

## The Ever-Expanding FMLA: DOL Issues New Regulations and Guidance

by [Marti Downey](#)

The Family and Medical Leave Act (FMLA) is celebrating its 20th anniversary this year and the Department of Labor (DOL) appears determined to make it a memorable one.

On January 14, 2013, the DOL issued an official administrative interpretation regarding FMLA leave to care for an adult son or daughter with a serious health condition who is incapable of self-care because of a physical or mental disability. The DOL clarified that the child's age at the onset of the disability is irrelevant and, in fact, onset may occur after the age of 18. It further clarified that whether a child has a physical or mental disability is defined by the expansive definition of "disability" set forth in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The DOL stated that it will follow the ADAAA's regulations and construe the definition of disability "in favor of broad coverage." The DOL noted that many impairments will satisfy both the ADAAA's definition of disability and the FMLA's definition of serious health condition. The interpretation emphasized that whether an adult child is "incapable of self-care" is a fact specific inquiry, as is the question of whether a parent is "needed to care" for the adult child. The DOL specifically stated that the phrase "needed to care" includes providing psychological comfort and reassurance that would be beneficial to the child. As a practical matter, this new DOL guidance means that many more employees will be entitled to take FMLA leave to care for their adult children. Employers should expect an uptick in these requests and train their personnel accordingly.

On February 5, 2013, less than a month after issuing its interpretive guidance, the DOL published new FMLA regulations which will take effect March 8, 2013.

These regulations implement a series of recent changes to the FMLA regarding military leave and airline flight crews. The regulations also clarify the DOL's position concerning the calculation of intermittent leave and remind employers of their obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). The most significant changes in the regulations are summarized below.



**Military Exigency Leave:** The regulations add a new category of exigency leave for "parental care" (similar to the existing child care provision, this new category of leave will allow employees to take time off to arrange for care for parents who are incapable of self-care when the need arises as a result of active duty or a call to active duty). The regulations also increase the maximum number of days for "rest and recuperation" leave from 5 days to 15 days.

**Military Caregiver Leave:** The regulations clarify that caregiver leave has been expanded to include leave for "covered veterans" who are undergoing medical treatment, recuperation or therapy for a serious injury or illness ("covered veterans" include individuals who left military service--under conditions other than dishonorable--in the five-year period preceding the first day of military caregiver leave). The regulations also

clarify that the definition of "serious injury or illness" has been expanded to include pre-existing injuries that were aggravated during military service. Finally, the regulations state that any health care provider may provide a certification to support military caregiver leave (not just those affiliated with the Department of Defense).

**Calculating Intermittent Leave:** The regulations provide helpful guidance on one of the most troubling aspects of FMLA administration - calculation of intermittent leave. For example, the FMLA provides that when calculating intermittent FMLA leave, employers must use the shortest increment of time that the employer uses to track other forms of leave, provided it is not greater than an hour. The regulations clarify that this does not mean FMLA can always be tracked in one-hour increments. Rather, if an employer allows employees to take vacation or sick leave in 15-minute increments, it must allow employees to take FMLA leave in 15-minute increments as well. In a similar vein, the regulations clarify that employers may only charge employees for leave that is actually taken,

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# What Does *Canning v. National Labor Relations Board* Mean for Employers?

by Aron Karabel

In 2012, the National Labor Relations Board (the "Board") issued several key decisions that have expanded the rights of both union and non-union employees.

These decisions have impacted how employers write confidentiality and social media policies and protect and manage their public image. These decisions have also restricted the right of employers to discipline employees under the "at-will" doctrine and have expanded the right of unions to insert themselves into internal workplace investigations of employee misconduct.

A recent decision issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has cast doubt on the validity of these and many other decisions that have been handed down by the Board since January 4, 2012.

On January 25, 2013, the D.C. Circuit Court vacated a decision issued by the Board that found that Noel Canning, a bottling and distribution company for Pepsi-Cola, violated the National Labor Relations Act (NLRA) when it failed to implement the terms of a collective bargaining agreement. The D.C. Circuit held that President

Obama's January 4, 2012 appointments of three Board members (Members Block, Flynn and Griffin) were unconstitutional because they were not made while Congress was actually "in recess" as defined by the Recess Appointments Clause of the Constitution. Therefore, the Board's February 8, 2012 Decision was invalid because, without the appointments, it did not have a three-person quorum and could not conduct business and issue a ruling on that date.

It is expected that the Department of Justice will appeal this ruling to the Supreme Court of the United States. In the meantime, the Board's Chairman, Mark Gaston Pearce, has made clear that the Board will proceed with business as usual--which it has. Since *Canning*, the Board has issued over 40 decisions, all while Congress remains gridlocked on how to limit the Board's authority.

**What, if anything, does this mean for employers?** An employer may consider asserting a lack of quorum defense in an answer to an unfair labor practice charge, in an appeal or exceptions filed with the Board, and in any pending Court actions as a jurisdictional defense.

