

Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws

Thursday, December 5, 2013, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

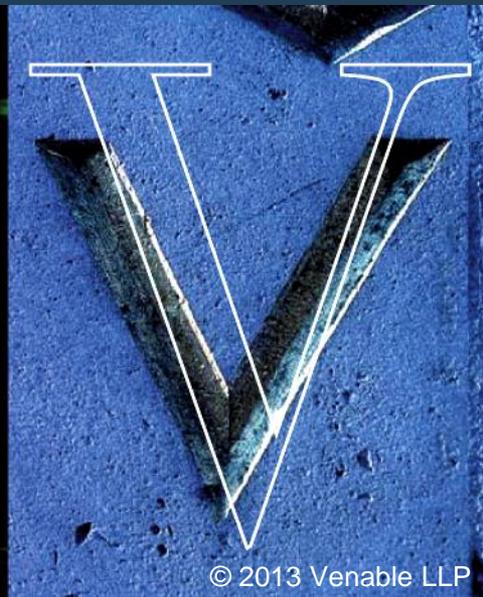
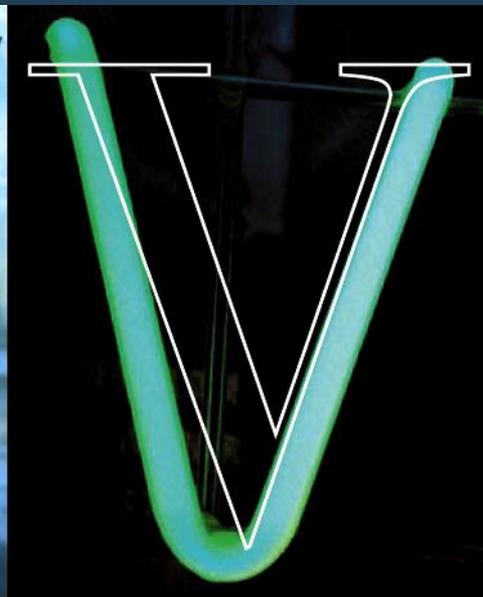
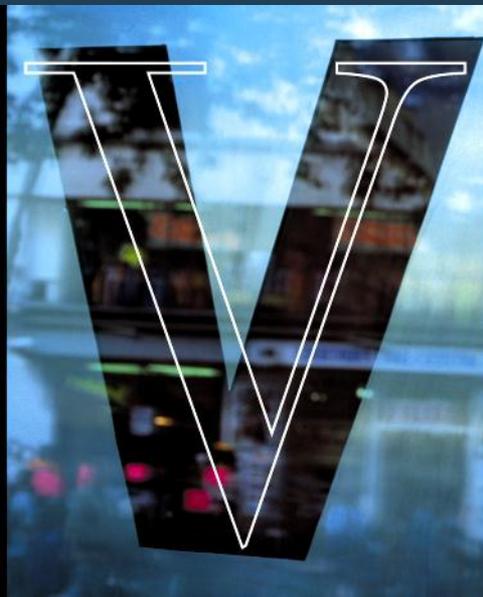
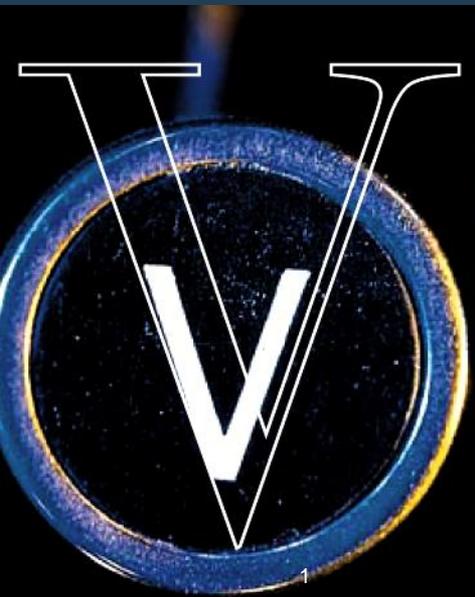
Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Megan H. Mann, Esq., Venable LLP

