

## Welcome



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## The Legal and Administrative Stuff

- This presentation is not legal advice.
- Information presented as of September 23, 2021.
- Laws, regulations, and guidance continuously evolving (especially on issues relating to COVID-19).
- Will try to field questions as we go; submit them in Chat or Q&A.
- Presentation materials will be emailed within a few days.

# Agenda

- Quick Refresher on Leave Laws
- FMLA: Basics + COVID-19
- ADA: Basics + COVID-19
- PDA: Basics + Tricky Leave Issues

# Quick Refresher on Leave Laws

# Common Sources for Employees' Right to Leave

- Federal Family and Medical Leave Act (FMLA): Applies to all public\* agencies and private employers with 50 employees within a 75-mile radius.
- Federal Families First Coronavirus Response Act (FFCRA): Optional payroll tax credit extension for certain employers expiring on September 30, 2021.
- Federal Americans with Disabilities Act (ADA): Applies to all employers with 15 or more employees.

# Common Sources for Employees' Right to Leave

- Federal Pregnancy Discrimination Act (PDA): Applies to all employers with 15 or more employees.
- Federal Uniformed Services Employment and Reemployment Rights
   Act (USERRA): Applies to all employers regardless of size.
- State & Local Law: Varies. May encompass paid and unpaid sick leave laws, disability and pregnancy accommodation laws, military leave laws, etc.

## Additional "Non-Legal" Reasons to Provide Leave

- Employee morale and retention
- Job candidate recruitment
- Reward for long tenure
- Increased workplace flexibility
- Increased productivity and focus when at work

FMLA: Basics + COVID-19

# FMLA: Qualifying Reasons for Leave

- Birth of son or daughter or placement of a son or daughter with the employee for adoption or foster care
- To care for a spouse, son, daughter, or parent who has a serious health condition
- For the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military service member on covered activity duty or called to cover active-duty status

# FMLA: Requirements for Employee Eligibility

- Works for a covered employer
- Has worked for the employer for at least 12 months (do not have to be consecutive)
- Has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave
- Works at a location where the employer has at least 50 employees within 75 miles.

#### FMLA: "Serious Health Condition"

- An illness, injury, impairment, or physical or mental condition that involves...
  - Inpatient care in a hospital, hospice, or residential medical care facility; or
  - Continuing treatment by a health care provider
- "Continuing treatment" requires...
  - Treatment two or more times by a health care provider; or
  - Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider

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Challenging COVID-19 Leave Issue #1: Is exposure alone a qualifying reason for FMLA leave?

## Is COVID-19 exposure an FMLA-qualifying reason?

- May works as an in-home caregiver. After she is exposed to COVID-19 in a client's home, she visits her doctor a <u>single</u> time. Her doctor advises her to get tested and quarantine.
- May provides her employer with documentation supporting her need for time off to quarantine, and her employer approves her leave.
- However, before she is scheduled to return, May is terminated due to an administrative error.
- May's employer offers to reinstate her, but because her position has been filled, she is offered a new client whose home is much further away.

#### Does May have a viable FMLA retaliation claim?

### Is COVID-19 exposure an FMLA-qualifying reason?

- Answer: Possibly. A federal district court says that May's need to quarantine might qualify as a "serious health condition" under the FMLA. Mays v. RHA Health Servs., LLC, Court File No. 1:21-cv-01077 (W.D. Tenn. Aug. 31, 2021).
- But how? May has not been incapacitated for 3 or more days, and she only visited her doctor one time.
- Is quarantining a "regimen of continuing treatment? The court says no.
- Nonetheless, the court denies the employer's motion to dismiss. The court concludes May might present additional evidence showing she received a regimen of continuing treatment beyond basic quarantining.
- Plus, "[s]ome case law does suggest that the FMLA protects absence from work for purposes of diagnosing a potentially serious condition."

