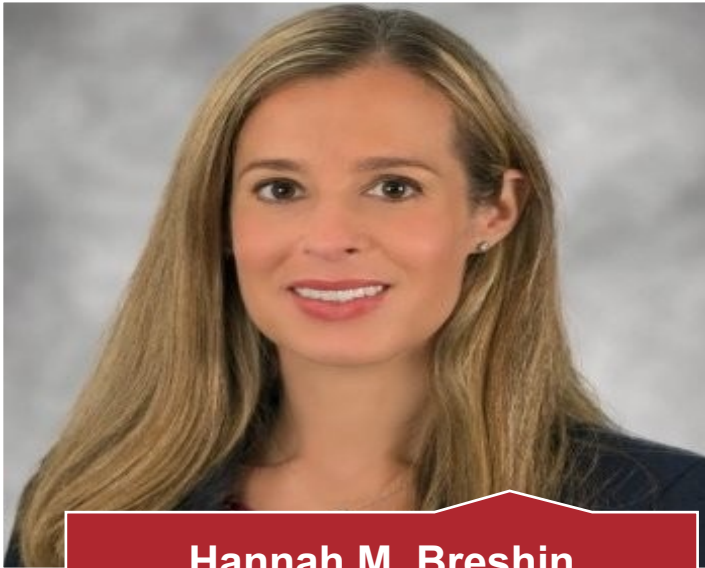




Thorny Leave Issues in Employment

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Agenda

Sources of Employee Leave Entitlements

Important Features of Leave Entitlements

Issues in Crafting Employee Leave Policies

Unlimited PTO Policies

Leave Coordination Issues

Update on State Leave Laws in D.C., Maryland, and Virginia

Notable Leave Provisions in other states

FMLA Review

ADA Leave Issues

Federal Contractor Leave Issues

Remote and Hybrid Work

Sources of Employee Leave Entitlements

- Employer provided leave
- State and local laws:
 - Sick and safe leave
 - Paid family leave (PFL)
 - PTO requirements
- Federal government contract requirements
- Family and Medical Leave Act
- Pregnancy Discrimination Act and Pregnant Workers Fairness Act
- Americans with Disabilities Act



Important Features of Leave Entitlements



WHO IS ENTITLED TO
LEAVE?



HOW MUCH LEAVE IS
PROVIDED?



WHAT HAPPENS TO
UNUSED LEAVE (YEAR TO
YEAR, AND ON
TERMINATION)



DOES THE LEAVE CARRY
JOB PROTECTION?



CAN THE LEAVE BE
COORDINATED WITH
OTHER TYPES OF LEAVE
TO ADDRESS STACKING?

Issues in Crafting Employer Leave Policies

- Types of employer leave plans:
 - Separate vacation and sick leave buckets
 - Paid time off (PTO) that can be used for any reason
 - Unlimited PTO
- Employer parental leave plans – increasingly expected in the job market, especially for “white collar” employers
 - Coordinating with state programs

Unlimited PTO Policies

- Unlimited PTO is the newest trend in employer-provided leave
- Employees do not have set accruals and can (in theory) take as much leave as is consistent with performance of duties
- Balancing issues with rules or guidelines for use of leave
 - Strict rules around use can cause unlimited PTO policy to be viewed as de facto accrual policy for purposes of termination payout treatment
- Most states do not require any payout on termination for a genuine unlimited PTO policy
 - Illinois – must estimate leave usage and pay out if employee's usage is less than estimate
- Unintended impacts of unlimited PTO policies on other employment issues:
 - Pregnancy-related leave
 - Disability-related leave
 - Military leave

Unlimited PTO Scenarios

- Company A has a leave policy providing that employees may take unlimited PTO consistent with their job responsibilities
- What happens if:
 - Managers as an informal policy refuse to approve vacation over 4 weeks per year?
 - The sales staff was slashed, doubling each employee's account total, and employees cannot as a practical matter take more than 1-2 weeks?
 - An employee is an Army reservist and is called to long-term military leave?

