

# MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

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## LEGAL AND LEGISLATIVE UPDATE

by

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### ***Paid Family Leave, Flex Time, Etc.*** **Are NH Employers Ready for these Potential Workplace Changes?**

When the federal Family and Medical Leave Act (FMLA) was first proposed in 1990 President George H. Bush vetoed it as he questioned the need for a formal leave requirement claiming that many employers already offer some form of paid and unpaid leave available to employees. That “*Thousand Points of Light Argument*” didn’t convince Congress so one of the first bills President Bill Clinton signed into law was the FMLA. That was 1993. Since then the American workforce has evolved and many employers have responded to demands for greater workplace flexibility by creating benefit policies that permit time off for more reasons than permitted by the FMLA and various state leave laws. Still many other employers simply provide what the law requires. Beyond the eligibility for leave programs is the issue of affordability. FMLA is unpaid leave up to 12 weeks in a year. While many employers require employees to use accrued but unused paid leave time during FMLA, all or most of FMLA leave is unpaid. That presents a challenge for many employees who are in need of time to attend to medical and other family matters but they can’t afford to be without a paycheck.

In recent years, advocacy groups have lobbied Congress and state Legislatures for paid family leave benefits. Until recent years those efforts were rebuffed because of the expense involved and the questions about how that leave would be integrated with other employer leave policies.

Over the last two years several states have adopted various forms of paid leave laws (e.g. mandatory paid sick leave, parental leave, paternity leave, etc.). These were largely in response to the changing face and needs of the 21<sup>st</sup> century workforce (e.g. working parents, telecommuting, job sharing, an aging workforce, the integration of disabled workers, etc.).

While over the last 10 – 15 years several attempts to expand the FMLA in Congress have stalled or died in committee, if they made it that far, lately there is traction in Congress for changes to FMLA.

In a novel approach to efforts to expand the FMLA and address changes in the workforce, as well as the reluctance of employers to embrace more leave policies when they are already struggling to comply with existing state and federal laws, Representative Mimi Waters (R-CA) has proposed the Workflex in the 21<sup>st</sup> Century Act (HR 4219). If passed and signed into law this Act would give employers the choice of opting in to a federal program that guarantees full and part-time employees a minimum level of paid leave and flexible work options (e.g. compressed work schedule, telecommuting or job sharing). In exchange employers, especially those with operations in more than one state, would gain predictability by following a federal standard for paid leave and workplace flexibility as they would also be exempt (via pre-emption) from a patchwork of all applicable state and local leave laws. It is too soon to predict how that bill will fare in Congress and whether it could withstand legal challenges, especially from states with generous leave laws, but it is worthy of note that this bill has, at least for now, some support from both sides of the aisle. In the meantime, several states, including nearby Vermont and Massachusetts have adopted new paid leave laws continuing the trend of recent years where states have stepped up because of the stalemates in Congress.

Likewise, in the current session of the New Hampshire Legislature, bills have been introduced to adopt mandatory minimum sick leave benefits, require payouts of accrued vacation and expand maternity leave protections. The prospects of the passage of these bills remains uncertain but another bill creating a paid family leave program under New Hampshire law has surprising support in a legislature where both houses have Republican majorities.

On February 8, 2018 the New Hampshire House of Representatives passed (by a narrow margin of 5 votes) HB 628, a bill that would create a voluntary family and medical leave insurance (“FMLI”) program. This bill would set up a trust fund within the Department of Employment Security into which employees (not employers) can pay a small portion of their wages, which they would then be eligible to apply for to cover 60% of their pay when they are out on FMLA leave. There have already been concerns voiced about the program’s sustainability. An earlier version of the bill passed the House Labor, Industrial and Rehabilitation Services Committee but failed to pass the House Commerce Committee because of those and other concerns. Those concerns were addressed in amendments to the bill. The version of the bill that passed shortened the FMLI from 12 weeks to 6 weeks and increased the premium as a percentage of an employee’s pay from one-half of 1% to 1%. The program is still subject to further review as to its financial viability.

As of February 27, 2018 the bill was still before the House Finance Committee but for the first time there is real support and momentum behind this bill or at least the concept of paid

family leave; something that would have been unheard of a few years ago. If passed this could be a meaningful benefit for employers and employees in New Hampshire as it could provide employees with financial support during an FMLA leave but employers wouldn't be required to provide those payments.

There will likely be more developments soon. Stay tuned!

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**Disclaimer**

***Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.***