

Who's Leaving Now?

Navigating Leave and Accommodation Issues that Currently Dominate an Employment Lawyer's Time

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Presented by



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Agenda



1. Leave Available to Employees in the DMV
2. Interplay Between Different Types of Leave
3. Unlimited Leave Policies
4. Employer Challenges
5. Leave Issues in the Era of Remote Work
6. Questions



Leave Available to Employees in the DMV

FMLA and ADA Comparison

	FMLA	ADA
Employer coverage	50 or more employees	15 or more employees
Eligibility	12 months of employment; at least 1,250 hours of service in the 12 months preceding leave; 50 employees within 75 mile radius	No minimum requirement; eligible day 1 of employment
Entitlement	12 weeks of unpaid, job-protected leave during any 12-month period or 26 weeks for service member leave	Job-protected leave as necessary to meet employee's needs; no minimum or maximum
Purpose	<ul style="list-style-type: none"> Employee's own or immediate family member's "serious health condition" Birth and care of a newborn child or placement of a child for adoption or foster care Service member & family member of service member 	Individualized determination to find reasonable accommodation for a qualified individual with a disability who can perform the essential functions of the job with or without accommodation, unless doing so would constitute an " undue hardship "

Washington, D.C. Long-Term Leave Laws

	DC FMLA	DC Paid Family Leave
Employer coverage	20 or more employees in D.C.	All employers in D.C.
Eligibility	12 months of employment; at least 1,000 hours of service in the 12 months preceding leave	Employed by an employer and earned income as during 1 of the past 5 quarters prior to event
Entitlement	Up to 32 weeks of unpaid leave within a 24 months period for: <ul style="list-style-type: none"> • Medical leave (own “serious health condition”) (16 weeks) • Family leave (to care for a family member or for parental leave) (16 weeks) 	Up to 8 weeks of paid leave in a 52-week calendar period for: <ul style="list-style-type: none"> • Parental leave (8 weeks) • Family leave (8 weeks) • Medical leave (8 weeks)
Paid?	No	Yes
Job protection?	Yes	No
Administration	Through employer	Through DOES

Maryland Long-Term Leave Laws

	Parental Leave Act	Flexible Leave Act
Employer coverage	15-49 employees	15 or more employees
Eligibility	12 months of employment; at least 1,250 hours of service in the 12 months preceding leave	Employees that have earned accrued paid leave
Entitlement	Up to 6 weeks of unpaid leave in a 12-month period for: <ul style="list-style-type: none"> • Birth of a child • Placement of a child with the employee for adoption or foster care 	Accrued leave with pay may be used for an illness in the employee's immediate family (child, spouse, parent)
Paid?	No	Yes
Job protection?	Yes	No

Paid Sick Leave Laws

DMV Comparison

	DC	Maryland	Virginia
Name	Accrued Sick and Safe Leave Act	Maryland Healthy Working Families Act	N/A
Entitlement	24 or fewer employees = 3 days 25-99 employees = 5 days 100+ employees = 7 days	1 hour for every 30 hours worked, capped at 40 hours per year (paid only if 15+ employees)	N/A
Permissible uses	<ul style="list-style-type: none">• Care or treatment of a mental or physical illness, injury, or condition of, or preventive medical care for, an employee or employee's family member• Parental leave• Specified reasons due to domestic violence, sexual assault, or stalking committed against the employee or employee's family member	<ul style="list-style-type: none">• Care or treatment of a mental or physical illness, injury, or condition of, or preventive medical care for, an employee or employee's family member• Parental leave• Specified reasons due to domestic violence, sexual assault, or stalking committed against the employee or employee's family member	N/A

COVID-19 Leave Laws

Washington, D.C.

	Expansion of DC ASSLA	Emergency DC FMLA Expansion
Employer coverage	50-499 employees (except not health care providers)	All employers
Eligibility	All employees	Employees that have earned accrued paid leave
Entitlement	Up to 2 full weeks of work up to 80 hours for reasons covered by FFCRA: <ul style="list-style-type: none">• Employee subject to a COVID-19 quarantine or isolation order, or advised to quarantine• Employee experiencing COVID-19 symptoms and seeking diagnosis;• Care for individual subject or advised to quarantine or isolation order• Substantially similar condition	Up to 16 weeks of work for the following reasons: <ul style="list-style-type: none">• Health care provider recommendation that employee isolate or quarantine due to high risk from COVID-19• Care for family or household member under order to quarantine or isolate• Care for a child whose school or day care is closed or childcare unavailable



*Personal
Leave*

Interplay Between Different Types of Leave Laws

Eligibility for Leave

Serious Health Condition / Disability / Illness



“Serious Health Condition” v. “Disability”



How do you know if an employee’s health condition is a qualified reason for leave?

