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# Labor & Employment Newsletter

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## A WARN Act Primer

With the troubled state of the U.S. economy, many employers are cutting back operations and reducing their workforce headcounts. The Department of Labor reported 2,275 mass layoffs (i.e., 50 or more employees) in December 2008 alone. With the challenging economic trends likely to continue, the 20-year-old Worker Adjustment and Retraining Notification ("WARN") Act has become a hot topic for employers. Although WARN may appear straightforward, it contains many technical points that can trip up an unwary employer. Additionally, numerous states have enacted "mini-WARN" statutes that may impose still more requirements.

**Who Is Covered By WARN?** Generally, employers are covered under WARN if they have 100 or more employees. The regulations exclude from the headcount employees who have worked less than six months and employees who have averaged less than 20 hours per week during the relevant period. Yet these excluded employees may nonetheless be entitled to notice if a WARN-triggering event occurs. While some of the parallel state-law provisions adopt the federal threshold for coverage, some set a lower level for coverage.

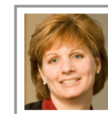
**What Triggers WARN Notice?** A covered employer must give notice for a "plant closing" that will result in an employment loss of 50 or more employees during any 30-day period. Notice is also required for a "mass layoff," meaning an employment loss for 500 or more employees at a single site during any 30-day period. If the employment loss applies to less than 500 but more than 50 employees, it is also a "mass layoff" if those employees make up at least 33% of the employer's active workforce. This seems simple enough to calculate, but beware of issues involving multiple locations. The terms "single site of employment" and "employment loss" can also complicate the analysis. Trickier still may be determining the appropriate time period to consider when a series of layoffs occur.

**What Notice Must Be Given?** A covered employer must give notice 60 days in advance of a plant closing or mass layoff. This notice must be provided not only to the affected workers and their representatives but also to state and local government. The WARN regulations specify the contents of a notice and certain circumstances that may require additional notice.

**What If Notice Is Not Given?** The penalties under WARN include backpay and benefits for the period of violation, up to a maximum of 60 days. A court also may award attorney fees. Additionally, a civil penalty of $500 per day of violation may be imposed on an employer that fails to provide the appropriate notice to local government. State "mini-WARNs" often impose additional penalties; for example, at least one state's law provides severance pay – equal to one week of pay for each year of service – for employees to whom notice was not properly given.

As employers adjust to the declining economy and contemplate the possibility of a mass layoff or plant closing, early consideration of WARN is imperative. A WARN violation can make a bad situation even worse.

– written by Paula J. Dehan



## Managing the Costs of Employee Benefits

Employers are seeking ways to trim costs, and employee benefits are not immune from cutbacks. Here are a few options to consider:

**Consumer-Driven and Higher-Deductible Plans**
Many employers turn to consumer-driven health care plans to help stabilize, and even decrease, insurance premiums. A variety of arrangements – such as flexible spending accounts, health spending accounts (HSAs), and health reimbursement arrangements (HRAs), with or without a high-deductible health plan – can help lower premiums and allow individuals to save their own money for healthcare needs.

**Limit Spousal Participation and Lifetime Maximums**
Employers that are not passing the full cost of spousal coverage on to employees may consider excluding spouses from participation in the health plan, particularly if the spouses are eligible for alternative coverage through their own employer or otherwise. Another option is to reduce the lifetime maximums under group health plans.

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## Frequently Asked Questions About Payroll Deductions and Final Paychecks

Virtually all employers are familiar with the minimum wage requirements.  However, minimum wage is just one of the many issues applicable to the everyday process of developing and implementing payroll practices.  This process becomes more complicated when employees leave their jobs or owe money to their employer.

A patchwork of federal and state laws govern wage payment issues, and these laws go far beyond setting a minimum hourly rate.  The Fair Labor Standards Act ("FLSA") is the overarching federal law, and it specifies which employees are entitled to overtime pay, how pay should be calculated, and what kind of payments constitute "wages" for purposes of minimum wage calculation.  The FLSA also regulates deductions from paychecks – limiting employers' ability to give with one hand and take away with the other – to ensure employees actually earn the minimum wage rate "free and clear."  Yet the FLSA leaves many questions unanswered, and states often fill the gaps by imposing requirements above and beyond those created by the FLSA.  Below, we address a few frequently asked questions in this area of the law.