Employers should consult with their attorneys on how to best preserve and assert this defense in the appropriate context. Employers may also consider filing a petition for review of an unfavorable Board decision issued against it since January 4, 2012, with the D.C. Circuit, as the Court has taken steps to enforce its *Canning* decision. As recently as February 19, 2013, the D.C. Circuit suspended an appeal of the Board which challenged a lower court's decision that it lacked a quorum to issue a ruling regard in union elections.

While it may be tempting to follow suit and petition the D.C. Circuit to vacate unfavorable Board decisions, employers should exercise caution with this approach because valid appointments will at some point be made, and most, if not all, of the Board's decisions issued since January 4, 2012, will likely be reissued by a reconstituted Board. Additionally, employers should continue to review workplace policies and practices that have been invalidated by the Board and actively participate in Board investigations and proceedings. The failure to do these things may ultimately lead to "cause" findings under a reconstituted Board with the authority to enforce these findings.

## "Time-Off Plans" - Complying with the FLSA

by [Andy Naylor](#) and [Brian M. Clifford](#)

Private employers seeking to take advantage of Fair Labor Standards Act provisions that allow "time-off plans" for non-exempt employees often face a conundrum: how to reconcile a "time-off plan" with the FLSA's overtime pay requirements?

The Fair Labor Standards Act (FLSA) prohibits private employers from offering employees compensatory time off or "comp time." Comp time is paid time off which is earned and accrued by an employee in lieu of overtime. Generally, comp time can be used by the employee anytime on a rolling basis, however, it is only available to public sector employees.

On the other hand, the FLSA allows private employers to set up a "time-off plan" for non-exempt employees that allows mitigation of overtime in one week by reducing hours worked in another. But how does that comply with the FLSA?

The FLSA requires employers to pay non-exempt employees a minimum hourly wage and a premium pay-rate for any work in excess of forty hours per week. The Congressional purpose behind the FLSA is two-fold: (1) to effect greater employment by providing a financial disincentive to employers who require overtime hours;

and (2) to compensate employees for the burden of a lengthier work week.

The Wage and Hour Division of the Department of Labor (DOL) and the courts interpret the FLSA as requiring overtime to be figured on the basis of a single work-week. Under certain conditions, however, an employer can pay the same amount each pay period even where an employee works overtime during one or more weeks. The DOL and the courts have approved time-off plans that balance overtime - not average it.

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# H-1B Filing Date for Cap Subject Petitions: What Employers and Employees Need to Know

By [Vinh Duong](#)

On April 1, 2013, employers will be permitted to submit new H-1B petitions to U.S. Citizenship and Immigration Services (USCIS) for Fiscal Year 2014. As in previous years, April 1 is the earliest date that employers may submit new “cap subject” petitions to USCIS, and October 1, 2013, is the earliest date that a foreign worker may commence employment under a “cap subject” petition. Employers that anticipate the need to file new “cap subject” H-1B petitions should be prepared to file the H-1B petition with USCIS no later than April 1, 2013.

The H-1B cap refers to the annual numerical limitations set by Congress for H-1B non-immigrant classification. The H-1B cap controls the number of foreign nationals who can be issued a visa in a given fiscal year. The H-1B cap also controls the number of foreign nationals already in the United States who may be authorized to change their status to a cap-subject classification.

The current H-1B cap is set at 65,000, of

which up to 6,800 H-1B visas are set aside each fiscal year for nationals of Chile and Singapore. In addition, the H-1B Visa Reform Act of 2004 allocates an additional 20,000 new H-1B visas for foreign workers with a Master’s or higher level degree from a U.S. academic institution.

Not all H-1B non-immigrants are subject to the H-1B cap. The H-1B cap generally does not apply to persons who have already been previously counted against the cap and/or are seeking to extend their stay in H-1B status or requesting concurrent employment. Further, H-1B non-immigrants are exempt from the cap if they are employed by, or have received an offer of employment from, institutions of higher education or a related or affiliated nonprofit entity, as well as nonprofit research organizations or a governmental research organizations. However, if an employer wishes to hire an H-1B employee who is currently employed at such an entity, the new petition would be subject to the H-1B cap.

Lastly, physicians who have been approved for a Conrad 30 waiver of the two-year foreign residence requirement based on work in a medically underserved area are also exempt from the H-1B cap.

We anticipate that the demand for H-1Bs will increase this year. In light of the anticipated demand and because of the timing issues created by the U.S. Department of Labor’s iCERT system for Labor Condition Applications, employers should identify early which current and/or prospective employees may benefit from an H-1B petition and take the necessary steps to prepare and file their H-1B petitions no later than April 1, 2013.

For more information on H-1B cap subject petitions or other immigration issues, please contact Vinh Duong at [vinh.duong@wallerlaw.com](mailto:vinh.duong@wallerlaw.com) or at (615) 850-8936.

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Time-off plans allow the employer to schedule an employee off a number of hours during one week of the pay period so the wage or salary equals the desired amount of compensation for that employee even where the employee works overtime the following week.

