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## THE EMPLOYER'S QUARTERLY

Winter 2008

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### **New Form I-9: The Government Isn't Kidding**

*By  
Leigh McCarthy*

Employing a foreign worker who is not authorized to work in the U.S. is a violation of federal law. Since 1986 *all* employers have been required by immigration law to verify on Form I-9 the identity and the employment eligibility of *all* employees. An employer therefore has two separate and independent obligations—(1) to not hire workers who lack employment authorization *and* (2) to complete within the required time mandatory I-9 paperwork to verify the worker's eligibility for employment.

Many employers make the mistake of assuming that because they have no foreign employees they do not need to worry about I-9s or immigration law. Since 9/11, however, there has been a dramatic increase in worksite enforcement by U.S. Immigration and Customs Enforcement (USICE). A government audit and a finding of failure to comply with the I-9 rules can result in significant civil fines and penalties, loss of access to government contracts, and highly negative publicity. In some cases, where there is a pattern of continuing violations, the

government has charged noncompliant employers with crimes.

In the summer of 2007 the federal government issued a new form I-9. The new form is dated June 5, 2007. *As of December 26, 2007*, only the new I-9 form may be used to verify a newly hired or reverified employee's identification and work authorization. A new I-9 need not be completed for current employees *unless* no I-9 is on file for that worker or the employee's work authorization expires and must be reverified.

When it issued the new form I-9, the government also deleted several documents from the "List A" documents that may be used as proof of both identity and work authorization. The government added to List A the most recent version of the governments temporary employment document, known as Form I-766.

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An employee is no longer *required* to provide a Social Security number in Section 1 of form I-9, unless that worker offers a Social Security card to prove work authorization or the employer is participating in the government's E-Verify program, which electronically checks a Social Security number with identity information to verify a newly hired worker's employment eligibility.

Scam artists sometimes offer to sell I-9 forms to unsuspecting employers. The new Form I-9, however, like every other government immigration form, is available *free of charge* on the Department of Homeland Security website. Go to <http://www.uscis.gov/portal.site/uscis> and click on the Forms and Fees button in the banner across the top of the page. You will need to scroll almost to the bottom of the forms list to find the I-9.

A helpful 47-page Handbook for Employers with instructions for completing I-9 forms, including examples of acceptable proof of identity and work authorization, is available on the USCIS web site at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

**Interested in hearing more on this topic?  
Join Leigh McCarthy on**

**January 25, 2008  
at noon  
Bangor Public Library  
Third Floor Lecture Room  
for a**

**New I-9 Form and Acceptable  
Documents Workshop**

**Complimentary lunch  
and workshop materials provided  
Register by calling Robin at 992-4456**

## Did You Know?

**Anne-Marie Storey** will present a six seminar series for the Bangor Region Chamber of Commerce focusing on workplace issues. The sessions are scheduled for April 15, May 13, June 10, September 9, October 7, and November 11. Topics include hiring and firing, performance evaluations, sexual harassment, disability issues, leave laws, and workers' compensation. To register contact the Chamber.

**Paul H. Sighinolfi** was recently named Chair of the Maine Board of Overseers of the Bar.

**John W. McCarthy, Paul W. Chaiken, Frank T. McGuire** and **George F. Eaton** were named as "New England Super Lawyers" for 2007. "Super Lawyers" is a publication naming top attorneys in New England based on nominations by their peers in the legal community.

**Timothy A. Pease** and **Debra A. Reece** have become members of the firm.

**John K. Hamer** has joined the firm as an associate. John previously held the position of Assistant City Solicitor for the City of Bangor.

**April A. Bentley** was recently elected President of the Penobscot County Bar Association.

**Paul W. Chaiken** will chair the Maine Supreme Judicial Court's Advisory Committee on the Rules of Professional Responsibility for a three year term; this Committee oversees the rules governing the conduct of lawyers in the state.

## FMLA: No Magic Words

*By  
Brent Singer*

A December 12, 2007 case decided on appeal, *Sarnowski v. Air Brooke Limousine*, F.3d (3<sup>rd</sup> Cir. 2007), is a reminder that when an employee

requests leave under the FMLA, there are “no magic words” that he must use – much less even refer to the FMLA by name.

The facts were that Mr. Sarnowski worked for a company that provided limousine services. Mr. Sarnowski worked as a service manager maintaining the fleet. He was hired in 2001 and performed well. In October of 2002, he underwent quintuple coronary artery bypass surgery and was out of work for six weeks. In December of 2002, after he returned to work, he received a written warning that his work performance was unacceptable in the few weeks leading up to his surgery and since his return.

Five months later, doctors informed Mr. Sarnowski that he had more blocked arteries. Mr. Sarnowski told his immediate supervisor that his doctors found more blockages, that his heart was being monitored, and that he might need six weeks off for further heart surgery. Mr. Sarnowski did not mention the FMLA.

