



36TH ANNUAL SEMINAR

Labor & Employment Relations Law

Leave No Doubt: Navigating Evolving Leave Laws

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Discussion Points

- **Family and Medical Leave Act**
 - Applicability
 - Protected Leave
- **Americans with Disabilities Act**
 - Leave as an Accommodation
- **Pregnant Workers Fairness Act**
 - Leave as an Accommodation
- **The Evolving Leave Landscape**
 - State-Level Leave Changes
 - Employees' Changing Expectations
- **Strategies for Managing Leave**

Family and Medical Leave Act (FMLA)

What is the Family and Medical Leave Act?

The Family and Medical Leave Act provides employees with job-protected, unpaid leave for qualified medical and family reasons.

- Applies only to employees of qualified employers
- Employees must be eligible for job-protected leave

12 weeks of unpaid leave per 12-month period for:

- A serious health condition
- The birth, adoption, or foster placement of a child
- To provide care for a qualified family member
- Other qualified exigencies

FMLA Protected Leave

FMLA leave is unpaid:

- Employees may elect to use unused Vacation Leave, Sick Leave, or other PTO concurrently
- Employer must maintain any group health plan coverage

Intermittent leave:

- Only required by law when medically necessary

Re-employment rights:

- Employees are entitled to return to the same or an equivalent job after the conclusion of the leave period
- Employers may temporarily transfer employees on intermittent leave

FMLA Protected Leave

Employer's rights:

- Employee must promptly return to work at the conclusion of leave
- Employer may request certification of need for leave from the employer's health care provider
 - *Brown v. BNSF Railway Company*, Northern District of Texas, No. 4:24-cv-00729, June 25, 2025: employers may hold employees to the leave supported by a certification, and if employees take leave outside the certification and don't provide documentation to support it, employers can take action.
- Employers can require a second opinion
- Employers can require employees to submit to a fitness-for-duty test before re-employment

Information relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for purposes of the FMLA must be maintained as confidential medical records in separate files/records from the usual personnel files.

FMLA Eligibility

Eligible employees:

- Work for a covered employer
- Have worked for the employer for 12 months/ 1,250 hours during the 12 months preceding the beginning of leave
- Work in a facility with 50 or more employees
- Work at a location where the employer has 50 or more employees within 75 miles

Remote workforces are not exempt:

- If an employee has no physical job site, the headcount is based on their home base, the site to which they report, or the site from which their work is assigned

THE FMLA – What to Look For

1. Employee specifically requests FMLA leave
2. Employee requests time off for surgery, pregnancy, birth of child, adoption, or treatment (e.g., chemotherapy or physical therapy)
3. Employee requests time off for sick child, parent, or spouse
4. Employee misses more than 3 consecutive days of work
5. Employee misses work sporadically due to a chronic condition (e.g., migraines or asthma)
6. Employee is hospitalized overnight
7. Employee requests leave for reasons related to family service member

Americans with Disabilities Act (ADA)

What is the Americans with Disabilities Act?

The Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities in employment.

- Employers must provide a reasonable accommodation unless doing so would create an **undue hardship** on the employer
 - Interactive process between employer and employee to determine how to best accommodate the employee's disability

Leaves of absence may qualify as a reasonable accommodation under the ADA.

Undue Hardship

The following factors are relevant to determining undue hardship:

1. The nature and net cost of the accommodation
2. The overall financial resources of the covered entity
3. The overall size of the covered entity and the number of employees employed
4. The number, type, and location of the covered entity's facilities
5. the effect of the accommodation on the facility's expenses and resources
6. the ability of other employees to perform their duties
7. the facility's ability to conduct business

ADA Leave as an Accommodation

Eligibility:

- A person with a disability is someone who:
 - Has a physical or mental impairment that substantially limits one or more major life activities (eating, sleeping, movement, working, learning, sensory functions, cognitive functions)
 - Has a history or record of such an impairment (cancer in remission)
 - Is perceived by others as having such an impairment

Returning from ADA leave:

- The ADA does not generally restrict the length of leave permitted
- Employees are entitled to return to their original position or another equivalent position for which the employee is qualified

Pregnant Workers Fairness Act (PWFA)

What is the Pregnant Workers Fairness Act?

The Pregnant Workers Fairness Act requires certain employers to provide reasonable accommodations to qualified employees for known limitations related to pregnancy, childbirth, or related medical conditions unless it would cause undue hardship.

- Under the PWFA, employers must engage in an interactive process to determine what reasonable accommodations are available for employees with pregnancy-related limitations
- Request does not need to be in writing or include special words

Leave is a permitted accommodation under the PWFA, but employees cannot be required to take leave if another accommodation is reasonable and would not cause undue hardship.