**Q.  An employee just resigned.  When do we have to deliver her final paycheck?**

**A.** Although the FLSA does not address final paychecks, the rules differ greatly by state.  Some states require immediate payment upon termination, and the answer may be different depending upon whether the employee is fired or quits.  In Ohio and Indiana, assuming that existing payroll practices conform to the statutory requirements, you may pay the individual at the employer's next regularly scheduled payday.  Under Kentucky law, an employee who resigns or is terminated must be paid on the next regularly scheduled payday or within fourteen days, whichever comes later.

**Q.  A terminated employee wants payment for his unused vacation time.  Are we required to do this?**

**A.** It depends on the specifics of the situation.  Payment of accrued but unused vacation time is not automatically required by federal law, and many states' wage payment statutes do not address it.  However, employment agreements or company policy may – intentionally or otherwise – treat vacation as a deferred compensation benefit, which might entitle the employee to receive pay for unused time upon termination.  Ohio, Indiana, and Kentucky have addressed this issue not by legislation but through the courts, thus emphasizing the fact-specific inquiry that has to be made to answer this question.  In general, though, an employer's options can be limited by policies and employment agreements that fail to address how unused vacation time will be handled.  Consult with counsel to review your existing vacation policy or to prepare a new one with this issue in mind.

**Q.  My company loaned money to an employee, and he signed an agreement to have money taken out of his paycheck until the debt is repaid.  Are we actually allowed make those deductions from his pay?**

**A.** Generally, yes – but only if done by an agreement specifying the amount of the deductions and when they will be taken.  Legitimate employee debts often arise in the ordinary course of business.  Many employers seek to recover these amounts through payroll deductions, and some have employees sign agreements purporting to authorize such deductions.  However, the FLSA restricts this practice, and some states prohibit it altogether.

The FLSA leaves many questions unanswered, and states often fill the gaps by imposing requirements above and beyond those created by the FLSA.

Note that it is permissible under the FLSA for an employee's net pay to fall below minimum wage because of a repayment deduction, but not because of deductions for interest or administrative costs.  The minimum wage for hours worked over 40 includes the overtime premium, and this must be taken into account when determining how much of a deduction is permitted.

To illustrate:  Suppose an employee earning minimum wage has a $500 loan from the employer and agrees to a $25 weekly deduction. If the deduction is used to pay down the principal amount of the loan, the deduction is permissible.

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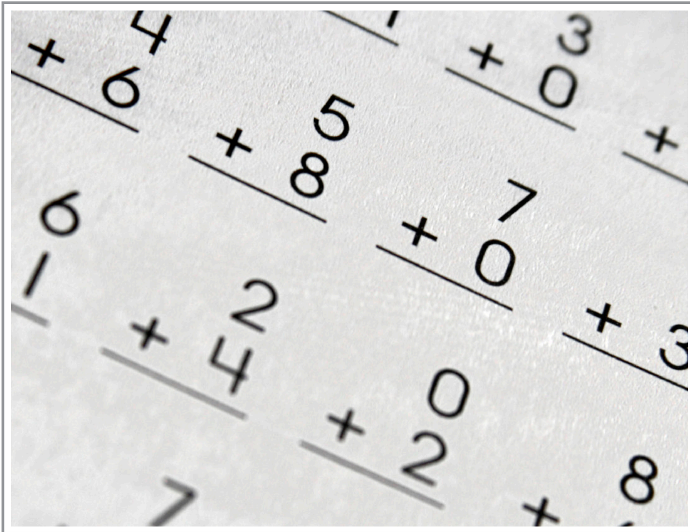
# FMLA Math 101

Perhaps you breezed through algebra and made short work of calculus, but how are you at FMLA math? It seems that even federal judges cannot agree on how to "crunch the numbers" under the FMLA.