Specifically, federal courts have held that “it is permissible for the employer employing one at a fixed salary for a fixed workweek to lay off the employee a sufficient number of hours during some other week or weeks of the pay period to offset the amount of overtime worked so that the desired wage or salary for the pay period covers the total amount of compensation, including overtime.”

There is no requirement under the FLSA that overtime compensation be paid weekly. The employer can require that an employee accept the time off in lieu of overtime provided it is covered under the same pay period.

**Here is how it could work:**

Assuming a two week pay period - in Week One the employee works 44 hours (four 9 hour days, one 8 hour day). That employee has thus accrued 4 hours of overtime that should be paid time and one-half. In lieu of that premium pay for overtime, in Week Two the employer can allow 6 hours of time off (4 x 1.5). If the time off is not taken in Week Two, then the employer must be paid for the overtime. The time off cannot accrue from week to week in order to create a bank of leave time to be used toward a larger amount of paid leave. Also keep in mind that if an employee works the 44 hours in Week One and they leave employment or are terminated in Week Two, the employer must pay that employee their overtime for Week One.

Ideally, employers want to implement time-off plans without disrupting operations. The principal idea of the time-off plan is the employer’s control over an employee’s earnings by

controlling the number of hours an employee is permitted to work. Due to the nature of “balancing” time over several weeks in a pay period, employers cannot implement time-off plans for employees who are paid weekly. The time off cannot be accumulated in one pay period to be used in another. Moreover, this is not a “use-it-or-lose-it” policy; it is a use-it-or-be-paid-for-it policy. If the employee does not use the time off in the following week and works a full forty hours, the employer must pay overtime from the previous week.

Employers are constantly looking for new ways to manage employee pay in a way that fits their business. Time-off plans can be an efficient, economic, and legal way to do so when implemented correctly. Due to the strictures of the FLSA and the administrative difficulty in managing time-off plans, employers are encouraged to consult with counsel prior to implementing a time-off plan.

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and not for time worked. For example, if an employee arrives at work half an hour late because he/she is returning from an FMLA qualifying leave (e.g. a doctor's appointment), and the employer decides to allow the employee to start work immediately, despite its general rule that all leave be taken in one-hour increments, the regulations state that only the amount of leave actually taken (half an hour) may be counted against the employee's allotment. The employer cannot charge the employee for one-hour of leave, even though its policy says that leave must be taken in one-hour increments.

**Airline Flight Crew Eligibility:** The regulations provide that an airline flight crew employee will meet the hours-of-service eligibility requirement if he/she has worked or been paid for not less than 60%

of the applicable total monthly guarantee or the equivalent and has worked for been paid for not less than 504 hours during the previous 12 months (exclusive of commute time, vacation, medical or sick leave).

**Recordkeeping Requirements and FMLA Forms:** The new regulations also remind employers of their confidentiality obligations under GINA, to the extent that documents created for FMLA purposes contain family medical history or genetic information. In addition to the regulations, the DOL has published a series of updated forms, including a new FMLA poster. Employers should be sure to replace their current FMLA posters with the revised version, available on the DOL's website. Fortunately, unless you are in the airline business, the new regulations will not require sweeping revisions to existing

policies that are already compliant with the recent FMLA statutory amendments. That being said, employers should review current policies, forms, and posters, and update them, as necessary, to conform to the new regulations. It is also a good time to train your HR and managerial staff on these new developments (particularly the expanded definition of "son or daughter" in the context of requests to care for adult children with disabilities and the expanded definition of military leave) so that FMLA requests will be recognized and handled appropriately.

## Upcoming Events

**"Labor & Employment Year in Review" and "FLSA Roundtable"** (click [here](#) for more information)

**When:** April 12, 2013  
**Who:** Stan Graham and Bob Boston  
**Where:** Tennessee Bar Association's 17th Annual Labor and Employment Forum  
Tennessee Bar Center, Nashville, Tennessee

**"Immigration and International Business"**

\*as part of Waller and Fifth Third Bank's Developing and Maintaining a Successful Minority-Owned Business Seminar Series

**When:** April 2013 (date TBA)  
**Who:** Ving Duong  
**Where:** Waller Conference Center, Nashville, Tennessee

**"SHRM Legal Workshop"** (click [here](#) for more information)

**When:** May 29, 2013  
**Who:** John Park, Vinh Duong, Coe Heard, Aron Karabel, Brian Clifford  
**Where:** Waller Conference Center, Nashville, Tennessee

**"Accessing Capital: SBA Loans and Local State and Federal Third Party Certifications - DBS, MBE, GLBT"**

\*as part of Waller and Fifth Third Bank's Developing and Maintaining a Successful Minority-Owned Business Seminar Series

**When:** June 2013 (date TBA)  
**Who:** John Park, Bahar Azhdari  
**Where:** Waller Conference Center, Nashville, Tennessee

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