- EEOC recently sued two businesses under the PWFA

PWFA Leave as an Accommodation

Employees may use leave to:

- Attend healthcare appointments
- Recover from childbirth
- Address other pregnancy-related medical conditions

Concurrent leave policies:

- ADA
- FMLA
- Other PTO

Managing Intermittent Leave

FMLA

- Granted in the shortest increment of leave allowed by the employer that is less than one hour
- May seek recertification for new conditions and increase in frequency
- Employee must make a reasonable effort to schedule treatment outside of work hours
- Employer may temporarily transfer the employee's position

ADA

- May require medical records for increased severity or frequency
- Employer may choose reasonable accommodation, including schedule change or alteration of job duties

Managing Employee Performance During Leave

1. Each law prohibits retaliation
2. Performance should be managed without consideration of leave or medical condition
3. Employer may enforce work rules and notification requirements
4. Adverse actions that would have occurred regardless of leave may be taken
5. ADA prohibits discrimination because of disability as well

The Evolving Leave Landscape

Paid Time Off and Sick Leave

- States vary on requirements for paid time off and sick leave
- Some states require payout of unused PTO upon termination
 - California: required
 - North Carolina: required unless a written policy states otherwise
 - Texas: not required
- Many states mandate paid sick leave:
 - Alaska, Arizona, California, Colorado, Connecticut, DC, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington
 - Don't forget local laws on paid sick leave, as well!
 - California, Illinois, Louisiana, Maryland, New Mexico, New York, Oregon, Pennsylvania, Washington

It is unclear if **Unlimited PTO** is paid out at termination (when required) or covers mandated sick leave.

Employees' Changing Expectations

"Unlimited" PTO policy trend shifts:

- It is disputed if employees take more or less time off
- Unclear if it's paid out at termination
- Unclear if it can double as mandated sick leave

PTO is an expected benefit by applicants and a powerful recruiting tool.

Challenges Multi-State Employers Face

Common State Leave Laws

- Voting Leave
- Jury Duty Leave
- Witness/Victim of Crime Leave
- Safe Leave
- Bereavement Leave
- Organ and Bone Marrow Donation Leave
- Civil Air Patrol Leave
- National Guard Leave
- School Activity Leave

State-Level Leave Changes

Influx of states recognizing new forms of mandatory leave:

- Bereavement leave
 - California, Colorado, Illinois, Maryland, Minnesota, Oregon, and Washington
- Neonatal care leave
 - Colorado, Illinois
- School leave
 - 11 States and Washington D.C.
- Safe leave
 - 20 States and Washington D.C.
- Anti-retaliation measures

States are also recognizing expanded definitions of "family" for purposes of taking leave.

Challenges Facing Multi-State Employers

Multi-state employers may face difficulty adopting one common leave policy due to varying state leave laws.

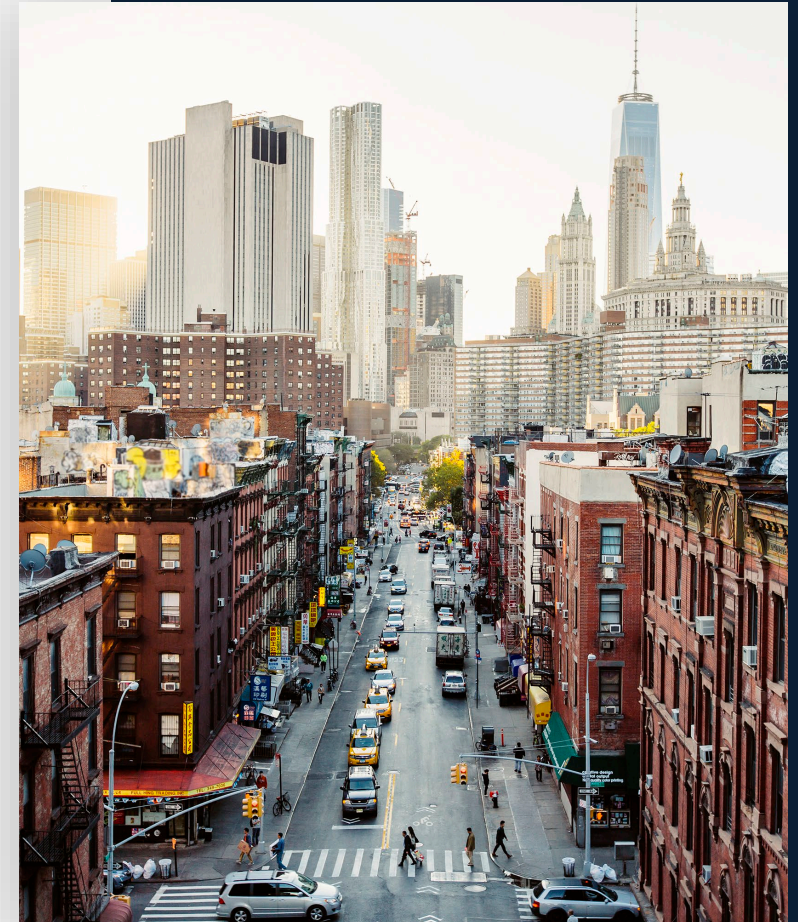
- States may impose more onerous standards than those contained in the FMLA, ADA, PWFA, and USERRA
 - Employers must adopt multiple policies or follow the least restrictive set of laws
- Certain states treat paid leave as a form of wage earned, requiring unused but accrued leave days to be paid out

Local leave laws add another layer to the difficulty employers face in adopting compliant policies.

- More than 20 cities and counties require paid sick leave – but they face state pushback

Leave Law News Board

- **Rhode Island** became the first state requiring workplace accommodations for employees experiencing menopause
- **Illinois** will require leave for employees during the hospitalization of a newborn in a NICU regardless of length of service
- **New York** requires providing up to 20 hours of paid prenatal leave
- **Nebraska** requires paid sick leave beginning after 80 hours of consecutive employment



Questions?



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