

Congress Looking to Overhaul FMLA *Proposed Legislation Could Present New Compliance Challenges*

By Jason Leo (Tampa)

Although sometimes lost in the buzz over health care reform and union card-check legislation, over the past several months, Congress has also been considering a slew of aggressive proposals designed to expand various aspects of the Family and Medical Leave Act (FMLA). While these changes could affect employers in all industries, retailers should be especially concerned due to the possible lowering of requirements for coverage of part-time employees.

The Devil's In The Details

To facilitate passage, a number of proposals were recently consolidated within a single bill that could bring about the most sweeping reforms since FMLA became law sixteen years ago. On June 25, 2009, Representative Lynn Woolsey (D. CA) introduced "The Balancing Act of 2009," which incorporates multiple expansion efforts. Taken together, these provisions could have significant implications for employers and employees alike.

The most controversial proposal within Woolsey's bill would essentially convert FMLA to a paid-leave statute, allowing employees to take upwards of 12 weeks of paid leave over a 12-month period for qualifying family, medical or military exigency reasons. At present, covered employers are only required to extend such leave to eligible employees on an unpaid basis.

Pursuant to this provision, a federal "Family and Medical Leave Insurance Fund" would be established to finance paid leave distributions. Based upon similar models that have already been implemented in California and New Jersey, employers and employees would jointly subsidize the trust fund by contributing a premium of 0.2 percent of employee earnings.

Applying this to the median household income in the United States, which according to the U.S. Census Bureau was \$49,901 in 2007, employees and employers would each pay approximately \$100 into the fund per year. The fund would be managed by the Department of Labor, much like the states presently administer unemployment compensation.

The Balancing Act also purports to expand the FMLA by creating new forms of protected leave for both "parental involvement" and "family wellness." Parental-involvement leave would allow workers to participate in certain academic and extracurricular activities of their children and grandchildren, while "family wellness" leave would enable employees to assist family members in attending medical appointments and to care for elderly relatives.

The consolidated legislation contains additional provisions that would: 1) require covered employers to provide a minimum of seven days of paid sick leave per year; 2) extend protection to victims of domestic violence and sexual assault; and, 3) allow leave to care for a broader category of family members, which would include domestic partners and same-sex spouses.

The bill would extend these obligations to a broader scope of small to mid-sized businesses. While the FMLA currently covers only those employers with 50 or more employees, the Balancing Act would expand the coverage threshold to encompass those with 15 or more employees, so even smaller retailers should be concerned. The bill would also extend eligibility to certain part-time employees who work 1,050 or more hours per year, a substantial reduction from the current minimum threshold of 1,250 hours per year.

What's Already On The Table

This has already been a busy year for the FMLA, which saw the issuance of a new set of regulations for the first time in fourteen years, implementing military-qualifying exigency leave based on amendments that had been signed into law a year earlier. It remains to be seen whether these proposals will survive once the bill makes its way through the House and into the Senate.

Nonetheless, supporters of the bill are optimistic as to its passage, and many are already speculating that the Administration would be willing to sign it into law. Retail employers will want to monitor these developments closely as the bill makes its way through Congress.

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Five Things You Need To Know About Immigration Law – Right Now

By Kim K. Thompson (Atlanta)

Retailers have been spared the high-profile immigration woes that some industries (such as manufacturing, food processing, and hospitality) have faced in the past few years. But the new administration recently announced that it is going to turn the heat up on employers from all industries, so now more than ever it is important to ensure that your

business is protected. Here are five quick things about immigration laws that are important for you to know.

1. Form I-9 - Use the New Version

The new Form I-9 (revised 2/2/09) went into effect on April 3, 2009. The new form requires that you accept only unexpired documents to verify employment authorization and identity, removes

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some documents from the List of Acceptable Documents, and expands the citizenship status options in Section 1. Although the 2/2/09 version of the form has an expiration date of June 30, 2009, U.S. Citizenship and Immigration Services (USCIS) has authorized the continued validity of the form until they issue a new version. The current version of the Form I-9 and the new I-9 handbook are available on our website (www.laborlawyers.com) or at the USCIS website (www.uscis.gov).