A Minnesota court recently flunked an employer in FMLA math. To calculate attendance rates, a hospital divided the number of hours an employee was absent by the employee's scheduled hours of work. An absenteeism rate over 4% resulted in disciplinary action, though FMLA leave and certain other absences were excluded from the calculation altogether.

A nurse had taken both unexcused absences and FMLA leave. When the hospital calculated her absenteeism rate at 7%, it terminated her. She sued under the FMLA, arguing that the hospital's failure to include the FMLA leave in her scheduled hours of work inflated her absenteeism rate. The hospital responded that it treated FMLA leave neutrally by excluding it from the calculations altogether.

**Conflicting Decisions Over FedEx Policy**

The court considered two other cases on the same issue. These cases both involved a Federal Express policy that required employees to work at least 96.92% of the eligible days. Like the hospital, FedEx had not included FMLA leave when calculating employee attendance rates. The two courts examining the FedEx policy reached opposite results.

One court found in favor of FedEx because including FMLA leave in the calculation would effectively give the employee 100% attendance during time away from work. The court likened this result to the accrual of a benefit during leave, which the FMLA does not require.

However, the other court disagreed. It found that FedEx had turned the use of FMLA leave into a negative performance factor by effectively reducing the number of "no-fault" days available to the employee. After considering those two cases, the Minnesota court ruled against the hospital. The court gave the following example to support its conclusion: the nurse was scheduled to work 1,872 hours per year, so she could miss 74.88 hours a year to remain below the 4% absenteeism rate (74.88 ÷ 1,872 = 4%). If she was absent for 74.88 hours and then took 100 hours of FMLA leave, her absenteeism rate would rise to 4.22% (74.88 ÷ 1,772 = 4.22%). Therefore, by using FMLA leave, employees get fewer non-FMLA absences.

**Handle Attendance Issues Carefully**

Although the law remains unsettled on this issue, it is but one illustration of how the FMLA can complicate the administration of attendance policies. Poor evaluations for attendance can lead to trouble where it is unclear whether the rating is based exclusively on non-FMLA absences. In addition, employers often must defend one or more attendance "occurrences" from challenges under the FMLA. Employers are thus well advised to carefully consider and test the application of their attendance policies to FMLA-covered absences, ensuring that such absences do not result in occurrences or adverse actions. Likewise, consider whether the policies could be construed as turning FMLA leave into a negative factor for disciplinary purposes.

Finally, FMLA training for supervisors and managers is vital to ensure compliance with the FMLA. Among other things, supervisors must understand the importance of accurately reporting the precise reason an employee gives for an absence and the need to avoid broad references to "poor attendance" that fail to distinguish between FMLA and non-FMLA absences.

– written by David H. Peck

*continued from Managing the Costs of Employee Benefits article on cover*

**Reduce or Suspend 401(k) Contributions**
Reducing or suspending employer matching or nonelective contributions to company 401(k) plans can also lower benefit costs. Plan documents must be amended to reduce contributions before the benefit is earned, however. And if the plan is currently relying on safe-harbor matching contributions to satisfy nondiscrimination requirements, the employer must provide 30 days notice to participants and will be required to perform nondiscrimination testing for the entire plan year.

**Reduce or Freeze Pension Accruals**
Employers sponsoring defined benefit pension plans may also consider freezing or reducing benefit accruals for current plan participants, or excluding new hires from the plan. To implement these reductions, plan documents must be amended before the effective date of the change and participants must be notified at least 45 days in advance of any significant reductions in future benefit accruals. Note that reductions to future accruals may not have an immediate impact on funding.

An important caveat: Employers cannot divert monies withheld from employee paychecks for premiums, reimbursement accounts, or qualified plan contributions for other uses. Yet cost-cutting alternatives like the ones discussed above are available if needed.

