#### **NOVEMBER 7, 2019**

## UNDERSTANDING JOB-PROTECTED LEAVES OF ABSENCE



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#### POLLING VIA TEXT OR THE WEB

#### **Text Voting**

Step 1: Text JL02 to

**22333** <u>once</u> to join

**Step 2:** Text only response

(A, B, etc.)



#### **Web Voting**

Step 1: Enter url

Pollev.com/JL02 to join

Step 2: Select your

response



#### You're trapped on a desert island. Who do you hope is trapped with you?

Tom Brady
Kanye West
Anderson Cooper
Sofia Vergara
MacGyver
Lassie
Deb Ford

Start the presentation to see live content. Still no live content? Install the app or get help at PollEv.com/app

Managing employees who abuse the system

Communication between operations and HR

Lawfully getting relevant information from employees

Avoiding improper medical related inquiries

Providing and identifying reasonable accommodations

Distinguishing between protected and unprotected absences

Understanding legal obligations

CHALLENGES

#### THE BIG THREE

Americans with Disabilities Act (ADA)

Family and Medical Leave Act (FMLA)

Workers' Compensation Act (WC)

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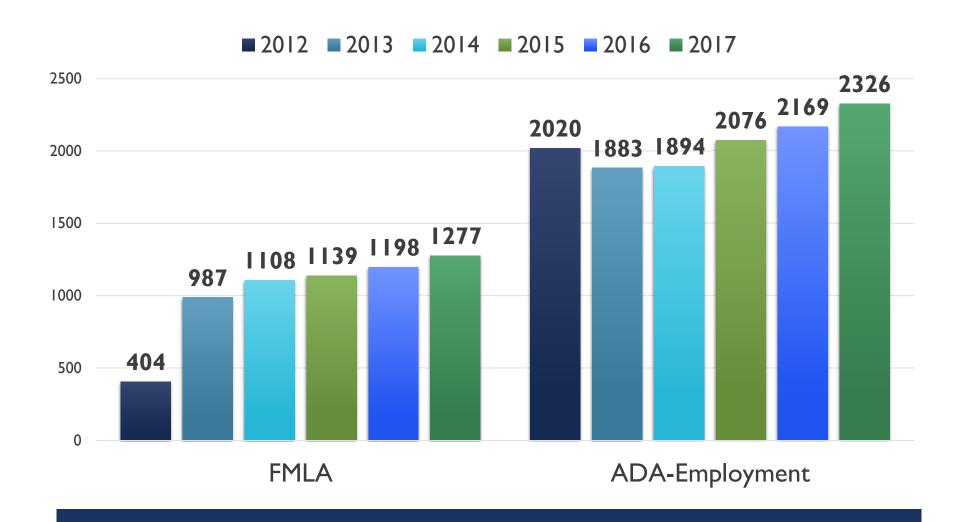
#### **BASIC OBLIGATIONS**

ADA: Prohibits discrimination against qualified individuals with a disability

FMLA: Provides
eligible employees up
to 12 weeks of jobprotected leave due to
serious health
conditions of
employees and family
members; 26 weeks for
military caregiver leave

Basic Obligations

Workers' Comp:
Offers benefits to
employees who are
unable to work due to
an injury "arising out
of" or "in the course
of" employment



#### FEDERAL FMLA & ADA LAWSUITS

# LEAVES OF ABSENCE THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

#### **DEFINITIONS**

#### **Eligible Employee:**

- Employed for at least 12 months
- Worked at least 1,250 hours in past 12 months
- 50 or more employees within 75 miles of worksite

#### Up to 12 weeks of leave in a 12 month period for:

- Childbirth and care for newborn, adoption, foster care placement
- Inability to perform job functions due to serious health condition
- Care for family member with serious health condition
- Qualifying exigencies due to family member's active duty or call to active duty

