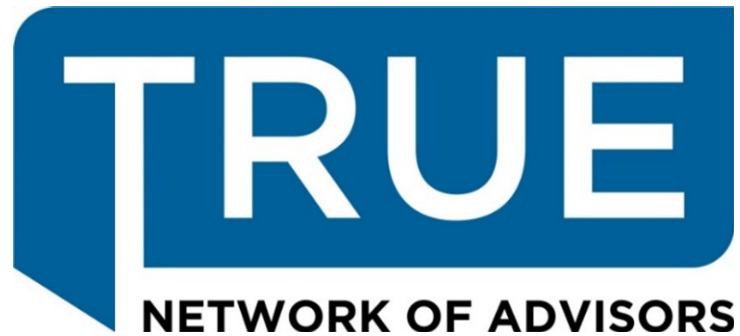


# **Employee Leaves of Absence: Do They Really Even Have to Show Up Anymore?**



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**You**

**FMLA**

**State Leave Laws**

**STD/LTD**

**PTO**

**Military Leave**

**Pregnancy Leave**

**ADA**

**Sick Leave**

**Workers' Comp**

# FMLA LEAVE RIGHTS

- ▼ Must have worked 1 year and 1,250 hours to qualify
- ▼ Up to 12 weeks of unpaid leave each calendar year/rolling 12-months
- ▼ For your own serious health condition or health condition of parent, spouse, or child (loosely defined)
- ▼ Birth or adoption
- ▼ Block time or intermittent leave
- ▼ Servicemember Family Leave
- ▼ Servicemember Caregiver Leave (up to 26 weeks)
- ▼ Benefits continue during FMLA as if employee is actively employed
- ▼ Requires reinstatement to same or equivalent position upon return

## **FMLA LEAVE RIGHTS**

*Are voluntary medical procedures  
“serious health conditions”?*

## **FMLA LEAVE RIGHTS**

***When is leave designated as FMLA leave?***

- ▼ **Prior to the absence when reasonable**
- ▼ **After it has commenced if the reason for leave was unknown when it commenced**
- ▼ **Even if the employee does not want it?**

# FMLA LEAVE RIGHTS

## *What tools are available to prevent abuse?*

- ▼ Management and HR should coordinate on the front end to meet business unit needs
- ▼ Require employee certification of need for leave (not available for pregnancy) and get second opinion (at employer's expense) when necessary
- ▼ Require re-certification for on-going leaves
- ▼ Keep in touch with employee
- ▼ Discipline/terminate employees who falsify need for leave
- ▼ Being on FMLA does not mean the employee cannot work at all or cannot engage in other activities

# **FMLA LIABILITY ISSUES**

## ***What legal claims area available to an FMLA claimant?***

- ▼ **FMLA Interference**
  - ▼ Where the employer takes an adverse employment action against an FMLA claimant that prevents the employee from receiving FMLA rights
- ▼ **FMLA Discrimination or Retaliation**
  - ▼ Where the employer discriminates or retaliates against an employee who has asserted FMLA rights or taken a leave of absence

## **FMLA LEAVE RIGHTS**

*How do other leaves of absence (vacation, sick leave, PTO), insurance leaves (workers comp, STD, LTD), or state leave laws interact with FMLA Leave?*



# **WORKERS' COMP LEAVE RIGHTS**

*Workers' comp only applies to an injury that:*

- (1) Arises out of and*
- (2) Occurs in the course of employment*

# WORKERS' COMP LEAVE RIGHTS

- ▼ **Does not require leave, but where employee is unable to perform his job, the employee may receive workers' comp benefits while away from work recuperating**
- ▼ **Light duty may be another option, but is not required to be offered**
- ▼ **Most state workers' comp statutes prohibit retaliation against an employee who files a workers' comp claim**
- ▼ **Reinstatement to same job not necessarily required, but helps reduce the likelihood of retaliation claim**

## **WORKERS' COMP LEAVE RIGHTS**

- ▼ When in doubt, report an on-the-job injury
- ▼ Better to ensure that an employee's initial visit to a healthcare provider is in conjunction with your carrier's claims administration process
- ▼ Avoid any appearance of disparaging an employee with a workers' comp injury
- ▼ Workers' comp fraud is a crime in every state

## **ADA LEAVE RIGHTS**

- ▼ ADA prohibits discrimination against qualified individuals with disabilities and requires “reasonable accommodation”
- ▼ Employers used to struggle to understand what is a qualified disability, but that is no longer worth consideration
- ▼ Assume any physical or mental impairment is likely covered
- ▼ ADA does not expressly require a “leave of absence” but this may be a “reasonable accommodation”
- ▼ ADA leave need not be paid leave

# ADA LEAVE RIGHTS

- ▼ ADA accommodations should be the result of an “interactive process” to determine what we can do to help an employee perform the essential functions of the job:
  - ▼ Modifying job content, facilities, work schedules, or allowing breaks
  - ▼ Providing a leave of absence
- ▼ An employer need not provide a reasonable accommodation if it would pose an “undue hardship”
  - ▼ Cost prohibitive
  - ▼ Disruptive
  - ▼ Safety Risk