- Chronic fatigue?
 - Blake v. City of Montgomery, Ala., 492 F. Supp. 3d 1292 (M.D. Ala., 2020)
- Regular flu-like symptoms during COVID-19 pandemic?
 - Milman v. Fieger & Fieger, P.C., No. 2:20-cv-12154, 2021 WL 2284445 (E.D. Mich. June 4, 2021)



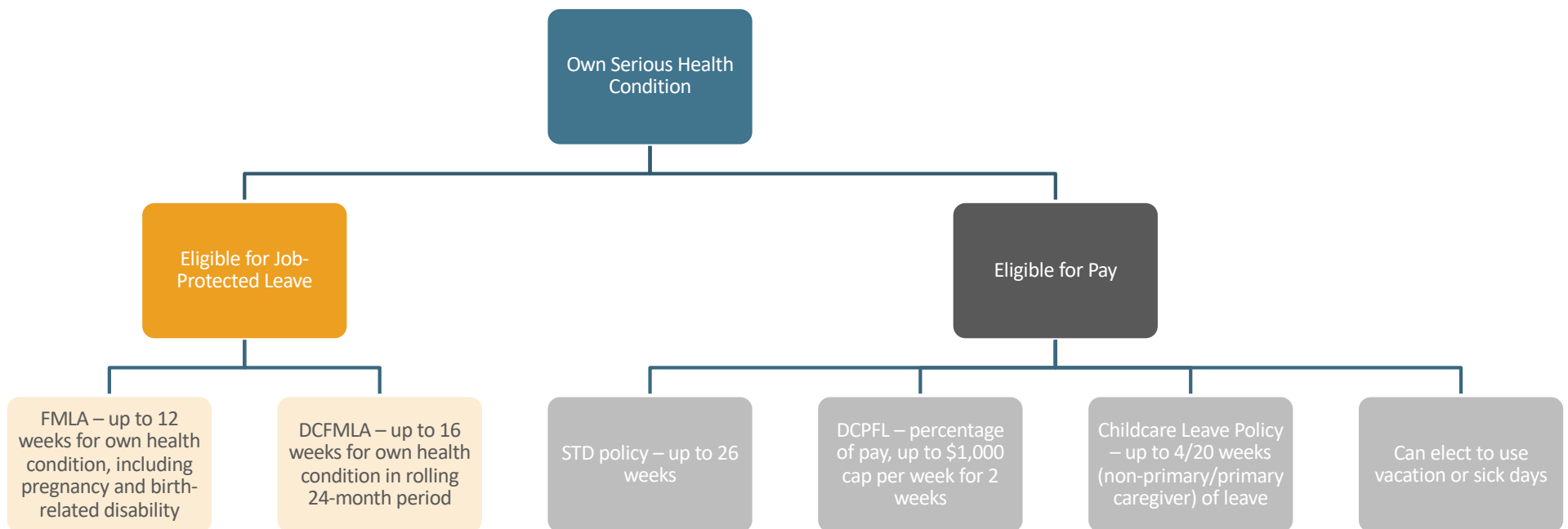
Has the employee made a request for leave?

- Waggel v. George Washington Univ., 957 F.3d 1364 (D.C. Cir. 2020)