#### Up to 26 weeks for care of an injured service member

#### **DEFINITIONS**

#### Serious health condition

- Inpatient care and subsequent treatment OR
- Incapacity of >3 consecutive days and subsequent treatment (ex. Physical therapy)
  - Incapacity due to pregnancy or for prenatal care
  - Incapacity due to chronic condition (ex. Asthma)
  - Permanent or long-term incapacity
  - Absence to receive multiple treatments (physical therapy)

#### **DEFINITIONS**

#### FMLA leave is job-protected leave

 Employer cannot discipline employee for FMLA leave (e.g., no-fault attendance policy)

Employees must be reinstated to same/equivalent job after FMLA leave

Employer must maintain employee's health benefits, though employee is still responsible for his/her contribution

#### EMPLOYER NOTICE RESPONSIBILITIES

Employer allowed to make direct contact with healthcare provider who submitted certification to authenticate/clarify after Employee has been given opportunity to cure deficiency

- Employee's supervisor may <u>not</u> contact the healthcare provider only employer's own healthcare provider, HR professional, leave administrator or management official
- Employer should not ask for information beyond what is required for the certification form
  - The US DOL recently found a hospital network's FMLA leave request form required employees to disclose health information beyond the illness for which leave was requested which was not permissible under the FMLA
- DOL WH-380(E): Certification of Health Care Provider Form (For Employee)
- DOL WH-380(F): Certification of Health Care Provider for Family member's Serious Health Condition

## PROPOSED REVISIONS TO US DOL FMLA FORMS

08/05/2019 US DOL published proposed changes to 7 FMLA forms:

- Fewer questions requiring written responses; replaced by statements that can be verified by checking a box
- Layout/style changes to improve readability; color-coded sections specific to employees, employers, health care providers;
- Reorganization of medical certification forms to more quickly determine if a medical condition is a "serious health condition"
- Clarifications to reduce the demand on health care providers for follow-up information
- More information on notification forms to better communicate specific information about leave conditions to employees
- Changes to qualifying exigency certification forms to provide clarity to employees about what information is required
- Changes to military caregiver leave forms to improve consistency and ease of use

Public comment period closed 10/04/2019.

#### MEDICAL CERTIFICATIONS & RECERTIFICATIONS

#### **MEDICAL CERTIFICATIONS**

- Employers may request new medical Certification annually
  - If condition extends beyond a single leave year, e.g., chronic conditions

#### MEDICAL RECERTIFICATIONS

 Employers may request Recertification for continuing, open-ended conditions every 6 months

#### FITNESS-FOR-DUTY (FFD) CERTIFICATION

Employers may demand more than a "simple statement" of ability to return to work

Employer may require employee's healthcare provider to certify that employee can perform his/her essential job duties IF:

- Employer gives employee with the FMLA-leave Designation Notice:
  - A list of essential job duties; and
  - Advises employee that the certification must address employee's ability to perform the essential job functions

Employees may take FMLA leave on a reduced schedule or intermittently (in blocks of time less than the full amount of leave entitlement)

#### **Intermittent/Reduced Schedule Leave:**

- Subject to employer approval
- For placement for adoption/foster care of a child, for birth of a child

#### **Automatic**

 If medically necessary or medical need best accommodated through intermittent/reduced schedule due to pregnancy, serious health condition, serious illness/injury of covered servicemember

Employers can require 30 days' advance notice for "foreseeable" leave or as much notice as "practicable"

- If employee gives fewer < 30 days, employer may delay leave at least 30 days after the date notice was received
- Employer's policies must alert employees of the 30 days' notice requirements for foreseeable leaves

Employee must make reasonable effort to schedule treatment so as not to unduly disrupt employer's operations

Employers may require use of paid leave (e.g., vacation time) before any unpaid FMLA leave

#### **Employers should enforce call-in procedures**

 Establish and enforce reasonable call-in and attendance policies for all absences, as employees on FMLA leave must comply with employer's usual and customary call-in and attendance policies

#### **Transfers**

- Employers are permitted to transfer employee to another position for foreseeable leaves of absence temporarily planned for medical treatment
  - Employee must have equivalent pay and benefits, but not equivalent duties
  - FLSA permits employers under these circumstances to pay exempt employee on an hourly basis without losing exemption

