arisen under the FMLA in the past. Comments must be submitted by April 11 and the new rules are expected some time thereafter.

The DOL has identified the following main regulatory changes:

**Penalties Removed For Employer's Failure to Follow Notice Obligations.**

Under the current regulations, employers who did not comply with their notice obligations, such as informing an employee that she is eligible for FMLA within three business days, were unable to count the time the employee was on leave as FMLA leave, thereby resulting in an employee being given more leave than

that permitted under the FMLA. Due to the number of courts that have invalidated these penalty provisions, the new regulations have eliminated them and clarified that when an employee suffers individualized harm due to the employer's failure to adhere to the notice obligations, then and only then may an employer be liable.

**Light Duty.** The current regulations and a number of courts have provided that if an employee chooses to return to work in a light duty capacity instead of remaining on FMLA, the time he works in that light duty capacity counts as FMLA leave, even though he is continuing to work. The proposed rule will actually clarify that time spent on light duty work *does not* count against FMLA leave entitlement.

**Perfect Attendance Rewards.** Under the current regulations, employers who provide rewards for perfect attendance are not permitted to take FMLA leave absences into account in determining whether an employee is eligible for such a reward. Thus, many employers have eliminated these types of rewards because they were required to reward those who did not have perfect attendance. The new rules now allow an employer to disqualify an employee from a reward predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence, so long as other non-FMLA absences are similarly treated.

**Employee Notice.** The current regulations permit employees to provide notice of their absence up to two business days after their absence, even if they could have notified the employer in a more timely nature and even where the failure to notify violates their employer call-in procedures. The new rules now state that an employer may delay FMLA leave for up to the amount of time the employee unreasonably

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# EMPLOYMENT: UNDERSTANDING THE OHIO HEALTHY FAMILIES ACT AND STATE-MANDATED PAID SICK LEAVE

By Ryan T. Neumeyer

The Ohio Healthy Families Act is legislation which seeks to guarantee full-time Ohio employees at least seven days of paid sick leave and a pro-rata share of sick days. The Act was initiated through a ballot initiative process. The United Auto Workers (UAW), who are supporters of the Act, circulated a summary of the Act to voters for signatures.

In December 2007, the UAW submitted 270,000 signatures to the Ohio Secretary of State, who has yet to certify the signatures. If the Secretary of State certifies the signatures, the Act will go to the General Assembly, which has 120 days to vote on the Act. If a majority of the General Assembly votes to pass the Act, it will become law absent a veto by the Governor. However, a veto by the Governor is very unlikely given the supporters of the Act. If the General Assembly does not address the Act, then it is given back to its supporters to obtain 120,683 different valid signatures to get it on the November 2008 ballot.

The Act as currently written applies to Ohio employers with 25 or more employees. Under the Act, employees who work 30 or more hours per week would be entitled to seven sick days per year. Employees who work under 30 hours a week or 1,560 hours per year, would be entitled to a pro-rata amount of paid sick leave.

The Act will allow employees to carry-over up to seven sick days per year, with no limit as to the total bank of sick days. Unfortunately for

employers, this will permit employees to take longer leaves without having the financial incentive to return to work as early as medically possible.

Employees will be able to save their sick leave orally or in writing and must provide the reasons for the absences and the expected duration of leave. Employees with foreseeable leave must provide seven days notice. If the leave is not foreseeable, then notice would only need to be given when reasonably practicable. This would mean that employees could technically notify their employer on the actual day that they need to begin leave.

The Act allows employees not only to take paid sick leave for their own ailments, but also to take care of sick family members. Sick leave includes time off for caring for a child, parents, in-laws or a spouse. Sick leave under the Act broadly includes any absence resulting from a physical or mental illness, injury, or medical condition, and an absence relating to obtaining a medical diagnosis or preventative medical care.

