How Employment Law Affects Children

By Jeffrey W. Larroca

This is not an article on the evils of child labor, a by-product of American industrialization that is thankfully a thing of the past. Rather, this article touches on employment law and how it impacts children in ways more subtle than a prohibition on sweatshops.

The passage of health care reform has already had a significant impact on the workplace, and while most employers are preparing to deal with the mandates (and attendant fines) that will be in force in 2014, certain aspects of the health bill became applicable immediately, or will soon be in force. Interestingly, the first provisions deal with children. Upon the bill's execution by President Obama on March 23, 2010, federal law mandated that employers provide new mothers with "reasonable break time" to express breast milk for nursing children who are up to 12 months old. Not only is "reasonable time" required for the expressing of breast milk, but the law also requires employers to provide a location for employees to express breast milk, and that place cannot be an unsanitary bathroom. Instead, employers must provide a place "shielded from view and free from intrusion by coworkers and the public." The breast milk provision applies to all employers, although employers with less than 50 employees can be excused from its application if they can show that adherence would pose an "undue hardship," certain to be a tall order by courts asked to interpret the law.

Additionally, effective September 23, 2010, group health plans will be required to provide dependent coverage to participants' children up to age 26, and regulations addressing the provision have already been issued. Under those regulations, a child can only be defined in terms of the relationship between the participant and the child, meaning that the group health plan will not be able to impose additional requirements for coverage eligibility, such as financial dependence on the participant, residency with the participant or student status. Moreover, group health plans will not be able to charge a premium differential based on a child's age.

While the health care bill is a new statute affecting children, existing law is being interpreted in ways that also greatly impact sons and daughters. For example, the Family and Medical Leave Act ("FMLA") allows employees 12 weeks of leave a year for various reasons, including allowing an employee "to care for" a child who has a serious health condition. Recently, courts have clarified what it means to "care for" a child under the FMLA. For example, a federal court in Minnesota held that an employee did not qualify for FMLA leave "to care for" his girlfriend's eleven-year-old son during her hospitalization for surgery, despite the fact that the son suffered from Attention-Deficit Hyperactivity Disorder and Tourette Syndrome. The employee testified that during the leave he claimed was protected under the FMLA, he returned to his home several times during the day to "check on" the child. The court concluded that merely "checking on" a child did not amount to "caring for the child." Thus, the leave was not protected.

Courts are also grappling with the FMLA's treatment of adult children. The FMLA protects a son or daughter, meaning a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under the age of 18, or 18 or older and "incapable of self-care because of a mental or physical disability." The regulations define "incapable of self care" as the adult child requiring "active assistance or supervision to provide daily self-care in three or more of the activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities, such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

In another recent decision, a federal court in Illinois dealt with a mother who had a 23-year-old learning-disabled daughter hospitalized with pancreatitis. The employee requested FMLA leave "to care for" the daughter, but the leave was denied because the employer did not deem the daughter "incapable of self care because of a mental or physical disability." The court found that because the daughter may have been incapable of dressing herself appropriately and may have had difficulty putting on her shoes correctly, there was evidence that the daughter was substantially limited in one area of caring for herself - dressing. Accordingly, the court ordered a trial rather than ruling for the employer on motion.

Finally, the federal agency that enforces federal law on the payment of wages, and many of its state counterparts, are closely watching the utilization of positions many children occupy prior to their entry into the workforce - internships. According to a recent New York Times article,1 federal and state regulators are increasingly scrutinizing unpaid internships to ensure that they do not run afoul of the law. Regulations enforcing the federal wage payment law underscore governmental concerns that private employers are getting free work instead of paying compensation. Thus, the federal government maintains six criteria for internships:

1. The training is similar to what would be given in a vocational school or academic educational instruction;

2. The training is for the benefit of the interns;

3. The interns do not displace regular employees, but work under their close observation;

4. The employer derives no immediate advantage from the activities of the interns, and on occasion the employer's operations may actually be impeded;

5. The interns are not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the interns understand that the trainees are not entitled to wages for the time spent in training.

Unfortunately, many employers are using a rather elastic definition of an internship – using unpaid interns, for example, to perform routine manual tasks - which is getting them into legal trouble.

As is shown by these recent developments, the reach of employment law is ever-expanding into our families. ●

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1 http://www.nytimes.com/2010/04/03/business/03intern.html