#### RECENT CASES/HYPOTHETICAL SCENARIOS

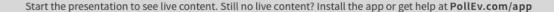
#### **FMLA LEAVE ABUSE**

- A long-time data resource manager for the Massachusetts Water Resources Authority, was granted FMLA leave for foot surgery. The Employee's surgeon reported that the Employee would need 4 to 6 weeks' leave while his foot gradually improved.
- However, the Employee had long-standing plans for an annual family vacation in Mexico which overlapped part of his recovery period. The Employee's doctor cleared him to go to Mexico and the Employee told the Employer.
- When the Employee returned from leave, he was suspended and then terminated for "mispresenting" his injury.
- The Employee brought claims under the FMLA and Massachusetts anti-discrimination laws.

## Was the Employee's termination lawful or unlawful?

**LAWFUL** 

**UNLAWFUL** 



#### UNLAWFUL

- The Massachusetts Supreme Judicial Court affirmed a jury verdict in favor of the Employee for nearly \$2 million in actual damages, punitive damages, and attorneys' fees.
- The jury believed the Employer didn't investigate in good faith because it started its fact-finding with a "presumption of wrongdoing."

DePrato v. Mass. Water Resources Auth. (June 2019)

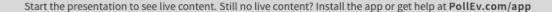
#### **ACTIVITIES WHILE ON FMLA LEAVE**

- A railroad mechanic was granted intermittent FMLA leave due to a hiatal hernia and GERD.
- After seeing an urgent care physician, the Employee submitted a note stating he needed 4 days of intermittent leave. He called the Company hotline daily to report each of these absences.
- During this time, on a day when he was not scheduled to work, the Employee went on a preplanned fishing trip during which he "fished, but mostly sat and stood."
- That evening, he called the hotline to report he would be on FMLA leave for his next shift.
- After learning about the fishing trip, the Employer opened an investigation. The Employer found that the Employee was "using FMLA in a manner that was not consistent with the serious medical condition for which he received FMLA and being dishonest when he requested FMLA."
- The Employee was terminated. He then sued alleging FMLA interference, among other claims.

## Was the Employee's termination lawful or unlawful?

**LAWFUL** 

**UNLAWFUL** 



#### LAWFUL

- The Court granted the Employer's motion for summary judgment on FMLA interference, upholding the legality of the termination.
- The Court held that the railroad "presented evidence that it terminated Plaintiff because he acted in a manner that was inconsistent with his serious medical condition and was dishonest in requesting FMLA leave."

Dunger v. Union Pac. R.R. Co. (June 2019)

Sophie, a receptionist, has been caring for her sister who has Stage 4 cancer. The cancer has metastasized and Sophie will need to take time off to care for her sister as she goes into care and comfort.

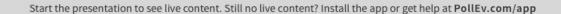
Sophie has been providing care to her sister, and is also the sister's psychological support.

#### HYPOTHETICAL SCENARIO NO. I



YES

NO



NO

- The FMLA does not apply to siblings.
- Family members NOT covered by the federal FMLA include siblings, in-laws, grandparents and other extended family members.
- The FMLA only requires leave to an eligible employee to care for the employee's spouse, child, or parent with a serious health condition.

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Jack has been granted intermittent FMLA leave. His doctor supplied documentation identifying panic attacks and depression and stated that Jack cannot work during times of high stress.

The doctor listed the frequency of episodes as once every 2 to 3 weeks. Each episode would require 2 to 3 days to resolve.

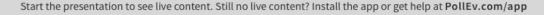
Jack's manager has recently noticed that Jack has a pattern of absences on Fridays and Mondays, usually when he is scheduled to return to work after taking intermittent FMLA leave.

#### **HYPOTHETICAL SCENARIO NO. 2**

## Is there anything Jack's manager can do since Jack has been approved for FMLA leave?

YES

NO



Where there is an identifiable pattern of Friday and Monday absences, the regulations allow an employer to request additional medical certification from the employee's provider to verify that the absences were FMLA-related.

