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Take It or Leave It: What You Need to Know about Employee Leaves and Absences

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Employees are entitled to certain types of leave under federal, state and local law. Additional leaves may exist by policy or contract.

Today's training will:

- Give you information regarding what types of leave are available to employees under the law.
- Help you better understand how different types of leave may interact.
- Give you practice spotting potential legal issues related to employee leaves and absences.

CAUTION: Employee Leaves can be a hyper-technical area of HR management; even the most experienced managers should seek expert assistance when dealing with complex employee leave matters.

What types of leave are employees entitled to take?

Type of library?

- **Public?**
- **Association?**

Other factors?

- **Number of employees?**
- **Union representation?**

Types of leave include:

- Vacation
- Sick
- Bereavement
- Holiday
- Jury Duty
- Voting
- Religious Accommodation
- Family and Medical Leave
- Paid Family Leave
- Leave as an Accommodation under the Americans with Disabilities Act and the NYS Human Rights Law
- Blood / Marrow donation
- Cancer screening
- Breast Feeding (break time)
- Domestic Violence
- Crime Victims
- Short-term Disability
- Military

Vacation, Sick Leave, Paid Holidays, and Bereavement Leave

Generally governed by employer policy, but
be careful of:

- local laws
- equal treatment (N.Y. Civ. Rights Law §79-n)
- employee reliance on existing policies

Family and Medical Leave (FMLA)

Unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

A creature of federal statute; Administered by the U.S. Department of Labor.

Family and Medical Leave (FMLA)

Employers covered

- Public agencies
- Schools
- Private sector employers who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

Family and Medical Leave (FMLA)

Eligibility

- 12 months of employment
 - Includes any time the employee is maintained on payroll; need not be consecutive
- 1,250 hours of service
 - Includes only hours worked
- At least 50 employees within 75 miles

Family and Medical Leave (FMLA)

Eligible employees are entitled to twelve workweeks of leave in a 12-month period for:

- the birth of a child or placement of a child with the employee for adoption or foster care;
- care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of the job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty"

Family and Medical Leave (FMLA)

Eligible employees are also entitled to twenty-six (26) workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Family and Medical Leave (FMLA)

Under some circumstances, employees may take leave on an intermittent (non-continuous) or reduced schedule basis.

Family and Medical Leave (FMLA)

Employer Notice Requirements

Poster explaining rights and responsibilities under FMLA.

Information about FMLA in employee handbook or upon hire.

Family and Medical Leave (FMLA)

Employer Notice Requirements

Eligibility Notice

- Within 5 days of request for leave
- The first time the employee takes FMLA leave in a leave year

Rights and Responsibilities Notice

- With the Eligibility Notice
- In writing

Designation Notice

- Amount of leave designated as FMLA leave

Employee Notice

Generally 30 days before leave*

- Oral or written – needn't say "FMLA"
- When the leave will begin
- How much leave is needed

*If 30 days notice is not possible, as soon as possible and practical



Family and Medical Leave (FMLA)

Certification

The employer may require that the employee provide certification in support of the leave from a health care provider, as well as periodic recertification.

Family and Medical Leave (FMLA)

Health Insurance Continuation

During FMLA leave, an employer must maintain the employee's coverage under any group health plan under the same conditions as coverage would have been provided if the employee remained employed during the leave period.

Family and Medical Leave (FMLA)

Reinstatement

On return from FMLA leave, an employee is generally entitled to be reinstated to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

Paid Family Leave (PFL)

It applies to all private employers with one or more employees on each of at least thirty days in any calendar year.

A creature of NY statute; administered by the NYS Workers Compensation Board.

Public employees are not covered unless their employer chooses to participate.

What Are PFL Benefits?

<u>Effective Date</u>	<u>Maximum Paid Leave in a 52 Consecutive Week Period</u>	<u>Amount of the Employee's Benefit</u>
January 1, 2019	Ten Weeks	55% of Employee's AWW (but not to exceed 55% of the 2019 NYSAWW).
January 1, 2020	Ten Weeks	60% of Employee's AWW (but not to exceed 60% of the 2020 NYSAWW).
January 1 st of Succeeding Years	Twelve Weeks	67% of Employee's AWW (but not to exceed 67% of the current NYSAWW).