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# Handling COVID-19 Exposure: Recommendations

- The *Mays* court case is probably an outlier. Seems unlikely that absences due to exposure will be deemed a "serious health condition," especially following expiration of Families First Coronavirus Response Act.
- Nevertheless, employers should consider permitting employees to work remotely or take time off if they have been exposed to COVID-19.
  - Reduces risk of workplace exposures
  - Promotes health and safety
- Risk of workers' compensation and/or OSHA retaliation claims if exposure occurred at work?
- Consider other state and local law requirements.

Challenging COVID-19 Leave Issue #2: Is a COVID-19 diagnosis a qualifying reason for FMLA leave?

## Is a COVID-19 diagnosis an FMLA-qualifying reason?

- Tony worked as a residential counselor for a group home. He contracted COVID-19 after several residents tested positive.
- Tony's doctor advised him to quarantine for 14 days even though he had no symptoms. Tony requested leave, which was granted.
- Six days later, Tony's boss told Tony he was "cleared" and needed to return to work. When Tony insisted on completing his quarantine period, he was terminated.

Does Tony have viable FMLA interference and retaliation claims?

## Is a COVID-19 diagnosis an FMLA-qualifying reason?

- Yes, Tony has viable FMLA claims. Payne v. Wood Servs., Inc. (E.D. Pa. Feb. 16, 2021).
- As in May's case, Tony's employer argued he didn't have a "serious health condition."
- But when Tony requested leave, his employer did not notify him that there were any deficiencies with his request, or that they needed more information to confirm he suffered from a serious health condition.
- The employer "did not provide an explanation of any deficiencies in [Tony's]
  request, or allow an opportunity to cure any deficiencies, as the FMLA regulations
  require. [Tony] was fired the day after his request. Therefore, [Tony] has
  adequately pled his claims of interference and retaliation under the FMLA."

### Handling COVID-19 Diagnoses: Recommendations

- Remember that the COVID-19 situation, and guidance surrounding COVID-19, is constantly changing. You cannot set black and white guidelines surrounding any situation with COVID-19 right now.
- Rely on medical provider information/opinions when assessing COVID-19 FMLA requests.
- If it is unclear whether a serious health condition exists, consult counsel.
- Train your managers not to ignore absences related to COVID-19 (or symptoms related to COVID-19).

#### FMLA: Leave Entitlement

- Up to 12 workweeks of leave in a 12-month period (26 weeks under certain circumstances involving care of injured or ill family service member).
- Types of FMLA Leave:
  - Continuous (e.g., planned two-week leave after surgery)
  - Intermittent (e.g., unplanned medical-related absences as needed)
  - Reduced schedule (e.g., four hours per day for three weeks)

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#### FMLA: Leave Entitlement

- Calculating available FMLA for continuous leave is straightforward: 1 week is 1
  week, regardless of whether the employee regularly works 20, 30, or 40 hours
  per week.
- But how do you calculate available FMLA for intermittent and reduced schedule leave?
- Begin by calculating how many hours of leave the employee is entitled to. Do they work 40 hours per week? Then they are entitled to 480 hours.
   Do they work 32 hours per week? Then they are entitled to 384 hours.
- Do their hours vary from week to week? Use their upcoming scheduled hours, or
  if not possible to determine, then calculate their average weekly hours
  scheduled over the 12 months preceding their leave.

Challenging COVID-19 Leave Issue #3: What if an employee refuses to return from FMLA leave due to concerns about exposure in the workplace?

# Refusing to Return due to Safety Concerns?

- Patricia works as a clerk for the sheriff's office. Her doctor indicates she needs FMLA leave because she has COPD and must avoid exposure to COVID-19.
- During leave, Patricia becomes concerned that co-workers are not complying with a mask mandate. She asks the sheriff to return her call to discuss her concern, but he does not call her back.
- When she has exhausted her 12 weeks of FMLA leave, Patricia refuses to return to work due to her safety concerns.
- Patricia is terminated the same day her FMLA leave expires.

Does Patricia have a viable FMLA retaliation claim even though she used all her available FMLA leave?

