



Current and Future Leave Compliance Considerations

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Birmingham Area Chapter ISCEBS
November 15, 2023

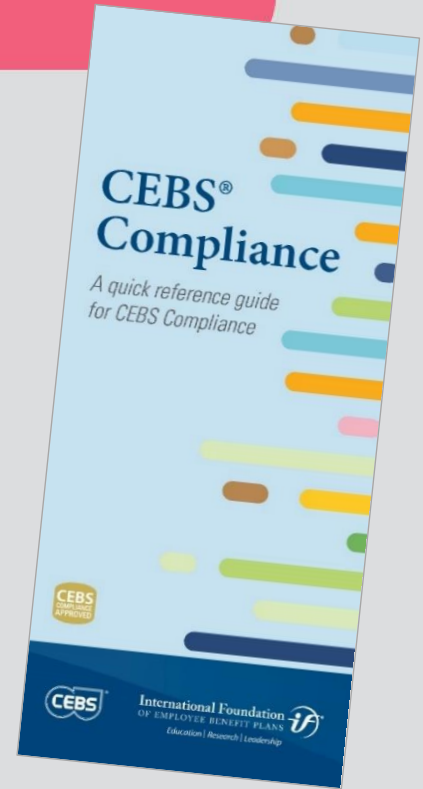


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November 15, 2023

Presented by:
Paula Day, JD
VP, Director HR Compliance Consulting

Agenda

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Mandated Statutory Leave

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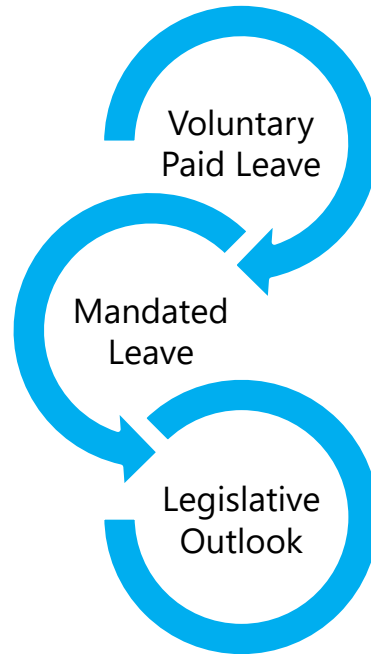
Reasonable Accommodations

Questions & Answers

Introduction



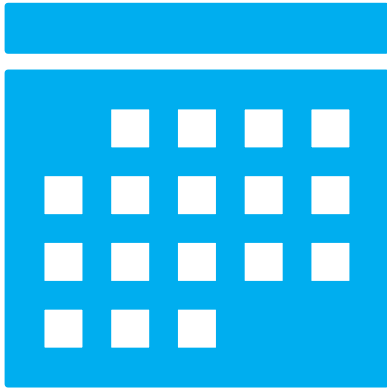
The Evolving Landscape of Leave



Voluntary Paid Leave



Voluntary Paid Leave includes:



- Vacation
- Sick leave
- Paid time off
- Personal time
- Holidays
- Bereavement
- Jury duty
- Voting leave
- Military leave
- Paid parental leave

What is paid parental leave?

Paid parental leave is an employer sponsored program not mandated by law.

Example: Birth mother with 8-week recovery (STD) followed by 4-weeks of bonding leave.

Weeks	1	2	3	4	5	6	7	8	9	10	11	12
Medical Recovery Period												
Bonding Leave												

Example: Father with 4-weeks of bonding leave.

Weeks	1	2	3	4	5	6	7	8	9	10	11	12
Medical Recovery Period	Not Applicable											
Bonding Leave												

Best Practices: Paid parental leave policy

Separate leave policies

- Pregnancy disability leave
- Parental leave (all parents receive the same length of leave)

Define eligibility requirements

- Full-time, part-time
- Identify length of service requirements

Specify the qualifying events for parental leave benefits

- Birth of employee's child
- Placement of a child under 18 with the employee for adoption
- Placement of a child under 18 with the employee for foster care

Identify exclusions and limitations

- Bonding with a spouse's child newly acquired through marriage is excluded
- Multiple births or adoptions don't qualify for additional leave
- Benefits are limited to a 12-month period

Address the impact of state paid family leave benefits for qualifying leave

- Condition company benefit on employee's application for the state paid leave
- Run the company paid parental leave concurrently
- Offset company benefit by amount received by employee through the state paid leave program

Paid Parental Leave: EEOC guidance

EXAMPLE #1

Pregnancy-Related Medical Leave and Parental Leave Policy - No Disparate Treatment

An employer offers pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and childbirth as part of its short-term disability insurance. The employer also offers new parents, whether male or female, six weeks of parental leave. A male employee alleges that this policy is discriminatory as it gives up to 16 weeks of leave to women and only six weeks of leave to men. The employer's policy does not violate Title VII. Women and men both receive six weeks of parental leave, and women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth under the short-term disability plan.

