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**NAMWOLF 2008 ANNUAL MEETING & LAW FIRM EXPO**

The 2008 NAMWOLF Annual Meeting and Law Firm Expo was a huge success with over 175 in-house counsel, law firm members and staff in attendance.

Dallas, Texas was the host city for the 4th Annual Meeting, complete with two days of diversity discussion and legal networking. The Annual Meeting, inside the beautiful Marriott Dallas Las Colinas Hotel, included several CLE sessions on *Developing New Business—How to Effectively Respond to RFPs*; *Stay Out of Court, Stay Out of the Media and Stay Out of Trouble: The Many Faces of Corporate Compliance*; and *Extreme Contracting Challenges: Tough Topics/Strategic Solutions*.

KeyCorp was presented with the 2008 Annual Diversity Initiative Achievement Award for outstanding achievement in advancing the utilization of diversified outside legal counsel. Rebecca McMahon accepted the Diversity Award on behalf of KeyCorp.



Congratulations to **JOEL STERN**,  
winner of the 2008 Award  
for Outstanding Service by  
an Advisory Council Member



Joel Stern of Accenture was presented with the 2008 Award for Outstanding Service by an Advisory Council Member.

The highlight of the meeting was the Law Firm Expo—a networking session for in-house counsel and NAMWOLF Law Firm Members. Over 50 member firms networked with corporate counsel from AT&T, PepsiAmericas, Prudential Financial, ArcelorMittal USA and many more.



Congratulations to **KEY CORP**,  
winner of the  
2008 NAMWOLF  
Annual Diversity Initiative  
Achievement Award

## Message from the Chairman



**Emery K. Harlan**  
Chairman

The 2008 Fourth Annual Meeting & Law Firm Expo of the National Association of Minority and Women Owned Law Firms was a great success. In keeping with the theme for this year's Annual Meeting, "Changing the Ways People See Diversity," NAMWOLF remains committed to advocacy on behalf of minority and women owned law firms. One of the exciting additions to this year's Annual Meeting was the offering of multiple CLE classes. We are also pleased to announce that the number of member law firms who attended this year's Annual Meeting increased almost 20 percent from the 2007 Annual Meeting.

We are thankful to the City of Irving and to our Event Sponsors, Panelists, and Exhibitors for making this past Annual Meeting such an enjoyable experience. Again, we are thankful to our law firm members, Partners and Advisory Council members for their dedication and commitment to the success of our organization.

NAMWOLF will continue its mission of building relationships between corporations and minority and women-owned law firms. We will also consistently assist our law firm members with developing lasting partnerships with other law firm members. We are thankful for our successes, but remember our work is not complete. I look forward to seeing you at NAMWOLF's Fifth Annual Meeting & Law Firm Expo in 2009.

## WELCOME NEW NAMWOLF MEMBERS



**Yolanda Coly**  
Managing Director

### New Law Firm Members:

Bailey Law Group, PC  
Washington, D.C.

Brown Stone Nimeroff LLC  
Philadelphia, PA

Colbalt LLP  
Berkeley, CA

Cooper & Walinski  
Cleveland, OH

Cuyler Burk, P.C.  
Parsippany, NJ

Emile Banks & Associates  
Milwaukee, WI

Insley and Race, LLC  
Atlanta, GA

Meyers, Roman, Friedberg  
& Lewis  
Cleveland, OH

Miletich Pearl LLC  
Denver, CO

Pruetz Law Group LLP  
El Segundo, CA

Quintairos, Prieto, Wood &  
Miami, FL

Spencer Crain Cabbage  
Healy & McNamara  
Dallas, TX

SweetinBleeke, P.C.  
Indianapolis, IN

Taber Estes Thorne & Carr  
Dallas, TX

### New Corporate and Public Entity Partners:

City of Cincinnati—  
Attorney General's Office

Del Taco

Marriott International

New York State Dormitory  
Authority

New York State Housing  
Finance Agency/State of  
New York Mortgage  
Agency

## Spotlight—Corporate Partner: W. Scott Nehs, PepsiAmericas, Inc.

***Interview with W. Scott Nehs, Senior Vice President – Legal & Government Affairs for PepsiAmericas, Inc., the world's third-largest bottler with \$4.5 billion in annual revenues and operations in nineteen states and seventeen foreign countries.***

Mr. Nehs joined PepsiAmericas in 2000 as Assistant General Counsel. In his current role as Senior Vice President, Mr. Nehs serves on the company's seven-member Worldwide Leadership Team. He is responsible for franchise relationships, litigation, real estate, the company's Code of Conduct and managing the legal department.