Paid Family Leave (PFL)

- PFL Benefits are funded through payroll deductions from Eligible Employees.
- Employer submits the collected contributions to insurance carrier to cover the cost of the premiums.
- Employer's disability benefits / PFL insurance carrier provides and administers the coverage.

Which employees are covered by PFL?

- Employee eligibility for PFL Benefits is based on a 20-hour work week.
- An employee is eligible for PFL Benefits if the employee:
 1. Has a regular work week of 20 or more hours and has worked for the employer for 26 consecutive weeks (or during the period “usual to and available” during a 26 consecutive week period); or
 2. Has a regular work week of 20 hours or less and has worked for the employer for 175 days.
- These time periods are calculated retrospectively based on the employee’s entire history with the employer.
- Note that, generally, independent contractors and volunteers are not entitled to PFL coverage, because they are not employees.

Can employees waive PFL Benefits?

- Generally, no.
- ONLY employees who:
 1. Regularly work 20 or more hours per week but will not work 26 consecutive weeks in a 52 consecutive week period, and
 2. Regularly work less than 20 hours a week but will not work 175 days in a 52 consecutive week period.
- If the employee chooses to waive PFL Benefits, the employee will be exempt from the obligation to make PFL contributions, and will also be ineligible to receive PFL Benefits.
- Employer must give a qualifying employee the option to waive PFL Benefits.

When Can Covered Employees Use PFL Benefits?

- **ONLY** under the following circumstances:
 - 1) to participate in “providing care” for a “family member” of the employee made necessary by a “serious health condition” of the family member; or
 - 2) to bond with the employee’s child during the first 12 months after the child’s birth, or the child’s placement for adoption or foster care with the employee; or
 - 3) because of any “qualifying exigency,” as defined under FMLA, arising out of the fact that the spouse, domestic partner, child or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces of the United States.
- **NOT** for an employee’s own serious health condition.

When Can Covered Employees Use PFL Benefits?

When can an employee take PFL Leave for the birth, placement, or adoption of a child?

- Under the PFL, leave for the birth of a child can only be taken after the child is born.
- Under the regulations, however, an employee may take PFL Leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed (including to appear in court, consult an attorney or doctor(s) representing the birth parent, or travel to another country to complete an adoption).

When Can't Covered Employees Use PFL Benefits?

PFL Benefits cannot be used when the employee:

- 1) is receiving total disability benefits pursuant to a claim for Workers' Compensation, volunteer firefighters or volunteer ambulance workers' benefits;
- 2) is not employed or is on suspension or administrative leave;
- 3) is collecting sick pay or paid time off; or
- 4) has worked at least part of the day during the same working hours as those for which PFL Benefits are claimed.

How Can Employees Use PFL Benefits?

- Employees can use their PFL Benefits “intermittently,” in increments of no less than one full day.
- The employee’s maximum period of intermittent PFL Leave is calculated based on the average number of days the employee works per week.
- The amount of the employee’s benefit is calculated based on the employee’s AWW divided by the average number of days the employee worked per week (based on the same 8-week period used to calculate the employees’ AWW).

Employee Notice Obligations



- If an employee's need for PFL Leave is foreseeable, the employee must provide at least 30 days' notice before the date on which the employee's PFL Leave is to begin.
- Failure to provide this notice could delay payment of claims.
- If the leave is not foreseeable, the employee must provide as much notice as is practicable.
- Written notice to the employer is not required.

Employee Notice Obligations

- When an employee seeks leave for the first time for a qualifying event, the employee does not need to expressly assert rights under the PFL.
- The employer can seek further information from the employee to determine whether PFL Leave is being sought by the employee.
- When employees takes intermittent PFL Leave, the employer may require that the employee provide notice as soon as is practicable before each day of intermittent leave.

