

Employee Leaves of Absence: Do They Really Even Have to Show Up Anymore



Presented By:



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AGENDA

❖ Federal Leave Laws

- FMLA
- ADA
- Pregnancy & Related Medical Conditions
- PUMP
- USERRA

❖ State Law Implications

❖ Action Items

FMLA LEAVE RIGHTS

- ❖ Must have worked 1 year and 1,250 hours to qualify
- ❖ Up to 12 weeks of unpaid leave each calendar year/rolling 12-months
- ❖ For your own serious health condition or health condition of parent, spouse, or child (loosely defined)
- ❖ Birth or adoption
- ❖ Block time or intermittent leave
- ❖ Servicemember Family Leave
- ❖ Servicemember Caregiver Leave (up to 26 weeks)
- ❖ Benefits continue during FMLA as if employee is actively employed
- ❖ Requires reinstatement to same or equivalent position upon return
- ❖ Requires you to allow continued participation in group health benefits as if employee is actively at work



FMLA LEAVE RIGHTS

When is leave designated as FMLA leave?

- ❖ Prior to the absence when reasonable
- ❖ After it has commenced if the reason for leave was unknown when it commenced
- ❖ Even if the employee does not want it?

FMLA LEAVE RIGHTS

What tools are available to prevent abuse?

- ❖ Management and HR should coordinate on the front end to meet business unit needs
- ❖ Require employee certification of need for leave (not available for pregnancy) and get second opinion (at employer's expense) when necessary
- ❖ Require re-certification for on-going leaves
- ❖ Keep in touch with employee
- ❖ Discipline/terminate employees who falsify need for leave
- ❖ Being on FMLA does not mean the employee cannot work at all or cannot engage in other activities

FMLA LEAVE RIGHTS

What legal claims are available to an FMLA claimant?

❖ **FMLA Interference**

- Where the employer takes an adverse employment action against an FMLA claimant that prevents the employee from receiving FMLA rights

❖ **FMLA Discrimination or Retaliation**

- Where the employer discriminates or retaliates against an employee who has asserted FMLA rights or taken a leave of absence

FMLA LEAVE & OTHER LEAVES

How does FMLA affect other leaves of absence (vacation, sick leave, PTO)?



FMLA LEAVE & WORKERS' COMP

Workers' comp only applies to an injury that:

(1) Arises out of and

(2) Occurs in the course of employment



FMLA LEAVE & WORKERS COMP

- ❖ Does not require leave, but where employee is unable to perform his job, the employee may receive workers' comp benefits while away from work recuperating
- ❖ Light duty may be another option, but is not required to be offered
- ❖ Most state workers' comp statutes prohibit retaliation against an employee who files a workers' comp claim
- ❖ Reinstatement to same job not necessarily required, but helps reduce the likelihood of retaliation claim



FMLA LEAVE & WORKERS COMP

- ❖ When in doubt, report an on-the-job injury
- ❖ Better to ensure that an employee's initial visit to a healthcare provider is in conjunction with your carrier's claims administration process
- ❖ Avoid any appearance of disparaging an employee with a workers' comp injury
- ❖ Workers' comp fraud is a crime in every state

FMLA LEAVE & STD/LTD

*How does FMLA affect insurance leaves
(workers comp, STD, LTD)?*



FMLA LEAVE & STATE FAMILY LEAVE

- ❖ **Most state family leave statutes apply concurrently to FMLA**
 - **Comparable employer coverage and employee eligibility**
 - **May have broader qualifying reasons than federal FMLA, broader definition of eligible family member, narrower employer coverage thresholds**
 - **California CFRA amended in 2021 to apply to employers with 5 employees or more and amended in 2023 to apply to a leave for the serious health condition of a “designated person” who may have no real family relationship to the employee**
 - ***Employers should check applicable state leave laws, in addition to FMLA, whenever an employee requests leave for a family related reason***

ADA LEAVE RIGHTS

- ❖ ADA applies to all employees of employers with 15 or more employees
- ❖ ADA does not expressly require a “leave of absence” but this may be a “reasonable accommodation” for individuals with physical or mental impairments
- ❖ ADA leave, when reasonable, need not be paid leave
- ❖ Employees on a leave under the ADA may require a COBRA notice under terms of your group health plan
 - *See our materials from last month’s webinar on workplace accommodations for more detail on ADA compliance*

PWFA LEAVE RIGHTS

- ❖ Pregnant Workers' Fairness Act applies to all employees of employers with 15 or more
- ❖ Prohibits discrimination and requires reasonable accommodation for limitations related to pregnancy, childbirth, or related medical conditions
- ❖ Took effect on June 27, 2023
- ❖ Identical to the ADA in terms of leave as a potential accommodation
 - *See our materials from last month's webinar on workplace accommodations for more detail on PWFA compliance*