In 2004, Mr. Nehs was recognized as one of the "Top 40 Under 40" attorneys in the State of Illinois. Mr. Nehs was also an early signatory to the "Call to Action," and is currently a CTA subcommittee member and a frequent speaker on the topic of the compelling need for greater diversity in the legal profession.



**W. Scott Nehs**

In this interview, Mr. Nehs was asked multiple questions regarding his commitment to diversity and to NAMWOLF:

**QUESTION:** Is there anything in your background that was a catalyst to your commitment to Diversity?

**NEHS:** I've simply never thought of greater diversity in our profession as anything other than the goal we should all be striving for. My actions and level of engagement have hopefully embodied my thinking on the topic, but I also carry with me a strong sense that there is much more to accomplish. Defining success in this arena is a challenge – don't know exactly how we should measure it – but I do know that we're not "there" yet.

The catalysts for me are what I have tried to make a well-rounded set of life experiences. Of those pertaining to diversity, two stand out. One was being the coach for the Frederick Douglas Moot Court competition, which held its finals at the National BLSA convention held that year in Compton, CA. The experience of being one of the few people "of color" in an otherwise vast sea of rightfully proud African American law students and advisors was memorable on many fronts. The second, more elongated experience came at the law firm where I clerked and spent the first part of my career. Following law school, there were sixteen women and two men in my starting class. When I left, there were still two men, but there was only one woman from that original class. The opportunity to witness the many challenges my female colleagues faced – in and out of the firm – also left a lasting impression on me.

**QUESTION:** How did you get involved with NAMWOLF?

**NEHS:** I became involved with NAMWOLF shortly after first meeting with Emery Harlan to discuss the organization and the role it intended to play in assisting consumers of legal services (like me) to identify minority and woman owned firms. Emery and I had a shared history at the University of Wisconsin Law School that made the introduction easier, but the results that NAMWOLF firms deliver are what bring me back again and again.

**QUESTION:** Do you see a world where NAMWOLF wouldn't be necessary?

**NEHS:** No. I hope and expect that NAMWOLF's mission will adjust and evolve over time, but I don't ever think there will be a time when tackling the issues of better representation in our profession will be an overtly easy thing to do.

*Continued page 4*

## Corporate Partner Profile: W. Scott Nehs, PepsiAmericas, Inc.

(Continued from page 3)

As NAMWOLF and our profession mature, I'm hopeful that the mission will evolve to include bringing more people into the profession by supporting pipeline programs to interest young people or by advocating in front of legislative bodies for support. People have organized since time began because it has always been true that groups can often accomplish more than individuals working in their own silos. NAMWOLF can and should become whatever its members need it to be.

*"I simply believe  
that diversity is the  
epitome of  
'more is better' "*

### **QUESTION: Is there a moment in your life that influenced your commitment to diversity?**

**NEHS:** As noted above, specific to the legal profession, there were many catalysts – two of which I've highlighted. To diversity generally, my experiences in life have yielded many moments that form the stew that is my makeup today. I'd like to hope that my life will allow for more ingredients to be added in the years to come. I simply believe that diversity is the epitome of "more is better" – whether that is better music or better fashion or better education, more views and more experiences leads to a better world for everybody. I recognize that not everyone sees it this way, that some are more comfortable (and seek out) only those things that they already know, but I truly believe those folks are missing out.

