



**FOLEY & FOLEY** <sup>PC</sup>  
ATTORNEYS AT LAW



# **General Counsel Employment Law Report**

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# H-1B Approved? That Can Change At Any Time

It's no secret that the uptick in H-1B denials is a big part of the Trump Administration's Buy American Hire American policy. H-1B petitions have received more scrutiny in the last several years than even the most seasoned practitioners have ever seen, and it's more critical now than ever to make sure that you have trusted and experienced counsel taking you through the H-1B petition process.

But the headaches don't end with an approval. USCIS can revoke a petition at any time. We've seen employees with several approved H-1B petitions receive a Notice of Intent to Deny for the first petition ever filed many years prior. A higher level of scrutiny on immigration should not deter employers from hiring and employing foreign-born individuals, but should make clients more diligent in the cost-benefit analysis with the help of skilled counsel.

Let us help. Contact us to consult on your immigration matters and help with your strategic planning.

Our comprehensive immigration practice includes:

- US work authorization for foreign nationals– our team will assist your team through the complex areas of work authorization, both permanent resident (immigrant) and non-immigrant visa services.
- We can help negotiate the complex minefield of regulations that exist in order to obtain key US non-immigrant visas.
- We have an in depth understanding of the most recent changes to immigration policies and will guide your team through US immigrant visa processing and procedures.
- We will help your team develop a comprehensive compliance strategy, including immigration policy development and training for your in-house team on a wide range of issues that affect work authorization.

**Attorney Cassie Ramos** leads our work authorization and immigration practice.

# DELAYED: Massachusetts Paid Family Medical Leave Contribution and Notice

It is official: legislation was enacted to delay the start of contributions for the Massachusetts Paid Family Medical Leave program. The notice requirement has been pushed back as well. Here is the breakdown:

- Withholding starts 10/1/19
- Required Employee Notices must be provided by 9/30/19
- Contribution rate adjusted from 0.63% to 0.75%, with the allocation provided in the final regulations, below

Employers that offer paid leave at least as generous as those under PFML will now have until December 20, 2019, to apply for an exemption that will excuse them from the obligation to remit contributions for the full period commencing with the October 1 start date.

The draft of the final regulations was posted on the [Department website](#) on Monday, June 17, 2019. The final regulations will not be promulgated until July 1, 2019.

We have prepared an overview in the form of a [PowerPoint](#) to pave the pathway for our clients to achieve compliance.

We hope you find that overview to be informative.

As always, we stand ready to help, should the need arise.

# FMLA and Vacation: It's a Thing

There is a great line from a Seinfeld episode when Kramer announces he is taking a vacation.

Jerry's response: A vacation from what? You don't work!

And so it is with an employee on FMLA leave taking a vacation. But is a vacation while on medical leave an abuse of leave? Don't assume yes.

A recent Massachusetts case illustrates the importance of a thorough investigation and examination of the facts in each situation. The plaintiff was on medical leave for foot surgery and took a long planned annual vacation. The HR Director testified that an investigation was launched because she did not think an employee who is seriously ill or disabled would be able to go on vacation. The court stated that position was incorrect as a matter of law. The Justice went on with a memorable line:

*An employee recovering from a leg injury may sit with his or her leg raised by the sea shore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process.*

Ultimately the employee prevailed and received over \$1,000,000 for back pay and emotional distress. Where did the employer go so wrong? Their investigation was determination first, fill in the holes later and did not include medical information about the employee's recovery. The employer's "honest belief" defense did not survive the facts and the shabby investigation. Here is how to proceed:

- An employer may not treat a vacation alone as an abuse of medical leave.
- An investigation into alleged leave abuse must be thorough and based on facts, not assumptions.
- An examination of the facts must include the employee's disability or injury—what might now be called the Machu Picchu standard.
- To be defensible in court, an investigation must be conducted impartially, and with necessary documents and communication to determine whether the vacation or activity is inconsistent with the disability.
- Hard and fast rules are the enemy of FMLA and reasonable accommodations: circumstances matter.

An employee's conduct while on medical leave can be evaluated for abuse. When launching an investigation, keep this case in mind. Or think Machu Picchu for short. Or just call us. We can help.

# Restricting Union Access? The NLRB Says Heck Yeah!

Employers face complications in many facets when dealing with a union—most notably, access to employees. How much access do employers need to give unions on company property? Not so much anymore.

The change in the Oval Office has trickled down to change at the National Labor Relations Board. Overturning a 40 year old “public space exception” the Board held that even if a workplace’s cafeteria was a public space, a hospital still had the right to restrict access to that space as long as the restriction was evenly applied. In this case, the hospital had a no-solicitation policy by non-employees in its public spaces. To be valid, it must exclude not only unions but also religious organizations and the like (so long Girl Scout cookie booths\*). As long as the policy is applied neutrally and consistently, the union can be prohibited from the space. The Board went further in noting that prior precedent required public spaces be open to union organizers only if there were no other feasible means of communication. But now, with the wide spread use of electronic communication, they claimed that there were other forms of communication available thereby eliminating the union’s need for special use.

What should you do?

- If you have a public space on your property— a cafeteria, parking lot, courtyard, etc.— then you should create a policy that prohibits non-employee solicitation of any kind in that area.
- Once the policy is written, it must be enforced evenly across the board.
- Call us—we can draft a valid policy and explain or train anyone needed to implement it.

\*We can help. Who can say no to Thin Mints?



# General Counsel's Office Hours

## Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – at no cost.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.