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The ABC's of the ADA/FMLA/PFL & NYSLL Too

CP of NYS

Richard D. Landau

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Jackson Lewis P.C. | White Plains, New York

914-872-6886

richard.landau@jacksonlewis.com

NYSLL

Overview

- On April 3, 2020, legislation was signed establishing the right to paid sick days for New Yorkers.
- New York's paid sick leave law requires employers with five or more employees or net income of more than \$1 million to provide **paid** sick leave to employees and for employers with fewer than five employees and a net income of \$1 million or less to provide **unpaid** sick leave to employees.
 - Employees will receive an amount of sick leave depending on the size of their employer.
- On September 30, 2020, covered employees in New York State began to accrue leave at a rate of one hour for every 30 hours worked.
- On January 1, 2021, employees could start using accrued leave.

Sick Leave Requirements

100+ Employees

- Employers with 100 or more employees must provide up to 56 hours of **paid** sick leave per calendar year.

5-99 Employees

- Employers with 5-99 employees must provide up to 40 hours of **paid** sick leave per calendar year.

0-4 Employees

- If net income is *\$1 million or less*, employer must provide up to 40 hours of **unpaid** sick leave. If net income is *greater than \$1 million*, employer must provide up to 40 hours of **paid** sick leave.

- **Leave must be accrued at a rate not less than one hour for every 30 hours worked.**
- **Alternate Accrual System:**
 - As an alternative to employees accruing 1 hour for every 30 hours worked, employers may choose to provide the full amount of sick leave required by this law at the beginning of each calendar year.
 - Example: A business with over a 100 employees could provide 56 hours of sick leave to each employee starting January 1 of each year or at the beginning of a twelve-month period as determined by the employer. Such up-front sick leave is not subject to later revocation or reduction if, for instance, the employee works fewer hours than anticipated by the employer.

Accruals

Eligibility

- All private-sector employees in New York State are covered, regardless of industry, occupation, part-time status, and overtime exempt status. Federal, state, and local government employees are NOT covered, but employees of charter schools, private schools, and not-for-profit corporations are covered.
- Employees are immediately eligible to accrue leave under the law; there is no minimum period of employment required.



Permitted Uses

- Employees may use accrued leave **following a verbal or written request** to their employer for the following reasons impacting the employee or a member of their family for whom they are providing care or assistance with care:
- **Sick Leave:**
 - For mental or physical illness, injury, or health condition, regardless of whether it has been diagnosed or requires medical care at the time of the request for leave*; or
 - For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or need for medical diagnosis or preventive care.

*This includes using leave for the recovery of any side effects of the COVID-19 vaccination.



- **Safe Leave:**

- For an absence from work when the employee or employee's family member has been the victim of domestic violence as defined by the State Human Rights Law, a family offense, sexual offense, stalking, or human trafficking due to any of the following as it relates to the domestic violence, family offense, sexual offense, stalking, or human trafficking:
- to obtain services from a domestic violence shelter, rape crisis center, or other services program;
- to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
- to meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
- to file a complaint or domestic incident report with law enforcement;
- to meet with a district attorney's office;
- to enroll children in a new school; or
- to take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

Who qualifies as a “family member” for the purpose of this law?

- “Family member” is defined as an employee’s child, spouse, domestic partner, parent, sibling, grandchild, or grandparent; and the child or parent of an employee’s spouse or domestic partner.
- “Parent” is defined as a biological, foster, step, or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child.
- “Child” is defined as a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

Non-Permitted Uses

- Employees may use sick leave only for the purposes previously listed.
- Employees may not use sick leave for:
 - Periods of bereavement
 - Religious observance
 - Vacation days
 - Other personal absences



Unlawful Disciplinary Action

- Employers may not engage in any adverse action against employees for exercising their right to paid sick leave.
- This includes:
 - Discipline
 - Discharge
 - Demotion
 - Suspension

- An employer cannot retaliate against an employee in any way for exercising their rights to use sick leave.
- Furthermore, employees must be restored to their position of employment as it had been prior to any sick leave taken.
- The law prohibits employers from discharging, threatening, penalizing, or in any other manner discriminating or retaliating against an employee for requesting and using sick leave.

*Retaliation

Lawful Disciplinary Action

- Employers may take disciplinary action, up to and including termination, against an employee who uses leave for purposes other than those listed in the law or who lies to their employer in connection with taking leave.
- Indications of abuse of sick leave may include:
 - Use of unscheduled safe/sick time on or adjacent to weekends, regularly scheduled days off, holidays, vacation or pay day;
 - Taking scheduled safe/sick time on days when other leave has been denied; and
 - Taking safe/sick time on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.