### **QUESTION: You were at Grant Park for Obama's speech, how did that impact you?**

**NEHS:** I was proud and profoundly happy to be in Grant Park on the night that President-elect Obama gave his acceptance speech. It was a moment of great pride for every member of that audience and one of the best things was that each of us had arrived there by such dramatically different paths. The vast array of faces and ages in the park that night was truly amazing and even the t-shirts and other wares being sold by impromptu entrepreneurs reflected what a monumental step this was. Even if you had been asleep for the two years leading up to that moment in time, a snapshot of the audience told volumes of how one man brought us together – not just for the night, but hopefully in a way that has forever changed how the United States conducts itself. I thought about two other things that night. First, that I had been in that same park as part of a MUCH smaller group, listening to Jesse Jackson speak some 20 years earlier about hope. I reflected on how much had happened in between. And second, I thought that my children and others their age (8-12) will never know of an election for President that does not include women, people of color and the chance to express any point of view. That's a pretty cool thing for them and for all of us.

### **QUESTION: How do those of us involved in NAMWOLF confirm that the commitment to diversity is strengthened in these poor economic times?**

**NEHS:** By emphasizing that dollars count even more when there are fewer to go around. Many NAMWOLF firms are no different than any other small business – they operate on smaller margins and often have less of a cushion to fall back on when things slow down. It can also be an advantage as NAMWOLF firms can deliver a great value. The "pitch" can be tweaked to remind those hiring that the goals of spending less while supporting diversity in the profession are not mutually exclusive. By hiring a NAMWOLF firm, you can accomplish both goals.





## Effective and Legal Employee Terminations

By Ginger D. Schröder



Theoretically speaking, terminating an employee is as easy as uttering two simple words: “you’re fired.” However, unlike Donald Trump’s reality-TV “employees,” real-life employees often look for ways to sue their employer after being terminated, typically claiming that some sort of unlawful discrimination or unlawful retaliation was the basis for the termination. As this article explains, executing an effective and legal termination boils down to the following few steps:

### **1. Avoiding an Illegal Termination**

In order to lay the groundwork for both an effective defense, and to avoid employment discrimination lawsuits entirely, supervisors and managers must be trained to understand when and how employees should be fired.

Supervisors should be taught the following:

1. All of the laws that govern employee terminations and how a seemingly legal termination can be considered illegal, such as in the case of disparate impact discrimination.
2. How plaintiffs prevail by proving an employer’s decision was “pretextual,” or that the employer’s true reason for the termination was motivated by unlawful discrimination, which can be proven by comments, inconsistent treatment, or statistics, to name a few.
3. That certain statements can potentially create employment contracts, and others, in and of themselves, can be considered pretextual for what is really unlawful discrimination.
4. Consistent and accurate documentation of employee discipline and performance is essential.
5. Illegal terminations can also be avoided by using a consistently applied progressive discipline system, which imposes progressively greater disciplinary measures upon an employee whose performance continues to be substandard. A progressive discipline system not only gives the offending employee an opportunity to improve, but demonstrates that the employer gave the employee (if deserving) a chance to rehabilitate.

### **2. Documenting Your Decisions**

Since employees may embellish or manufacture the circumstances surrounding their termination, personnel files should contain a chronology of disciplinary notices to avoid a potential “he-said/she-said” situation.

Disciplinary notices should be simple and accomplish the following objectives:

1. contain a factual description of the incident, including the date and time;
2. include the name of witnesses, if possible;
3. state the disciplinary action taken;
4. state future expectations of that employee;
5. be dated and signed.

Be careful in maintaining records of disciplinary notices, not to commit any of the following common missteps:

1. including inaccurate facts, admissions of company liability or personal thoughts;
2. maintaining inconsistent records. Employers should keep the same types of documents for similarly situated employees, and for similarly situated offenses.
3. preparing a “paper trail” to support the termination of a particular employee. Evidence of such set-ups can support allegations of malicious conduct and claims of punitive damages.
4. failing to document discipline or terminate in a timely manner.

*(Continued on page 6)*

## Effective and Legal Employee Terminations

*(Continued from page 5)*

Although time should be taken to fully investigate the facts prior to termination, too long a period of time between the alleged triggering event and the termination may give rise to suspicion of pretext.

Before terminating an employee, first investigate the employee's performance deficiencies, as detailed in the disciplinary notices. Make sure the termination-triggering event is fairly investigated and well-documented.

Second, make sure you can defend your decision to terminate with specific evidence. It is easier to defend a termination based on "poor performance because the employee does not complete work in a timely manner and his work often has to be redone because of errors" than for, simply, "poor performance."