EXAMPLE #2

Discriminatory Parental Leave Policy

In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, an employer provides six additional months of paid leave for new mothers to bond with and care for their new baby. The employer does not provide any paid parental leave for fathers. The employer's policy violates Title VII because it does not provide paid parental leave on equal terms to women and men.

Parental Leave

For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).

Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions. However, **parental leave must be provided to similarly situated men and women on the same terms.**

If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.



Lessons learned

Past settlements of discriminatory parental leave policies

- Cosmetics company class action: \$1.1m (210 class members)
 - **Problems:**
 - Different duration of paid parental leave for birth mothers vs. male employees
 - Afforded return-to-work benefits to new mothers, but not fathers
 - **Changes:**
 - All parents receive 20-weeks of paid parental leave
 - All parents receive 6-weeks of flexible return-to-work benefits
- Bank class action: \$5m (hundreds of class members)
 - **Problem:** Distinguished between “primary” vs. “non-primary” or “secondary” caregivers with only birth mothers considered to be “primary” caregivers
 - **Changes:**
 - Both parents can be eligible for “primary” caregiver leave
 - HR is trained to apply the policy fairly



What employers know now

Use a single policy for parental/bonding leave:

- Offer all parents the same length of leave
- Offer all parents the same return-to-work support

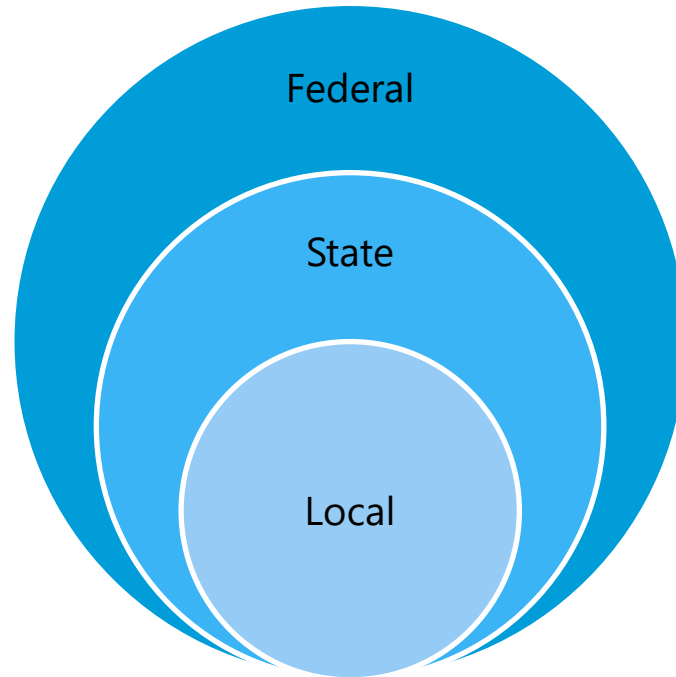
Terms to avoid :

- “maternity” and “paternity”
- “primary caregiver” and “secondary caregiver”

Mandated Statutory Leave



The interaction of federal, state and local laws



Overview of state and local leave laws

- Bereavement
- Blood/bone marrow/organ donation
- Court attendance/witness leave
- Crime victims' leave
- Domestic/sexual violence victims' leave
- Earned leave for any reason
- Election officials' leave
- State/local family medical leave
- Family military leave
- Jury duty leave
- Legislative/political leave
- Military service/veterans' leave
- Paid family medical leave
- Paid sick leave
- Pregnancy disability leave
- Public health emergency leave (quarantine)
- School activities/visitation leave
- Voting leave



Paid Sick Leave

Vary by state/locality

- Coverage may depend on number of employees
- Accrual rates and caps
- Maximum annual leave usage
- Qualifying reasons for use
- Carryover rules
- Posting requirements
- Wage statement requirements
- Recordkeeping obligations



Earned Paid Leave

Three states provide earned paid leave to employees to be used for **any** reason – Nevada, Maine & Illinois