PUMP RIGHTS

- ❖ The same 2022 appropriations bill that included PWFA also included the PUMP Act:
 - Expands upon ACA's requirement that employers provide space, breaks for nursing mothers
 - Space cannot be a restroom
 - Applies to both FLSA exempt and non-exempt employees
 - Breaks can be taken whenever needed to express milk for up to 1 year after birth of child
 - It's about breaks, and not leave, but the breaks are paid breaks for salaried employees
 - *See our materials from last month's webinar on workplace accommodations for more detail on PUMP compliance*

USERRA LEAVE

- ❖ **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)**
 - Applies to all employers, public and private, regardless of number of employees
 - Protects employees in military service from discrimination and retaliation on the basis of military service and requires unpaid leave for military duty and reinstatement to position upon return
- ❖ **Covered “service” includes all categories of military training and service**
- ❖ **Reinstatement rules:**
 - < 31 days: (first full regularly-scheduled work period on the first full calendar day following eight hours after returning home)
 - > 30 days, but < 181 days: (must submit application for reemployment (written or verbal) within 14 days of completing service)
 - > 180 days: must submit application for reemployment (written or verbal) within 90 days of completing service
 - “Escalator principle”



USERRA LEAVE

- ❖ If an employee on USERRA leave has coverage under a health plan in connection with his employment, the plan must permit the employee to elect to continue the coverage for up to 24 months
 - Employee pays employee share of premium for leaves < 31 days
 - For leaves 31 or >, employee pays the COBRA premium
 - Most employees on active duty will decline COBRA and receive TRICARE

STATE MILITARY LEAVE LAWS

- ❖ Most states either defer to USERRA or have an overlapping state law that explicitly includes state national guard activities (although USERRA recognizes such activities as protected for leave anyway)
- ❖ A few nuances:
 - IL – employees on military leave must be given a performance review during their absence equal to the average of the last three years but not less than their last rating; separate posting/notice requirements
 - ME – Employers must allow employees on military duty to continue any benefit participation as if they were actively employed for the duration of their military leave

STATE FAMILY LEAVE LAWS

- ❖ 13 states (CA, CO, CT, DE, MA, MD, MN (effective in 2026), NH, NJ, NY, OR, RI, WA) and the District of Columbia offer some kind of paid family leave funded primarily by payroll taxes
- ❖ Most of these programs initially set their coverage threshold the same as FMLA (50 employees or more)
- ❖ Increasingly, states with older programs are amending them to lower the employee threshold for coverage
- ❖ Many of these states are using a state administered disability benefit via payroll tax deduction to fund the benefit and administer it directly between the state and the employee
 - States have varied their approach to payroll funding, which can be shared (employer and employee contributions) or employee-only



STATE SICK LEAVE LAWS

- ❖ Sixteen states (AZ, CA, CO, CT, MA, ME, MD, MI, NV, NJ, NM, NY, OR, RI, VT, WA) and the District of Columbia have some form of paid sick leave obligation
 - Cities and counties may also use ordinances to require paid sick leave:

Berkely, CA
Emeryville, CA
Los Angeles, CA
Oakland, CA
San Diego, CA
San Francisco, CA
Santa Monica, CA
Chicago, IL
Cook County, IL
Montgomery County, MD

Duluth, MN
Minneapolis, MN
Saint Paul, MN
New York City, NY
Westchester County, NY
Unincorporated Bernalillo County, NM
Allegheny County, PA
Philadelphia, PA
Pittsburgh, PA
Seattle, WA
Tacoma, WA



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STATE LEAVE AND FMLA

- ❖ Where a reason for leave qualifies under FMLA and state (or local) law, the state law allows the leaves to run concurrently
- ❖ But consult counsel and assess the qualifying reasons carefully, because many state (and local) laws cover a broader range of “family” and “reasons” for leave than FMLA

Designated person
Roommates
Domestic violence
Sexual violence
Stalking
Human trafficking
Drug/alcohol rehabilitation

Bereavement
Care for a service animal
School meetings/parent conferences
School or Daycare closures
Long term care appointments
Public health or safety



OTHER STATE LEAVE LAWS

- ❖ Other state leave laws may apply to matters not generally overlapping with federal leave requirements:

Bereavement

Voting Leave

Jury Duty

Subpoena/Witness Duty

School meetings/parent conferences

School or Daycare Closures

Public health or safety

Genetic testing/cancer screening

Civil Air Patrol

First responder training

Legislative/political leave

Literacy

Hotel worker victim leave

Domestic worker leave

Student leave

Drinking/Driving classes

Emergency evacuation



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Action Items

1. Update your policies for PWFA and PUMP Act compliance
2. When considering whether to allow a remote employee in a new jurisdiction, consider the implications of adding state law compliance, including state and local leave laws
3. Review the unique reasons for leave authorized under the state laws where you do business
4. When a reason for leave overlaps between federal and state leave requirements, seek legal counsel assistance to navigate the complexities



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