### **3. Conducting a Professional Termination Meeting**

Terminations meetings should be conducted with privacy and respect. Prepare what you will say, have a written outline and anticipate the employee's objections or responses, and be ready with your responses. Employees should be terminated in a formal, face-to-face meeting. Present at the meeting should be the employee, the person conducting the termination and one company witness, if possible.

To begin, avoid small-talk and give the employee all of the reasons why it is necessary for the company to make the termination decision, as raising new reasons at a later time may be perceived as pretextual. Give the employee an opportunity to talk, but not to argue. This gives you an opportunity to learn the employee's defenses, and the employee may raise a point or an issue not considered by the employer, warranting further investigation. Lastly, keep the meeting short and sweet, and do everything you can to help the employee retain his dignity and sense of esteem.

### **4. Following Through After the Termination**

Even though the termination is complete, some post-termination areas of concern exist:

1. **Owed Compensation:** Generally, an employer must pay all earned wages and compensation to a terminated employee no later than the next payday on which the amount would ordinarily be paid. In the event that there is a dispute over the amount of wages due, the employer still must give written notice of the amount conceded to be due and pay that amount at the regular time to avoid potential penalties and liability.
2. **Unemployment Compensation Claims:** Claims for unemployment should not be ignored. Employer responses to such claims should be honest and accurate, as these responses could become evidence of pretext, if a different reason for termination is offered later during litigation.
3. **Job References:** Employers should have firm policies concerning what information they will release about a former employee when a job reference is requested. Some employers provide only the fact of past or present employment; dates of employment; and title or position. If an employer plans to provide more information, however, it is best to require the former employee present a signed, written request for the reference, specifically stating his or her permission to provide more information, and the request should contain language which releases the employer from liability arising from or related to the information provided in the reference.

In conclusion, a well-advised employer that treats employees consistently and fairly will reap the benefits of a productive workforce and will be able to avoid or defend against employee lawsuit resulting from employment terminations. The key is to develop and implement personnel policies that are effective and manageable, and to train supervisors to understand the legal and practical consequences of their decisions.

## Law Firm News—Successes and Awards



**bailey law group**  
WWW.BAILEYLAWGROUP.COM

### Bailey Law Group Fulfills Holiday Wishes

Every year, Bailey Law Group's staff and its clients, families and friends become "Santas" to disadvantaged children. The firm fulfills holiday wishes for more than a hundred kids and their families, buying, wrapping and delivering gifts to those who might otherwise not have gifts for the holidays.

Through the years, Bailey Law Group has bought coats and gifts for PS 89, a school the firm adopted in the Bronx. This particular year, Bailey Law Group is taking care of the kindergarten class.

Bailey Law Group, P.C. is a woman-owned law firm based in the heart of Washington, D.C.'s legal community. Specializing in Hospitality Law, Litigation, Business and Non-Profit Law, Real Estate Law, Employment Law, Government and Regulatory Affairs, Environmental Law and Alcoholic Beverage Licensing, the firm's team approach to practicing law delivers powerful legal representation, superior talent and resources that ensures the needs and goals of each client are carefully analyzed and vigorously pursued. The firm also has offices in Orange County, California and Boulder County, Colorado. More about the firm can be found on its website: [www.baileylawgroup.com](http://www.baileylawgroup.com).

### Sweetin Elected to Board of Directors for Defense Trial Counsel of Indiana

Attorney Doris L. Sweetin of the Indianapolis law firm SweetinBleeke was recently elected to serve on the Board of Directors for the Defense Trial Counsel of Indiana (DTCI). DTCI is an association of Indiana lawyers who defend clients in civil litigation. The association assists and supports its members in the substantive and management aspects of their law practices.

Doris is honored to be elected to the Board of Directors. She was chosen for this position based on multiple attributes, including her experience, professionalism, perspective and personality. She plans on being very active with the Board in promoting DTCI in positive and different ways. Preliminary initiatives on her agenda include growing the membership base and possibly extending memberships to law students - giving them networking and mentoring opportunities to start a successful legal career. Doris looks forward to serving her role and fulfilling her responsibilities as a board member.



**Doris L. Sweetin**

### Concepcion Elected Member of the Federation of Defense and Corporate Counsel



Attorney Carlos F. Concepcion of the Florida law firm Concepcion Sexton & Martinez was recently elected as a member of the Federation of Defense and Corporate Counsel.