- **New:** Illinois Paid Leave for All Workers (PLFAW) Act
 - Effective Jan. 1, 2024
 - Provides nearly all IL workers with a minimum of 40 hours of paid leave (or a pro-rata number of hours) during a designated 12-month period
 - Employees do not have to provide a reason for the leave
 - Employers are **not allowed** to require any documentation

State-specific rules on:

- Accrual method
- Frontloading
- Carryover
- Cap
- Notice requirements
- Recordkeeping requirements

FMLA: Quick refresher

Designed to help balance work and family life

Covered employers:

- Private employers with 50 or more employees;
- Public agencies;
- Public and private elementary and secondary schools

Covered employee:

- Employed at least 12 months with 1,250 hours worked
- Employed at a work site with 50 employees within 75 miles

FMLA: Common issues

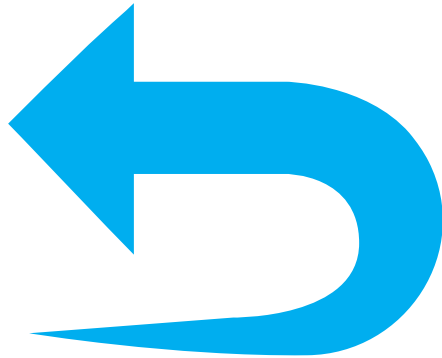
Retroactive designation of FMLA leave

Delaying designation of leave as FMLA

Providing more generous FMLA leave

Ignoring the “in loco parentis” possibility

Retroactively designating leave as FMLA



An employee has been off work 6 weeks due to a work comp injury and will be off another 4 weeks. The employee is eligible for FMLA, *but* the leave was not timely designated as FMLA leave.

Can the employer designate this leave as FMLA back to Day 1 even though the employee is already taking leave?

Retroactively designating leave as FMLA

General rule: Absent extenuating circumstances, employers must notify employees in writing whether leave will be designated and counted as FMLA leave within five business days after the employer has enough information to determine whether the leave is being taken for an FMLA qualifying reason.

Retroactive designation is permissible when: Leave may be retroactively designated as FMLA with appropriate notice to the employee provided the employer's failure to timely designate the leave does not cause harm or injury to the employee. While failing to provide the proper FMLA notices is a "technical violation" of the FMLA, this inaction does not create a standalone FMLA claim.

Regulation §825.301(b):

Retroactive designation. If an employer does not designate leave as required by §825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Retroactively designating leave as FMLA

What if the employee has **returned** from a leave that qualified as FMLA leave, but was not properly designated as FMLA leave?

First, determine if the employee would be harmed by the retroactive designation.

If so, a retroactive designation may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights resulting in liability.

Example: An employee takes leave to provide care for her daughter with a serious health condition believing it would not count toward her FMLA entitlement, and the employee planned to later use her FMLA leave to provide care for a spouse needing care when recovering from surgery at a later date within the same 12-month period. If the employer tries to retroactively designate the first leave period as FMLA, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly.



Tip: When retroactively designating leave as FMLA, send a letter to the employee explaining why the leave is being retroactively designated and ask the employee to contact you with questions or concerns.

Employee does not want to use FMLA just yet



An employee plans to take FMLA but asks to use accrued PTO for two weeks and *then* begin her 12-week leave of absence.

Can an employer lawfully delay designating leave as FMLA when the leave qualifies, and the employee is eligible?

Delaying FMLA designation

- An employer may not delay the designation of FMLA-qualifying leave
 - Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer can decline FMLA protection for the leave
 - When an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement
 - Employer must provide the designation notice within five business days
- The employer may require, or the employee may elect to "substitute" paid leave to cover any part of the unpaid FMLA entitlement period. Note: The FMLA leave and paid leave run concurrently, *not* consecutively
- An employer may not designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA

Providing more generous ‘FMLA leave’

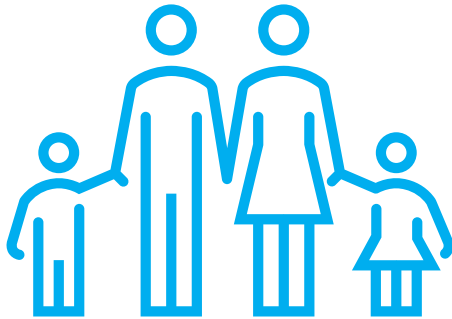


An employee with 6-months of employment takes two weeks off work to care for his parent following surgery. Employer wants the leave to be “job protected,” so it designates the leave as FMLA.

Eight months later, the employee notifies the employer of his need for bonding time following the birth of his child and asks for 12 weeks of leave.

