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**Don't Be Caught Up a Creek Without a Paddle**  
 Navigating the Current Wave of Proposed Changes in Employment Law  
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With the current presidential primaries focusing on "bringing change" to America, businesses should take this time to reflect upon what changes are already being contemplated in Federal employment law. Obviously, the 2008 presidential elections will have a profound impact on American workplaces as a Democratic President and Congress will mean a big change in priorities from the current Bush administration. However, even a cursory review of the current wave of pending, proposed, and recent employment law changes should have businesses ready to raise their anchors and prepare for a wave of change beginning in 2008. This article will serve as your guide through some of the hottest new and proposed Federal employment law changes currently facing American businesses.

**FMLA**

President Bush recently signed into law the National Defense Authorization Act ("NDAA") which amended the Family and Medical Leave Act ("FMLA") as it relates to military family leave. The NDAA permits the use of up to 26 weeks of FMLA leave during a twelve month period to care for a service member with a "serious illness" who was injured in the line of duty. It also provides the FMLA's standard 12 weeks of leave during a twelve month period for a "qualifying exigency" related to a service member's call to active duty. The NDAA charged the Department of Labor ("DOL") with defining "qualifying exigency" through the DOL's power to regulate under the FMLA.

On February 11, 2008, the DOL responded to the NDAA by publishing proposed new FMLA regulations. However, not all of the proposed new regulations relate to the new military family leave. Some of the important non-military family leave regulatory changes proposed by the DOL include the following:

- A. Employers will have to provide employees a much more substantive notice whenever leave is designated FMLA. Employers must provide the notice to employees within five (5) days of having sufficient information to make the determination. The current regulations require the designation notice to be provided within two (2) days, which can be difficult to comply with. However, having more time to designate the leave comes with a price - employers will now be required to inform employees of the precise number of hours, days, or weeks that will be designated FMLA within the body of the notice. The more substantive calculations may prove difficult for unforeseeable and intermittent leave requests. The DOL will also require employers to inform intermittent employees every 30 days that their leave is designated and protected under FMLA and advise the employees as to the amount of FMLA taken during the 30 day period.
- B. Employers will be able to directly contact an employee's medical provider in order to obtain clarification or authentication of FMLA documentation. Current regulations prohibit employers from personally contacting an employee's medical provider. Instead, employers are limited to communicating with the employee's medical provider solely through the employer's own retained medical provider. Even then, the employee must first consent. The DOL is clear, however, that even though employers will now be permitted to contact an employee's medical provider personally, the employer must still comply with HIPAA's privacy rules. Therefore, employers will need to have employees complete a HIPAA Release prior to contacting the employee's medical provider. This requirement seems reasonable and serves as a layer of protection for employee privacy.
- C. Employees will have to comply with an employer's usual paid leave callin procedures before taking unscheduled, intermittent leave under the FMLA except in cases of emergency. The new regulations will make it clear that an employee covered under FMLA is not entitled to any paid benefits that they would not normally be entitled under the employer's paid leave policy. Therefore, an employer will be permitted to deny paid benefits and seek any appropriate, non-retaliatory disciplinary procedures against employees who fail to follow company policy for paid leave. Current FMLA regulations state that an employer cannot enforce FMLA notice provisions that are stricter than the FMLA. This regulatory change is very welcome and will help remove employee perception that FMLA-

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covered employees are treated more favorably than non-FMLA covered employees who seek the same level of paid leave benefits.

D. The proposed regulations clarify that employers may not place limits on employees who request FMLA protection in order to care for family members with a serious illness. Some employers have taken the position that employees only qualify for FMLA leave in these situations if the employee is the only individual or family member available to provide care. The new regulations will prohibit this practice and its continued use will unlawfully interfere with employee FMLA rights.

E. The new regulations will permit public employers to run compensatory time concurrently with FMLA leave. This is not currently permitted in the regulations and will serve to treat compensatory time off the same as other paid leave benefits.

F. Employers will be prohibited from counting an employee's time worked during a temporary light-duty assignment (typically pursuant to a workers compensation injury) against the employee's twelve-week FMLA allotment. The new proposed regulations specify that time worked in a light-duty assignment does not count toward an employee's FMLA leave.

G. Finally, the proposed regulations will clarify the confusion in the courts as well as among practitioners as to the validity of an employee's waiver of FMLA rights in a severance or settlement agreement. The DOL's proposed regulations take the majority view that employers and employees can enter into enforceable agreements that waive an employee's right to institute litigation regarding past FMLA claims. However, future FMLA claims that may arise after the date of the agreement may not be waived. Again, these are proposed regulations at this time and are currently open for public comments through midnight, April 11, 2008. The indication from the DOL is that the agency wants to have the final rules in place before the current Bush administration leaves office. If you want to offer comment or your opinion to the DOL about the proposed regulations, please contact the DOL prior to the deadline for public comments. Go to [www.dol.gov](http://www.dol.gov) for directions on how to submit your comments.