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Upcoming Venable Nonprofit Legal Events

January 15, 2014 – [How to Safeguard Your Nonprofit against Fraud and Embezzlement: Best Practices, Common Pitfalls, and Practical Strategies](#)

Featuring:

- William H. Devaney, Esq., Partner, Co-Chair of the Anti-Corruption Practice, Venable LLP, and a former federal prosecutor
- Joe Stephens, Staff Writer for the Washington Post and author of “Inside the Hidden World of Thefts, Scams and Phantom Purchases at the Nation’s Nonprofits”
- Nidhi Rao, CPA, CFE, CFF, CIA, Director, BDO USA LLP

February 19, 2014 - [Implementing a Bring-Your-Own-Device Policy: What Your Nonprofit Needs to Know](#)



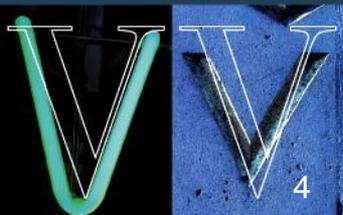
Today's Topics

- Overview of the Family and Medical Leave Act (“FMLA”)
 - Eligibility
 - Leave
 - Care of Covered Military Service Members
 - Intermittent Leave and Reduced Schedule
- Pregnancy and Childbirth
- Lactation and Nursing
- Common Family Caregiver Legal Claims
- Employment Policy Tips



Eligibility for Leave under the Family and Medical Leave Act (“FMLA”)

- Leave for eligible employees of covered employers
- Covered employers
 - Private sector employers with at least 50 employees for 20 or more workweeks
 - All public sector employers
 - All public or private schools
- Eligible employees
 - Employed at least 12 months
 - Worked at least 1,250 hours during the prior 12-month period
 - Worksite has at least 50 employees within 75 miles



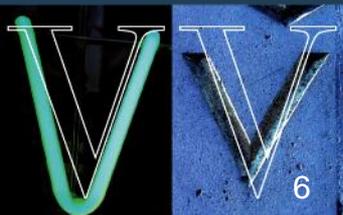
Leave Entitlement under the FMLA

- Up to 12 weeks of unpaid leave in a 12-month period for any qualifying reason:
 - Birth of a child or to care for newborn
 - Adoption/foster care of a child or to care for newly adopted child
 - To care for a spouse, child, or parent with serious health condition
 - Employee's serious health condition prevents the employee from performing his/her job
 - “Qualifying exigency” due to employee's spouse, child, or parent having been called to active military duty



Additional Leave for Care of Covered Military Service Members

- Eligible employees may take up to **26 weeks** of leave during a 12-month period to care for a covered military service member who has a serious injury or illness
- Employee must be spouse, child, parent, or next of kin of the covered military service member



Understanding the Qualified | For Leave under the FMLA

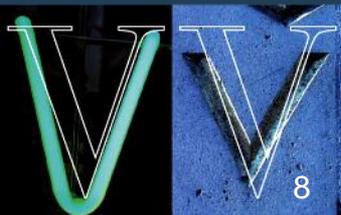


- New child
- Serious health condition
- Qualifying exigency (call to active duty)
- Serious injury or illness (care of covered military service member)



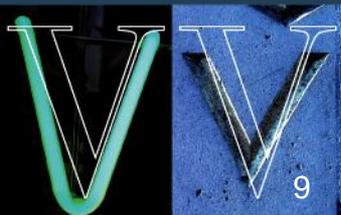
Newborn Child, Adoption of Child, or Placement in Foster Care

- No distinction between newborn child, adopted child, or placement in foster care
- Under 18 years of age, or incapable of self-care because of mental or physical disability