## Law Firm News—Successes and Awards

### Trademark Settlement on Eve of Trial

Pruetz Law Group LLP was lead counsel for K-Swiss, Inc. on the team that achieved a substantial settlement payment and worldwide injunction against defendant Payless ShoeSource, Inc. on the eve of a five-week jury trial.

K-Swiss sued Payless for trademark and trade dress infringement on 32 lots of athletic shoes confusingly similar to the famous K-Swiss Classic athletic shoes. K-Swiss' claims were based not only on infringement of its registered five-stripe and toe box design trademarks, but also on infringement of its Classic trade dress, the overall look of the shoes that combined the registered trademarks with D-rings and other features. K-Swiss has been using a five-stripe trademark on its athletic footwear, as well as a trade dress that incorporates the five-stripe logo, D-rings and a distinctive toe box design, since 1966.

In addition to paying K-Swiss substantial compensatory damages, Payless agreed to a consent judgment and worldwide injunction that prohibits Payless and its related Collective Brands, Inc. companies, i.e. Stride Rite and Saucony, from advertising, promoting, making or selling shoes confusingly similar to K-Swiss. Payless must sell off its existing inventory of shoes in violation of the injunction by December 31, 2008.



**Adrian Pruetz and  
Erica Pruetz**

### Biotech Patent Summary Judgment Victory

Pruetz Law Group LLP led the team that won an important legal victory on behalf of defendants Roche Molecular Systems, Inc., Roche Diagnostics Corporation and Roche Diagnostics Operations, Inc. (collectively "Roche"), when the U.S. District Court for the Northern District of California granted summary judgment in favor of Roche, invalidating plaintiff Stanford University's patents for obviousness. Stanford sought hundreds of millions of dollars from Roche based on claims that Roche infringed three Stanford patents involving a polymerase chain reaction (PCR) assay to measure viral load in patients infected with HIV/AIDS. The test assists in monitoring whether or not a particular therapy is effective.

We successfully demonstrated to the court that the prior art, in particular a 1991 Journal of Infectious Disease Article that suggested using HIV RNA as a marker and applying the PCR assay, would have been obvious to a person of ordinary skill in the art. At the lengthy motion hearing, we deflected Stanford's arguments that the prior art taught away from the claimed invention by pointing out that the prior art JID article was authored by Stanford and Roche's predecessor, and disclosed the patented assay itself. The Court agreed, granting Roche's motion for summary judgment and invalidating the patents for obviousness. The case continues as Stanford has appealed the judgment to the Federal Circuit Court of Appeals. Pruetz Law Group is lead counsel for the appeal.



Interested in submitting an article for future editions of the NAMWOLF newsletter?

Contact:

Stacy Fode, Editor  
fode@brownlawgroup.com





## Spotlight—Member Firm :

### d'Arcambal Levine & Ousley<sup>LLP</sup> Attorneys at Law

Michelle d'Arcambal first launched her law firm in September 1996. Changes occurred within the firm in 2006 and Michelle, Aimee Levine and Jodie Ousley thereafter founded DLO in April of that year. The firm currently consists of eight attorneys, three of whom are partners and six of whom are women. The firm practices and has locations in New York (Offices in Manhattan) and New Jersey (Offices in Edison).

The firm focuses on commercial litigation, with unique emphasis on health, life and disability litigation, mediations and arbitrations, and fraud and recovery litigation (including overpayments and subrogation).

Michelle d'Arcambal became a member of NAMWOLF in 2003 after an in-house attorney client called her and recommended the organization. Jodie Ousley and Aimee Levine became NAMWOLF members in 2006. NAMWOLF has proven itself to be an excellent voice for minority and women-owned law firms and has allowed us to meet, become friends with, and sometimes even partner with, other women and minority attorneys with similar goals. We have learned from these firms, shared success stories with these firms and have become a part of a network of attorneys all striving for similar objectives. Additionally, the organization has provided opportunities and venues for our firm to meet in-house counsel with the companies we seek to do business with and to build relationships which have garnered new clients for our firm. The annual meeting, and Law Firm Expo in particular, has been especially helpful in providing opportunities to meet with in-house counsel, make personal connections and build relationships between members of our firm and potential clients. Not just the formal Expo, but the cocktail receptions, the breakfasts and lunches, have all allowed us to interact on a more personal level with potential corporate clients. It is these types of informal settings that we have found so useful in building relationships that lead to new clients.