Employer approves the employee for 10-weeks of bonding time stating the employee already exhausted 2-weeks of FMLA to care for his parent.

Qualifying “family member” under the FMLA leave



An employee requests FMLA leave to care for his grandparent who has a serious health condition.

The employee does not inform his employer of his *in loco parentis* relationship with his grandparent at the time he requests leave.

The employer denies the request.

FMLA to care for someone who was “in the role of parent”

Coutard v. Municipal Credit Union (2nd Cir. 2017)

- The request for leave to care for his grandfather was clearly leave that “may” qualify for FMLA protection.
- The employee was not required to give his employer all of the necessary details about his leave request, including that he had an *in loco parentis* relationship with his grandfather.
- Rather than deny the request, the employer was obligated to request additional information to determine whether the employee was entitled to FMLA leave.

Take-aways:

- Be cautious when considering FMLA requests
- Do not deny a request without considering the possibility of an *in loco parentis* relationship
- Avoid categorically denying FMLA leave without seeking additional information if there is a possibility that the FMLA may apply

FMLA Definitions:

Parent: The biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter.

Son or daughter: A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is—

- under 18 years of age; or
- 18 years of age or older and incapable of self-care because of a mental or physical disability.

Intent: These terms should be construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.

FMLA and the “*in loco parentis*” relationship

Standing in the role of a parent includes having day-to-day responsibilities to care for **or** financially support a child.

A person does not have to have a biological or legal relationship to a child to stand *in loco parentis* to the child, but in some circumstances grandparents or other relatives, such as siblings, may be in this role.

Factors that relate to whether a person is *in loco parentis* to a child include the:

- Age of the child,
- Degree to which the child is dependent on the parental figure,
- Amount of financial support, if any provided, and
- Extent to which the parental figure performs duties commonly associated with parenthood.

The fact that a child has a biological parent at home, or both a mother and a father, does not prevent another from standing in the role of a parent to the child.

The FMLA does not restrict the number of parents a child may have.

The specific facts of each situation will determine whether an individual stood *in loco parentis* to an employee when the employee was a child.

An employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting the requisite family relationship is all that is needed.

29 C.F.R. §825.122(j)

Examples of in loco parentis

- An employee who provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, could be considered to stand in loco parentis to the child and be entitled to FMLA leave to care for the child if the child had a serious health condition.
- An employee who is not married to their partner, but will co-parent their partner's child, may take leave for the child's birth and for bonding with the child even if they are not the biological parent of the child.
- Where a child's biological parents divorce, and each parent remarries, the child will be the "son or daughter" of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child.
- An employee who has ongoing responsibility for raising a grandchild may take FMLA leave to care for the child when the child has a serious health condition.
- An employee who becomes responsible for her nephew's care following the passing of her sibling may take FMLA leave for the care of her nephew when he has a serious health condition.
- An employee has an aunt who acted in the role of his parent during part of his childhood. He uses FMLA leave to care for her when she has a qualifying serious health condition.
- An employee's grandfather acted as a parent to her when she was growing up. The employee can use FMLA leave when he is hospitalized for a week.

Other Family Medical Leave Laws

State (Local) Family Medical Leave Laws		
Alabama	Kansas	New Jersey
California	Kentucky	New Mexico
Colorado	Louisiana	Oregon
Connecticut	Maine	Rhode Island
District of Columbia	Maryland	South Carolina
Miami Dade County, Florida	Massachusetts	Tennessee
Georgia	Minnesota	Vermont
Hawaii	Montana	Washington
Illinois	Nevada	Wisconsin

State Family Medical Leave Laws: Some variations



Paid Family Medical Leave

Paid family (and medical) leave laws

California (+ San Francisco)

Colorado (Eff. 1/1/2024)

Connecticut

Delaware (Eff. 1/1/2026)

District of Columbia

Maine (Eff. 1/1/2026)

Maryland (Eff. 1/1/2026)

Massachusetts

Minnesota (Eff. 1/1/2026)

New Jersey

New York

Oregon (Eff. 9/3/2023)

Rhode Island

Washington





State-specific nuances:

- Employer threshold
- Employee qualifications
- Qualifying reasons for paid leave
- Covered family members
- Contributions
- Benefit amount
- Waiting period
- Intermittent leave
- Use of other accrued leave as a top-off
- Job protection
- Availability of a private plan