If there is objective evidence of FMLA abuse, there can be a legitimate reason to ask for a second opinion or, depending on the evidence, terminate the employment relationship.

In this specific case, the employer is within its legal rights to request the recertification.

YES

# LEAVES OF ABSENCE AMERICANS WITH DISABILITIES ACT (ADA)

#### THE ADA BASICS

#### An employer cannot discriminate against:

A qualified person with a disability

#### A person is qualified if:

 He/she can perform the essential functions of a job, with or without a reasonable accommodation that does not pose an undue hardship

#### WHO IS A "PERSON WITH A DISABILITY"?

A person with a physical or mental impairment that substantially limits one or more "major life activities"

#### A person who has a record of such an impairment

- Past history of a genuine disability
- Misclassified as having a disability

#### A person who is <u>regarded</u> as having such an impairment

- Past history of a genuine disability
- Misclassified as having a disability
- Has an impairment but does not substantially limit a major life activity
- Does not have an impairment, but is treated as having one

#### WHAT ARE "MAJOR LIFE ACTIVITIES"?

Caring for oneself Breathing Standing Walking Seeing Hearing **Speaking** Bending Lifting Performing Manual Tasks

Eating Sleeping Learning Reading Concentrating Thinking Communicating Working Major Bodily Functions

### WHAT ARE "MAJOR BODILY FUNCTIONS"

- Immune System, e.g. lupus, HIV/AIDS
- Normal Cell Growth, e.g., cancer
- Digestive, e.g., Crohn's disease
- Bowel, e.g., ulcerative colitis
- Bladder, e.g., kidney disease
- Neurological, e.g., epilepsy, multiple sclerosis
- Brain, e.g., bipolar disorder
- Respiratory, e.g., asthma
- Circulatory, e.g., hypertension
- Endocrine, e.g., diabetes
- Reproductive

#### WHAT ARE "ESSENTIAL FUNCTIONS"?

Fundamental job duties – not marginal

#### **Factors to consider:**

- Information on job descriptions
- Amount of time spent performing function

#### 4-STEP ADA ANALYSIS

STEP 1

Does the employee have a disability?

STEP 2

If yes, is the disabled employee a "qualified" individual (can employee perform essential functions of the job with or without reasonable accommodations)?

STEP 3

If yes, what is a reasonable accommodation (interactive process)?

STEP 4

Does it create an undue hardship for the employer?

### STEP 1

## What is a Disability?

- Could be almost anything, depending on the severity:
  - Epilepsy, sleep apnea, paralysis, depression/ anxiety, AIDS, diabetes, infertility, missing limb, Crohn's Disease, migraines, carpal tunnel, alcoholism/ drug addiction, back injuries, neck injuries, asthma, allergies/ scent intolerance, schizophrenia, heart disease, some cancers, hearing loss
  - Could also be temporary issues such as comminuted fracture
- Likely not:
  - Sprains, colds, stomach bug, cosmetic surgery

- "I can't keep up with my work due to my medical condition"
- "I know I shouldn't have yelled at Maya, but lately I just feel so anxious I find myself snapping at people"
- "I have a bad back"
- Employee is often away from work for medical appointments
- You hear from another person that an employee has epilepsy
- An employee explains that he runs past exterior windows to avoid the New England Patriots who have put a hit out on him

#### **AREYOU ON NOTICE?**

## STEP 2

Is the
Disabled
Employee a
"Qualified"
Individual?

- Once you're "on notice" managers should immediately contact HR
- HR should gather up-to-date medical
  - Diagnosis & Duration
  - Work Restrictions
  - FMLA?