Leave Increments

- Employers are permitted to require that leave be used in increments (e.g., 15 minutes, 1 hour, etc.) but may not set the minimum increment at more than 4 hours.
- Employers are permitted to limit the leave taken in any year to the maximum amount required to be provided to such employee (e.g., 40 hours for mid-sized employers and 56 hours for large employers). Any limitations permitted by the law must be put into writing and either posted or given to employees.
- Employers must notify employees in writing or by posting a notice in the worksite, prior to the leave being earned, of any restrictions in their leave policy affecting the employees' use of leave, including any limitations on leave increments.

Rate of Pay

- Employees must be paid their normal rate of pay for any paid leave time under this law, or the applicable minimum wage rate, whichever is greater. No allowances or credits (e.g., tip credits) may be claimed for paid leave hours, and employers are prohibited from reducing an employee's rate of pay for sick leave hours only.



Carryover and Payout

- **Carryover:** Employers must permit their employees to carry over unused accrued paid sick leave from one year to the next, but the employer may limit the amount of sick leave that may be used in a calendar year to 40 hours (employers with fewer than 100 employees) and 56 hours (employers with 100 or more employees).
- **Payout:** An employer is not required to pay an employee for accrued, unused paid sick days when the employee leaves their employment.

FMLA

Is the Employee Eligible?

- Employee must have worked for Employer for a total of 12 months
- Employee must have worked at least 1,250 hours over the previous 12 months
- Employee must work at a site that has 50 or more employees within a 75-mile radius



Reasons for Leave

- The birth of a child and in order to care for such child.
- The placement of a child with the employee for adoption or foster care and to care for the newly placed child.
- To care for a spouse, son, daughter or parent with a **serious health condition** (not in-laws).
- For an employee's own **serious health condition** which renders the employee unable to perform the functions of his/her position.
- Qualifying exigency leave
- Military caregiver leave

Serious Health Condition

- Means an illness, injury, impairment or physical or mental condition that involves **inpatient care OR continuing treatment** by a health care provider.
- Inpatient care means an **overnight stay** in a hospital, hospice, or residential medical care facility, including any period of incapacity.



Continuing Treatment

- ◆ Continuing treatment means incapacity plus treatment:
- ◆ Incapacity of more than 3 consecutive full calendar days; and
- ◆ Treatment
 - On 2 occasions by healthcare provider within 30 days of the first day of incapacity, unless extenuating circumstances exist; or
 - Treatment on 1 occasion plus a regimen of continuing treatment (e.g., prescription of medicine).

Military Family Leave

- ◆ “Qualifying Exigency”:
 - An eligible employee may take up to 12 weeks of leave due to a “qualifying exigency” where the employee’s spouse, son, daughter or parent is on active duty.
 - Covers active duty service members, National Guard members and Reservists.



Reduced Schedule and Intermittent Leaves

- Leave available when:
 - Medically necessary.
 - Medical need best accommodated through intermittent/reduced schedule.
- Employee must make reasonable effort to schedule treatment so as to not disrupt unduly employer's operations.
 - Employer can request why leave is necessary and the schedule for treatment.
 - Possibility of transfer or light duty.

How FMLA Can Be Taken

- Single Blocks:
 - Carpal tunnel surgery out 6 weeks.
- Intermittent:
 - Single qualifying reason; Repeated short periods of time in as little as one-hour increments.
 - Carpal tunnel surgery out 6 weeks and off every Monday and Wednesday afternoon for PT.
- Reduced Schedule:
 - Reduced hours per day or days per week.
 - Carpal tunnel surgery out 6 weeks and returns to work 35 hours/week (less than regular full-time schedule).

FMLA Challenges

- “Spot” FMLA entitlements and provide them to employees.
- Avoid penalizing employees for FMLA protected absences.



- Track protected and unprotected absences.
- **This is why it is so important for supervisors to communicate well with HR!!!**

When Do They Need To Say It?

- Foreseeable - at least 30 days.
- Not Foreseeable - as soon as practicable under the circumstances.
- LATE NOTICE
 - Employee about to be terminated due to absences.
 - Informs supervisor for first time that prior absences due to migraine headaches and presents doctor's note.
 - Late notice **does not** shield employee from discipline under an attendance policy.