A week later, Mr. Sarnowski was fired.

Mr. Sarnowski sued, claiming that his employer violated the FMLA by illegitimately preventing him from obtaining leave benefits to which he was entitled. The employer argued that Mr. Sarnowski was not entitled to benefits under the FMLA because he did not submit a formal request for leave under the employer's written FMLA policy. The lower court agreed with the employer and awarded it summary judgment. The appeals court, however, disagreed.

The appeals court explained that FMLA regs state that employees may provide FMLA qualifying notice before knowing the exact dates or duration of the leave they will take. Although in some instances, 30 day notice is required, the 30 day notice period is designed to be flexible and an employee is not required to give greater notice than is “practicable.” The court concluded that in providing notice,

the employee need not use any magic words. The critical question is how the information conveyed to the employer is

reasonably interpreted. An employee who does not cite to the FMLA or provide the exact dates or duration of the leave requested nonetheless may have provided his employer with reasonably adequate information under the circumstances to understand that the employee seeks leave under the FMLA.

Applying this standard to the facts of the case, the court found that a jury would be able to find that Mr. Sarnowski's employer had sufficient notice of Mr. Sarnowski's intent to take FMLA leave. The appeals court sent the case back for a jury trial to determine whether Mr. Sarnowski's employer terminated him for a reason unrelated to his intention to take FMLA leave, or because he had given notice of intent to take FMLA leave.

The moral of this case is that employers have to be on the lookout and should not bury their heads in the sand when circumstances imply that an employee may be requesting leave under circumstances that may entitle him to leave under the FMLA. Under such circumstances, the prudent employer will interpret the request as a request for FMLA leave, and work with the employee to determine if he is eligible for such leave, and if so, its timing and duration.

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## MHRC Sexual Orientation Regulations are Worthy of Study

By  
*Frank T. McGuire*

On September 15, 2007, new sexual orientation amendments to the Employment and Housing Regulations of the Maine Human Rights Commission became effective. The new regulations are found at: [http://www.maine.gov/mhrc/laws/Sexual\\_Orientation\\_Adopted\\_Rule.htm](http://www.maine.gov/mhrc/laws/Sexual_Orientation_Adopted_Rule.htm)

and The Commission's "Basis Statement and Response To Comments" are found at: <http://www.maine.gov/mhrc/laws/SO%20Basis%20Statement%20and%20Response%20to%20Comments.htm>

The regulations follow the amendment of the Maine Human Rights Act in 2005 to include protection from employment and housing discrimination based on sexual orientation. The Act defines "sexual orientation" to mean "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."

The sexual orientation changes to the Employment Regulations include the following:

- They define "gender identity" to mean an individual's gender-related identity, whether or not that identity is different from that traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.
- They define "gender expression" to mean "the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth."
- They state that it is an unlawful employment practice for an employer to fail or refuse to make reasonable accommodation in rules, policies, practices, or services that apply directly or indirectly to gender identity and gender expression, unless undue hardship can be shown.
- They state it is it is unlawful to discriminate on the basis of sexual orientation with regard to fringe benefits, including medical, hospital,

accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; overtime or compensatory time benefits; and other terms, conditions or privileges of employment. The Commission states it plans to issue further guidance setting forth its interpretation of this provision.

- They define narrowly a "bona fide occupational qualification (BFOQ)" exception.
- They include an exception for non-profit religious organizations that do not receive any public funds. Such organizations may give preference in employment to individuals of its same religion, and may require applicants and employees to conform to the religious tenets of that organization.
- Harassment based on sexual orientation is prohibited.

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## Same-Sex Sexual Harassment Claims

By

*Anne-Marie L. Storey*

Since the release of the regulations discussed above, the Federal District Court in Portland has decided a case involving a claim of same-sex sexual harassment.

In *Foss v. Circuit City*, a male employee alleged he was subjected to obscene remarks made by his supervisor, also a male. The comments were always about females.

The court pointed out the well-settled rule that harassment is not necessarily discrimination "because of sex" just because the words have sexual content or connotation. In order to be actionable as sexual harassment, the conduct has to expose those of one sex to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. In

this case, since the conduct took place between two males, there were three ways the plaintiff could show the conduct was based on sex: 1) that the conduct was motivated by sexual desire; 2) that the harasser was motivated by a general hostility to the presence of the same gender in the workplace; or 3) with direct evidence about how the harasser treated both males and females in a mixed-sex workplace.

The plaintiff did not allege that his supervisor was a homosexual or that he was motivated by sexual desire toward the plaintiff. There was also no evidence that the supervisor was motivated by a general hostility toward males in the workplace. Instead, the plaintiff argued that the supervisor treated males and females differently and exposed plaintiff, as a male, to less advantageous working conditions by subjecting him to the obscene language. The employer responded by filing for summary judgment, arguing that despite the graphic nature of the supervisor's language it was not "based on sex" as a matter of law because it occurred in front of both men and women. The Court agreed with the employer and granted summary judgment.