Status of PFML Legislation 2023

Failed PFML Legislation		
<ul style="list-style-type: none">■ Arizona■ Indiana■ Iowa■ Kentucky■ Louisiana■ Mississippi	<ul style="list-style-type: none">■ Missouri■ Montana■ Nebraska■ New Mexico■ North Carolina■ North Dakota	<ul style="list-style-type: none">■ Oklahoma■ Tennessee■ Texas■ Virginia■ West Virginia
Proposed or Pending PFML Legislation		
<ul style="list-style-type: none">■ Illinois■ Michigan	<ul style="list-style-type: none">■ Pennsylvania	<ul style="list-style-type: none">■ Wisconsin
No PFML Legislation		
<ul style="list-style-type: none">■ Alabama■ Alaska■ Arkansas■ Florida■ Georgia	<ul style="list-style-type: none">■ Idaho■ Kansas■ Nevada■ Ohio■ South Carolina	<ul style="list-style-type: none">■ South Dakota■ Utah■ Vermont■ Wyoming

Voluntary PFML through insurance products

The following states offer insurance an employer can voluntarily choose to purchase:

- Alabama
- Arkansas
- Arizona
- Florida
- Pennsylvania
- Tennessee
- Texas
- Virginia

Sample Leave Coordination Scenarios

California

Example: Pregnant employee delivers baby week 1 via vaginal birth.

Weeks	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
FMLA	Federal Unpaid Job Protected Leave																							
PWFA	Federal Unpaid Job Protected Leave																							
CFRA							State Unpaid Job Protected Leave																	
CA PDL	State Unpaid Job Protected Leave																							
STD	Employer Paid Disability																							
CA SDI	State Paid Disability																							
CA PFL							State Paid Leave																	
SF PFL							SF Supplemental Paid Leave																	
ER PPL							Employer Paid Parental Leave																	

FMLA – Family and Medical Leave Act – 12 weeks of unpaid job protected leave;

PWFA – Pregnant Workers Fairness Act – unpaid job protected leave for pregnancy disability and recovery

CFRA – California Family Rights Act – 12 weeks of unpaid job protected leave

CA PDL – California Pregnancy Disability Leave – unpaid job protected leave for recovery (up to 4 months of unpaid job protected leave due to pregnancy disability)

CA SDI – California State Disability Insurance – covers recovery period

CA PFL – California Paid Family Leave - 8 weeks of paid leave for parental bonding

SF PFL – Requires employer to supplement CA PFL bonding leave so that pay equals 100% of CA average weekly wage

ER PPL – Employer paid parental leave benefit – 12 weeks - subject to terms of employer policy; example assumes top-off of CA PFL and SF PFL to 100%

Note: This is not legal advice. Consult with an attorney when addressing leave related issues.

California

Example: Employee goes out Week 1 due to pregnancy complications; gives birth via cesarean Week 7.

Weeks	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
FMLA	Federal Unpaid Job Protected Leave																									
PWFA	Federal Unpaid Job Protected Leave																									
CFRA															State Unpaid Job Protected Leave											
CA PDL	State Unpaid Job Protected Leave																									
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CA SDI	State Paid Disability																									
CA PFL															State Paid Leave											
SF PFL															SF Supplemental Leave											
ER PPL															Employer PPL											

FMLA – Family and Medical Leave Act – 12 weeks of unpaid job protected leave

PWFA – Pregnant Workers Fairness Act – unpaid job protected leave for pregnancy disability and recovery

CFRA – California Family Rights Act – 12 weeks of unpaid job protected leave

CA PDL – California Pregnancy Disability Leave – unpaid job protected leave for recovery (up to 4 months of unpaid job protected leave due to pregnancy disability)

CA SDI – California State Disability Insurance – up to 52 weeks of partial wage replacement; no job protection

CA PFL – California Paid Family Leave - 8 weeks of paid leave for parental bonding; no job protection

SF PFL – Requires employer to supplement CA PFL bonding leave so that pay equals 100% of CA average weekly wage

ER PPL – Employer paid parental leave benefit – 4 weeks (policy conditions benefit on applying for state paid leave; tops off CA PFL and SF PFL to 100%)

Note: This is not legal advice. Consult with an attorney when addressing leave related issues.

Connecticut

Example: Pregnant employee goes out on leave week 1 due to pregnancy disability and gives birth week 3 via vaginal birth.