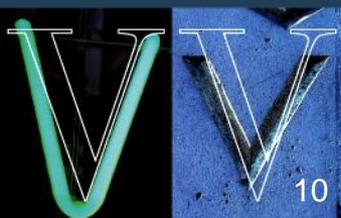
Serious Health Condition

- Illness, injury, impairment, or physical or mental condition that involves either:
 - Inpatient care, or
 - Continuing treatment by a health care provider.
- Colds, flu, dental work, etc. are not included unless complications arise
- Cosmetic treatments also excluded



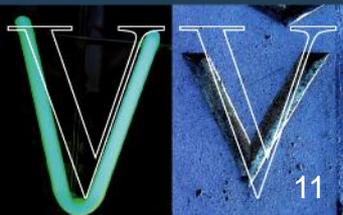
Qualifying Exigency for Covered Military Service Member

- Covered Military Service Member
 - Member of armed forces, including reserves
 - On active duty or notified of impending call to active duty
 - Deployment in foreign country
 - Spouse, child, or parent of employee



Qualifying Exigency for Covered Military Service Member (cont'd.)

- Qualifying exigencies
 - Issues due to 7 or less days' notice of deployment
 - Attend military-sponsored events
 - Arrange for alternative childcare
 - Enrollment in a new school or day care facility
 - Attend meetings with school or day care staff
 - Make financial arrangements
 - Attend counseling sessions
 - Rest and recuperation leave during deployment
 - Funeral and other post-death arrangements
 - Care for parent of covered military member
 - Other exigencies agreed-upon between employee and employer



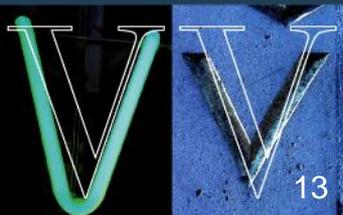
Serious Injury or Illness of Covered Military Service Member (26 weeks)

- Covered Military Service Member
 - No deployment necessary
 - Either a service member or veteran who is undergoing medical treatment, on outpatient status, or on temporary disability retired list
 - Leave must be taken within five years of the veteran's last day of active duty service



Serious Injury or Illness of Covered Military Service Member (cont'd.)

- Serious injury or illness
 - Injury or illness incurred either during active duty or prior condition aggravated during active duty
 - Renders the service member or veteran unfit to perform duties of his/her rank or office
- Other ways veterans' injury or illness will qualify
 - USVA Service-Related Disability Rating of at least 50%
 - Unable to secure employment due to qualifying injury or illness
 - Enrollment in the USVA Program of Comprehensive Assistance for Family Caregivers



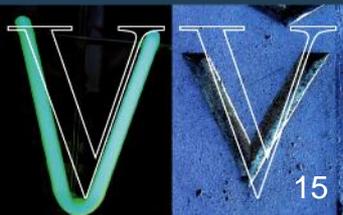
Leave to Care for a Family Member

- Common issues when a need for leave arises
 - Designation of FMLA leave
 - Intermittent leave or reduced schedule?
 - Scheduling when leave is taken
 - Calculating leave
 - A special note about “maternity leave” policies



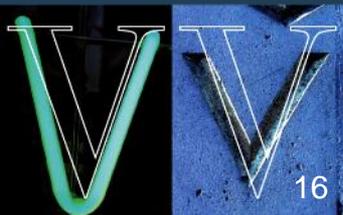
Designation of FMLA-Qualifying Leave

- Employee's responsibilities
 - 30 days' notice to the employer, to the extent possible
 - Sufficient information for the employer to decide whether the leave qualifies under the FMLA
 - Provide certification upon request
- Employer's responsibilities
 - Inquire with the employee if insufficient information
 - Notify the employee of his/her rights and responsibilities under the FMLA
 - Request certification upon notice of need for leave
 - Discuss and document disputes with the employee
 - Issue written decision of whether leave granted under the FMLA



Intermittent Leave and Reduced Schedule

- Intermittent Leave
 - Leave taken in separate blocks of time due to a single qualifying reason
 - Typically a condition which requires periodic treatment by health care provider
 - E.g., prenatal exams, chemotherapy
- Reduced Schedule
 - Reduction in employee's usual work hours due to qualifying reason
 - Typically involves converting the employee from full-time to part-time status
 - E.g., employee cannot work 8 consecutive hours because of the need to recover from surgery



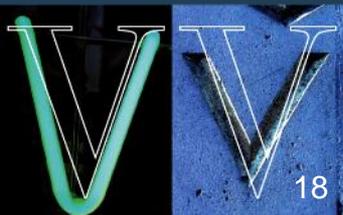
Intermittent Leave and Reduced Schedule (cont'd.)