You may use Section 3 to re-verify the work authorization for employees who work on a sporadic basis (such as students who are rehired regularly to work during summer breaks and school holidays throughout the year), but only if they are being re-hired within three years of the original start date. Section 3 is completed on the new version of the I-9 form, and the form containing Section 3 is attached to the original form.

2. Worksite Enforcement

The Department of Homeland Security issued new worksite enforcement guidelines on April 30, 2009 announcing a shift of focus towards criminal prosecution of employers who knowingly hire illegal workers. Immigration and Customs Enforcement (ICE) will continue to arrest illegal workers as they are discovered during worksite raids and will use civil and administrative tools (such as civil fines) to punish employers and deter illegal employment.

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In line with the new enforcement guidelines, ICE issued 652 I-9 Form Notices of Inspection to employers across the U.S. on July 1. There is every indication that this is just the first wave of ICE I-9 Form audits and that no industry is immune. The initial round of I-9 audits were triggered by complaints or were the result of an on-going ICE investigation. Although the retail industry has not been high on the list as a target for worksite raids, we expect that to change as the new administration ramps up its efforts to show that it is tough on enforcement. We recommend that you conduct regular I-9 audits and ensure that you have an I-9 form for all employees hired after November 6, 1986.

3. Social Security No-Match Rule

In August 2007, the Department of Homeland Security (DHS), issued a rule entitled *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter* ("No-Match Rule"). The rule has been on hold since 2007 as a result of a lawsuit filed by business groups. DHS announced on August 19 that it proposes to rescind the Social Security No-Match rule and focus its enforcement efforts on increased compliance through I-9 Form audits and other employment verification programs. Rescission of the No-Match Rule is expected to occur before the end of September. Once the rule has been rescinded and the litigation resolved, the Social Security Administration (SSA) will resume issuance of the No-Match letters. We expect the DHS to view a SSA No-Match letter as notice that the identified employees may not be authorized to work in the U.S. and that the employer should take remedial steps.

4. Federal Contractor E-Verify Rule

Starting on September 8, 2009, federal contractors and subcontractors will be required to enroll in E-Verify when they are awarded a federal contract or subcontract that includes the E-Verify requirement or when an existing contract is amended to include the E-Verify clause. Covered employers will be required to E-Verify all new hires company-wide and all current employees assigned to work on the federal contract. The rule covers prime federal contracts of \$100,000 and over, which have a performance period of 120 days or longer.

Not covered are contracts for work to be performed only outside the U.S., for only commercially available off-the-shelf (COTS) items (or which would be COTS items with only minor modifications), or for food and agricultural products shipped as bulk cargo and which would otherwise be classified as COTS items. For example, if you sell pencils to the government and the pencils are the same as those you sell to the general public, it is unlikely that your contract would be covered by this rule. Subcontractors are covered if providing services or construction with a value of \$3,000 or more.

5. State Immigration-Related Laws

Across the country, states continue to enact employment-related immigration legislation, including legislation requiring certain employers to use E-Verify to electronically verify the employment eligibility of their newly hired employees. For example, all employers in Arizona are required to use E-Verify for all newly-hired employees. Employers in Mississippi and South Carolina are required to use E-Verify on a phased-in basis tied to the number of employees. Several states require public employers and private employers with state contracts to use E-Verify, including Arkansas, Colorado, Delaware, Georgia, Minnesota, Nebraska and Rhode Island.

Keeping up-to-date on changes in immigration law will continue to be an important component in protecting your business and employees. Details about safe-harbor procedures and a complete list of all states that have enacted employment-related immigration legislation, are available on our website at www.laborlawyers.com.

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