

Employee Leaves of Absence: Practical Guidance for Difficult Issues

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Broad and Overlapping Coverage: Federal “*alphabet soup*,” State Laws, Company Policies, and Insurance Coverages

- FMLA, ADA, USERRA
- State
 - Paid family leave
 - Paid and unpaid sick leave
 - Parental leave
 - Small necessities leave
 - Jury service
 - Domestic violence leave
 - Workers’ compensation
- More generous company policies, STD, LTD

Handling Employee Leaves of Absence – Getting it Right can be Difficult Because:

- Several laws deal with LOAs and rights of disabled/injured employees
- May be different obligations under different laws that must be reviewed/followed
- Plus Company policies may be more generous
- Multistate employers may not be as familiar with state/local laws and regulations
- Call outs/unplanned time off & discipline create burdens for HR, supervisors, and managers

Handling Employee Leaves of Absence: Consistent Approach

Step 1: Review and apply employer policies.

Step 2: What laws apply? (FMLA, ADA, state law)

- Is employer covered?
- Is employee eligible under law?
- Is need for leave medically certified?
- Promptly determine and designate leave entitlement and inform employee
- Document and track use of leave and time off
- Prepare to manage for return to work

Federal Family & Medical Leave Act (FMLA)

Covered employers must provide up to 12 weeks ***unpaid, job-protected leave*** within a 12 month period for:

- Birth of a child, adoption, or placement of a foster child
- To care for a spouse, child, or parent with serious health condition
- The employee's own serious health condition that prevents the employee from working
- A covered military member's qualifying exigency
- Military caregiver leave (up to 26 weeks of leave)

Federal Family & Medical Leave Act (FMLA)

Coverage

- Private employers employing 50 or more employees for each working day during each of 20 or more calendar workweeks in current/preceding calendar year
- There must be 50 or more employees employed at or within 75 miles (road miles) of the employee's worksite
- To be eligible, employee must have
 - Been employed for at least 12 months (not continuous)
 - Worked at least 1,250 hours during the immediately preceding 12 months

Federal Family & Medical Leave Act (FMLA)

- Serious Health Condition: An illness, injury, impairment, or physical or mental condition that involves
 - Any period of incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical care facility
 - A period of incapacity requiring absence of more than 3 calendar days from work, school, or other regular daily activities or more that involves continuing treatment
 - Any period of incapacity due to pregnancy, or for prenatal care

Federal Family & Medical Leave Act (FMLA)

- Serious Health Condition (continued):
 - Any period of incapacity or treatment due to a chronic serious health condition;
 - A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective; or
 - Any absences to receive multiple treatments by health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated.

Federal Family & Medical Leave Act (FMLA)

12 month period defined: Employer may select 1 of 4 options to be uniformly applied

- The calendar year: 12 month period Jan. 1 to Dec. 31
- Any fixed 12 months, e.g. FY; anniversary date
- 12 month period measured forward from first leave date
- “Rolling” 12 month period measured backward

Federal Family & Medical Leave Act (FMLA)

Intermittent Leave:

- When medically necessary, employees may take leave intermittently -- separate blocks of time for a single qualifying reason -- or on a reduced leave schedule.
- Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.

Federal Family & Medical Leave Act (FMLA)

Group Health Insurance Benefits

- The employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work.
- If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave.
- The employee must continue to make any normal contributions to the cost of the health insurance premiums.
- If paid leave is substituted for FMLA leave, the employee's share of group health plan premiums must be paid by the method normally used during paid leave (usually payroll deduction).
- An employee on unpaid FMLA leave must make arrangements to pay the normal employee portion of the insurance premiums in order to maintain insurance coverage.

Federal Family & Medical Leave Act (FMLA)

Job Restoration:

- The employer must return the employee to the same job, or one that is nearly identical (equivalent).
- If not returned to the same job, a nearly identical job must:
 - offer the same shift or general work schedule, and be at a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance);
 - involve the same or substantially similar duties, responsibilities, and status;
 - include the same general level of skill, effort, responsibility and authority;
 - offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and
 - offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.).

Leaves Under Disability Laws: Federal ADA & State FEPA Laws

- The federal Americans with Disabilities Act (ADA) and state law, such as the Mass. Fair Employment Practices Act (Chapter 151B), prohibit discrimination in the terms and conditions of employment against any “qualified individual with a disability”
- Time off may be required as reasonable accommodation

Leaves Under Disability Laws: Federal ADA & State FEPA Laws

A “disability” is defined as a physical or mental impairment that substantially limits one or more “major life activities” such as

- Caring for oneself
- Performing manual tasks
- Breathing
- Learning
- Seeing
- Hearing
- Speaking
- Working
- Walking

Leaves Under Disability Laws: Federal ADA & State FEPA Laws

- A “qualified” individual with a disability is a person who, notwithstanding the disability, can perform the “essential functions” of the job, either with or without “reasonable accommodation.”