- When **must** the employer make intermittent leave or reduced schedule available?
 - Medical necessity for serious health condition
 - Medical necessity for serious injury or illness of covered military service member
 - Any qualifying exigency for notice of covered military service member being called to active duty
- When **may** the employer permit the employee to take intermittent leave or reduced schedule?
 - Birth of a new child, adoption, or placement in foster care



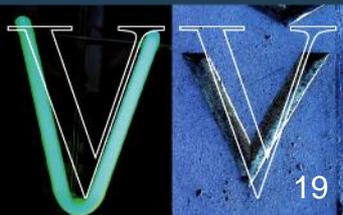
Scheduling FMLA Leave

- Employee must make reasonable effort not to unduly disrupt the employer's operations
- Employer may require a temporary transfer which better accommodates recurring periods of leave or a reduced schedule
 - Must have equivalent pay and benefits
 - May proportionately reduce accrued vacation if normal practice ties vacation to work hours
 - Transfer may not be used to discourage leave
 - Reinstatement to same or equivalent job required



Calculating the Amount of Available Leave

- The employer chooses the 12-month period*
 - Calendar year
 - Fixed 12-month period, e.g., the fiscal year or anniversary of hire
 - 12-month period after the first day of leave
 - “Rolling” 12-month period before the first day of leave
 - * Leave to care for covered service members is 12 months from the first day of leave
- Consistent application required
- 60 days’ notice of any change
- Most beneficial option is the default



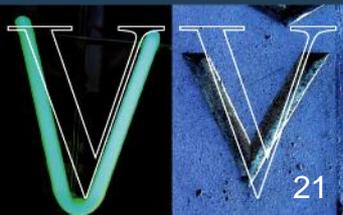
Calculating the Amount of Leave Taken

- Intermittent leave or reduced schedule is measured in increments
- The increment may be no greater than the smallest increment for other leave, but not greater than one hour
- Examples:
 - Employer measures paid vacation time in 1 hour increments and paid sick time in ½ hour increments
 - Employer measures paid vacation time in ½ days and does not provide paid sick time



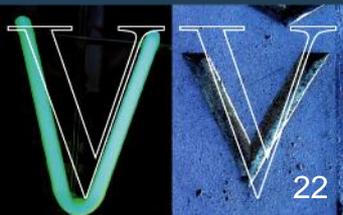
Calculating the Amount of Leave Taken (cont'd.)

- Pro-rata equivalent of the employee's workweek
- Examples:
 - 40 hour workweek less 8 hours of intermittent leave → employee used 1/5 of a week of FMLA leave
 - 40 hour workweek where employee works half days on a reduced schedule → employee used 1/2 of a week of FMLA leave
 - 30 hour workweek less 10 hours of intermittent leave → employee used 1/3 of a week of FMLA leave
- 12-month averages may be used for employees with varying weekly schedules

