



This webinar will start shortly

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Managing the Paid Sick Leave Patchwork: What HR Leaders Need to Know

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Speakers

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Overview / Background

1. In the background, unpaid leaves/accommodations under federal laws (e.g., FMLA, ADA, PWFA)
2. Also in the mix, state and local:
 - Unpaid leave laws (family/medical, parental)
 - Accommodation laws (pregnancy, disability)
 - Insurance programs/benefits (STD, WC)
3. CBA rights for unionized employees
4. Employer-provided paid time off (PTO, parental leave)
5. State & local paid sick (and safe) leaves laws
6. Intersections

Background

1. Key Distinctions to Consider:

- Entitlement to job protection/job restoration and continuation of benefits
- Entitlement to be paid during a period of sickness, incapacitation, inability to work

Background

2. Role of HR/Leave Administrator:

- Apply laws, policies and benefits in neutral, non-discriminatory manner
- Timely respond to requests for leave and other accommodations
- Effective and timely communication with employees, managers, third-party administrators
- Manage return to work obligations

Background

3. HR must be able to:

- Recognize accommodation/leave requests
 - No requirement for employee to use particular words
 - No requirement for initial request to be in writing
- Respond appropriately (and timely) to requests
- Provide necessary paperwork/information and follow-up relating to request
- Maintain confidentiality of any medical or other relevant information provided, consistent with applicable law

Background

4. Managers must be able to:

- Recognize accommodation/leave/time off requests
 - No requirement for employee to use particular words
 - No requirement for initial request to be in writing
- Respond appropriately to requests
 - This includes informing HR of the request
 - This includes NOT making assessment or determination of the request
- Interface with HR as needed
- Maintain confidentiality

Requests for Leave/Accommodation/Time Off

1. Recognizing a request for a leave or reasonable accommodation (including leave)

- Employer may require written notice, BUT....
 - Non-written notice is sufficient
 - “Plain English” request is sufficient
 - Notice may come from family member, health professional, or other representative
- Managers **MUST** report accommodation and leave requests to Human Resources
 - Including any disclosure of physical or mental condition in response to job performance feedback

Requests for Leave/Accommodation/Time Off

2. Once an employer is on notice of need for a leave, accommodation or paid sick time, paperwork needs to be provided, the interactive process must begin and/or other process must commence to determine what may be applicable.

- Regarding accommodation requests:
 - Is the accommodation requested reasonable?
 - Do alternative accommodations need to be considered?
- Regarding paid sick leave requests:
 - Has sufficient information been provided?
 - What additional information is needed?
 - What requirements under applicable law must be met?

Requests for Leave/Accommodation/Time Off

3. Knowledge by manager of an employee's need for accommodation or leave (and potentially paid sick leave) is deemed to be knowledge of the employer

- No defense to claim that Human Resources was not aware of the need for leave, accommodation, paid sick time

Requests for Leave/Accommodation/Time Off

4. Critical to identify clear process

- Do not want employees not knowing where to go, with whom to speak
- Do not want managers making unilateral decisions (whether permitting or rejecting requests)
- Regarding use of third-party administrator:
 - Administrator needs to be aware of process for handling, in conjunction with company
 - Company cannot ignore request made to manager or HR, even if outside of established process

Paid Sick Leave Laws

1. Variety of approaches taken by different jurisdictions; need to be mindful of the specifics of each.
2. Generally, cover nearly all employees – especially those most not likely covered by an employer's existing PTO policies (e.g., part-time, temporary employees).
3. Accrue an amount of time based on an amount of hours worked (e.g., 1-hour for every 30 hours worked).
4. Generally, employers can limit use during initial period of employment (most commonly, first 90 days).

Paid Sick Leave Laws

5. Most have a wide range of covered reasons permitted for use (e.g., domestic violence, care of family member, preventative appointments, pregnancy related reasons).
6. Most require carryover of time into following calendar year OR replenishment of days at start of calendar year; most permit maximum accrual cap.
7. Permit employer to meet obligation for paid sick leave through use of existing PTO policies.
8. Do not require payout of accrued paid sick leave at termination; some require reinstatement if re-employed.

Hypothetical #1

Jennifer returns to work after being out for several days and tells the manager that she was in the hospital and then was home recovering from pneumonia.