ENDA

The Employment Non-Discrimination Act (ENDA) is a proposed Federal law that would prohibit discrimination against employees on the basis of sexual orientation. It would have the same damages as Title VII of the Civil Rights Act. The Act exempts religious organizations and the U.S. armed forces from compliance. There are two pending versions of this bill (H.R. 2015 and H.R. 3685). The main difference between them is that HR 3685 does not include the term "gender identity" within its coverage. The main argument advanced for excluding gender identity (which is essentially taking on the characteristics, appearance, or mannerisms of the opposite sex) is that Courts have already extended Title VII of the Civil Rights Act's protections against sex discrimination to gender identity. On November 7, 2007, HR 3685 overwhelmingly passed the House of Representatives and is currently pending in the Senate.

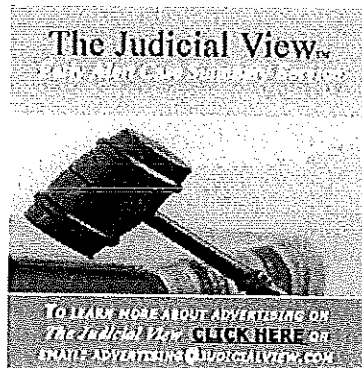
If either of these bills pass, which is rather likely at this time, businesses will be highly encouraged to revise their handbooks, policies, and recruiting materials to add the new protected category of "sexual orientation" to their anti-discrimination policy statements. Additionally, management and employee training and awareness will be a must.

ADA Restoration Act

The ADA Restoration Act is pending before the House of Representatives and would drastically expand the definition of disability under the American with Disabilities Act ("ADA") to cover, and require employers to accommodate, individuals with any "mental or physical impairment." This proposed new definition expands disability to cover minor or temporary impairments such as near-sightedness, headaches, and even runners knee.

Currently, an employee must have a physical or mental impairment which renders the employee substantially limited in an everyday life activity in order to qualify as disabled under the ADA. Minor or temporary impairments do not currently meet this definition. The Restoration Act also would remove the current judicial interpretation that employee impairments must be considered in their mitigated state. Therefore, under the Restoration Act, an employee who is near-sighted but has 20/20 vision with corrective contact lenses would now be considered disabled since the person is near-sighted without the mitigation of contact lenses.

The Restoration Act would have far reaching implications for employers. Since the ADA requires employers to provide reasonable accommodations to qualified disabled individuals, if the Restoration Act's new definition of disability is enacted, employers will be faced with a substantial increase in accommodation requests that they must consider



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and provide to employees with allergies, headaches, and plausibly sinus infections since they will be disabled under the Restoration Act's language. Further, these newly disabled employees will be protected from discrimination and retaliation under the ADA.

Civil Rights Act of 2008

Pending before both the House and Senate are two related bills ( HR 2159 and S.B. 2554, respectively) that would radically modify employment law in a manner that would be detrimental for American businesses. S.B. 2554 is co-sponsored by both Senator Hillary Clinton and Senator Barack Obama. Both Acts would do the following:


- A. Eliminate the current damage caps under Title VII and the ADA, thereby increasing litigation costs for employment claims.
- B. Add compensatory and punitive damages to the FLSA and the Equal Pay Act ("EPA")
- C. Amend the Federal Arbitration Act ("FAA") to prohibit clauses in employment agreements (except collective bargaining agreements) that require arbitration of federal constitutional or statutory claims unless the parties consent AFTER the dispute arises. Therefore, pre-employment arbitration agreements will be invalid as to federal claims.
- D. Provide the National Labor Relations Board ("NLRB") with the ability to award back pay to undocumented workers. Currently, undocumented workers are not eligible for back pay as they are not legally entitled to wages under the FLSA.
- E. Condition a State's receipt of federal funds on the State's waiver of sovereign immunity against individual claims for monetary damages under the Age Discrimination in Employment Act ("ADEA"), the FLSA, and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Currently, States cannot be sued for these claims based upon their sovereign immunity. However, in practice, state law will typically be applied against the States in place of federal law.

Both bills are relatively new and have not come to a vote before either the House or Senate. Either bill, however, appears to have dire consequences for all American employers as they substantially increase both damages and exposure to liability.

FLSA

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Let's not forget the Fair Labor Standards Act. Under the Federal minimum wage increases signed into law in May of 2007, the Federal Minimum Wage will jump to \$6.55 on July 24, 2008 and to \$7.25 on July 24, 2009. For most Ohio employers, the State minimum wage is higher than the Federal rate at this time. However, in 2009, that may change. Besides ensuring that both Federal and State minimum wage requirements are met, businesses are encouraged to inspect their current FLSA employment law posters to ensure that they reflect the new Federal rates. If they are out of compliance, a penalty may be imposed.

CONCLUSION

All radar indicates that this year is going to be the beginning of an interesting period for employment lawyers and human resources professionals alike. In order to legally navigate through the proposed and coming waves of change, businesses should keep a continuous look-out over the port-side to ensure that they are not caught up the creek without a paddle.

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