# Refusing to Return due to Safety Concerns?

- Yes, Patricia has a valid claim according to a federal district court. Romans v. Wayne County Commission, Court File No. 3:20-0797 (S.D.W.V. Sept. 2, 2021).
- The sheriff's office argued her failure to return after her FMLA leave was exhausted was a legitimate reason for firing Patricia.
- The court said, "Maybe," but Patricia at least gets to develop evidence that might show that the sheriff's office's true motivation was to retaliate against her for taking FMLA leave.
- Such evidence might include the sheriff's failure to return her call, refusal to enforce the mask mandate, and the decision to terminate her immediately when her FMLA leave expired.

## Refusing to Return: Recommendations

- Respond to any employee inquiries about safety or other concerns made while the employee is on leave.
- Document response to the employee.
- Consider contacting an employee who fails to return when expected from FMLA leave to determine their intent to return, and to hear them out on any outstanding concerns.
- Consider whether any additional reasonable accommodations should be explored.
- Accurately document reason for discharge (e.g., "Your expected return date was September 20, but you did not show up at work. When I spoke to you on September 21, you stated that you had no intent to return.").

#### Intermittent Leave under the FMLA

- Means taking leave in separate blocks of time over the course of multiple days, weeks, or months for a single qualifying reason.
- When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as to not unduly disrupt the employer's operation.
- Employers are not required to grant intermittent leave requests for the birth, adoption, or foster placement of a child. Optional for employer (but apply uniformly).
- Special rules apply to teachers and other employees of education agencies.

Challenging COVID-19 Leave Issue #4: What if an employee needs intermittent FMLA leave for "brain fog?"

#### Intermittent FMLA Leave for COVID-19 Symptoms?

- Dionne has COVID-19 and works remotely for 14 days during illness.
   Dionne has mild symptoms and generally feels able to perform the work.
- After the 14 day period passes, Dionne returns to the workplace.
- A couple of weeks later, Dionne begins to experience bouts of severe brain fog that prevents her from working during those periods.
- Dionne goes to her doctor and Dionne's doctor tells her that the brain fog is a result of COVID-19 and she has what is considered Long COVID.

Does Dionne have a viable request for intermittent FMLA leave?

## Handling Intermittent Leave: Recommendations

- Employers are likely to see employees with Long COVID need intermittent leave more than those that recover quickly. Do not assume that an employee doesn't need FMLA because they have been released from quarantine/isolation.
- Train your managers! This is another one where the symptom/intermittent need is more likely to be brought to your manager's attention than directly to HR.
- Intermittent leave due to COVID-19 or Long COVID may be more likely to result in FMLA retaliation claims.

# FMLA Tricky Leave Issue: Counting Holidays

# Counting Holidays under the FMLA

- Can you count work holidays against an employee's FMLA bank?
- The answer may depend on whether the employee works other days in the same workweek.

**Hypothetical #1:** Suzy takes FMLA leave for chronic migraines on Monday through Wednesday. Thursday and Friday are work holidays for Thanksgiving. Can all five days count against her 12 workweeks of FMLA?

# Counting Holidays under the FMLA

**Hypothetical #1 Answer:** Yes, Suzy's employer can count the entire workweek as one full week of FMLA used since Suzy was absent for all of the workdays that were not holidays.

**Hypothetical #2:** Suzy works a half day on Monday before leaving early due to her migraines. She takes FMLA leave on Tuesday and Wednesday, as well. Thursday and Friday are work holidays for Thanksgiving. Does the fact that she worked a partial day affect how the week counts toward her FMLA leave?

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# Counting Holidays under the FMLA

**Hypothetical #2 Answer:** Only Monday afternoon, Tuesday, and Wednesday can be counted toward Suzy's FMLA usage. The Thanksgiving holidays cannot count against Suzy's FMLA entitlement.

See 29 C.F.R. § 825.200(h): "[I]f an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday."

For counting purposes, Suzy has exhausted 50% of the workweek (2.5 days/5).

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ADA: Basics + COVID-19

#### **ADA: Leave Entitlement**

- Leave may sometimes be a reasonable accommodation if it enables a disabled employee to perform the essential functions of the employee's job.
- Does not have to be paid unless also covered by the employer's existing paid leave policy.
- Does not have to be provided if the employer can show that providing the leave would impose an undue hardship on its operations or finances.
- What does "disabled" mean? A condition that substantially limits one or more major life activities (e.g., breathing, eating, working, etc.).