Weeks	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
FMLA	Federal Unpaid Job Protected Leave																							
PWFA	Federal Unpaid Job Protected Leave																							
CT FMLA	State Unpaid Job Protected Leave																							
CT PFML	State Paid Leave																							
STD	Employer Paid Disability																							
ER PPL									Employer Paid Leave															

FMLA – Family and Medical Leave Act – 12 weeks of unpaid job protected leave

PWFA – Pregnant Workers Fairness Act - unpaid job protected leave begins Week 1 through recovery

CT FMLA – CT Family Medical Leave– 12 weeks of unpaid job protected leave (+2 for pregnancy incapacity)

CT PFML – CT Paid Family Medical Leave – 12 weeks of paid leave for employee's recovery, plus bonding (+2 for pregnancy incapacity)

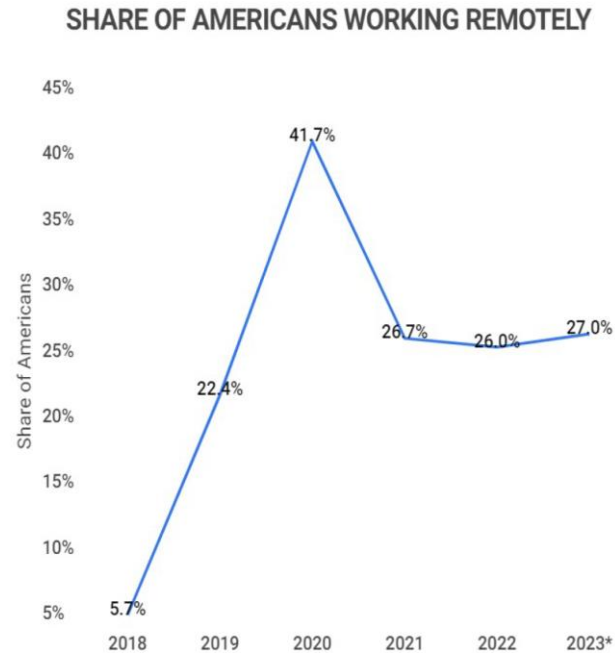
STD – Employer Paid Disability – may have a 1-week waiting period – supplements CT PFML

ER PPL – Employer paid parental leave benefit – subject to terms of employer policy; example assumes top off-of CT PFML

Note: This is not legal advice. Consult with an attorney when addressing leave related issues.

Factoring in the Remote Worker

The impact of remote work on leave laws



Remote employees: FMLA eligibility

Federal FMLA threshold:

- Employee has been employed for 12 months and worked 1,250 hours
 - Determined when the leave is set to *begin*
- Employer has 50 employees within 75 miles
 - Determined at the time the leave is *requested*
 - The "worksite" is their *home base* to which they report or from which their work is assigned.



Remote Employees: Mandatory State PFML

- Look to the state where the work is being performed



Reasonable Accommodations





ADA & leave as a reasonable accommodation

When is the ADA triggered?

- FMLA is exhausted
- The employee is not otherwise eligible for FMLA

What action should an employer take?

- Engage in the ADA interactive process
- Assess continued leave as a reasonable accommodation

What limitations can be set?

- Continue to evaluate leave when provided as a reasonable accommodation
- Ensure form letters related to STD/LTD comply with ADA obligations

Leave as an accommodation

What if the employee provides an “approximate” return to work date?

What if there is no fixed date of return to work?

What if the employee has requested and received extensions?

Remote work as an accommodation

What to consider:

- Is there an alternative accommodation that would allow the employee to continue working on the job?
- Can the essential functions of the job be performed at home?
- Has the employee worked remotely in the past without an issue?
- Can you adequately supervise the employee?
- Does the employee need to work with certain equipment or tools that cannot be replicated at home?

EEOC Recent Lawsuits: Remote work as a reasonable accommodation

- **Denying remote work** – lawsuit filed (9/26/23)
 - Employee, a web designer, requested to work remotely three days per week due to her disabilities;
 - Employee was able to perform all job duties remotely;
 - The day after her request, it was denied, and she was terminated
- **Denying remote work**– lawsuit filed (3/29/23)
 - Employee repeatedly requested to work remotely due to high-risk status for COVID-19;
 - Took medical leave while waiting for a remote position to open;
 - Employee's leave expired and most of the department was working remotely but her request was denied;
 - Employee was forced to resign.





Final Take-Aways

- ✓ Ensure that voluntary leave policies (e.g., paid parental leave) are compliant
- ✓ Apply the appropriate state or local leave law to employees
- ✓ Understand how leave laws run concurrently and consecutively
- ✓ Train managers so they understand their responsibilities
- ✓ Distinguish between the ADA vs. FMLA
- ✓ Know your responsibilities regarding remote work requests



Questions?



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