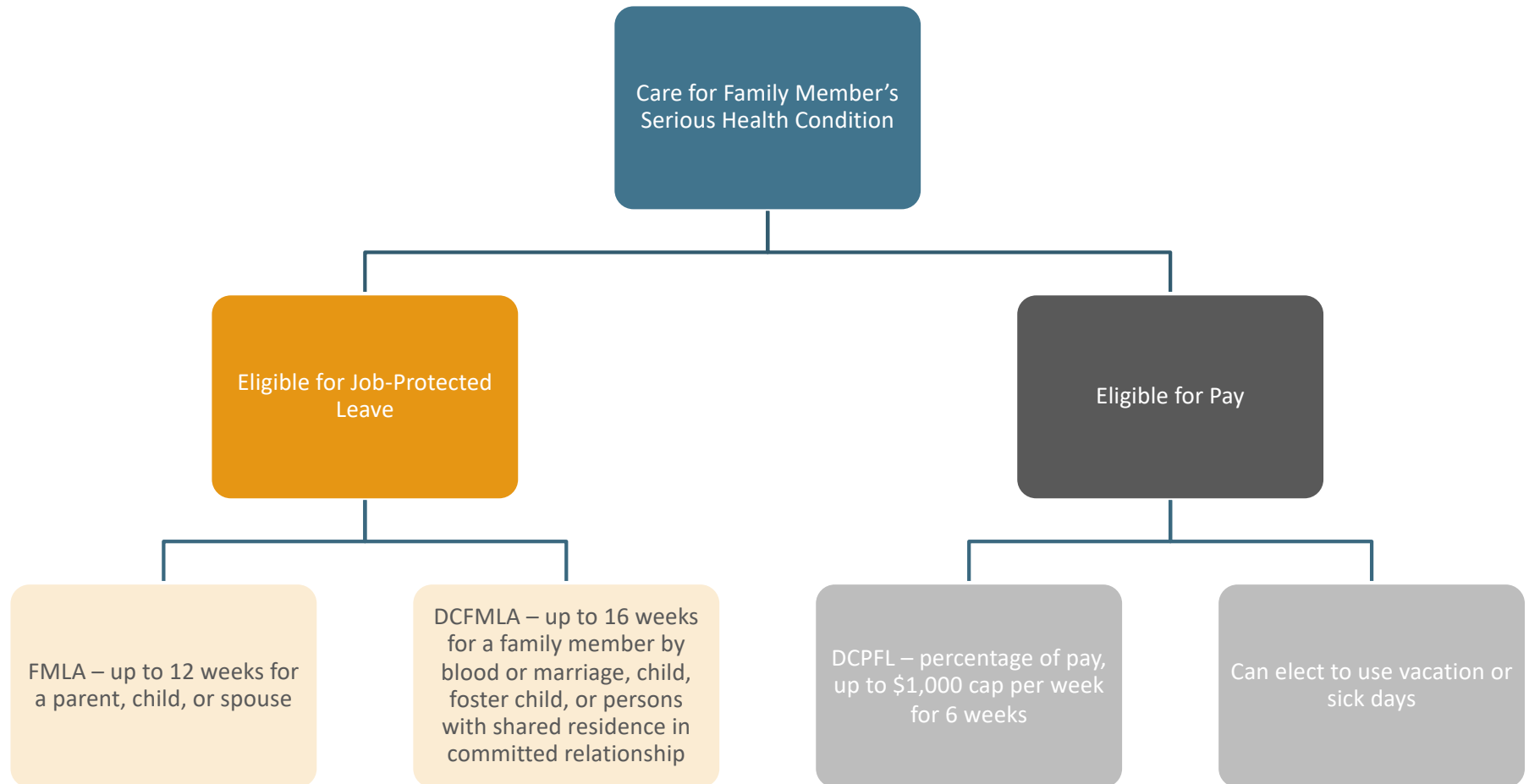
Length of Leave

- Long-term unpaid leaves ≠ reasonable accommodation
 - *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)
- Indefinite leave ≠ reasonable accommodation
 - *Easter v. Arkansas Children's Hospital*, No. 4:17CV00361 (E.D. Ark. Oct. 3, 2018)
 - Leave without an end date, and/or multiple extensions of leave request
- Maximum leave policies
 - EEOC Guidance says no
- Intermittent leave
 - Unforeseeable intermittent leave (e.g., migraines)
 - Regenerating intermittent leave