## STEP 3

# The Interactive Process

- Employee's request for a reasonable accommodation:
  - Verbal request is sufficient
  - No "magic words"
  - Need only place the employer on notice that they have an impairment and need some assistance
  - Employee not required to disclose particular disability or medical condition
  - Family members or others may request accommodations on behalf of the employee

#### WHAT IS A REASONABLE ACCOMMODATION?

- Workplace modifications
  - Physical/software aid (Dragon software)
  - Alterations to equipment (e.g. keyboards)
- Modified job duties (e.g. limited travel)
- Modified work schedule (e.g. shorter shifts)
- Job restructuring of marginal job functions
- Temporary exemption from rules (e.g. attendance)
- Leaves of absence (reasonable time but not indefinite)
- Reassignment/transfer to vacant position (same shift and pay)
  - Must always look to see if vacant position is available

#### WHAT IS NOT A REASONABLE ACCOMMODATION?

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Tolerating current misconduct
- Excessive poor attendance which is not medically related, especially when late or no notice of missing work is provided
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Changing an employee's supervisor; a "stress-free" workplace

#### **Considerations**

- Employer does not have to choose the best or most expensive option
- No need to eliminate essential functions as an accommodation
- Need not cause others to work harder or longer
- If employee rejects reasonable accommodation, employer has no obligation to continue interactive process

#### REASONABLE ACCOMMODATIONS

#### **BEST PRACTICE**

 Job descriptions play a crucial role in identifying the essential functions of a job and also assisting in identifying reasonable accommodations – keep them updated and accurate

## STEP 4

## "Undue Hardship"

- An "undue hardship" is "an action requiring significant difficulty or expense," when considering various factors, such as:
  - nature and cost of the accommodation
  - employer's financial resources
  - size of employer's workforce
  - impact of the accommodation on employer's business operations (operational impact generally most important factor)
- A reasonable accommodation should be the least disruptive change to the business that allows the employee to do the job

#### THE ADA AGREEMENT

- Keep a log of all communications with an employee regarding interactive process
- Memorialize all agreed-upon, trial, temporary reasonable accommodations with an agreement
  - Confirming restrictions
  - Dates/content of interactive process discussions
  - Description of accommodations provided
  - Beginning/end dates
  - Affirm accommodations are temporary and subject to discontinuation/change if Employee is unable to adequately perform job, or Employer's needs not met.

#### FITNESS-FOR-DUTY STANDARD UNDER THE ADA

Employer may require FFD examination for return from medical leave if employer has a reasonable belief that:

- The employee's present ability to perform essential job functions will be impaired, or
- The employee will pose a direct threat due to a medical condition

#### WHAT IS A REASONABLE BELIEF BASED ON OBJECTIVE EVIDENCE?

### According to the EEOC, an employer might:

Observe performance problems and reasonably attribute them to a medical condition

Receive reliable information from a credible third party that an employee has a medical condition

Observe
symptoms
indicating that an
employee may
have a medical
condition that will
impair his or her
ability to perform
essential job
functions or pose
a direct threat

#### WHAT IS A "DIRECT THREAT"?

"Direct threat" means a "significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation"

Must be based on the best available objective medical evidence that relies upon the most current medical knowledge

 Medical information must be "job-related and consistent with business necessity"

#### Factors to consider in making direct threat determinations:

- Severity of harm
- Likelihood of harm
- Imminence of harm

## RECENT CASES/HYPOTHETICAL SCENARIOS

#### EXTENDED LEAVE AS AN ACCOMMODATION

- A hospital nurse, took FMLA leave for several months for issues with her esophagus rendering her unable to speak.
- She was unable to return to work when expected and was granted an additional week of personal leave.
- The Employee's doctor submitted a note stating the Employee was "unable to perform her current line of work for an indefinite amount of time." The Employee requested additional leave until she was able to return, presumably some point after an appointment with a specialist scheduled in 20 days.
- The Employer denied the Employee's request for additional leave and terminated her because it needed to fill the position.

## Was the Employee's termination lawful or unlawful?

**LAWFUL** 

**UNLAWFUL** 



#### LAWFUL

- The Court ruled in favor of the Employer because indefinite leave is not a reasonable accommodation.
- The Court held that even if the Employee's request for additional leave could be construed as request for leave for a finite period (i.e., until her medical specialist appointment and no longer), the request was still not reasonable because the Employee could not establish that this proposed accommodation was reasonably likely to enable her to return to work.