Also, and most importantly, under the Act it would be illegal to discriminate against employees for using paid sick leave or complaining about unlawful practice. Thus, employers could not count paid sick leave as an occurrence under the no-fault attendance policy and would have to alter such existing policies to be compliant with the Act. In

addition, employers would not be able to negatively evaluate, discipline, or refrain from promoting an employee due to absenteeism associated with paid sick leave.

Finally, employers cannot reduce existing vacation time or paid time off after the Act is enacted in order to comply with the law and provide seven sick days. However, employers could change such policies prior to the Act's enactment so that when the additional seven days are mandated by law, it would conform to existing leave policies. Therefore, employers with paid time off policies should seriously consider revising such policies before the Act is passed by distinguishing sick days from personal and vacation days.

***Consequently, in addition to the obvious effect of having to pay an employee who is not working, the Act has other considerable negative effects which employers must be aware of and prepare for in the event that the Act becomes law.***

***Please do not hesitate to contact Ryan Neumeyer or Lynn Schonberg for additional information regarding the foreseeable effects of The Ohio Healthy Families Act. We will, of course, keep our clients updated as to any new information regarding the Act.*** ■

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failed to provide timely notice and to take disciplinary action for the employee's violation of internal call-in procedures so long as the discipline is the same for any other violation.

**Employer Notice.** The proposed rules will increase the employer's notification duty from three business days to five business days. In addition, employers are provided with an easier procedure to work with employees to cure incomplete or insufficient medical certifications. The new rules will permit an employer to return the incomplete or insufficient certification to the employee, specify in writing what exactly is insufficient or incomplete, and permit the employee seven days to return a completed certification.

**New Medical Certification Form and Process.** The proposed rules will revise

the WH-380 form, commonly known as the Medical Certification form. Also, for the first time, the proposed rules permit employers to directly contact the health care provider for purposes of clarification, so long as the HIPAA privacy laws are followed.

**Fitness-for-Duty Certifications.** Two changes are proposed regarding fitness-for-duty certifications. First, an employer has been given authority to require that the certification address the employee's ability to perform the essential functions of the job. Second, where reasonable job safety concerns exist, an employer can now require a fitness-for-duty certification from an employee returning from an intermittent leave.

Along with new rules, new posters and other forms have been revised. Upon the finalization of the proposed rules, all employers subject to

the FMLA will need to order new posters that will reflect the new military leave provisions and the other changes. There are also proposed new forms for employers to use in meeting their new notice requirements, such as a new Eligibility Notice form and a Designation Notice form.

***At this point, employers need not make any changes based on these proposed rules, except for the new military leave provisions (see [www.rbslaw.com](http://www.rbslaw.com), "Latest News," 2/20/2008). We will issue a Legal Alert at the time the new rules are finalized and conduct Breakfast Briefings at that time as well. In the meantime, please contact Lynn Schonberg with any and all questions or concerns regarding this matter.*** ■

# WORKERS' COMPENSATION: UNDERSTANDING THE IMPLICATIONS OF AN EMPLOYEE'S POSITIVE POST-ACCIDENT DRUG OR ALCOHOL SCREEN

By Tricia L. Hurst and Anthony A. Baucoco

It is standard operating procedure for many companies to require a drug and alcohol screen immediately after an employee is injured on the job. If your company does not mandate post-accident drug and alcohol screens, it is definitely time to start! It is simply essential in this day and age to have workplace policies and procedures in place to ensure a drug free and safe workplace. Furthermore, as noted below, a positive drug or alcohol screen may be the difference between an allowed claim and a disallowed claim.

Consider this scenario: An employee reports a work injury in accordance with company policy and, in further accordance with company policy, submits to a mandatory drug and alcohol screen. A workers' compensation claim is then filed and within a few days you receive the employee's drug and alcohol test results. You may or may not be surprised to see that this particular employee tested positive. Is a positive test alone enough to deny a workers' compensation claim? The answer, unfortunately, is no. All is not lost, however.

An employer must overcome four statutory hurdles to create a "rebuttable presumption" that the employee's intoxication was the cause of his industrial injury. If the employer can get past these hurdles, the employee then essentially has the burden to prove that his intoxication was not the cause of the injury.