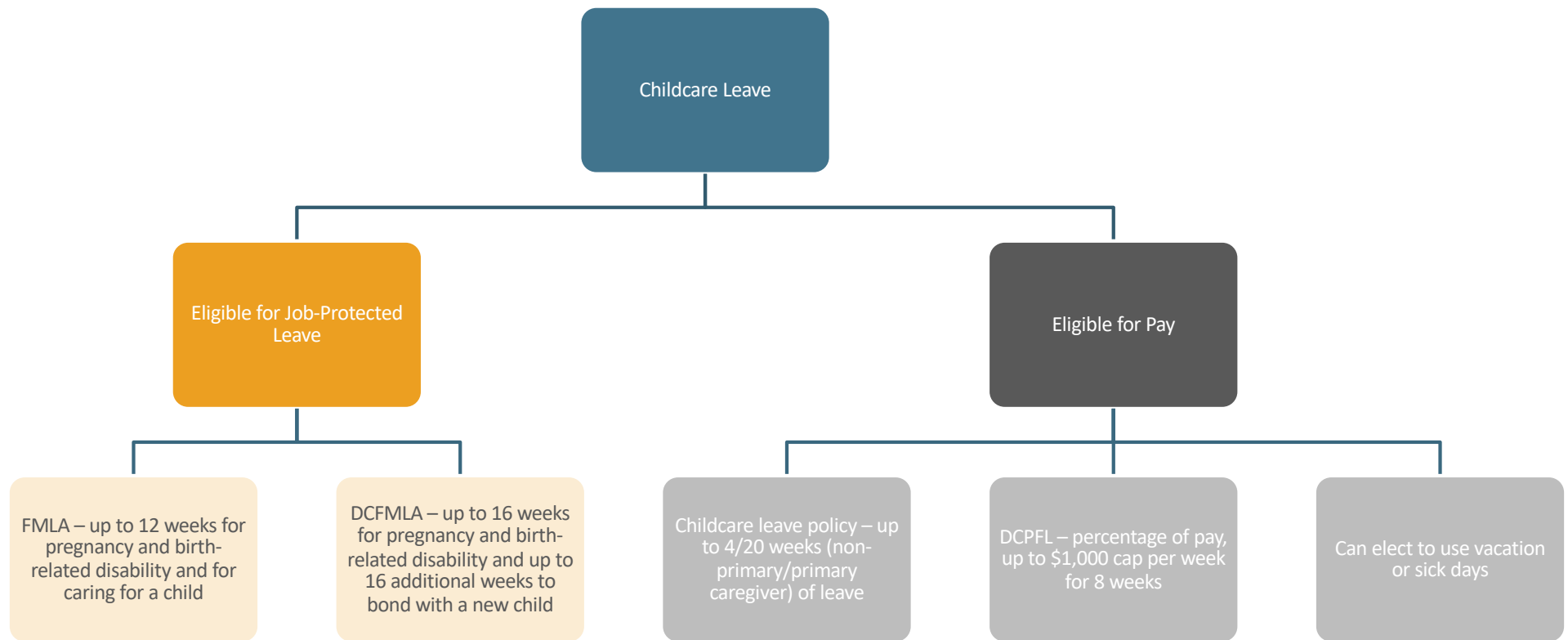
Own Serious Health Condition



Care for Family Member's Serious Health Condition



Childcare Leave



Hypothetical #1

Long-Term Illness

SuperCorp is a company based in Washington, D.C. Roger has worked at SuperCorp for 20 years. He was diagnosed with cancer and was eligible for leave for his own health condition for a full 12 weeks. Due to the aggressive nature of his treatment, he requires at least another 18 weeks of leave. Roger will be out for at least 30 weeks. If applicable, the STD policy provides up to 26 weeks of 100% pay to eligible employees.

Must SuperCorp grant Roger's request?

If SuperCorp CANNOT demonstrate undue hardship, how will Roger's leave be treated?

Audience Poll #1

Must SuperCorp grant Roger's request?