Easter v. Arkansas Children's Hospital (Oct. 2018)

- Annie works on the assembly line. Her output has significantly slowed down. Also, she is making mistakes.
- When questioned about her poor performance, Annie tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

#### HYPOTHETICAL SCENARIO NO. 3

## What should the Employer do?

Nothing

Give Annie a warning about her performance issues

Begin the interactive process

Lupus is a disability under the ADA, so the employer should immediately engage in the interactive process to determine if there is a reasonable accommodation that can be made, or if any undue hardship exists.

**ANSWER: C** 

Six months ago, Kate's manager heard Kate tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, Kate still comes to work every day and performs her duties in her normal manner.

#### HYPOTHETICAL SCENARIO NO. 4

### What should the Employer do?

**Nothing** 

Ask Kate if she needs to take leave

Ask Kate if she needs an accommodation  The employer should do nothing because there have been no performance issues and no requests for accommodation.

**ANSWER: A** 

#### REASSIGNMENT AS AN ACCOMMODATION

- The Employee, a supervisor at a bank call center, was responsible for fielding escalated calls from customers.
- The Employee developed anxiety, ultimately taking medical leave to address his increasing symptoms.
- The Employee's physician opined that Employee's job aggravated his anxiety and recommended Employee be reassigned to a position that did not include that task. The physician also recommended that Employee stay out of work until such an accommodation was put in place.
- The Employer denied the request and indicated it was willing to discuss "other, more reasonable accommodations" once Employee returned to work in his current position.
- The Employee quit.

## Was the Employer's denial of the Employee's requested accommodation lawful or unlawful?

LAWFUL

UNLAWFUL



#### ANSWER: WHO KNOWS?

- After the Employee quit, he filed a charge of discrimination with the EEOC.
- In July 2019, the EEOC announced that it filed suit against the bank, seeking back pay, compensatory and punitive damages, and injunctive relief, after first attempting to reach a pre-litigation settlement through its conciliation process.
- Since suit has only recently been filed, there is not yet an outcome.

EEOC v. Citizen's Bank (July 2019)

- The ADA explicitly recognizes reassignment to a vacant position as a type of reasonable accommodation
- As an accommodation "of last resort," the employer has no obligation to consider reassignment to another position until it is determined that the employee cannot be accommodated in their own position
- Reassignment accommodation is limited to jobs that are currently vacant or the employer knows will become vacant in the near future
- The law is unsettled as to whether reassignment means allowing the disabled employee to compete for a vacant position, or whether the employer must prefer a minimally qualified disabled candidate over other, more qualified, candidates.

#### REASSIGNMENT ACCOMMODATION

## LEAVES OF ABSENCE WORKERS' COMPENSATION

#### RETURN TO WORK

- New Hampshire law requires employers (5 or more employees) to reinstate an injured worker:
  - To the employee's former position if the position exists and is available
    - A position is "available" even if it was filled by a replacement during the injured employee's absence
    - If the position was eliminated, must reinstate to another existing position which is vacant and suitable

#### **AND**

- the employee is not disabled from performing the duties with reasonable accommodations
- Unlike FMLA, employer has no latitude to offer employee a substitute position
- Right to reinstatement continues for 18 months from date of injury

Nathan has been out of work for 18 months due to a workers' compensation injury. He has been certified by his attending physician as being able to return to work. The Company is concerned about Nathan's ability to perform his job duties once he returns to work, and would like to require Nathan to take a functional capacity exam before returning work.

#### HYPOTHETICAL SCENARIO NO. 5

## Can the Company require Nathan to take a functional capacity exam?

YES

NO



The New Hampshire Workers' Compensation statute states that if an employee's attending physician states that the employee can return to work, the employer cannot get a second opinion.