Employer Notice Obligations

- The employer is required to post and maintain in a conspicuous place a notice stating that the employer has provided for the payment of PFL Benefits.
- The employer is required to adopt a PFL policy.
- **Also: Whenever an employee who is eligible for PFL Leave is absent from work for more than 7 consecutive days, or the employer learns that an employee's absence is due to family leave, the employer must provide that employee with a Statement of Employee Rights.**

Americans with Disabilities Act (ADA) and NYS Human Rights Law

The ADA and the disability provisions of the HRL are meant to prohibit discrimination on the basis of disability. They require that covered employers provide reasonable accommodations to otherwise qualified applicants and employees with disabilities to enable them to perform the essential functions of the job sought or held.

Americans with Disabilities Act and NYS Human Rights Law

The ADA applies to private and public employers with 15 or more employees (on the payroll for 20 or more weeks per year).

The HRL applies to employers with one or more employees.

Americans with Disabilities Act (ADA) and NYS Human Rights Law

A reasonable accommodation is generally any change in the work environment or in the way things are customarily done that enables a qualified individual with a disability to perform the essential functions of the job sought or held.

Americans with Disabilities Act and NYS Human Rights Law

The employee's or applicant's "plain English" request for a reasonable accommodation triggers the employer's obligation to engage in an "interactive process" with the employee, to identify proposed accommodations.

Americans with Disabilities Act and NYS Human Rights Law

The employer must provide a reasonable accommodation that will enable the employee to perform the essential functions of the job.

The employer is not required to provide the accommodation if it can show that doing so would cause an undue burden for the employer.

Americans with Disabilities Act and NYS Human Rights Law

Medical Inquiries

Except in limited circumstances, such as when an employee has requested a reasonable accommodation, the ADA prohibits an employer from inquiring as to whether an employee has a disability and the nature and severity of any such disability.

An employer may ask for information to confirm or to elaborate on information that the employee has provided regarding the reason for the leave, whether it will be a block of time or intermittent, and when the leave will end.

Americans with Disabilities Act and NYS Human Rights Law

Return to Work

If the employee can return to work with restrictions, the employer must explore with the employee (and her doctor) possible accommodations that will enable the employee to perform the essential functions of the job.

If the requested accommodation is reassignment to a new job, the employee may be entitled to be transferred to a comparable position if the position is vacant.

Americans with Disabilities Act and NYS Human Rights Law

Undue Hardship – Case by Case Evaluation

- Duration of the leave
- Frequency of the leave
- Whether there is flexibility regarding the days on which the leave is taken
- Whether the leave is predictable or unpredictable
- Impact on work and whether specific job duties are performed in an appropriate and timely manner
- Impact on the employer's operations and its ability to serve customers

Military Leave

Both New York Military Law § 317 and the federal Uniformed Services Employment and Reemployment Act (USERRA) entitle certain employees to reemployment following military service, depending on the circumstances.

Military Spouse Leave

New York Labor Law § 202-i covers employers with 20 more employees at one or more sites.

The law entitles the spouse of a member of the armed forces, National Guard or military reserves to take up to 10 days of unpaid leave when their military spouse is on leave from military service.

Jury Duty (NYS law)

- An employer must allow employees time off for jury duty.
- An employer may not require an employee to use paid vacation, personal time or sick leave for jury duty, but an employee may opt to use paid leave time for this purpose.
- An employer may not require an employee to make up time lost as a result of jury duty.

Jury Duty

- Employers with 10 or more employees must pay either the jury fee amount of \$40 or the employee's wage, whichever is lower, for the first three days of the employee's jury service.

N. Y. Judicial Law § 519.

Voting (NYS law)

N.Y. Election Law § 3-110. Time allowed employees to vote.

A registered voter may, without loss of pay for up to three hours, take off so much working time as will enable him or her to vote at any election governed by the election law (i.e., not school district votes and not some library votes)

Voting (NYS Law)

- Only at the beginning or end of a shift, as the employer may designate, unless otherwise mutually agreed.
- Employee must notify the employer not less than two working days before the day of the election.
- Employer must post notice of employee right to time off to vote, starting at least ten working days before every election and until the close of the polls on election day.