☐ Yes

☐ No

☐ Depends

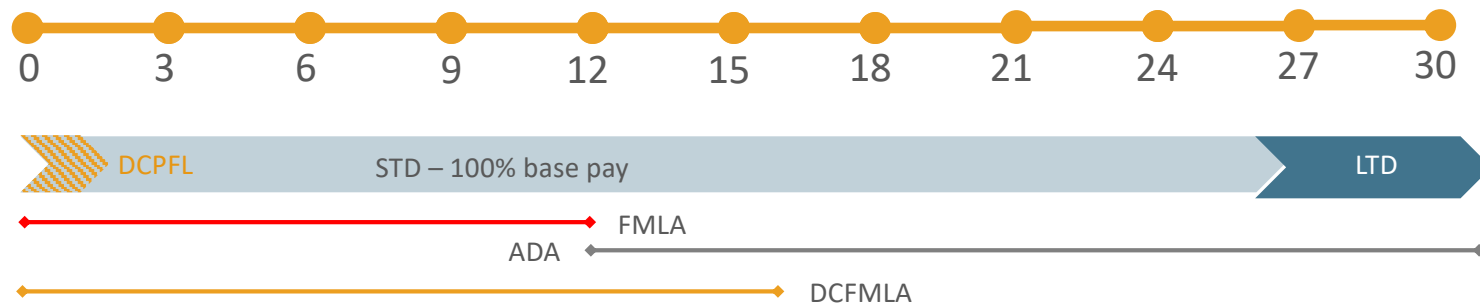
Hypothetical #1

■ Leave:

- Weeks 1-12: covered under the federal FMLA and DCFMLA
- Weeks 13-16: covered as an accommodation under ADA and state/local disability laws and DCFMLA
- Weeks 17-30: covered as an accommodation under ADA and state/local disability laws

■ Pay:

- Weeks 1-2: 100% pay under STD policy; offset by DCPFL benefits, up to \$1,000 per week
- Weeks 3-26: 100% pay under STD policy
- Weeks 27-30: pay under LTD policy



Hypothetical #2

Pregnancy and Childcare Leave

Rhonda's doctor instructs her to go on bed rest for two weeks before delivery. She has a C-section, and her doctor certified that she was disabled for 8 weeks after delivery. She will be the primary caregiver for her newborn child. Rhonda has worked for SuperCorp for 3 years as a full-time employee and she has not taken any leave in the previous 12 months. SuperCorp has a Childcare leave policy, which provides up to 20 weeks of paid Childcare leave.

How much leave is Rhonda entitled to?

How will she be paid during this period?

Audience Poll #2

What is the maximum amount of paid leave that Rhonda may take under these circumstances (excluding application of any vacation or PTO)?