NO

Duke worked for the Hospital as an LNA. He was repositioning a patient in bed and felt a pull in his left shoulder. Duke's injury was covered under the workers' compensation statute. Duke treated his injury with physical therapy and ultimately surgery. Based on his work restrictions as a result of the injury, Duke was out of work for the statutory 18-month period. At the conclusion of the 18-month period, Duke was still unable to return to his position as LNA.

#### HYPOTHETICAL SCENARIO NO. 6

# Can the Hospital terminate Duke because the 18-month return-to-work period has expired?

YES

NO



Policies of blanket termination at the end of the 18-month period are not recommended.

Under NH's Workers' Compensation Law, if an employee cannot return to his/her original position within 18 months of the date of the original injury, the employee is no longer protected by the law. Therefore, theoretically, the person can be separated from employment.

However, the potential exists that the employee, depending on the type of injury, may still be afforded the protections of the ADA and could be entitled to a reasonable accommodation, including additional leave time.

In this case, further examination is required to determine how much longer Duke would need to be out of work, and if there is any way to accommodate his extended leave.

## NOT RECOMMENDED

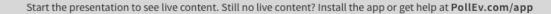
- Miguel suffered a workers' compensation injury and has been out of work for 6 months. He works in a manual labor position requiring great physical exertion on a daily basis. Miguel is cleared to return to work on light duty, with a lifting restricting on 10 lbs., as well as sitting and standing restrictions.
- The Company does not have any light duty positions that would meet Miguel's restrictions. The company has one "desk job," that of office manager, which is filled by a long-term, good employee.

## HYPOTHETICAL SCENARIO NO. 7

# Does the Employer need to create a light-duty position so Miguel can return to work?

YES A

NO B



The statute states, in part:

All employers with 5 or more employees shall develop temporary work opportunities for injured employees.

Although the statute itself appears to mandate creation of light duty positions, the NH Department of Labor has taken the position that light duty is required only if it already exists.

If there is no light duty work, the employee will continue to receive workers' compensation benefits until being able to return to work.

NO

# LEAVES OF ABSENCE NEW LEAVE LAWS

## MAINE

## VETERANS LEAVE LAW (EFF. 09/19/2019)

- Employers must provide veterans with time away from work to attend scheduled appointments at Department of Veterans Affairs medical facilities
  - Employees allowed to use paid leave, if available
  - Employees allowed to take unpaid leave, if no paid leave available
- Employees required to give their employer notice of the appointment "as soon as reasonably possible"

## EARNED EMPLOYEE LEAVE ACT (EFF. 01/01/2021)

- Qualifying Employers: with least 10 employees who work more than 120 hours in a calendar year (other than seasonal workers)
- Amount of Leave: One hour of paid leave for every 40 hours an employee works up to maximum of 40 hours paid leave annually
- Accrual: Employees begin accruing earned pay leave at the start of employment and are eligible to use the accrued paid leave after 120 days of employment.
- Notice: Employees are required to provide "reasonable notice" of the intent to take leave, absent an emergency or other sudden necessity.
  - The law does not define "reasonable notice" but states that "use of leave must be scheduled to prevent undue hardship on the employer"
- Pay/Benefits During Leave: Employees must be paid the same base rate of pay earned prior to taking leave and receive the same benefits as provided for other types of paid leave pursuant to the employer's "established" policies. The taking of paid leave may not result in the loss of any accrued employee benefits.
- Exception: The law does not apply to an employee subject to a collective bargaining agreement during the period between January 1, 2021, and the expiration of the agreement.