Challenging COVID-19 Leave Issue #5: Is COVID-19 a "disability"?

- Nino worked as a waitress at a restaurant for about two months.
- On Nov. 19, Nino told her supervisor that she "felt ill." Specifically, she said she was losing her sense of taste and smell.
- Three days later, Nino notified the restaurant that she needed FFCRA leave because she tested positive for COVID-19.
- The restaurant terminated Nino that same day, saying she was "not a good fit."
- Nino sued, bringing claims under FFCRA and the ADA.
- For her ADA claim, Nino alleged she was terminated because the restaurant regarded her as disabled.

Does Nino have a viable "regarded as" disability claim under the ADA?

- Yes, Nino has a viable "regarded as" ADA claim. Matias v. Terrapin House, Inc., Court File No. 5:21-cv-02288 (E.D. Pa. Sept. 16, 2021).
- "Regarded as" claims require a plaintiff to show that she was subjected to adverse employment action because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.
- The plaintiff must also show that her employer misinterpreted information about her limitations and believed her impairment substantially limited a major life activity.
- <u>But</u> transitory and minor impairments are excluded from "regarded as" claims. To establish this defense, the employer must prove both. Objective standard.
- Transitory = lasts less than six months.

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- Nino's case survived because she had no disciplinary history, and the employer gave a vague "not a good fit" reason for terminating her on the very same day she confirmed her COVID-19 diagnosis.
- While the <u>majority</u> of COVID-19 cases might be "transitory and minor," the Court held that Nino's employer could not rely on that defense.
- Court relied on Nino's allegation that she had disclosed to her employer one
  of the symptoms common to long-term impairment: loss of taste and smell.
- The court also questioned the employer's claim that COVID-19 is transitory.

- DHHS & DOJ
  - Long COVID = symptoms that last weeks or months
    - Tiredness or fatigue
    - Difficulty thinking or concentrating (sometimes called "brain fog")
    - Shortness of breath or difficulty breathing
    - Headache
    - Dizziness on standing
    - Fast-beating or pounding heart (known as heart palpitations)
    - Chest pain
    - Cough
    - Joint or muscle pain
    - Depression or anxiety
    - Fever
    - Loss of taste or smell
  - Long COVID can be a disability if it substantially limits a major life activity
    - MLA = caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, working, and the operation of a major bodily function.

- EEOC
  - Sept. 9, 2021 published that Long COVID may be a disability
  - Look for additional technical assistance from the EEOC
    - Such guidance will likely guide employers to handle accommodation requests related to COVID in the same manner as other requests under the ADA

#### Indefinite leave for COVID

- Barry is a relatively new employee of the organization and has COVID.
- Barry is not eligible for FMLA.
- Barry was in the hospital for three weeks with COVID and has now been released to a long-term care facility.
- Barry's medical provider has stated that Barry will recover from COVID, and be able to return to work, but he is unsure if it will be 3 weeks from now or 3 months from now.

Is this request for leave a reasonable accommodation?

### Long COVID Indefinite Leave: Recommendations

- Court cases grappling with this issue are likely on the horizon.
- While it's ok to ask employees to provide an expected return-to-work date,
   don't jump immediately to termination if complications arise that delay return.
- "We have never recognized a per se rule that extended leave could never constitute a reasonable accommodation. In fact, we have consistently health that whether a proposed accommodation is reasonable requires a factspecific, individualized inquiry." Kachur v. LVH, No. 19-16251 (9th Cir. 2020).

PDA: Basics + Tricky Leave Issues

#### PDA: Leave Entitlement

- Employers cannot force pregnant workers to take leave as long as they are able to perform their jobs.
- Employers must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.
- An employer cannot impose a shorter maximum period for pregnancy-related leave compared to other types of medical or short-term disability leave.