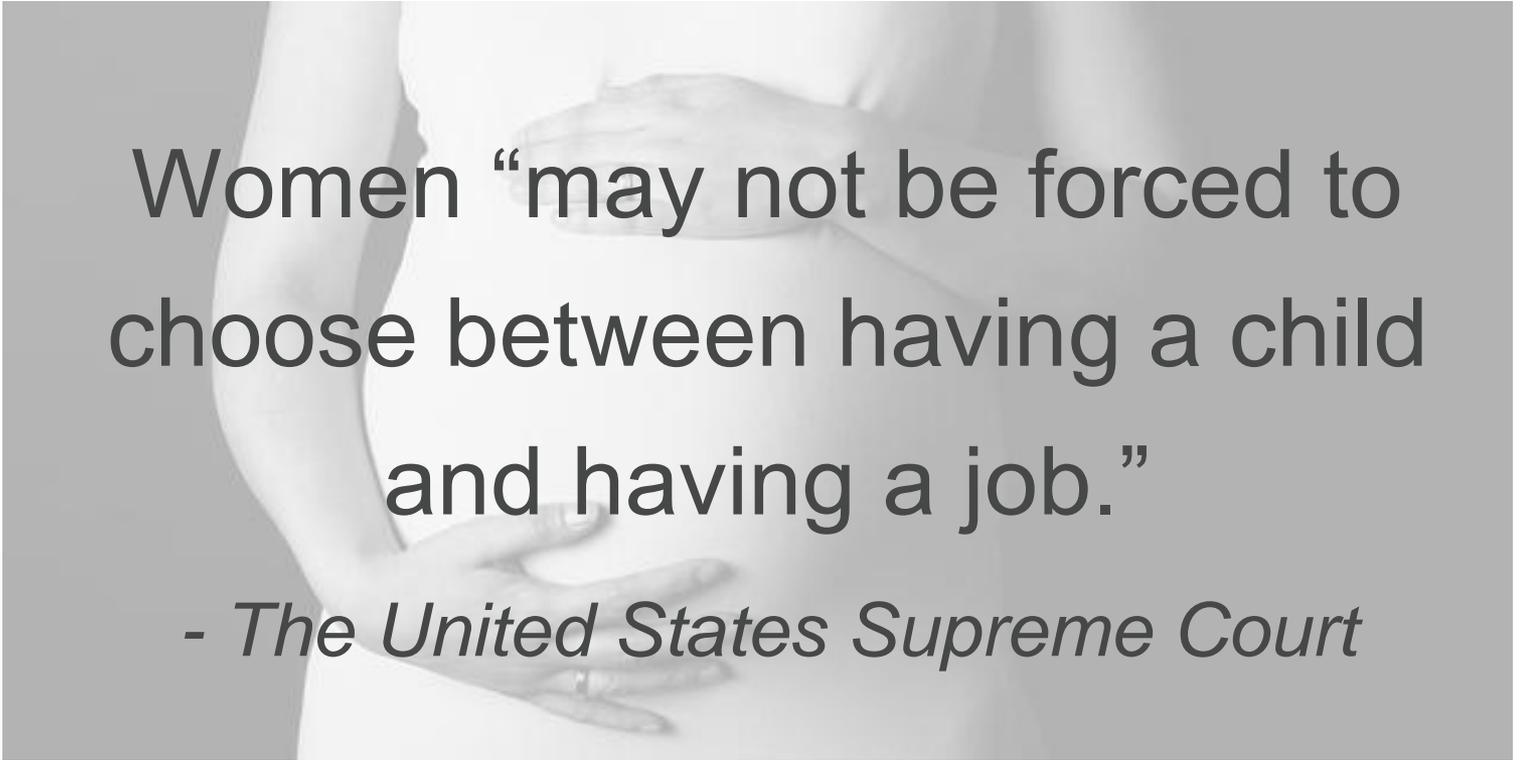


Parental Leave

- “Maternity” and “Paternity” leave
- Discrimination issues
 - Paid time off generally not required, but if you have a policy, it should be administered equally between male and female employees
 - In addition to any paid time off policy, either parent may take unpaid FMLA leave
- Notice requirement still applies
- Same employer limitation
 - 12 weeks per child, not per parent

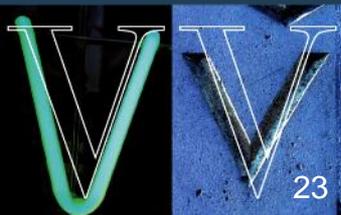


Pregnancy, Childbirth, & Lactation



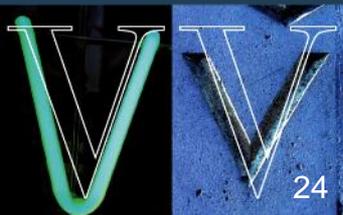
Women “may not be forced to choose between having a child and having a job.”