Relation to Other Leaves

- FMLA leave runs concurrently with other leave whenever possible:
 - PTO
 - Absences due to work-related injuries (workers' compensation)
 - NY Paid Family Leave - Designation Notice Required to run concurrently (8 weeks in 2018; 12 Weeks by 2021)

PFL

New York Paid Family Leave: Effective Dates Were Phased-In

- January 1, 2018:
 - 8 weeks paid at 50% of the employee's average weekly wage or 50% of the state average weekly wage, whichever is less
- January 1, 2019:
 - 10 weeks paid at 55% of the employee's average weekly wage or 55% of the state average weekly wage, whichever is less
- January 1, 2020:
 - 10 weeks paid at 60% of the employee's average weekly wage or 60% of the state average weekly wage, whichever is less
- January 1, 2021:
 - 12 weeks paid at 67% of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less

What You Need To Know

- **Paid** Leave Benefit
- Job **Protected** Leave
- Additional **Process** to administer PFL requests

PFL Eligibility

- Employee who works more than 20 hours per week must work 26 consecutive work weeks (175 days worked for employee who works fewer than 20 hours per week) preceding the first full day leave is required.
- Up to 12 weeks of leave (in 2021) within any 12-month period for any of the following:
 - Care for a family member:
 - Family member: parent, child, spouse, grandparent, grandchild, parent-in-law, domestic partner
 - Bond with a child during the first year of a newborn child's life or during first year of child's placement (adoption or foster care)
 - Military Qualifying Event: any qualifying reason provided under FMLA arising from employee's spouse, domestic partner, child, or parent being on active military duty, or alternatively, being notified of an impending call or order to active military duty

Required to Provide Notice of Right to PFL

- ◆ **Handbook Policies**
- ◆ **Workplace Postings:**
 - Must display/post a business typewritten or printed notice concerning PFL.
 - Display in plain view where EEs and/or applicants can readily see it.
- ◆ **Foreign Language/Accessibility:**
 - If many EEs do not read and write in English, the notice also must be in a language in which the employees can read and write.
 - Must follow laws for sensory-impaired individuals.

NYPFL & FMLA Similarities

- Up to 12 weeks of leave for family obligations related to serious health condition; birth, placement or adoption of a child; active duty in the military
- 30 days' notice for foreseeable leave and as much as practicable if leave is unforeseeable
- Requires medical certification to support leave
- Retaliation is prohibited
- Maintain existing health benefits for duration of PFL
- Reinstatement to same position or to comparable position with comparable employment benefits, pay and other terms and conditions of employment

Benefit Protected Leave

- ◆ Must maintain group health coverage during PFL under the same terms as if the employee was working.
- ◆ The taking of PFL cannot result in the loss of any employment benefit accrued prior to the date on which the leave commenced. (Similar to original FMLA regulation that required the payment of absence of occurrence bonuses, like perfect attendance. In other words, the taking of leave could not disqualify the employee from the bonus.)
- ◆ Not entitled to the accrual of any seniority or employment benefits during PFL, but cannot discriminate against PFL leave takers.
- ◆ Not entitled to a right, benefit or position that the employee would not have been entitled to had she not taken the leave. (e.g., layoff, termination of employment would have occurred if the employee had been actively employed).
- ◆ Paying employee share – start date
- ◆ Intermittent PFL v. NYSL

Employer Specific Notice Requirements

- ◆ Designation Notices Required
 - Necessary to run PFL concurrently with FMLA.
 - If an employer fails to provide this notice, Employer will be deemed to have permitted the eligible employee to receive family leave benefits without concurrently using the benefits available under FMLA.
- ◆ Must provide notice that certifications are required similar to federal FMLA.
- ◆ When the total hours taken for FMLA in less than full-day increments reaches the number of hours in an employee's usual workday, the employer may deduct one (1) day of PFL benefits from an employee's annual available PFL benefit.

Restrictions On Taking PFL

- ◆ Leave Caps: Employees who also are eligible for disability benefits may receive only a combined amount of 26 weeks of disability benefits and NY PFL benefits in a 52-consecutive calendar week period.
- ◆ Leave Exceptions: Situations in which NY PFL benefits may not be payable include when the employee:
 - Is receiving total disability payments pursuant to a claim for workers' compensation, volunteer firefighters' benefits, or volunteer ambulance workers' benefits;
 - Is on administrative leave from his or her employment;
 - Is collecting sick pay or paid time off from the employer; or
 - Works partial days with pay for any employer.

Disputes/Penalties Arising Out of PFL

- ◆ Any PFL claim-related dispute, including eligibility, benefit rate, and duration of paid leave is subject to arbitration at the WCB. Carrier or self-insured employer pays.
- ◆ An employee who believes he or she has been discriminated or retaliated against for taking PFL may file a claim under Section 120 of the Workers' Compensation Law.
- ◆ Significant Penalties for failing to provide coverage and health insurance continuation during PFL leave.
 - Fines up to .5% of weekly payroll for period without coverage.
 - Employer fully liable for wage replacement benefits.
 - Employer fully liable for medical costs.