- ☐ 20 weeks
- ☐ 22 weeks
- ☐ 28 weeks
- ☐ Some other amount

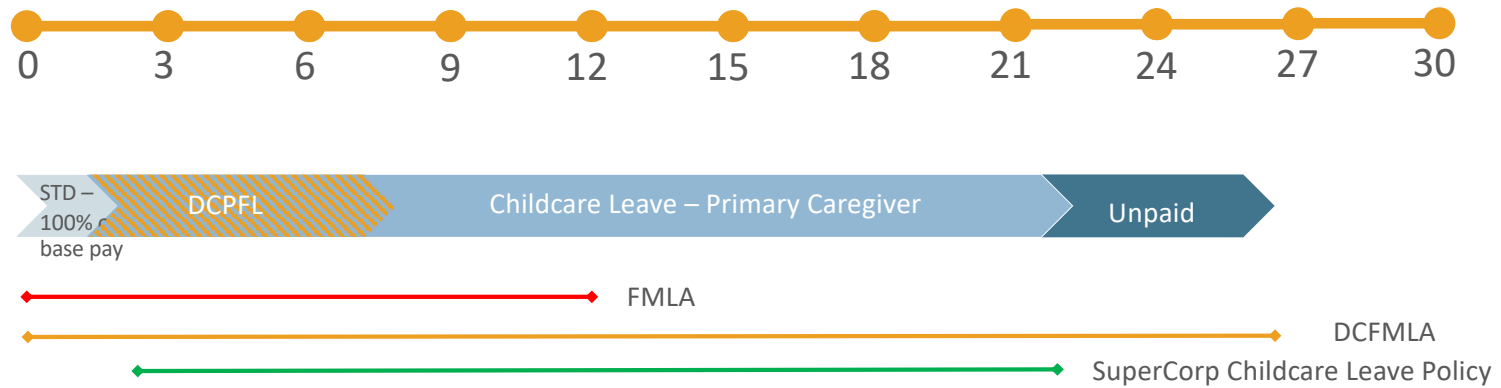
Hypothetical #2

Pregnancy and Childcare Leave

- Weeks 1-2: 2 weeks pre-birth – disability leave
 - Leave: Covered under the federal FMLA and DCFMLA (medical leave)
 - Pay: 100% pay under STD policy; offset by DCPFL benefits, up to \$1,000 per week (*employee may choose not to apply for medical benefits and instead use post-birth or during child care period*)
- Weeks 3-10: 8 weeks post birth – disability leave
 - Leave: covered under the federal FMLA and DCFMLA (medical leave)
 - Pay: 100% pay under the Childcare Leave policy; offset by DCPFL benefits, up to \$1,000 per week (*employee may choose not to apply for medical benefits and instead use pre-birth or during child care period*)
- Weeks 11-22: 12 weeks child bonding leave
 - Leave:
 - Weeks 11-12: covered under the federal FMLA and DCFMLA (family leave)
 - Weeks 13-26: covered under DCFMLA (family leave)
 - Pay:
 - Weeks 11-22: 100% pay under the Childcare Leave policy (if employee did not use DCPFL benefits, then up to 8 weeks will be used to offset)
 - Weeks 23-26: unpaid; employee may use vacation or sick leave

Hypothetical #2

Pregnancy and Childcare Leave



Hypothetical #3

Mixing Types of Leave

In January, Alicia takes a leave of absence for her own serious health condition for 6 weeks. Immediately after her return, Alicia's mother is diagnosed with cancer and she needs to go live with her mother to care for her while she is in recovery. Alicia has been employed by SuperCorp for 2 years.

How much time will Alicia be granted?

Will she be paid?

Audience Poll #3

Can Alicia mix or stack different types of leave?

☐ Yes

☐ No

☐ Depends

Hypothetical #3

■ Weeks 1-6: disability leave

- Leave:
 - Weeks 1-2: Covered under the federal FMLA and DCFMLA (medical leave)
 - Weeks 3-6: Covered under the federal FMLA and DCFMLA (medical leave)
- Pay:
 - Weeks 1-2: 100% pay under STD policy; offset by DCPFL benefits, up to \$1,000 per week
 - Weeks 3-6: 100% pay under STD policy

■ Weeks 7-18: family care leave

- Leave:
 - Weeks 7-12: covered under the federal FMLA and DCFMLA (family leave)
 - Weeks 13-18: covered under DCFMLA (family leave)
- Pay:
 - Weeks 7-12: pay under DCPFL (employee can choose to supplement with vacation or sick leave)
 - Weeks 12-18: unpaid





Policies Procedure


Unlimited Leave Policies

Transitioning to an Unlimited Leave Plan

Best Practices

- Update all employee handbooks and other benefit materials
- Provide employees advance notice
- Determine how to handle accrued, unused leave, and allow time to deplete current banks
- Require employees to sign documentation clearly outlining the terms of the transition, including:
 - The number of days accrued and not used under the prior accrued vacation policy;
 - Requirements on using accrued vacation time before unlimited vacation time;
 - Deadlines on the use or forfeiture of accrued vacation time (subject to state law); and
 - Terms of vacation time payout upon termination of employment.
- Continue to track accrued vacation/PTO time to avoid violating wage laws
- Clearly define potential uses for unlimited leave
- Reserve rights to seek supporting documentation and/or deny leave based on business needs

Preventing Abuse of Unlimited Leave Plans

- 
- ✓ Communicate!
 - ✓ Adopt clear parameters about the *limitations* of the unlimited leave policy
 - ✓ Provide guidelines to prevent underuse
 - ✓ Manage performance expectations
 - ✓ Require pre-approval of time off at managers' discretion
 - ✓ Track use & distribution of unlimited PTO moving forward

Unlimited PTO Plans - Discussion

Can the employer ask for documentation as to the need for leave?

Can the employer refuse to allow the employee to take leave under an unlimited plan?




Employer Challenges

Abuse or Overuse of Leave

- How do you prevent abuse of leave policies?
 - E.g., employee requests intermittent FMLA leave every Friday afternoon or immediately before holiday weekends
 - E.g., employee takes significant leave for various COVID-related reasons (only some of which are covered reasons under the FFCRA)

Poor Performers

- 
- ① How should employers handle poor performers seeking leave in anticipation of corrective action? Can a leave request be denied on the basis of poor performance?
 - *Meade v. Gen. Motors LLC*, 317 F. Supp. 3d 1259 (N.D. Ga. 2018)
 - ② How long can or should an employer wait to discipline an employee for poor performance following an employee's leave of absence?
 - *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54 (1st Cir. 2020)
 - ③ What should an employer do when an employee on a performance improvement plan (PIP) raises for the first time, just days before expiration of the PIP, that he requires a leave for a medical condition?