First, before a workplace injury even occurs, the employer must be in compliance with the statutory requirement of written notice informing employees that the failure of or refusal to submit to a drug test may affect their eligibility for compensation for injuries. This notice must be posted in the same location as the BWC certificate of premium payment or certificate of self insurance. It must also be at least the same size as these certificates.

Second, a positive qualifying chemical test must obviously be obtained. The test must be the correct type and exceed the positive test levels established by statute. Furthermore, a test for blood alcohol level must be administered within eight hours of the injury. A drug test must be administered no later than

thirty-two hours after an injury.

Third, the employer needs to demonstrate that "reasonable cause" was present to require that the injured employee undergo a post-accident drug and alcohol screen. This is the most difficult hurdle, and employers often cannot overcome the same. The focus is always on the employer's suspicion that the employee was under the influence of alcohol or a controlled substance at the time of his injury. Documentation and testimony would be necessary to prove the suspicion at a hearing before the Industrial Commission of Ohio. Reasonable suspicion can be the observed use, possession or distribution of alcohol or a controlled substance or reported use of such from a reliable source. It can also result from a noticeable pattern of abnormal conduct, erratic behavior or deteriorating work performance; this can include excessive tardiness or recurrent accidents that appear to be related to drug or alcohol use and do not appear to be caused by anything else. In addition, it can include an employee's repeated or flagrant violations of safety or work rules, or if the employee is the focus of a criminal investigation of a controlled substance.

What if "reasonable cause" was not present or cannot be adequately proven? The above-referenced standard can be bypassed if the post-accident drug or alcohol screen was at the request of a police officer or a licensed physician that is not the employer's physician.

Lastly, if the employer is able to meet all of the statutory requirements delineated above, there is one more significant hurdle to overcome. By successfully creating a "rebuttable presumption," the burden will shift to the injured employee to prove that his intoxication was not the cause of the injury. At this point, the employer must also be able to prove that the injury would not have occurred had the employee not been under the influence of drugs or alcohol. The only way to show this is through an expert medical opinion. A physician needs to review the test results and the accident description and offer an opinion as

to whether the employee's intoxication caused the accident. If the Industrial Commission sides with the reviewing physician, the employee's claim will likely be disallowed.

As you can see, a positive drug or alcohol screen, in and of itself, is just not enough to get a claim disallowed. The hurdles discussed above are daunting and many times cannot be overcome by an employer. It is often very difficult to prove reasonable suspicion prior to an injury. Many times, a good worker with no prior issues tests positive and the positive drug or alcohol test is an absolute surprise. What can be done about the situations where an employer is unable to overcome these hurdles and create a "rebuttable presumption?"

Under Ohio law, an injury is clearly not compensable if it is directly caused by an employee's intoxication. Furthermore, employers may still require and conduct post-accident drug or alcohol screens *without* any prior suspicion of an employee's drug or alcohol use. Therefore, a positive screen paired with an expert medical opinion opining that the employee's intoxication caused the accident may be enough to disallow a claim, thereby bypassing some of the hurdles described above. This difficult burden is obviously on the employer and can be rebutted by the employee. However, it is important to realize that all is not lost if a positive drug or alcohol screen takes you by complete surprise.

***It is important to have well-established workplace policies and procedures in place to combat drug or alcohol use on the job by your employees. Please do not hesitate to contact Nick Phillips at HR Department Unlimited for information on implementing a drug free workplace program. Additionally, Tricia, Tony or any of the other workers' compensation attorneys can offer advice when it comes to fully understanding the implications of a positive post-accident drug or alcohol screen. ■***

**We are pleased to announce the addition of a new attorney to the firm!**

**Tricia Hurst** is an associate who focuses her practice on the administrative defense of workers' compensation matters. Prior to joining the firm, Tricia represented injured workers both administratively and before Courts of Common Pleas. Tricia graduated from Cleveland-Marshall College of Law in 2002 and successfully competed as a member of the Moot Court team for two years while attending law school. During her tenure at Cleveland-Marshall, Tricia also worked as a journalist for *The Gavel*, the law school's newspaper. Tricia completed her undergraduate degree at The University of Cincinnati. Welcome aboard, Tricia!

