

Work**Smarts** Half-Day Seminar

Updating Your Leave Management Policies and Practices

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Leave Management Challenges

Leave management is unquestionably more challenging now than in the past:

- Multiple leave laws may apply to a leave situation
- Various HR policy considerations are also involved.
- Multiple departments may be involved with leave considerations.
- Multi-state employers face inconsistent requirements at state/city level.
- COVID-19 has complicated leave considerations.
- The future of “work from home” may also complicate leave considerations.



Leave Management Reimagined

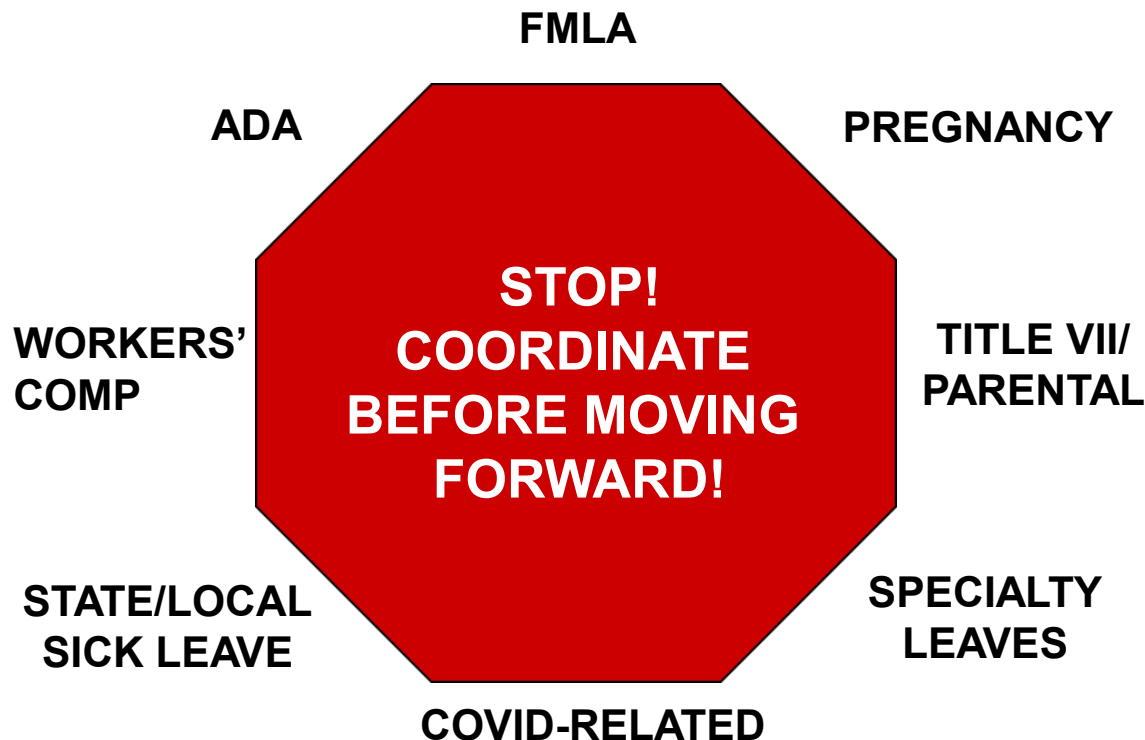
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Introduction

**Perhaps we need
a fresh perspective on leave issues
to enhance effective leave management!**

“Bermuda Triangle” Leave Laws Reimagined



The Major Federal Leave Laws

- Family and Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Title VII – Pregnancy Discrimination Act (PDA)
- Title VII – Parental (Maternity/Paternity)
- Executive Order 13706 – Paid Sick Leave (Government Contractors)

The Major State Leave Laws

- Mini-FMLA (in some states)
- Mini-ADA
- Mini-Pregnancy Discrimination (in some states)
- Mini-Parental or Maternity/Paternity (in some states)
- Workers' Compensation
- Paid Sick or Disability Leave (in some states)

Specialty Leave Laws

- Federal:
 - Uniform Services Employment & Reemployment Rights Act (USERRA)
- State:
 - Military Leave (National Guard Under Governor's Orders)
 - Child Adoption Leave
 - School Activities Leave
 - Bone Marrow/Organ Donation Leave
 - Emergency Responder Leave
 - Voting Leave
 - Jury Duty Leave
 - Domestic Violence Leave
 - Witness or Victim Leave
 - Others

COVID-Related Leave Laws

- Federal:
 - Families First Coronavirus Response Act (FFCRA)
- State/Local:
 - Mini-FFCRA's

Optional Leaves (Not Required by Law)