The basis of the decision was that the supervisor treated men and women similarly. Specifically, the court found at least three instances during the 19 days the plaintiff and supervisor worked together where at least one female was present during the supervisor's actions. Ultimately, the court concluded that despite the fact that the store was "undoubtedly an unpleasant place to work" during this time, the conduct did not amount to sexual harassment under the law because the supervisor created an environment that was "generally obnoxious" to both men and women.

The fact that the employer prevailed in this case because the workplace was equally as unpleasant for men and women is a dubious victory. Certainly, it is not appropriate to allow a workplace in which a supervisor (or any employee, for that matter) is permitted to create an environment as toxic as that described in this case, no matter whether the comments are directed at only men, only women, or both.

There was one other interesting aspect of this case. In addition to the harassment claim, the employee alleged retaliation on the basis that he was terminated within two weeks after making his complaint. The employer argued the termination was based on his abuse of the time clock system because he was found to have misrepresented his actual work hours. However, the investigation into his conduct occurred almost immediately after he complained about the supervisor's behavior and the management involved in his termination were also involved in investigating the complaint. For that reason, the Court denied the employer's motion for summary judgment on the retaliation claim and is allowing that claim to proceed to trial. This outcome is another good reminder that any bad behavior or performance issues must be addressed at the time they arise, and not left until after the employee has made a complaint about alleged unlawful behavior. Even behavior that could fairly be the basis for disciplinary action looks suspect if it is not raised until after a complaint is made. The case is also a reminder that even if the employer prevails on the underlying discrimination claim, a retaliation claim can still proceed.

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## **NLRB Sides With Employers On Restricting Union Use Of Company E-Mail**

by

*Frank T. McGuire*

On December 16, 2007, the National Labor Relations Board ruled in *The Guard Publishing Co., d/b/a The Register-Guard and Eugene Newspaper Guild*, that an employer did not violate the National Labor Relations Act by maintaining a policy that prohibited employees from using the employer's e-mail system for any "non-job-related solicitations". However, the Board upheld a finding that the employer discriminated when it disciplined an employee under the policy for sending an e-mail from her work computer to other workers that gave information on a recent union event, where the

employer had allowed a variety of other non-work-related e-mails.

The Board looked at two established standards: (1) that employers may restrict the use of the employer's own property and equipment (such as telephones and bulletin boards), and (2) that when it comes to restricting employee communication in the workplace, employers must balance employees' rights protected under Section 7 of the Act with the employer's interest in maintaining order and discipline at work. The first question was whether regulating use of the employer e-mail system falls under a "property rights" analysis, or under a "speech" analysis. Siding with the employer, the Board chose the first. Therefore, it held an employer may prohibit any personal or non-business use of its e-mail system, without applying a balancing test.

Next came the question of discriminatory enforcement. The employer had allowed individual personal e-mail messages—baby announcements, party invitations, offers of sports tickets and services like dog walking. It had not allowed e-mail use to solicit support for or participation in any outside cause or organization other than United Way, which the employer sponsored. The Board held an employer may not discriminate based on union content, but may draw lines on other grounds—between solicitations and mere talk; between solicitations of a personal nature and those for sale of a product; between charitable and non-charitable solicitations; and between business-related use and non-business related use. The Board held that the employer could lawfully prohibit e-mail solicitations of support for, or participation in, causes and organizations. However, when the employee was disciplined for sending an email that did not solicit support but just gave information, this was based unlawfully on the union content of the message.

This decision reinforces the importance of looking at your e-mail policy and drawing clear, non-discriminatory lines between what is allowed and prohibited—and of actually enforcing the rules in a non-discriminatory way.

## COBRA CORNER by Brent Singer

During FMLA leave, an employer must provide the employee with continued health plan coverage at the level that would have been in effect had the employee continued to work, including payment by the employer of any share of the premium that the employer would have paid had the employee continued to work. Thus, taking FMLA leave is not a COBRA qualifying event. Rather, under COBRA regulations, even if the employee is terminated while on FMLA leave for reasons unrelated to such leave, or even if the employee notifies the employer that he will not return to work after the FMLA leave, there is no COBRA qualifying event until the last day of the FMLA leave. The COBRA coverage period is measured from that date. For example, if an employee begins FMLA leave on February 1 and the last day of the leave is 12 weeks later, April 25, the employee will experience a qualifying event for COBRA purposes on the 25<sup>th</sup> and the maximum coverage period under COBRA is measured from the 25<sup>th</sup>, even if the employee's coverage under the health plan was terminated for some reason earlier during the FMLA leave.

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