Seeking Information from Employees on Leave

01

Can the employer contact the employee about work while out on leave?

02

Does employee medical privacy prohibit employer scrutiny of a leave request?

03

What can you do if you see social media posts from an employee that appear to contradict the need for leave?

Repeated Requests for Accommodations or Leave

1

Accommodation

- Require employees show that their request for additional leave is effective in helping their return to work
- Engage the employee in a robust interactive process and examine how the employee's continued absence is creating a hardship on operations
- Conduct undue hardship analysis early
 - EEOC: "indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue burden."
- Remain flexible

2

Leave

- Implement required notice procedure, limit frequency for non-sick leave requests



Leave Issues in the Era of Remote Work

Audience Poll #4

When do you intend to return employees to the workplace?

- ☐ We have already returned to the workplace full time.
- ☐ We have begun phasing employees back to work.
- ☐ We plan to return after Labor Day, but sometime in 2021.
- ☐ We do not intend to reopen until 2022.
- ☐ We have not decided.

WFH/Telecommuting as a Reasonable Accommodation

Legal Landscape

- ◆ **EEOC Guidance – Work At Home/Telework as a Reasonable Accommodation (last revised 2005)**
 - Working from home may be a reasonable accommodation
- ◆ Various factors should be considered such as the employer's ability to adequately supervise the employee, whether there is a need for face-to-face interaction and coordination of work with other employees and whether in-person interaction with outside colleagues, clients, or customers is necessary
- ◆ The employer may select alternative accommodations, if effective
- ◆ If granting, consider entering into a written agreement
 - Set forth terms and expectations
 - Stress temporary accommodation subject to the employer's ability to rescind at its sole discretion
- ◆ ***EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc)**: The court held the plaintiff's request to work from home was unreasonable because she could not perform the essential functions of the job telecommuting four days a week because the job required teamwork, and regular face-to-face interactions

Permanent WFH and “Hybrid” RTW:

The New Normal?

- 1 in 5 employers plan to allow workers to choose where they want to work
- Another survey:
 - 44% of employees favored hybrid working arrangements
 - 51% employers supported the hybrid work model
- If hybrid RTW policy adopted, must ensure policy is nondiscriminatory under all applicable laws and uniformly applied

Remember, “home,” as in “WFH,” can be anywhere, which may create a whole other set of legal headaches



Reasonable Accommodation – Teleworking

Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 353 (D. Mass. 2020)

- Plaintiff, an assistant manager with moderate asthma, sought telework in March 2020 after her physician advised her to avoid exposure to COVID-19.
- May 2020 Plaintiff sought and was given four more weeks of telework. Plaintiff renewed this request but, Defendant insisted that managers were needed “in the building and supporting operations.”
- Defendant continued to deny Plaintiff’s telework requests, expected all managers to work from the office.
- Plaintiff believed that Defendant did not undertake an individualized assessment of her circumstances in view of COVID-19, and she eventually filed a complaint alleging disability discrimination, failure to accommodate, and creation of a hostile work environment.
- The court granted Plaintiff’s motion for preliminary injunctive relief to preclude Defendant from terminating her and, instead, permitting her to telework.

Reasonable Accommodation of “Higher-Risk” (“Vulnerable”) Employees

■ EEOC Guidance

- Are underlying conditions and bases for compromised immune systems disabilities?
 - Precluding “vulnerable” employees from entering the workplace – permissible?
 - Age – not a disability, but a basis for accommodation?
- What about “vulnerable” household/family members – accommodations required?
- If no “vulnerability,” accommodation required?
- Elevated requirements under state and local law?
- If no legal obligation, should employer accommodate?
 - Be consistent
 - Consider unemployment insurance eligibility implications

Audience Poll #5

How has your organization handled vaccination?

- ☐ We encourage but do not require our employees to get vaccinated.
- ☐ Employees who want to return to the office on a voluntary basis must be vaccinated.
- ☐ We have implemented or will implement a mandatory vaccination policy.

Returning Employees to the Office

1

Must an employer allow employees to continue to work remotely if they are unvaccinated?

2

How should an employer deal with vaccinated employees who refuse to return to work unless everyone at the workplace is vaccinated?

3

Is being afraid of contracting COVID-19 a sufficient reason to stay home or request leave?



Questions?

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