**Congratulations to Alan Ross, Brian Brittain and Lynn Schonberg, who have been named "Ohio Super Lawyers" for 2008.** Only five percent of

all lawyers in Ohio received this distinction by *Ohio Super Lawyers* magazine! The magazine annually invites more than 31,000 lawyers in Ohio to participate in the nomination process. A complex series of safeguards prevents any attempts to manipulate the nomination process. The magazine then performs an intense multi-step evaluation of the candidates that incorporates peer recognition and professional achievement. After this lengthy process, final selections are made and the magazine publishes a diverse and comprehensive list of outstanding lawyers in Ohio. We are not at all surprised that our three founding partners made the cut! Congratulations to Alan, Brian and Lynn on this remarkable achievement!

**It is with pride that we announce the recognition of Chris Debski as a Certified Specialist in Workers' Compensation by the Ohio State Bar Association.** Chris, an

attorney with the firm since June of 2003, was recently notified of this distinction after completing a lengthy application process and passing a rigorous exam in Columbus. With this achievement, Chris joins Brian Brittain, Lynn Schonberg and Carol Strassman as firm attorneys recognized by the Bar as being experts in their field of practice. Congratulations, Chris!

**We are excited to announce that Renee Mezera, Paralegal Manager in the firm's workers' compensation group, was elected to the Keystone Local School District Board of Education in the November 2007 election.** Renee received 1,006 votes and over 31% of the votes cast, surpassed only by current Board Member Patricia Wakefield, who was also elected to fill one of the two vacancies on the Board. Congratulations to Renee on this great accomplishment!

## BREAKFAST BRIEFINGS

Please stay tuned for information regarding our 2008 breakfast briefings.

## RBS ATTORNEY SPEAKING ENGAGEMENTS

**July 10, 2008**

Lynn Schonberg will be speaking on the topic of advanced employment law at a seminar in Cleveland for the National Business Institute.

For more information, please contact Melody at [216] 447-1551.

## ASSOCIATED BUILDERS & CONTRACTORS, INC., NORTHERN OHIO CHAPTER

### **Two-Night Electrical State License Prep Course**

April 11-12, time TBD

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### **Live OSHA 10 Hours**

May 7, 14, and 15 at 6:00 PM

June 3, 10, and 17 at 6:00 PM

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### **EEO Seminar presented by Ross, Brittain & Schonberg Co., LPA**

May 7 at 12:00 PM

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### **Electrical Code Classes**

May 17 at 7:00 AM

June 28 at 7:00 AM

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### **Business of Your Business Seminars**

May 29 at 12:00 PM

June 5 at 12:00 PM

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### **Four-Day Medical Gas Certification (Life Medical Net)**

June 3-6 at 8:00 AM

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## ASSOCIATED BUILDERS & CONTRACTORS, INC., NORTHERN OHIO CHAPTER CONT.

### **Prevailing Wage Seminars presented by Ross, Brittain & Schonberg Co., LPA**

June 5 at 2:00 PM

June 12 at 8:00 AM

Contact Jennifer at ABC (440-717-0389) for more details  
on any of the above events!

#### **Location:**

All Cleveland training will be held at the NOC-ABC Training Center,  
9255 Market Place West, Broadview Heights, Ohio 44147.

For Perrysburg locations, call for details.

You can also visit [www.nocabc.com](http://www.nocabc.com) for updates on events and new course offerings.

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### **Safety Courses Are Available Online Through ABC!**

Employees can take courses from any computer – at work, at home, or at the library.

This can result in significant savings to companies,  
in both time and travel costs!

## *self-insured* [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which

self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Brian Brittain at (216) 447-1551 for additional information and membership details.