Blood Donation Leave (NYS Law)

- Employer must grant an employee three hours of unpaid leave in any 12 month period to donate blood off the employer's premises.
- Covers employers with 20 or more employees working at one or more sites.
- Applies to employees who work an average of 20 or more hours per week.

N.Y. Labor Law § 202-j.

Blood Donation Leave (NYS Law)

- Employers must notify employees in writing of their right to take blood donation leave.
- The employer may require employees to give reasonable notice of their intended use of leave time governed by these guidelines.

Bone Marrow Donation Leave

- Employees are entitled to take up to 24 hours' unpaid leave to donate bone marrow and recover from the procedure.
- Covers employers with 20 or more employees working at one or more sites.
- Applies to employees who work an average of 20 or more hours per week.

N.Y. Labor Law § 202-a.

Bone Marrow Donation Leave

- The law does not require employees to give notice of their need for leave, but DOL has advised employees to give at least 24 hours' notice.
- The law does not specifically require that employers notify employees in writing of their right to take bone marrow donation leave.

Cancer Screening Leave

All public employers are required to provide employees with four hours of leave with pay each year for cancer screening.

The employer cannot charge the leave against any other leave available to the employee.

N.Y. Civil Service Law 159-b.

Breastfeeding Break Time

- Employers must provide employees with enough break time to express milk. DOL guidelines permit 20 minutes, or 30 minutes if the location is not close to the assigned work location.
- Employers must provide written notice of the right, either upon return to work after childbirth or in a general notice.

Breastfeeding Break Time

- Employees can use paid break time or meal time instead and must be allowed to work before or after their shift to make up the unpaid time used to express milk, so long as the time falls within the employer's regular work hours.
- The employer must provide a private room or location in close proximity to the employee's work area.

Breastfeeding Break Time

- All New York employers are covered by the law.
- Employees are eligible for up to three years after childbirth.

N.Y. Labor Law § 206-c.

Crime Victims Leave

Employees who are victims of a crime or are subpoenaed as a witness in a criminal proceeding are entitled to an unspecified amount of leave time to appear as witnesses or consult with the district attorney.

Employees must provide at least one day's notice of their need to take the leave.

N.Y. Penal Law § 215.14.

Retaliation



Retaliation

It is unlawful for an employer to retaliate against an employee for exercising rights under FMLA, the ADA, the NYS HRL, or nearly all of the other leaves discussed here.

Employers cannot use the requesting of leave or taking of leave under these statutes as a negative factor in any employment decision such as hiring, promotion, or discharge.

What counts as retaliation?

Any action to alter an employee's terms and conditions of employment because that individual engaged in protected activities.

Examples:

- Sudden change in work schedule or work location
- Demotion
- Termination

What is not retaliation?

A negative employment action is not retaliatory merely because it occurs after the employee requests or takes a leave.

Hypothetical:

After a long vacation, a librarian returns to work with a doctor's note and discloses that she was on a missionary trip to Guatemala and contracted a serious food-borne illness. She was hospitalized in Guatemala and for the last 10 days she has been suffering from sporadic, but severe bouts of hallucination that cause her significant paranoia for 12-24 hours before it subsides. Her doctor's note confirms this, states that it is not yet clear whether the condition is chronic, and asks that the employee be given excused leave on days when she is dealing with a flare-up.

Hypothetical:

Is this employee entitled to FMLA leave to deal with her illness?

What type of FMLA leave is she entitled to?

- Regular?
- Intermittent?

If she requests intermittent leave, how much notice can she be required to give in order to take the leave?

Hypothetical:

Should you file a workers' compensation claim for this employee?

- Would your answer change if the employee had been at ALA rather than in Guatemala?

Is this employee eligible for PFL? Why or why not?

- Would your answer change if the person suffering from the hallucinations were the employee's daughter?
- What type of PFL would be required?
- How would it interact with FMLA?

Hypothetical:

Assume that you allowed the employee to take FMLA and she has now exhausted her entire 12 weeks.

- Is she entitled to any other leaves?
- Which ones?
- How would this be determined?

Questions?



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