- Bereavement/Funeral Leave (with and/or without Pay)
- Personal Leave with Pay (e.g., PTO, paid vacation days, paid sick days, paid personal days)
- Holiday Leave (e.g., paid holidays, paid floating holidays)
- Personal Leave without Pay (for extraordinary and compelling personal reasons not covered by any other leave policy)
- Educational Leave
- Sabbatical Leave
- Pet Adoption Leave



Leave Coordination and Policy Issues

Department Coordination Issues Reimagined



HR Policy Considerations Reimagined



Key HR Leave Policy Considerations

- Is it legally-required or not? If not, will we offer it anyway?
- Will we be more generous than the law requires?
- What are acceptable reasons for a leave?
- What are the eligibility requirements?
- Will it be paid or unpaid? Will an employee be able to use general paid time off? benefits or will special paid time off benefits be provided?
- What is the duration of the leave? Will there be a maximum?
- What documentation will we require?
- What conditions apply while the employee is on leave?
- What are the return to work requirements?
- Will the employee have guaranteed, qualified, or no reinstatement rights?
- How are we going to track leave time?



Common Leave Policy Pitfalls

Common Leave Policy Pitfalls

1. If your leave policy (such as a non-FMLA medical or a personal leave policy) doesn't define what qualifies as a "leave," how will an employee or a supervisor know when a "leave" is required or when an employee has taken unauthorized leave?

Solutions:

- Define "leave" (e.g., any absence of 5 consecutive work days that is not covered by another leave policy).
- Include consequences for being absent without applying for a leave or for taking an unauthorized leave.
- State that taking an unauthorized leave is grounds for discharge.

Common Leave Policy Pitfalls

2. If your leave policies include a maximum duration for leave (e.g., 6-month cap or 1-year cap), granting leave for at least that duration is arguably a reasonable accommodation under the ADA. Otherwise, your cap would be meaningless.

Solutions:

- Delete any reference to a cap/maximum leave duration.
- Reevaluate a leave every 30 days to determine if it will be extended.
- Make sure you specify that all leave time will be counted towards the cap.

Common Leave Policy Pitfalls

3. If you provide paid time off benefits (e.g., PTO, vacation, sick days, personal days, CTO), granting leave until those benefits are exhausted is almost always a reasonable accommodation under the ADA.

Solution:

- Revise your STD and LTD policies to clearly state that eligibility for or receipt of such benefits is not a guarantee of continued employment and that a job will not necessarily be held open while the employee is on leave and receiving said benefits.

Common Leave Policy Pitfalls

4. In many states, it is unlawful or considered retaliatory to terminate an employee from worker's compensation leave merely because the employee is absent from work.

Solution:

- In most cases, it is best to grant FMLA leave and then non-FMLA if necessary until the employee reaches maximum medical improvement (at which time permanent work restrictions are usually imposed if the employee is not able to return to full duty without restrictions). Then decide if restatement is an option.

Common Leave Policy Pitfalls

5. If an employee is not yet eligible for FMLA or has exhausted FMLA, he/she may still be entitled to leave under another leave law.

Solution:

- Once an employee exhausts FMLA leave for his/her own medical condition, you must evaluate under the ADA whether additional leave time (if needed) would be a reasonable accommodation.
- If an employee with less than 1 year of service requests a leave for his/her own medical condition, you must evaluate under the ADA whether granting the leave would be a reasonable accommodation.

The background of the slide is a light gray, semi-transparent image of a desk setup. It includes a laptop keyboard on the left, a pair of glasses in the center-right, and a pen at the bottom right. The title 'Emerging Leave Issues' is centered over this background in a bold, blue font.

Emerging Leave Issues

Emerging Leave Issues

1. Are the concepts of “leave of absence” and “PTO” becoming blurred and/or confusing to employees?
 - Employees who claim that use of PTO means the time off doesn’t count as FMLA.
 - Employees who claim that use of PTO means the employee doesn’t have to provide any FMLA or other documentation as to the reason for the time off.
 - Employees who claim that leave of absence time covered by PTO can never be held against them on their attendance records (e.g., a pattern of unscheduled non-FMLA absences covered by PTO).

Emerging Leave Issues

2. How is the “leave of absence” concept affected by unlimited PTO policies?
- If an employee can take unlimited PTO for any reason, at what point would a formal leave of absence be required?
 - If an employee is getting their work done in a timely and acceptable matter, do we really care if time not worked might also qualify as a “leave of absence?”
 - How do we apply leave policies and monitor leaves if an employee can take unlimited PTO?

Emerging Leave Issues

3. When employees are on leave, how do we prevent FLSA violations?

- If non-exempt employee, how do we prevent them from working off the clock?
- If exempt:
 - How do we prevent them from working a small fraction of the day in order to qualify for full pay that day once they exhaust PTO?
 - How do we monitor the time they actually work while on leave if they are not required to keep time records?