## **ADA LEAVE RIGHTS**

***Are alcoholism and drug addiction ADA  
qualified disabilities?***

## **PREGNANCY DISCRIMINATION ACT**

- ▼ **Amendment to Title VII prohibition on sex discrimination**
- ▼ **A pregnant worker is entitled to the same protections, accommodations, and other workplace benefits as employees with other, similar, short-term physical limitations**
- ▼ **Previously, EEOC guidance instructed that pregnant employees had no right to “light duty” if the employer reserved light duty for on-the-job injuries**

# YOUNG V. UNITED PARCEL SERV., INC.

135 S.Ct. 1338 (2015)

- ▼ Peggy Young was a part time delivery driver
- ▼ All drivers are required to lift up to 70 lbs, although Young's duties usually required delivering letters and small packages
- ▼ After becoming pregnant, she took unpaid leave and then presented a doctor's note with a 20 lb max lifting restriction
- ▼ She asked for light duty
- ▼ UPS refused the light duty and instructed her to remain on leave, because lifting over 20 lbs was an essential function of the job
- ▼ UPS maintained a light duty work program for employees who experienced on-the-job injuries. It also provided accommodations and light duty to persons with ADA disabilities
- ▼ Young sued for discrimination under PDA





## **YOUNG V. UNITED PARCEL SERV., INC.**

- ▼ **HELD**: A pregnant employee has a valid claim of pregnancy discrimination where (1) the **employer denied a request for a pregnancy accommodation**; and (2) the employer **accommodates other employees similar in their ability or inability to work**

# **PREGNANCY DISCRIMINATION ACT TAKEAWAYS**

- ▼ Although *Young* stopped short of finding all employer light duty policies must be open to pregnant employees, it left unresolved just how an employer could deny light duty to pregnant employees
- ▼ Although pregnancy is not an ADA disability (yet), even though pregnancy complications are covered as temporary impairments, would it not be more prudent to treat it like one?
- ▼ Pregnancy-related leaves need not be paid leave



## **FMLA AND ACCRUED PAID LEAVE**

- ▼ **FMLA's 1 year of service and 1,250-hour coverage requirement frequently leaves a gap in family leave protections for new hires, part time, and temporary workers, for which accrued paid leave (or another applicable law) may be the only protection**
- ▼ **Employers may choose when and how an FMLA qualifying leave will be treated concurrently as paid leave under the employer's vacation, PTO, or other paid sick leaves**
- ▼ **Requiring an employee to exhaust accrued paid leave concurrently with FMLA is authorized under FMLA regulations and protects the employer from excessive, prolonged leave while also frequently ensuring the employee has income to cover premiums for benefit continuation**

# FMLA AND STATE LEAVE LAWS

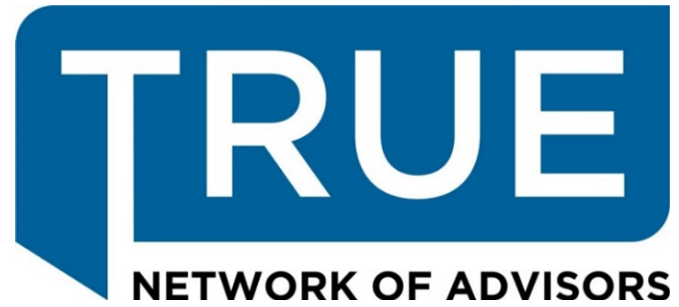
- ▼ Eleven states (CA, CO, CT, DE, MA, MD, NJ, NY, OR, RI, WA) and the District of Columbia offer some kind of paid family leave funded primarily by payroll taxes
- ▼ State legislators frequently add categories of leave to these state family leave laws that expand qualifying reasons for taking paid leave (such as leave for parental duties or obligations associated with a child's school)
- ▼ Sixteen states (AZ, CA, CO, CT, MA, ME, MD, MI, NV, NJ, NM, NY, OR, RI, VT, WA) and the District of Columbia have some form of paid sick leave obligation
- ▼ Where a reason for leave qualifies under FMLA and state law, the state law allows the leaves to run concurrently
- ▼ But consult counsel and assess the qualifying reasons carefully, because most state laws cover more reasons for leave than FMLA

# **WORKERS COMP AND OTHER LEAVES OF ABSENCE**

- ▼ A workers' comp leave of absence should always be treated as an FMLA leave of absence (concurrently) where the employee is FMLA-eligible
- ▼ An employee who has a workers' comp injury and FMLA eligibility for that injury may decide between light duty or remaining at home to recuperate. Any reduction in the work schedule may be deducted from FMLA leave, but time spent working light duty may not
- ▼ A workers' comp injury may also result in an ADA-qualified disability that requires engaging in the interactive process to discuss other reasonable accommodations

# ADA AND OTHER LEAVES OF ABSENCE

- ▼ ADA leaves are unpaid and do not require FMLA's job security; consider all reasonable options
- ▼ When an employee's FMLA leave expires but the employee needs additional time to recuperate and return to work, the ADA may require the employer to engage in the interactive process to determine whether additional leave is a reasonable accommodation
- ▼ ADA may require leave as a reasonable accommodation when a health issue results in a request for leave prior to an employee gaining FMLA eligibility
- ▼ Courts and federal agencies increasingly expect employers to extend the sort of interactive process and reasonable accommodations to any category of requested leave
- ▼ As employers accommodate minor physical and mental impairments, they create comparators for similar accommodations requested by others, particularly pregnant employees



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