- The United States Supreme Court



Pregnancy and Childbirth: PDA

- Pregnancy Discrimination Act: amended Title VII of the Civil Rights Act of 1964, which prohibits, among other things, discrimination in employment on the basis of “sex,” so that “because of or on the basis of sex,” includes “because of or on the basis of pregnancy, childbirth or related medical conditions.”
- The basic principle is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work, and discrimination in employment, because of pregnancy, is prohibited by the Act.



Pregnancy and Childbirth: PDA (cont'd.)

- A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she can be/contemplates/is pregnant or had an abortion (regardless of marital status).
- A woman generally cannot be forced to go on leave as long as she can still work.
- Although the PDA does not impose a duty to accommodate pregnant employees, if other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.
- Women cannot be discriminated against in the area of fringe benefits, due to pregnancy or related medical conditions.



PDA: Benefits

- In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies.
- A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons.
 - Additionally, she must be accorded the same seniority and vacation retention and accrual accorded those on other disability leaves.
- Any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions.
 - Abortion exception



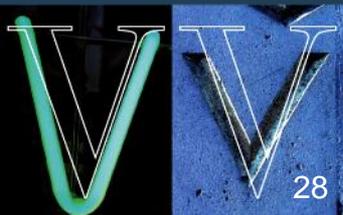
PDA and Infertility

- Infertility, by itself, can affect a man or a woman, and is therefore not protected by the PDA.
- However, child-bearing capacity and medical procedures related to infertility that can only be performed on a woman, are protected by the PDA.
 - Therefore, an employer violates the Act if it terminates a woman's employment for taking time off to undergo in vitro fertilization procedures.



PDA: Abortion

- An employer cannot discriminate in its employment practices against a woman who has had (or is contemplating) an abortion.
- Health insurance for typical expenses arising from abortion may be elected but is not required except where:
 - The life of the mother would be endangered if the fetus were carried to term; or
 - Where medical complications have arisen from an abortion.
- However, an employer's health insurance plan must cover *additional* costs due to *complications* arising during an abortion (e.g., excessive hemorrhaging).



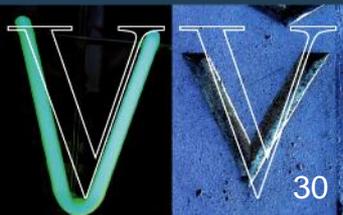
Is Pregnancy A Disability? The ADA:

- Normal pregnancy is not considered a “disability” under the Americans With Disabilities Act (ADA).
 - However, complications resulting from pregnancy can be impairments for ADA purposes, if it affects a major life activity and the major life activity is substantially limited.
- If circumstances surrounding an unusual pregnancy trigger ADA coverage, an employer may have an affirmative duty to accommodate the disabled employee, if the accommodation is reasonable and does not pose an undue hardship on the employer.



Pregnancy and Disability: the PDA

- Under the PDA, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions shall be treated the same as disabilities caused or contributed to by other medical conditions for health insurance plans, leave benefits (including type of leave), other benefits, and employer policies.
 - If an employee is unable to perform the functions of her job, the PDA requires that she be treated the same as other temporarily disabled employees (e.g., light duty, alternate position).



Pregnancy & FMLA

- A mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy (including morning sickness), and for her own serious health condition following the birth of a child.
- A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth).



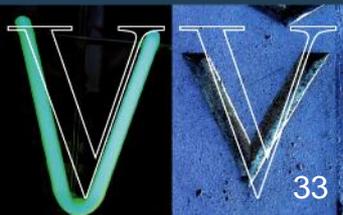
Lactation and Nursing

- The Patient Protection and Affordable Care Act amended the Fair Labor Standards Act (FLSA) to require employers to provide a nursing mother with:
 - Break time;
 - A private place; and
 - The ability to store breast milk.
- This applies to all employers and employees covered by the FLSA's overtime provisions, unless:
 - There are fewer than 50 employees; and
 - The employer can demonstrate that these requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.