Emerging Leave Issues

4. If the “workplace of the future” is “work from home,” what “leave of absence” issues need to be considered?
- If employees primarily work from home, how will we even know if a “leave” (e.g., intermittent FMLA leave) is being taken?
 - Likewise, if an employee primarily works from home, how will we know if an employee should not be working due to medical issues? Will their health care providers stop providing work restrictions?

Emerging Leave Issues

5. In light of COVID-19, do employers need to consider adopting a new form of leave for “contagious illnesses?”
 - Will employers require an employee to take a leave of absence in non-pandemic situations when the employee could be contagious (e.g., has the “flu” and the flu is in an epidemic state)?

Emerging Leave Issues

6. How can an employer effectively manage leaves in light of the multitude of federal and state/local leave laws, which seem to be increasing?
- What can we do to prevent or reduce abuse? Or should we just expect and accept it and plan staffing accordingly?
 - Will we need a separate leave management department even if we're a small employer? Should we outsource leave management?



Simplifying Leave Management

New Focus: Major Leave Policy Considerations

The Most Important Leave Considerations:

1. Reason for leave
2. Paid or unpaid
3. Reinstatement rights

New Focus: Major Leave Policy Considerations

1. The particular reason for the leave:
 - Must we legally give time off for that reason?
 - If not, do we want to give time off for that reason?

New Focus: Major Leave Policy Considerations

2. Whether the time off will be paid:

- Must we legally pay for the time off?
- If not:
 - Will we provide and require employees to use paid time off benefits?
 - Will we allow the time off to be unpaid?

New Focus: Major Leave Policy Considerations

3. Will the employee have any guaranteed reinstatement rights?
 - Are reinstatement rights guaranteed by law?
 - If not, do we want to guarantee reinstatement rights for a period of time?

New Focus: ADA Accommodation Leave

Key Issues

Whenever non-FMLA continuous leave is needed, the key issues under ADA in determining whether to grant leave are (assuming ADA applies):

1. Whether the employee will recover in the identifiable future and be able to return to work on a date that is reasonably certain and be able to perform all essential job duties; and
2. Whether it is reasonable and not an undue hardship to hold “a job” open for the employee.

New Focus: ADA Accommodation Leave

Key Options

Depending on the analysis of those two factors and how much legal risk the employer is or isn't willing to take, the options are:

1. No/Low Risk. Approve the leave and hold a job open (i.e., leave with guaranteed reinstatement rights at least for a designated period of time); or
2. Moderate to High Risk. Approve the leave, but don't hold a job open (i.e., leave without guaranteed reinstatement rights for a designated period of time); or
3. Highest Risk. Deny the leave and terminate the employee's employment.



Legal Developments in Leave Law

New Awareness: Evolving Leave Laws

- Stay on top of leave law developments and plan accordingly:
 - Federal level
 - State level
 - Local level
- Be aware of court cases in your jurisdictions that affect leave rights and obligations.

Leave Law Developments and Trends

- Federal:
 - Paid FMLA Leave (Ex. - Proposed FAMILY Act)
 - Paid Sick Leave (Beyond Federal Contractors)

Leave Law Developments and Trends

- State/Local:
 - Pandemic Emergency Leave (Ex. – WA)
 - COVID-19 Vaccination Time Off (Ex. – NY)
 - More State Paid Sick Leave Laws (Ex. – CO, NV, WA, DC)
 - Preemption by State Law of Local Leave Laws (Ex., TX)
 - Legal Challenges by Cities on Preemption Issue (Ex., Dallas, Austin)

Significant Recent Court Cases on Leaves

- New COVID-19 Cases
- *Weber v. BNSF Railway Co.*, No. 20-10295 (5th Cir. Feb. 24, 2021)
- *Ramji v. Hospital Housekeeping Systems, LLC*, Case No. 19-13461 (11th Cir., April 2021)
- *Kachur v. Nav-Lvh Casino, LLC*, LEXIS 17893 (9th Cir. 2020)
- *Aubrey v. Koppes*, 975 F.3d 995 (10th Cir. 2020)
- *Lutes v. United Trailers, Inc.*, No. 19-1579, 2020 WL 416329 (7th Cir. Jan. 2020);
McAllister v. Innovation Ventures, LLC, No. 20-1779 (7th Cir., Dec. 30 2020)
- *Hudnell v. Jefferson University Hospitals, Inc.*, Civil Action No. 20-01621 (E.D. Pa. Jan. 7, 2021).



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Top Tips

Leave Management Top Tips

- Leave management is far more challenging today than ever before.
- State and local governments have become increasingly active in passing their own leave laws and this trend is expected to continue.
- COVID-19 has resulted in additional leave laws (temporary in nature) that have made leave management even more challenging.
- Employers must remain vigilant to ensure that they do not inadvertently violate a leave law.
- New leave issues are emerging including issues related to the definition of “leave,” use of PTO, compliance with FLSA, and impact of working from home.

Thank You



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