The following companies are representative of the companies for whom we currently provide legal services: Metropolitan Life Insurance Company, The Prudential Insurance Company of America, Northwestern Mutual, JP Morgan Chase, UnitedHealth Group; Aetna, Inc., Marriott International, Inc.; Symetra Financial Corp.; Wellpoint, Inc./Meridian Resource Company; American International Group, Inc./Lancer. Several of these companies are involved with NAMWOLF.

The firm was founded by three women, with diverse backgrounds, families, experience, interests and personal goals. The firm strives to provide a flexible work environment where each attorney is able to perform challenging, interesting work, develop relationships with clients and pursue their own interests. Most importantly, we want the office to be a place that the attorneys and staff want to go to each morning and we strive to hire and retain individuals who enjoy their work, each other and the firm's clients. Our in-house clients are some of the best in the field, and working with them is always exciting, challenging and a privilege.

In the future, we hope to develop a mentoring program and a series of scholarships for women and/or minority students pursuing legal careers. And as we grow, we continue to strive to create the type of flexible and challenging positions that are not often attainable within larger traditional law firms.



## Tools and Traps in The New FMLA Regulations

*By Stephanie Collins*



One of the greatest challenges facing employers as they enter 2009 is ensuring compliance with the new Family and Medical and Leave Act regulations. Failure to revise policies and procedures accordingly can greatly increase liability exposure, but appropriate revisions can conversely limit exposure for responsible employers. The final rules contain a number of noteworthy revisions to FMLA rights and obligation, some of which are highlighted here. The DOL has posted a number of resources regarding the final rule at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

### **Notice Obligations For Employers and Employees**

The final revised regulations require that employers provide employees with a general notice concerning FMLA, either through an employee handbook or a separate notice given directly to the employee upon hire.

The new regulations also modify the optional forms available to employers for use in responding to employee requests for leave. Employers may use the DOL's new Form WH-381 (<http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>) to notify employees of both their eligibility and their "rights and responsibilities" concerning their leave, such as the need to provide medical certification or the right to substitute paid leave. Once the employee has provided information that allows the employer to determine whether the leave qualifies for FMLA, the employer now has five days rather than two within which to notify the employee that it has designated the leave as FMLA leave.

The final rules clarify that an employer may retroactively designate leave as FMLA leave, provided that the delay causes no actual harm to the employee. The new rules also provide, however, that failure to provide written notice of FMLA leave designation can be considered "interference" with FMLA rights, with expanded potential damages that include "any other relief tailored to the harm suffered."

For their part, employees must comply with the employer's standard call-in procedures for reporting an absence, except under unusual circumstances, such as the employer's failure to answer its telephone, or the employee's inability to call because they are seeking emergency medical treatment. This revision reverses a prior provision that some had interpreted as permitting an employee to notify the employer of the need for FMLA leave up to two days after an absence had already occurred.

Furthermore, employees may not trigger their FMLA rights by simply "calling in sick." The employee must adequately explain the need for leave so that the employer can determine whether the leave qualifies under FMLA. The employer may deny the leave if the employee fails to do so. If the employee has previously taken FMLA for the same reason, he or she must nevertheless alert the employer to the qualifying reason for the leave.

### **Medical Certifications**

The revised regulations made several changes to the rules concerning one of the most heavily litigated facets of the leave process, medical certifications. Employers now have five days instead of two within which to request a medical certification from an employee. Employers may require medical certifications even when an employee substitutes paid leave, whereas previously the employee could only be required to meet the employer's less stringent paid leave policy requirements.

The certification forms themselves have changed, as well. In recognition that the circumstances giving rise to employee leaves can be so different, the DOL has created two new medical certification forms, one for use by an employee for his or her own serious medical condition, and the other when an employee requests leave to

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## Tools and Traps in The New FMLA Regulations

*(Continued from page 10)*

care for a family member with a serious health condition.