Leave Coordination Issues

Multi-state employers may have numerous leave plans applicable to their employees	<p>Lowest common denominator</p> <p>State by state approach</p> <p>Can generally satisfy many state leave entitlements with an equivalent or more generous employer-provided plan</p>
Leave “stacking” – employee takes various leave entitlements sequentially to increase total amount of leave	<p>Many leave entitlements can run concurrently – for example, employees can be required to use PTO and FMLA leave at the same time, rather than using 12 weeks of FMLA and then taking PTO</p> <p>Some newer state laws (e.g., Washington state PFL) do not allow employer to require concurrent use</p>
Leave policy considerations:	<p>Allowing flexibility to ensure fairness among employees working in different states</p> <p>Opportunity to subsidize employer-provided leave with state PFL programs</p>

Coordination Nightmares

- The company offers a total of 12 weeks of paid parental leave to birthing parents. The company's policies provide that parental leave runs concurrently with any FMLA leave entitlement.
- Debra and Kim are employees in the same position who are, coincidentally, due to give birth on the same day. Debra works in the company's Seattle, Washington office, and Kim in Little Rock, Arkansas.
- **Kim**: Receives 12 weeks of paid parental leave per company policy, which runs concurrently with her 12 weeks of federal FMLA leave.
- **Debra**: Receives 12 weeks of paid parental leave per company policy, which runs concurrently with her 12 weeks of federal FMLA leave. Then, takes 12 weeks of Washington Paid Family and Medical Leave (PFML), which can be used at any time during the first year after birth, and which an employee has sole control over whether to apply for. Debra takes her PFML leave intermittently (as permitted by Washington law), taking off 3 days per week for 20 weeks.
- **How to address these differences in treatment based on state laws?**

Updates on Leave Laws in D.C., Maryland, and Virginia

▪ **D.C. Accrued Sick and Safe Leave**

- **Covered Employers:** Any entity that directly or indirectly employs or exercises control over a worker's wages, hours, or working conditions.
- Employees begin accruing sick leave on the date of hire. They cannot use the sick leave until after 90 days of employment. The employee must spend 50% or more of their time working in D.C.
- **Uses:**
 - An absence resulting from a physical or mental illness, injury, or medical condition of the employee;
 - An absence resulting from obtaining professional medical diagnosis or care, or preventive medical care, for the employee, subject to the requirement of subsection (d) of this section;
 - An absence for the purpose of caring for a child, a parent, a spouse, domestic partner, or any other family member who has any of the conditions or needs for diagnosis or care described in paragraph (1) or (2) of this subsection;

Updates on Leave Laws in D.C., Maryland, and Virginia

D.C. Accrued Sick and Safe Leave -Uses (cont'd):

- An absence if the employee or the employee's family member is a victim of stalking, domestic violence, or sexual abuse; provided, that the absence is directly related to social or legal services pertaining to the stalking, domestic violence, or sexual abuse, to:
- Seek medical attention for the employee or the employee's family member to recover from physical or psychological injury or disability caused by domestic violence or sexual abuse;
- Obtain services from a victim services organization;
- Obtain psychological or other counseling;
- Temporarily or permanently relocate;
- Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic violence or sexual abuse; or
- Take other actions to enhance the physical, psychological, or economic health or safety of the employee or the employee's family member or to enhance the safety of those who associate or work with the employee.
- If an employee is terminated and rehired within a year, their previously accrued sick leave balance must be reinstated.

Updates on Leave Laws in D.C., Maryland, and Virginia

D.C. Accrued Sick and Safe Leave –Accrual Rates:

If an employer has...	Employees accrue...	Not to exceed....
100 or more employees	1 hour per 37 hours worked	7 days per calendar year
25 to 99 employees	1 hour per 43 hours worked	5 days per calendar year
1 to 24 employees	1 hour per 87 hours worked	3 days per calendar year
Tipped restaurant employees*	1 hour per 43 hours worked	5 days per calendar year

Source: District of Columbia Department of Employment Services

Updates on Leave Laws in D.C., Maryland, and Virginia

D.C. Accrued Sick and Safe Leave:

- **The term “Family member” includes-**
 - A spouse, including the person identified by an employee as his or her domestic partner, as defined in § 32-701(3);
 - The parents of a spouse;
 - Children (including foster children and grandchildren);
 - The spouses of children;
 - Parents;
 - Brothers and sisters; and
 - The spouses of brothers and sisters.
- A child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility; or
- A person with whom the employee shares or has shared, for not less than the preceding 12 months, a mutual residence and with whom the employee maintains a committed relationship

Updates on Leave Laws in D.C., Maryland, and Virginia

D.C. Universal Paid Family Leave:

- **Provides eligible employees with the following within a 52-week period:**
 - 12 weeks to bond with a new child
 - 12 weeks to care for a family member with a serious health condition
 - 12 weeks to care for the employee's own serious health condition
 - 2 weeks to receive prenatal care
- **An employee must work in D.C. at least 50% of the time to qualify**
 - Remote employees qualify for paid family leave if they work in D.C. at least 50% of the time
- **Pays employees a percentage of compensation up to \$1,000 per week**

Updates on Leave Laws in D.C., Maryland, and Virginia

■ **D.C. Paid Family Leave:**

- Paid Family leave is completely employer funded;
- Employers must contribute 0.26% tax on employee payroll to fund the paid family leave; this was reduced from a 0.62% contribution in 2022
- Runs concurrently with FMLA and DCFMLA
- Not independently job protected

Updates on Leave Laws in D.C., Maryland, and Virginia

- **D.C. Family Medical Leave:**

- **Eligible Employees:** An employee must have one year with same Employer without a break in service except for regular holidays, sick or personal leave granted by Employer with at least 1000 hours service during the past 12-month period prior to leave request.

