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Developments Concerning The Ohio Healthy Families Act

Since the time of our initial Client Alert concerning the Healthy Families Act (“HFA”), the Governor of Ohio sought to broker a compromise between supporters and opponents of the ballot initiative. That effort has failed, and the proposed legislation will now be on the November 4, 2008 ballot, unless it is withdrawn by its supporters.

Both Governor Strickland and Lieutenant Governor Fisher have announced that they oppose the passage of this legislation. As have employer groups and many employers. If this legislation is enacted, Ohio would be the only state that has such a law.

Many of our clients have sought additional information and guidance concerning this potential legislation, and with the failure of the efforts to reach a compromise, further attention to this matter is clearly warranted. For reasons set forth below, every Ohio employer should give careful consideration to what, if any, actions it should take prior to November 4.

Before addressing several issues more specifically, a brief review of the HFA and some of its many problematic aspects is in order. The proposed legislation was written by representatives of the Service Employees International Union, not legislative experts, so it is full of undefined terms, ambiguous provisions and confusing references. Needless to say, the HFA is also heavily weighted in favor of employees and their attorneys.

If passed, the HFA would require employers with 25 or more employees to provide seven days of paid sick leave annually for employees who work 30 hours or more per week. Also, it would require the provision of pro rata amounts of paid sick leave annually to employees who work less than 30 hours per week or less than 1,560 hours per year. Sick leave would accumulate at least monthly and would begin to accrue immediately upon commencement of employment; however, employers would not be required to grant sick leave during the first 90 days of an employee’s employment. Accrued sick leave would carry over from year to year, but employers would not be required to permit the accumulation of more than seven days of sick leave per year. Employees would be permitted to take sick leave for periods of time less than a normal work day, and in such cases, sick leave would be calculated on an hourly basis, or on the basis of the smallest increment used by the employer to account for absences or the use of other leave.

Employers would be required to permit sick leave for absences resulting from any physical or mental illness, injury or medical condition of an employee, and for absences resulting from an employee’s obtaining a medical diagnosis or care or preventive medical care. Also, an employee would be entitled to take sick leave for absences needed to care for a child, parent (and that term is very broadly defined) or spouse who has a physical or mental illness, injury or medical condition or who needs medical diagnosis or care or preventive medical care.

Employees would be able to request leave orally or in writing, and would need to provide only a reason for the absence and its expected duration. Employees would be expected to give at least seven days notice when possible (if not possible, notice as soon as practical) and to make reasonable efforts to schedule leaves so as to avoid undue disruptions of the employers’ operations. Employees would have to provide certification from a health care professional only if their leave periods cover more than three consecutive work days, and would have up to thirty days after the first day of a leave within which to do so. A “health care professional” is defined to include anyone with a federal or state license to provide health care services; if broadly interpreted, this definition apparently could include emergency technicians, nursing assistants, licensed practical nurses and others.

The HFA would specify that an employer that already has a leave policy in place which provides paid leave shall not be required to modify such policy if it offers employees the option of taking paid leave that is “at least equivalent” to the sick leave required under the HFA. However, the proposed legislation also specifically provides that an employer will not be permitted to “eliminate or reduce leave” in existence on the date of enactment of the legislation in order to comply with the provisions of the HFA.

The HFA would list many “prohibited acts”, including interfering with the exercise or attempted exercise of any right provided by the legislation, discriminating against or discharging any employee for exercising or attempting to exercise any right under the law, using paid leave as a negative factor in any employment action, and counting the use of paid sick leave under a no-fault attendance policy. Stringent requirements would apply with respect to the maintenance and dissemination by employers of health information regarding employees, their children, parents and spouses.

The proposed legislation would provide that either any employee or the Ohio Attorney General could enforce its provisions and that employees could be awarded not only actual damages, but also treble damages and attorney’s fees.

With respect to strategies to be pursued by employers, each employer’s strategy must be crafted in light of the employer’s unique situation, workforce, corporate culture and employee morale. Certainly, every employer with 25 or more employees should carefully consider whether its current policies are “at least equivalent” to the sick leave that would be provided by the HFA. In that regard, in light of the provision of the HFA that specifies that an employer may not “eliminate or reduce leave” after the passage of the HFA in order to comply with it, every employer that may be affected should make a careful determination as to whether a reduction of current days off or changes in current leave policies should be made prior to November 4, so as to avoid the possibility of having to add seven costly new days of sick leave in the event of passage of the legislation.

There is no definition in the HFA as to the meaning of “date of enactment”, so the safest course of action for an employer that wishes to make changes would be to treat election day as that deadline. Most employers will not want to implement changes any earlier than necessary, since they are very likely to have problematic ramifications.

Employers who have employees who are represented by unions face special considerations. Under the National Labor Relations Act, employers may have to notify unions that represent their employees in advance of making any changes in their terms and their conditions of employment, and if the unions request to do so, bargain with the unions concerning those changes either to impasse or agreement before making them. Employers may generally avoid this obligation to bargain only where it has been waived either by contract provisions, such as strong management rights clauses, or union conduct. Consequently, employers whose contracts are not currently subject to negotiations for a new agreement need to assess promptly and carefully the terms of their labor contracts in order to determine what right, if any, they may have to make unilateral changes in leave policies. Unless such contract provisions unequivocally grant the right to make such changes, employers may seek to engage unions in bargaining for needed changes in their contracts. Certainly employers who are currently engaged in bargaining for new contracts should consider whether they should seek new contract language which would permit them to make necessary changes before November 4 and to return to the status quo in the event the HFA does not pass. Efforts to engage in bargaining concerning the HFA cannot be left to the last moment, since one component of good faith bargaining entails affording a union an adequate opportunity to respond to and negotiate with respect to any employer proposals.

The HFA does not have to pass. Employers, politicians and the media are becoming increasingly aware of its negative ramifications, and many are letting voters know just how harmful the legislation would be for the state and its workers. Employers should consider how they can lawfully and most effectively oppose the passage of the HFA, through both communications and financial support of the campaign opposing the HFA.

If you have any questions about this matter or wish to have us assist in the consideration and development of your strategies, contact Brian J. Kelly at (216) 515-1660, Frantz Ward LLP, 2500 Key Center, 127 Public Square, Cleveland, OH 44114, bkelly@frantzward.com.

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