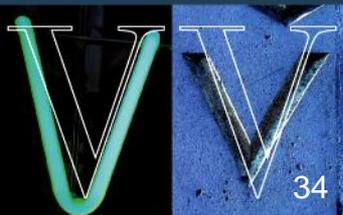
Reasonable Break Time

- Reasonable break time to express milk for 1 year after the nursing child's birth (throughout the day each time she needs to express milk)
 - Employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, if the employer permits short breaks, usually 20 minutes or less, the time must be counted as hours worked under the FLSA. An employee using such breaks to express milk must be paid in the same way that other employees are compensated for break time. Additional time beyond authorized paid break time may be uncompensated.
 - Cannot be counted against FMLA entitlement
- What is “reasonable”?
 - Consider the frequency, number, and length of the breaks that a nursing mother might need (based on various factors such as the age of the child); and
 - Related factors (e.g., time it takes to walk to lactation space, to gather breast pump, etc.).



Lactation Space & Storage Ability

- A place, other than a bathroom, that is shielded from view and free from coworker and public intrusion, that may be used to express milk
 - Need not be permanent
 - Consider the number of nursing mothers at any given time (may need multiple spaces; large space with privacy screens)
 - Must include a place for the mother to sit, a flat surface other than the floor (for the pump), and ideally, electricity access for the pump
- Ability to store breast milk and pump: refrigerator or place for insulated container and pump



Common Family Caregiver Legal Claims

- Pregnancy
 - Return after pregnancy or parental leave
 - Decisions based upon potential pregnancies
 - Title VII: unpaid leave policies must not discriminate against mothers
- Disability discrimination by association
 - Employees with disabled children, parents, or spouses
 - Employer may worry their employee will be less productive because of his/her family member's disability



Common Family Caregiver Legal Claims (cont'd.)

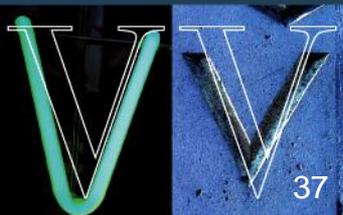
- Transfer or reinstatement issues
 - Same or substantially the same position?
 - Same location?
 - Same shift or work schedule?
 - Is the employee a “key employee?”
- Termination after notice of leave
 - Problematic employee gives notice of need for FMLA leave
 - Can the employer terminate an employee after notice?
 - What are the employer’s other options?



Employment Policy Tips

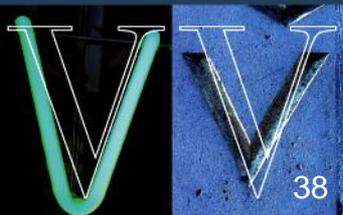


- Check all relevant state and local laws!
- Hiring:
 - Do not ask female applicants questions regarding pregnancy, childbearing, or child care.
 - Do not make decisions based on caregiver responsibilities or pregnancy-related factors.
- Pregnancy and caregiver leave:
 - Outline your family and/or medical leave policies. Know whether you are covered by state and/or federal laws and include relevant handbook language.
 - Outline other policies: vacation, sick, personal (paid/unpaid).
 - Outline parental leave policies for new fathers and mothers.



Employment Policy Tips (cont'd.)

- Pregnancy considerations:
 - Title VII (PDA); FMLA; ADA – Know your rights and your employee's rights, under each relevant law, based on the circumstances at hand.
 - Ensure the neutrality of benefits, including fringe benefits.
 - Know your return-to-work policy and how it is affected by relevant laws.
 - State laws may afford pregnant women or new mothers additional benefits beyond those afforded to other employees.
- Ensure your nursing mothers have break time and space.
 - Include language in the handbook.
 - Discuss lactation needs with your breastfeeding employee.



Questions?

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