Differences Between PFL & FMLA

NY PFL	FMLA
12 weeks of paid leave.	12 weeks of unpaid leave.
Applies to all Employers subject to NYSWC Law regardless of size.	50 or more employees in a 75 mile radius.
Covered after 26 weeks of employment (after 175 th day for 20 hours or less).	Covered after 12 months and 1,250 hours of work.
Does not provide benefits for Employee's OWN serious health condition. (NYSLL does)	Covers Employee's own health condition in addition to coverage for family conditions.
If offered by the employer, employees <u>may</u> supplement PFL benefits up to their full salary or wages with accrued vacation, or personal leave time during the paid leave (or NYSLL).	An employer <u>may compel</u> an employee to substitute paid time off for unpaid family and medical leave. (Forced use of NYSLL)

Disability Accommodation
The ADA And
NYS Human Rights Law

The ADA & NYSHRL

- **Prohibit discrimination** against “qualified individuals with a disability.”
- Require employers to provide **reasonable accommodations** to employees with disabilities that will enable them to perform the essential functions of their position, unless doing so would cause an undue hardship.
- Require employers to engage in a **good faith interactive process** with the employee to identify possible accommodations.

The ADA & NYSHRL

- Employers must provide reasonable accommodations to known physical or mental limitations of qualified applicants and employees unless the accommodation would impose an undue hardship on the operation.

Definition of "Disability"

The ADA & NYSHRL

- An impairment that substantially limits one or more major life activities.
- A record of such an impairment.
- Being regarded as having such an impairment.



S What Does This Mean for You?

The ADA & NYSHRL

- Most medical conditions will most likely be considered “disabilities” under the ADA and/or NYSHRL.
- Employee medical issues must be addressed carefully in conjunction with HR and CANNOT be ignored or downplayed.



What Constitutes “Discrimination” under the ADA and NYSHRL?

- Adverse employment actions
- Failure to accommodate
- Failure to engage in the interactive process

Interactive Process

Employers must engage in a **good faith interactive process** with an employee designed to identify possible accommodations. “Good faith” means direct communication and cooperative behavior that promotes identification of an appropriate accommodation. This process must be documented.

- Step 1: Determine the **essential functions** of the position. The following should be considered: (1) the position exists to perform that function; (2) there are a limited number of employees available to whom the job function can be distributed; or (3) the function is highly specialized. Review job descriptions. Consider time spent on the function, consequences of allowing the employee not to perform it, and past/current experience.
- Step 2: Consult with the employee to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation.
- Step 3: Identify potential accommodations and assess their effectiveness.
- Step 4: Consider the preference of the applicant or associate to be accommodated and pick the accommodation that is most appropriate for both the applicant or associate and the Company.

Possible Accommodations

Non-Leave Accommodations

- Making facilities more accessible
- Modifying work schedules
- Changing job responsibilities
- Rest breaks
- Reassignment to a vacant position for which the applicant is qualified

Leave

What is Not a Reasonable Accommodation?

- Removing essential job functions.
- Diluting uniformly enforced productivity standards.
- Excusing or forgiving past misconduct or poor performance.
- Promoting employees.
- Bumping another employee from an existing position.
- Creating a position.
- Changing a supervisor (as compared to changing supervisory techniques).
- Providing items of a personal nature (e.g., hearing aids, eyeglasses, wheelchairs, or prosthetic devices that are used both on and off the job).

Defenses to Failing to Provide Reasonable Accommodations

- Employers may defend a failure to provide reasonable accommodation by proving undue hardship
 - Undue hardship means significant difficulty and expense
 - Employers generally focus on operational, not financial, hardship
- Employers need not permit a “direct threat”
 - Direct threat means a significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodations
 - Direct threat determinations must be made individually considering the best available objective medical evidence and/or the most current medical knowledge

Defenses to Failing to Provide Reasonable Accommodations

- Significant difficulty or expense when considered in light of a number of factors
 - Overall financial resources of company
 - Number of person employed
 - Effect of expenses and resources on operation
 - Other impact on operation
 - Composition and structure of workforce
 - Geographic separateness
 - Impact on other employees

Undue Hardship

Undue Hardship

- Significant difficulty or expense when considered in light of a number of factors
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 - Number of person employed
 - Effect of expenses and resources on operation
 - Other impact on operation
 - Composition and structure of workforce
 - Geographic separateness
 - Impact on other employees

Potential Claims and Damages

Claims:

- Discrimination
- Failure to Accommodate
- Failure to Engage in the Interactive Process
- Retaliation

Damages:

- Economic (past and future lost wages)
- Non-economic (pain and suffering, emotional distress) (unlimited!)
- Reinstatement
- Punitive Damages
- Attorney's fees and costs

How Do We Manage It All

- Specific trained persons
- Detailed tracking of entitlement and usage
- Regular meeting to identify issues
- Ensure “fair” application
- Document to employee where they are in the process

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Questions?