– written by Catherine R. Reese and Stacey A. Huse

## Protect Your Organization from OFCCP Sanctions

For the fourth straight year, the Office of Federal Contract Compliance Programs ("OFCCP") has recovered record amounts of back pay and benefits from government contractors and subcontractors. OFCCP's enforcement efforts are expected to increase under the new presidential administration. For covered employers, conducting an annual review and update of your affirmative action program has never been more important.

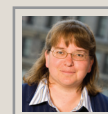
OFCCP requires that government contractors and subcontractors annually review personnel decisions – including hires, promotions, terminations, and compensation – for evidence of discrimination. Such evidence includes a significant statistical difference in the selection of minorities or females compared to Caucasians or males.

Other issues that are often overlooked but should be addressed in an annual review include the following requirements:

- Informational postings such as the EEO poster, an annual EEO statement signed by the employer's CEO, and the locations and times during which employees and applicants can access the affirmative action programs for veteran and disabled individuals.
- Outreach efforts to veteran and rehabilitation agencies (and minority and women organizations if required by your program).
- Posting of job openings with the unemployment commission or state workforce agency job bank.
- Notifications to unions about the affirmative action program.
- Inclusion of specified EEO language in subcontracts.
- Opportunities for employees to self identify as veterans or disabled individuals.
- Updating the veteran categories for the new VETS 100A form.
- Accessibility of the online application process for disabled individuals (a notice must be prominently posted on the online application telling applicants how to obtain a reasonable accommodation).
- Compliance with the minimum specifications for I-9 forms.

Hiring and compensation remain the focus of the OFCCP. Annual, and in some cases more frequent, analysis of these areas is essential to avoiding large monetary sanctions. Even if the OFCCP never comes calling, proactive review can help minimize the risk of employment litigation – particularly compensation discrimination claims, which are expected to increase under the Lilly Ledbetter Fair Pay Act.