- **Benefit:**

- 16 weeks during 24-month period for family leave to care for family member
 - 16 weeks for medical leave for the employee's own serious health condition
 - The entitlement to leave for birth or placement of a child expires 12 months after the employees receives the child

Updates on Leave Laws in D.C., Maryland, and Virginia

- **D.C. Family Medical Leave:**

- “Family member” includes a person to whom the employee is related by blood, legal custody, or marriage, sharing mutual residence and committed relationship with the Employee. Also includes a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility.



Updates on Leave Laws in D.C., Maryland, and Virginia

▪ **Maryland Paid Family Leave**

- Maryland enacted a new paid family leave entitlement similar to federal FMLA, but with some pro-employee differences
- Employees can begin taking paid leave in 2026
- Leave paid by State, funded by payroll tax on employers
- Tax begins in 2024
- Employees are eligible if they have been employed for 12 months and work 680 hours (vs. FMLA: 1,250 hrs)
- Applies to all Maryland employers (vs. FMLA's 50 employee threshold)

Updates on Leave Laws in D.C., Maryland, and Virginia

- **Maryland Paid Family Leave**

- Employees may take leave:
 - To care for a newborn child or child newly placed for adoption, foster, or kinship care
 - To care for a family member with a serious health condition
 - To attend to the employee's own serious health condition
 - To care for a military servicemember with a serious health condition resulting from military service
 - For the deployment of a family member for military service
- 12 weeks of leave – paid at fraction of wages up to maximum of \$1,000 per week
- Employers with 15 or more employees must provide paid leave. Employers with 14 or fewer employees must provide unpaid leave.

Updates on Leave Laws in D.C., Maryland, and Virginia

- **Maryland Paid Family Leave**

- Employer and employee contributions will not begin until Oct. 1, 2024
- Benefits payments to covered employees are postponed to Jan. 1, 2026.
- The employer/employee contribution rates are 50/50 percent
 - The total rate of contribution (i.e., the percent of wages up to the Social Security wage base to be split 50/50 percent) must be set by the Maryland DOL by Oct. 1, 2023, and cannot exceed 1.2 percent of an employee's covered wages.
 - That rate will remain the same from Oct. 1, 2024, through June 30, 2026.



Updates on Leave Laws in D.C., Maryland, and Virginia

■ **Maryland Sick and Safe Leave**

- Employees accrue 1 hour of paid leave for every 30 hours worked
 - Applies to employers with more than 15 employees, and employees who work more than 12 hours per week
- Employees can carryover up to 40 hours of unused leave to next year
 - Employers do not have to allow employees to earn more than 40 hours or use more than 64 hours in any given year
 - No payout is required on termination of employment
 - Employers prohibited from interfering or retaliating against employee for using sick and safe leave

Updates on Leave Laws in D.C., Maryland, and Virginia

▪ **Maryland Sick and Safe Leave - Uses**

- To care for or treat the employee's mental or physical illness, injury or condition;
- To obtain preventative medical care for the employee or the employee's family member;
- To care for a family member with a mental or physical illness, injury or condition;
- For maternity or paternity leave; or
- The absence from work is necessary due to domestic violence, sexual assault or stalking committed against the employee or the employee's family member and the leave is being used: (1) to obtain medical or mental health attention; (2) to obtain services from a victim services organization; (3) for legal services or proceedings; or (4) because the employee has temporarily relocated as a result of the domestic violence, sexual assault or stalking.
- "Family member" includes a spouse, child, parent, grandparent, grandchild, sibling or legal guardian

Updates on Leave Laws in D.C., Maryland, and Virginia

- **Virginia Paid Sick Leave for Home Healthcare Workers**

- Virginia provides paid sick leave for employees who work on average at least 20 hours per week or 90 hours per month.
 - An individual who (i) is licensed, registered, or certified by a health regulatory board within the Department of Health Professions; (ii) is employed by a hospital licensed by the Department of Health; and (iii) works, on average, no more than 30 hours per month is not covered.
 - Covered employees accrue one hour of leave for every 30 hours worked up to a maximum of 40 hours per year, unless the employer sets a higher limit.