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Challenging PDA Leave Issue #1:

Is it OK to deny a pregnant employee's leave request based on business considerations?

### Denying leave based on business considerations?

- Sharon requests two months' leave for her pregnancy-related medical complications when she is put on bedrest.
- Although such leave would ordinarily be permitted under her employer's written sick leave policy, Sharon's request for leave is denied due to the employer's claims of staffing shortages.
- Sharon can show that non-pregnant employees in different roles recently had similar requests for extended sick leave approved.

Does Sharon have a viable pregnancy discrimination claim?

# Denying leave based on business considerations?

- **Yes**. In the EEOC's view, Sharon's evidence supports a claim for disparate treatment because non-pregnant employees had their leave requests granted, but her request was denied.
- Before denying a leave request based on business reasons, take the time to review:
  - Whether such leave would otherwise be permitted under your policies, and
  - Whether other recent requests for leave of similar duration have been granted.

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Challenging PDA Leave Issue #2: Is it OK to deny a pregnant employee's leave request based on eligibility criteria?

# Denying leave based on eligibility criteria?

- Cora is an accountant who has worked for her firm for only four months when she requests 4 weeks of leave for pregnancy-related medical complications.
- Her firm's paid medical leave policy permits such leave for eligible employees.
- However, Cora will not be eligible until she has worked for the company for at least six months, so her leave request is denied.

Does Cora have a viable pregnancy discrimination claim?

### Denying leave based on business considerations?

- **No**. The EEOC takes the position that leave decisions made in accordance with an employee's predefined eligibility rules are permissible.
- However, if there is evidence that other similarly-situated non-pregnant employees who were likewise ineligible under the policy had their leave requests granted, then the accounting firm has a problem.
- And query: Could Cora have a claim under the ADA?

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Challenging PDA Leave Issue #3:
Are facially neutral policies that
disproportionately impact pregnant
employees permissible?

# Disparate impact under facially-neutral policies?

- Acme Solutions has a paid sick-leave policy that requires all employees to work for at least one year before they are eligible for sick leave.
- Molly has worked for Acme for 9 months when she asks for pregnancy-related leave. Her request is denied, and she is terminated.
- After Molly sues, statistical evidence shows that 50 out of the 53 first-year employees discharged under the sick leave policy in a four-year period were women, and 20 out of 50 were pregnant.
- Acme argues its policy is necessary because it has a high turnover rate among new employees, and the paid sick leave is a "reward" for employees who stay.

Does the statistical evidence support Molly's claim?

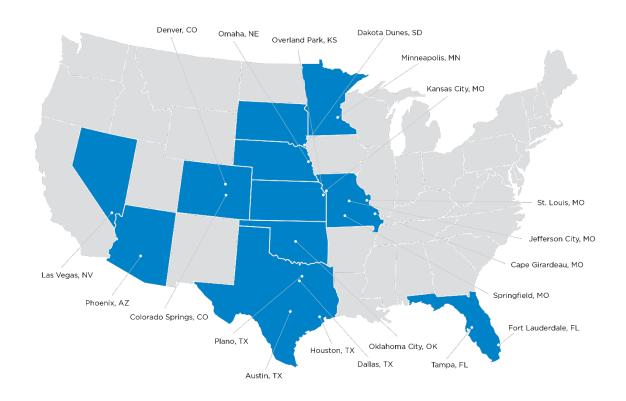
#### Disparate impact under facially-neutral policies?

- Yes. EEOC v. Warshawsky, 763 F. Supp. 647 (N.D. III. 1991).
- "Pregnant first-year employees are discharged at a significantly higher rate than non-pregnant first-year employees. This occurs because pregnant employees need more time off from work than non-pregnant employees."
- "Because only women can get pregnant, if an employer denies adequate disability leave across the board, women will be disproportionately affected."
- The employer offered no evidence to support its rationale for the policy. None of the managers could testify to the policy's origins or the reasons behind it.
- Plus, a shorter 90-day limitation period accomplished the same "reward" objective without having the same disparate impact.

# Questions?



#### **Spencer Fane Office Locations**



#### Thank You



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