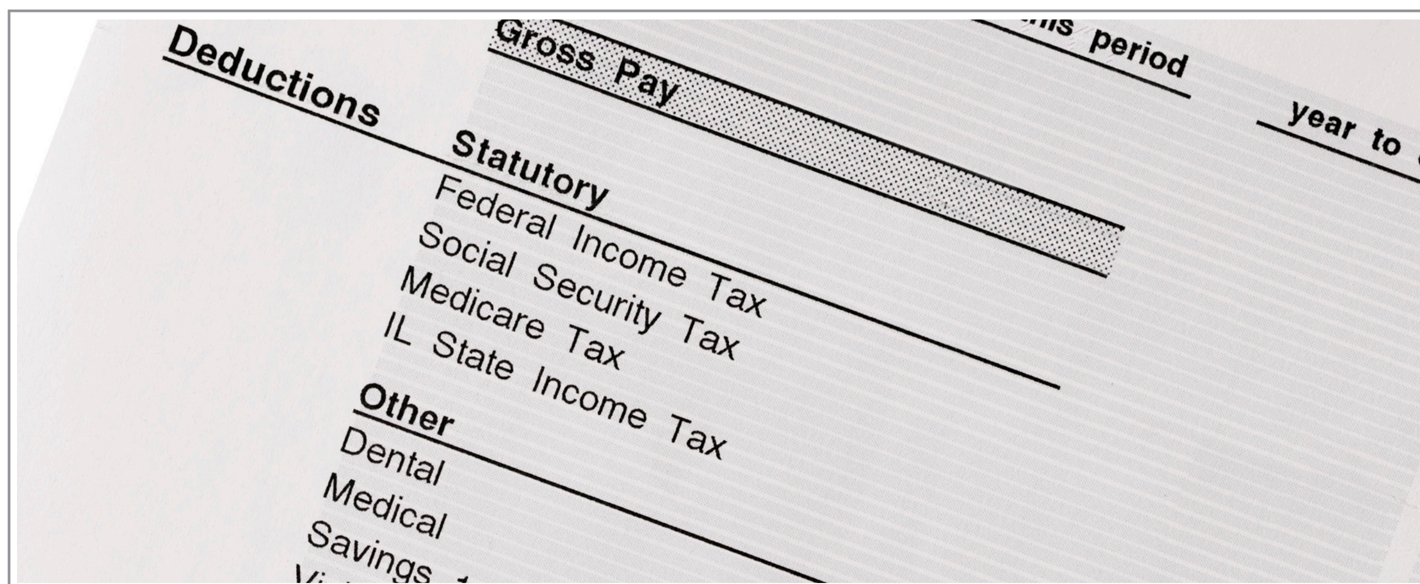
– written by Patricia A. Pryor



*continued from FAQ About Payroll Decutions*

However, if the employer also wants to deduct interest on the debt, or a one-time $5 administrative charge imposed by the payroll company to set up the payment plan, then such a deduction would violate the FLSA.

Indiana law imposes additional requirements on payroll deductions. A wage deduction is valid only under a written, signed agreement that is revocable by the employee at any time upon written notice. Further, Indiana limits the types of deductions that may be made. And though repayment of loans is specifically permitted, the amount an employer may deduct is controlled by the amount of the employee's "disposable earnings" (a term defined by Indiana statute).



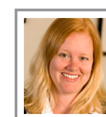

In all cases, paycheck deductions should be handled cautiously and subject to a written agreement signed before the deduction is taken. Courts and administrative agencies put the burden of proof on employers to justify any deductions, so proper documentation is critical.

**Q. An employee broke an expensive machine at our plant. Can we make him pay for what he broke through payroll deductions?**

**A.** As with other issues in this area of the law, it depends on the state. Ohio law generally permits deductions "for wares, tools, or machinery destroyed or damaged" so long as the employee is not a minor, agrees to the deduction under an "express contract," and continues to receive net pay that is above the minimum wage. Under Indiana law, deductions for breaking the machine could not be made, regardless of whether the employee had purportedly agreed to such an arrangement. Kentucky law specifies that no deduction may be made for "breakage" in any case, or losses that "are not attributable to employee's willful or intentional disregard of employer's interest."

**Q. The employee who broke the machine is now leaving the company. How much can we deduct from his final paycheck?**

**A.** There are no special deduction rules involving final paychecks in Ohio, Kentucky, or Indiana. If an employer could not make a particular deduction from a current employee's paycheck, then the employer cannot make that deduction from a terminated employee's final paycheck.

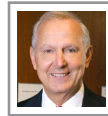


– written by Timothy G. Pepper and Casie E. Hollis

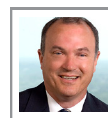
## Taft's Cleveland Office Bolstered by Addition of Labor and Employment Lawyers

Taft's Labor and Employment Practice Group is pleased to welcome three additional lawyers in the Cleveland office as a result of the recent merger between Taft and Kahn Kleinman, LPA. Steven M. Moss, Robert J. Valerian, and Lester W. Armstrong each bring extensive labor and employment law experience to an already outstanding labor practice.

Steve Moss, who chaired Kahn Kleinman's labor practice, brings 18 years of traditional labor law experience to the firm. Steve's practice includes negotiating and administering collective bargaining agreements, managing union election campaigns, litigation before the National Labor Relations Board, as well as counseling non-union clients on maintaining their union-free status. Steve also advises clients in developing sound labor and employment practices and provides general employment law advice. Steve received his undergraduate degree from Ithaca College and his law degree from the Cleveland-Marshall College of Law.



Bob Valerian is an accomplished litigator with over 30 years of experience defending employers in federal and state courts. A retired and decorated U.S. Air Force pilot, Bob has been recognized as one of the Best Lawyers in America and as one of the Top 100 Ohio Super Lawyers. Bob is a graduate of Georgetown University and Case Western Reserve University.



Lester Armstrong has over 20 years of experience counseling and representing employers in discrimination and wrongful discharge litigation, as well as the development of personnel practices and procedures, human resource counseling, and evaluation of employer compliance with the myriad of federal and state laws governing the workplace. Lester received his undergraduate degree from Heidelberg College and his law degree from the University of Toledo.