- **Uses**

- To care for an employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care; or
- Care of a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care of a family member who needs preventive medical care.

Updates on Leave Laws in D.C., Maryland, and Virginia

- **Virginia's Voluntary Paid Family Leave Law**

- Virginia passed legislation allowing employers to provide paid family leave through private insurance
- Virginia permits insurers to offer policies to employers that provide partial income replacement to employees for:
 - The birth or adoption of a child;
 - Placement of a child with the employee for foster care;
 - Care of a family member who has a serious health condition; or
 - Circumstances arising from the employee's family member who is an active service member (or has been notified of an impending call to active duty).



Updates on Leave Laws in D.C., Maryland, and Virginia

- **Virginia's Voluntary Paid Family Leave Law**

- Virginia passed legislation allowing employers to provide paid family leave through private insurance
- Virginia permits insurers to offer policies to employers that provide partial income replacement to employees for:
 - The birth or adoption of a child;
 - Placement of a child with the employee for foster care;
 - Care of a family member who has a serious health condition; or
 - Circumstances arising from the employee's family member who is an active service member (or has been notified of an impending call to active duty).

Notable Leave Laws in Other States

- **New York State**

- Paid Sick and Safe –
 - Leave Entitlement
 - 100 or more employees – 56 hours of paid sick leave
 - 5-99 employees- 40 hours of paid sick leave
 - 0-4 employees- if net income in \$1M or less, 40 hours of unpaid sick leave; paid sick leave if net income exceeds \$1M
 - Accrual – 1 hour for every 30 hours worked
 - All private-sector employees in NY State are eligible; Federal, state and local government employees are **not** covered
 - Uses –
 - 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.
 - For absences needed when an employee or a family member has been the victim of domestic violence and similar crimes
 - Employers must keep payroll records that include the amount of sick leave accrued and used by each employee on a weekly basis for **6 years**.

Notable Leave Laws in Other States

- **New York State**

- Paid Family Leave—

- Leave Entitlement

- 12 weeks of job protected, paid time off

- 67% of the employee's average weekly wage capped at the New York State Average Weekly Wage; continued health insurance

- Family members – spouse, domestic partner, child/stepchild, parent stepparent, parent-in-law, grandparent, grandchild, and sibling (2023)

- Uses –

- Bonding with a newly born, adopted, or fostered child

- Caring for a family members with a serious health condition, or

- Assisting loved ones when a spouse, domestic partner, child or parent is deployed abroad on active military service.

- Employees can waive coverage if they regularly work 20 hours or more per week but not employed for at least 26 consecutive weeks, or if they work fewer than 20 hours per week and will not work 175 days in a 52-week period.

Notable Leave Laws in Other States

- **California**

- Paid Sick Leave—
 - Leave Entitlement
 - Employees accrue 1 hour for 30 hours worked
 - They must receive at least 24 hour or 3 days of leave per 12 months; Certain cities have ordinance that provide up to 6 days or 48 hours
 - Eligibility- an employee must work for the same employer for at least 30 days within a year in California and complete a 90-day employment period before using paid sick leave calif
 - Uses –
 - Recover from physical/mental injury or illness
 - To seek medical diagnosis, treatment, or preventative care
 - To care for a family member who is ill or needs medical diagnosis, treatment, or preventative care
 - For victims of domestic violence
 - No payout upon separation of employment

Notable Leave Laws in Other States

- **California**

- Paid Family Leave–

- Leave Entitlement

- Up to 8 weeks of paid leave; 60-70 percent of weekly wages earned 5-18 months before the claim start date

- Eligibility- part-time or full-time employee of the public or private sector who has contributed to the State Disability Insurance program or a self-employed Californian who has contributed to the Disability Insurance Elective Coverage Program at some point during the previous 18 months with a loss of wages because of leave taken for the applicable reasons

- Uses –

- To care for a seriously ill family member

- Bond with a new child

- Participate in a qualifying event because of a family member's military deployment

- No payout upon separation of employment

FMLA Review

- The FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year.
- **Eligible Employees:** Employees must have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles. Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles for determining compensable hours or work.
 - **Uses-**
 - For the birth and care of the newborn child of an employee;
 - For placement with the employee of a child for adoption or foster care;
 - To care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition; or
 - To take medical leave when the employee is unable to work because of a serious health condition
 - Reasons related to a family member's service in the military, including
 - Qualifying exigency leave - Leave for certain reasons related to a family member's foreign deployment, and
 - Military caregiver leave – leave when a family member is a current servicemember or recent veteran with a serious injury or illness.