➤ *Is this a request for leave?*

Analysis of Hypothetical 1

- Reference to hospital stay is sufficient to put organization on notice that absence may be covered by FMLA leave
- Absence due to “inpatient” care (e.g., hospital stay) typically qualifies for FMLA leave, subject to medical certification
- Example of FMLA coverage for short absences even where employee is not incapacitated in excess of three consecutive, full calendar days

Hypothetical #2

James informs manager that he needs to go to treatments for a kidney condition and needs to miss work 1 day per week for the next six weeks.

➤ *Is this a request for leave, accommodation, paid sick time?*

Analysis of Hypothetical #2

- When making initial request, employee does not have to expressly assert rights under “FMLA” or “ADA” or even mention “leave” or “accommodation”
- Identification of need for “treatments” is sufficient to put organization on notice
- Example of short, intermittent absences for a chronic condition that may be eligible for FMLA (or ADA) leave, subject to medical certification, or for paid sick time

Hypothetical #3

Chris uses up all twelve weeks of FMLA leave for a series of treatments due to chronic back problems. He then submits a note for an additional two weeks of time off due to additional treatments. This request is granted. Chris then submits another doctor's note asking for three more weeks off, until the next doctor's visit.

- *How many times must the Company grant these additional requests for leave?*
- *What additional information should be obtained?*

Analysis of Hypothetical #3

- May not terminate at end of FMLA leave
- The company must consider additional time off
- Additional 2 weeks probably not an undue hardship
- If pattern of requests for short continuations of leave develops, stronger argument for undue hardship
- No obligation to accommodate indefinite leave

Hypothetical #4

Debra notifies HR that she is expecting her first child. A few months into the pregnancy, she has significant bouts of morning sickness and seeks to come in later and take frequent breaks.

- *Is the company required to accommodate these absences, even if she is not disabled?*

Analysis of Hypothetical #4

- Pregnancy itself is not a disability
- Complications from pregnancy and childbirth may be disabilities
- Need to accommodate on basis of pregnancy (Some state/local laws make this even more clear)
- This can be covered by FMLA, ADA, PWFA for (unpaid) time off
- This can be covered by applicable state/local paid sick leave laws (or laws relating to pregnancy accommodations)

Hypothetical #5

Thomas produces documentation relating to his depression, which provides that his condition will last for “months” and provides an “estimate” of four episodes over six months, each episode lasting two to five days. Over the next two months, he is absent on 5 times, for a total of 11 days.

- *May the company terminate based on the higher-than-estimated number of absences?*

Analysis of Hypothetical #5

- Pattern of absences exceeding what was approved by healthcare provider may give rise to attendance violation – however –
 - In this situation, where doctor provided an “estimate,” the company should obtain a recertification to confirm whether the change in pattern was consistent with condition
 - Only after recertification process is considered should the company determine whether to update accommodations or if attendance violations warrant discipline
 - What is this is not FMLA leave?

Hypothetical #6

Sharif has been taking a significant amount of paid time off intermittently. As a result of these absences, he has been missing deadlines and making mistakes.

- *To what extent can the employee be disciplined?*
- *Does it matter if this is FMLA, ADA, paid sick leave, or a combination?*
- *Potential issues/areas for concern?*

Analysis of Hypothetical #6

- Do not have to:
 - Tolerate poor performance/conduct
 - Withhold corrective action, poor performance rating or termination
 - Provide an altered evaluation that ignores performance issues
- Important to separate out job performance issues & leave/accommodation/paid sick time issues
 - Suggest division in handling of job issues (manager) and leave/accommodation/sick time issues (HR)
- Potential retaliation concerns

Hypothetical #7

Lauren makes a request for a reasonable accommodation due to her anxiety. She is requesting that she be able to come in late or work from home whenever she feels it is going to be a rough day for her.

- *Is this FMLA, ADA, paid sick leave?*
- *How to handle?*

Hypothetical #8

Nick provides a doctor's note requesting "removal of all stress-inducing responsibilities."

- *Is this sufficient to support a request for an accommodation?*
- *How to respond to such a request?*

Take-Away Reminders

- Remember the intersections of the FMLA and ADA, especially with regard to leaves.
 - For an employee's own medical condition, the ADA often picks up where the FMLA leaves off
- Need to consider ALL leave and accommodations requests; ADA requires individualized, case-by-case assessment.
 - Employers have obligations to engage in the interactive process.
- State/local paid sick leaves often provide broad coverage for time off relating to employee or family member health care or sickness, as well as for pregnancy and domestic violence
- Training of managers is essential; they are often the ones who receive leave, time off and accommodation requests.



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Questions?



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Thank you!