If the employee supplies a medical certification form that is inadequate, the employer is permitted to contact an employee's health care provider to authenticate or to obtain a clarification of information required by a certification form. Employers must be careful, however, because an employee's "direct supervisor" cannot make the inquiries. Such communication should be handled by human resources or other members of management.

The new regulations require the employer to notify the employee in writing if the medical certification is incomplete or inadequate and to explain what information is missing or insufficient. The employer must provide the employee seven days to supply the missing information.

Under the revised regulations, employers can seek a new medical certification each leave year for medical conditions that last longer than one year. Additionally, employers can ask for medical recertification's every six months, or more frequently under certain circumstances.

Employers have expanded abilities under the new regulations to seek more detailed and job-specific fitness for duty certifications when an employee returns to work after a leave. Additionally, employers can require fitness for duty certifications when an employee returns to work following an intermittent FMLA leave.

As a whole, the new regulations concerning medical certifications will allow employers to obtain more specific information and make more informed determinations regarding FMLA qualifying leaves. This will reduce the risk of litigation over vague and otherwise inadequate FMLA requests and certifications.

### **FMLA Disputes—Trap For The Unwary**

The revised regulations provide that, in the event of a dispute between the employer and the employee concerning the employee's right to FMLA leave, the parties should engage in discussions to resolve the dispute. Notably, these discussions and the resulting determination must be documented. Clearly, this requirement may become particularly relevant in the event an "FMLA dispute" becomes employment litigation down the road.

Employer will take solace, however, in the provision of the new rules clarifying that employees can indeed waive FMLA claims in settlement agreements. This alleviates any concerns that arose from a recent Fourth Circuit decision holding that employees could not waive their past or future FMLA rights. Employers and their counsel should review settlement and separation agreement forms to ensure they take advantage of this significant clarification.

The new rules also provide substantial guidance concerning leaves available to families of military personnel that were signed into law in January 2008. Military Family Leave issues will be addressed separately in future publications.

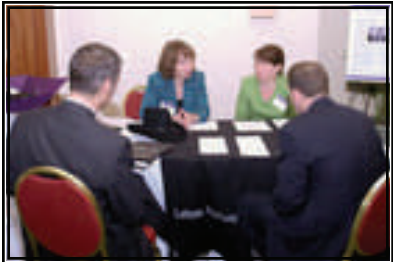
In light of the substantial changes implemented by the FMLA amendments and regulations, employers need to update their policies and procedures to incorporate their new obligations. Employers should also ensure that leave designation and certification forms comply with the new regulations, and that human resources and management personnel are aware of the changes.



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Stephanie Collins is Senior Counsel with Sanchez & Amador, LLP. She advises major corporate and non-profit employers in employment matters and defends them in employment-related litigation. She can be reached at [collins@sanchez-amador.com](mailto:collins@sanchez-amador.com).

NAMWOLF 2008 ANNUAL MEETING





## NAMWOLF 2008 ANNUAL MEETING



## NAMWOLF ANNOUNCEMENTS

### UPCOMING EVENTS:

- NAMWOLF BUSINESS MEETING  
March 12-13, 2009 | Chicago, IL

### INSURANCE INITIATIVE EVENTS:

- Insurance Coverage & Claims  
April 3, 2009 | Chicago, IL
- Life Health & Disability Conference  
April 22-24, 2009 | New York, NY
- DRI Diversity for Success  
June 11-12, 2009



### IMPORTANT REMINDERS:

- NAMWOLF Committee Meetings will commence the first week of March. Please check [www.namwolf.org](http://www.namwolf.org) for meeting calendar.
- If you are interested in planning the business meeting, please contact Michele Miller at [mbm@millerlawgroup.com](mailto:mbm@millerlawgroup.com).
- For corporate counsel who would like a 2009 law firm member directory, please contact the NAMWOLF office.



Raphaël Gerard Coly  
Future Soccer Star and Doctor

### ANNOUNCEMENTS:

- NAMWOLF welcomes Richard Amador from Sanchez & Amador as its newest board member.
- Yolanda Coly and her husband, Dr. Gerard Coly, gave birth to a beautiful baby boy, Raphaël Gerard Coly on October 17, 2008.



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