FMLA Review

■ FMLA Benefits:

- 12 workweeks of leave in a 12-month period for any FMLA leave reason except military caregiver leave, and
- 26 workweeks of military caregiver leave during a single 12-month period

• USERRA

- Returning servicemembers are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Any period of absence from work due to USERRA-covered service ***counts toward*** an employee's months and hours of service requirements for FMLA leave eligibility.

Scenario

- Alan works at XYZ Corp in Maryland. He was in a terrible auto accident and has been off work since March 12, 2023. He originally took paid sic to recover from his injuries but has still not been released to return to work. His paid sick leave entitlement expired last week, and his FMLA entitlement expired on or about June 12, 2023.
- Alan presents you with a doctor's note today, stating that he needs an additional three months to recover enough to return to work. Does the XYZ have an obligation to give Alan additional leave?
- What if the doctor's note states that he needs an unspecified amount of leave to recover?



ADA Leave Issues

- The ADA prohibits:
 - Discrimination against individuals with disabilities,
 - Discrimination because an individual is regarded as being disabled,
 - Retaliation against individuals who complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- This prohibition covers all aspects of the employment process, including recruitment, application, testing, hiring, assignments, evaluation, disciplinary actions, training, promotion, medical examinations, layoff, recall, termination, compensation, leave and benefits.
- The ADA requires employers to make **reasonable accommodations** to the known physical or mental limitations of a disabled applicant or employee, unless such accommodation would impose an **undue hardship** on the employer.

ADA Leave Issues

- Employers may have to provide unpaid leave as a reasonable accommodation even if:
 - The employer does not offer leave as an employee benefit;
 - The employee is not eligible for leave under the employer's policy; or
 - The employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).
- Reasonable accommodation does not require an employer to provide paid leave beyond what it provides as part of its paid leave policy.
- An employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances
- **Interactive Process**- still applies when an employee requests leave as an accommodation

ADA Leave Issues

- Unlike FMLA, which is a set 12-week entitlement, there is no specific amount of ADA leave to which an employee is entitled
- Two limitations on leave under ADA:
 - Leave cannot be “indefinite”
 - Leave cannot create an undue hardship to the business
- Cases are unclear about when leave becomes “indefinite”
- Employee must provide a return-to-work date, but becomes challenging when the date arrives and the employee is unable to return

ADA Scenario

- ABC Corp. provides employees 7 days of annual leave to use how they want and does not require the employees to explain the reason for the leave. Julie, an employee with severe anxiety and depression, mentions to her supervisor that she is using the leave to meet with her psychiatrist and get additional medication. ABC has never questioned anyone else's use of this leave but informs Julie she should use sick leave instead of this employer-granted leave to see her psychiatrist. ABC designates the leave as sick leave instead.
- Can ABC Corp deny Julie the employer-granted leave?

Pregnancy Leave Issues

- Pregnancy Discrimination Act – requires that employees who need leave due to pregnancy, childbirth, or related medical conditions receive equivalent accommodation as non-pregnant employees “similar in their ability or inability to work”
- Pregnant Workers Fairness Act – extends ADA reasonable accommodation standards to pregnancy
- Sex Discrimination Issues
 - Recovery vs. Bonding Leave
 - Application to Non-Traditional Families/LGBTQ+ employees

Federal Contractor Leave Issues

- Executive Order 13706 requires paid leave to be provided to federal government contractor employees
- Applies to SCA service contracts, DBA constructions contracts, contracts for concessions, contracts in connection with federal property and lands and offering services for federal employees
- Applies to work in the United States only
- Employees accrue 1 hour of leave for every 30 hours worked on or in connection with the contract, up to 56 total hours
 - Issues in calculating accrual for employees who perform both commercial and federal work
- Can carryover 56 hours year to year – no payout on termination required
- Employees can use for their own or family member's medical condition or care, domestic violence related absence

Remote and Hybrid Work

- **Applicable State Leave Laws**- If the employer has employees who work and live in different jurisdictions, the employer must be aware of the leave laws in those jurisdictions to ensure compliance.
 - Paid Sick Leave, COVID Leave, Parental Leave, Family Leave, etc.
 - Many leave laws apply based on the employee's work location.
 - **Example** – The remote employee who works in California.
- Employers with remote employees working in other states need to be aware of the leave eligibility and leave entitlement requirements of those states (or municipalities)
 - If the employee only works in DC 45% of the time, the employee is not eligible for DC sick leave
 - If the employee works in LA, the employee will be entitled to more leave than California requires



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