Leaves Under Disability Laws: Federal ADA & State FEPA Laws

- Reasonable Accommodation
 - Primary benefit of ADA and Chapter 151B for qualified, disabled individuals
 - May take the form of a leave of absence
 - Must be provided if will permit employee to perform the essential functions of their job
 - Interactive process: talking to the employee
 - ***Train managers to tell HR any time employee talks about needing something to do a job because of a medical issue***

Military Leave: Federal USERRA

- Protections for those absent from employment due to military service
- Applies to all employers, regardless of size.
- Under USERRA, employers must:
 - Re-employ those absent from employment by reason of service;
 - Restore seniority and other rights and benefits determined by seniority;
 - Provide any additional seniority, rights and benefits that the person would have attained if the person had remained continuously employed.
- Health Plan Benefits
 - May elect to continue health insurance coverage for themselves and their dependents.
 - 24 months beginning on the date when the absence began or, if earlier, the day after the date the employee fails to apply for return to work following completion of their service.
 - Individuals who are absent from work for less than 31 days may not be required to pay more for coverage than the amount charged to employees that are actively at work.
 - Employers may charge all other individuals no more than 102 percent of the full premium under the plan.

Retaliation for Exercise of Rights (i.e. taking leave)

Retaliation:

- Separate claim from discrimination
- “Distinct intent to punish or to rid the workplace of someone”
- Employee engages in legally protected conduct
- Suffers an “adverse employment action”
 - Change in working conditions that results in material disadvantage (e.g., termination, demotion, possibly discipline)
- Connection between conduct and action

Maine Leave Laws

- Maine Mini-FMLA
 - 15+ employees at one in state location
 - 12 months worked; no min. hours required
 - Up to 10 workweeks of leave in a two-year period
- Military Leave Law
- Family Military Leave Law
 - Employers with at least 15 employees
 - Spouse, dom. partner, or parent of ME resident deploying 180+ days
 - 12 months and 1,250+ hours
 - 15 days
- Employment Leave for Victims of Violence Law

Maine Leave Laws

- Earned Paid Leave
 - January 1, 2021
 - ERs with 11+ employees for more than 120 days in calendar year
 - Earn 1 paid hour for every 40 hours worked up to 40 hours/year
- Maine Family Sick Leave Law
 - Employers with 25+ employees
 - If provide PTO, must allow use to care for ill child, parent, or spouse
 - Must allow employees to use at least 40 hours in a 12-month period

Massachusetts – Parental Leave

- 8 weeks unpaid
- Giving birth or the placement or adoption of a child under 18 (or under the age of 23 if the child is mentally or physically handicapped) and to care for such child, provided that the employee:
 - (1) has completed 90 days of employment,
 - (2) gives at least 2 weeks' notice of the anticipated date of departure from work, and
 - (3) states his/her intention to return to work at the Company at the end of the leave.

Massachusetts – Small Necessities

- If employer FMLA covered, i.e. 50+ employees
- Up to 24 hours of leave during any twelve-month period to participate in certain family obligations
- Eligibility: an employee must have worked for the Company for at least twelve months and 1,250 hours or more in the preceding twelve-month period
- An eligible employee may take small necessities leave to:
 - participate in school activities directly related to the educational advancement of his or her child;
 - take his or her child to routine medical or dental appointments; or
 - accompany an elderly relative to routine medical or dental appointments or for other “professional” services related to the elder’s care.
- An eligible employee is entitled to 24 hours of such leave in addition to the leave provided for by FML.
- An eligible employee may take the leave in full at one time, intermittently, or through a reduced leave schedule.

Massachusetts – Paid Sick Time

- 11+ employees = paid; under 11 employees = unpaid
- Up to 40 hours of annual paid sick time off: 1 hour for every 30 hours worked
- Accrual begins on date of hire, but may not be used until 90 days after hire
- May be taken for the following purposes:
 - (1) To care for the employee's own physical or mental illness, injury, or medical condition;
 - (2) To care for the employee's child, spouse, parent, or parent of a spouse, who is suffering from a physical or mental illness, injury, or medical condition;
 - (3) To attend the employee's routine medical appointment or a routine medical appointment for the employee's child, spouse, parent, or parent of a spouse;
 - (4) To address the psychological, physical, or legal effects of domestic violence; or
 - (5) Travel to and from an appointment, pharmacy, or other location related to the purpose for which the time was taken.
- Full or partial days; smallest = one hour.
- May carry over up to 40 hours; may not use more than 40 hours in a calendar year
- Accrued but unused sick leave is not paid out at the time of separation of employment
- Where purpose also constitutes qualified leave under FMLA, SNLA, or other similar laws, the leave may run concurrently.