## PROTECTIONS FOR PREGNANT WORKERS (09/19/2019)

- Creates broad protections for workers, covering any limitation of an employee's ability to perform their job due to pregnancy, child birth, or related medical conditions including lactation
- Employers are required to provide reasonable accommodations for pregnancy-related conditions, which may include: more frequent or longer breaks, temporary modifications in work schedules, seating or equipment, temporary relief from lifting requirements, temporary transfer to less strenuous or hazardous work, and provisions for lactation
- Employers may only avoid providing these accommodations if they are able to demonstrate that the accommodation proposed would impose an undue hardship on the operation of their business

## **MASSACHUSETTS**

## AMENDED PAID FAMILY & MEDICAL LEAVE (PFMLA)

### The Basics

- Starting 2021, Massachusetts workers will be entitled to paid family and medical leave
- The state will pay benefits from a state trust fund
- The state trust will be funded through employer contributions based upon worker earnings
- The costs of the employer contributions may be passed to the employee through payroll deductions (with some limitations)
- Notices due to employees by September 30, 2019
- Employer contributions to start October 1, 2019
- Deadline for applying for 'private plan' exemption December 20, 2019

## KEY DATES (AMENDED)

#### September 30, 2019 (extended from June 30, 2019)

Employee notifications distributed and acknowledgements received

#### October 1, 2019 (extended from July 1, 2019)

Employers must begin accruing 0.75% (changed from 0.63%) of each employees' wages (up to a cap) to be contributed to state trust fund at the end of each quarter.

#### December 20, 2019 (extended from September 20, 2019)

- Last day to apply for Private Plan exemption for October to December 2019 quarter (retroactive for this quarter only)
  - If you intend to apply for Private Plan exemption, still obligated to provide employee notices

#### **January 31, 2020**

The initial payment for the first quarter of contributions must be made to the state by January 31, 2020.

#### **January 1, 2021**

- Paid family leave benefits available for bonding with a new child, and service member-related events
- Paid medical leave benefits available for serious personal health conditions

#### **July 1, 2021**

Paid family leave benefits available for the care of a family member with a serious health condition

### LEAVE ENTITLEMENT UNDER THE PFMLA

- 12 weeks of paid leave to care for a family member with serious health condition (SHC) or for birth/adoption
- 20 weeks for employee's own serious health condition
- 26 weeks for family member's serious health condition resulting from active military duty

#### Note:

- There is a seven-day "waiting period" before payment starts, but this counts toward the total amount of leave
- Employees may use other accrued paid time off such as sick, vacation, etc.
- Leave is capped at 26 weeks in a single benefit year even if more than one qualifying event
- Leave runs concurrently with FMLA and MA Parental Leave Law, if eligible
- Employees receive health coverage as if active during leave



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## THANK YOU!

### ABOUT DEBRA WEISS FORD

- Licensed in New Hampshire, Massachusetts and Maine
- AV (Preeminent) Martindale-Hubbell Peer Review Rating, the highest rating in legal knowledge, communication skills, and ethical standards
- "Top Rated Lawyer" by American Lawyer Media and Martindale-Hubbell
- Best Lawyers in America (Labor & Employment Law), Management Lawyer of the Year
- Business New Hampshire Magazine, Best Labor and Employment attorney in New Hampshire
- Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- Elected as a Fellow to the College of Labor and Employment Lawyers
- Listed in New England Super Lawyers (Top 100 attorneys in New England)
- Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- Listed in The Legal 500 (United States) for Workplace & Employment Counseling
- Listed in Chambers USA as one of the top Lawyers in Labor and Employment

## ABOUT JACKSON LEWIS P.C.

- Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- More than 900 attorneys in 61 locations nationwide
- Current caseload of over 6,000 litigations approximately 800 class actions
- Founding member of L&E Global
- A leader in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves

## PRACTICE AREAS



Affirmative Action Compliance and OFCCP Defense

Class Actions and Complex Litigation

Collegiate and Professional Sports

**Corporate Diversity Counseling** 

Corporate Governance and Internal Investigations

Disability, Leave and Health Management

**Employee Benefits** 

General Employment Litigation
• e-Discovery

**Government Relations** 



**Immigration** 

**International Employment Issues** 

**Labor and Preventive Practices** 

Non-Competes and Protection Against Unfair Competition

**Privacy, Data and Cybersecurity** 

Wage and Hour

White Collar and Government Enforcements

**Workplace Safety and Health** 

**Workplace Training** 

## **INDUSTRIES REPRESENTED**