Massachusetts – Victims of Domestic Violence or Sexual Assault

- Employers with 50 or more employees
- Up to 15 days of unpaid leave in a 12-month period for:
 - seeking medical attention for injuries caused by domestic violence or sexual assault,
 - seeking services from a domestic violence shelter or rape crisis center,
 - seeking psychological counseling for domestic violence or sexual assault related experience,
 - taking appropriate steps to ensure safety from future violence.

Massachusetts – Paid Family & Medical

- Benefits available January 1, 2021
- State offered, tax funded by employees and employers
- Any W-2 who works in MA: FT, PT, seasonal
- Up to 26 weeks for reasons similar to FMLA, but broader

New York Leave Laws

- Paid Family Leave
 - 1+ employees for at least 30 days in calendar year
 - employee eligible after 26 consecutive weeks
 - up to 10 weeks during 52-week calendar
- Crime Victims Leave
- Breastfeeding Break Time
 - up to 3 years after childbirth
- Blood & Bone Marrow Donation Leave
 - employers with 20+ employees
 - eligible employee: work 20+ hours/week
- Military Spouse Leave
 - 20+ employees
 - eligible employee works on average 20+ hours/week
 - 10 days leave to be with spouse on leave from military

New Hampshire Leave Laws

- Pregnancy & Childbirth: NH RSA s. 354-A:7(VI)(b)
 - Employers with at least 6 employees
 - “Female workers” for period of pregnancy-related physical disability
- Crime Victim Employment Leave
 - 25+ employees

Vermont Leave Laws

- Vermont Parental & Family Leave
 - for Parental Leave: employ 10+ who work at least 30 hours/week
 - for Family Leave: employ 15+ who work at least 30 hours/week
 - employee eligible after continuous employment 1 year
 - 12 weeks in 12 month period
- Workers' Comp. Reinstatement Requirement
 - covered employer = 10+ employees working more than 15 hrs/week
 - reinstatement required if recovery within 2 years of initial leave
- Military Reserve and Guard Leave

Vermont Leave Laws

- Earned Sick Time
 - All employers, except new employers exempt for one year
 - EE eligible = 18 hours/week average for year
 - Generally, 1 hour for every 52 hours worked
 - 40 hours in a 12 month period (carryover required but use capped)
 - Paid at employee's normal hourly rate

Rhode Island Leave Laws

- RI Parental & Family Medical Leave Act
 - At least 50 employees
 - FT EE who works average 30 hrs/week; 12 consecutive months
 - 13 weeks of leave in two calendar years
- RI Military Family Relief Act
 - 1,250 service hours in prior 12 months before leave
 - Spouse/parent of person called to state/federal service 30+ days
 - 15 days unpaid if ER has 15-50 employees; 30 unpaid if 51+ employees
- RI Employment Rights of Members of Armed Forces
- Temporary Caregiver Insurance Benefits
 - All employees; 4 weeks; mimics Temporary Disability Ins. Program

Rhode Island Leave Laws

- Victim's Bill of Rights
 - 50+ employees
- Accommodation of Pregnancy-Related Conditions
 - 4+ employees
 - includes lactation and need to express breast milk RI Parental & Family Medical Leave Act
 - at least 50 employees
 - FT EE who works average 30 hrs/week; 12 consecutive months
- RI Healthy & Safe Families Act
 - up to 40 hours paid; 1 hour for every 35 worked
 - 90 day wait period
 - carry over with 40 hour cap

Connecticut Leave Laws

- CT mini-FMLA
 - 75+ employees in CT
 - Similar to FMLA, but broader: less hours (1000); more reasons
 - 16 weeks unpaid in 24 month period
- Military & Guard Leave
- Pregnancy Leave
 - 3+ employees
 - Unpaid leave for pregnancy-related disability
 - Reasonable accommodation may be required instead of leave
 - Private right of action to CHRO

Connecticut Leave Laws

- Leave for Victims of Family Violence
 - 3+ employees
 - May limit to 12 days in calendar year
- Paid Sick Leave
 - 50+ employees
 - Accrue up to 40 hours annually; 1 hour every 40
 - For hourly-paid or non-FLSA exempt “service workers”
 - Not temporary workers; must work 680 hrs and average 10 hrs/week in quarter
 - Manufacturers excluded
 - Broadly for health reasons, family violence/sexual assault
- City of New Haven: paid sick leave for service contractors’ employees

Hypothetical

Perry worked as a security guard at a hospital. After being attacked by a patient, he asked you, his manager, to take off every Friday afternoon and Monday morning to attend PTSD therapy. The hospital is especially busy on those days and short-staffed. What do you say?

Hypothetical

A week after the attack, Perry stops coming to work and files for workers' compensation benefits. He calls and asks you for FMLA forms, but doesn't return them.

15 weeks go by. Then Perry emails you that his doctor cleared him to return to work the following Monday, but only in a sedentary desk job. There is no such role at the hospital. In the past, the hospital had a policy of administratively ending the employment of anyone out of work longer than the 12-week FMLA period. What do you do?