

EMPLOYEE LEAVE AND WORKPLACE ACCOMMODATIONS: COMMON EMPLOYER PITFALLS & LEGAL UPDATE

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | **PRUET**

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ROAD MAP

- ▶ Current trends
- ▶ Interplay between
 - ▶ Family and Medical Leave Act
 - ▶ Families First Coronavirus Response Act
 - ▶ Americans With Disabilities Act
- ▶ Retaliation Prevention

COVID-19 EMPLOYMENT CLAIMS

- ▶ Over 800 COVID-19 related cases filed by employees since March 2020
 - ▶ ~25% involve leave and work-from-home issues
 - ▶ ~25% involve retaliation or whistleblower issues
- ▶ Relatively few filed in North or South Carolina currently

CURRENT COVID CASES: SOUTH CAROLINA

- ▶ Estling v. GIDB Tiki d/b/a Tiki Hut (filed September 8, 2020 in D.S.C.)
 - ▶ Failure to provide paid leave required by FFCRA
- ▶ McJunkin v. Lake Keowee Chrysler Dodge Jeep Ram, LLC (filed July 22, 2020 in D.S.C.)
 - ▶ Failure to provide paid leave required by FFCRA
 - ▶ Retaliation/termination of employment

CURRENT COVID CASES: NORTH CAROLINA

- ▶ Bishop v. TRP Construction Group (filed August 13, 2020 in W.D.N.C.)
 - ▶ FFCRA interference
 - ▶ Retaliation/termination of employment
- ▶ Gates v. Lejeune Motor Company d/b/a Lejeune Honda Cars (filed July 23, 2020 in E.D.N.C.)
 - ▶ FFCRA interference
 - ▶ Retaliation/termination of employment
 - ▶ Wage payment

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

BASICS

- ▶ Paid sick leave and FMLA expansion
- ▶ Employers with fewer than 500 employees
- ▶ Effective April 1, 2020
- ▶ Currently expires December 31, 2020
- ▶ Regulations and FAQ page updated September 16, 2020

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

BASICS FOR PAID SICK LEAVE

- ▶ Employer: fewer than 500 employees
- ▶ No waiting period: eligible 1st day of employment (but only when work is available) (E-FMLA – 30 days)
- ▶ Health care providers/emergency responders may be excluded
- ▶ Paid Leave:
 - ▶ Full-time employees: 80 hours
 - ▶ Part-time employees: hours equal to two-week average
- ▶ Posting Requirement

QUALIFYING TRIGGERS - PAID SICK LEAVE

Employee is unable to work or telework because employee:

1. is under a government quarantine or isolation order due to COVID-19
2. has been advised by doctor to self-quarantine because of COVID-19
3. is experiencing COVID-19 symptoms and seeking medical diagnosis
4. is caring for an individual subject to quarantine or isolation order or advised to self-quarantine because of COVID-19
5. **needs to care for a child because daycare or school is closed and childcare is unavailable due to COVID-19 precautions (E-FMLA)**
6. Is experiencing other similar conditions (as determined by HHS)

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

VARIED PAY DEPENDS ON REASON FOR LEAVE

- ▶ Full pay capped at \$511/day up to \$5,110 (Reasons 1-3)
 - ▶ Subject to COVID-19-related quarantine or isolation order
 - ▶ Advised to self-quarantine by health care provider
 - ▶ Symptoms of COVID-19 and seeking diagnoses
- ▶ 2/3 pay capped at \$200/day up to \$2,000 (Reasons 4-6)
 - ▶ Caring for individual subject to COVID-19-related quarantine or isolation order
 - ▶ Caring for individual advised to self-quarantine due to COVID-19
 - ▶ Substantially similar circumstances
 - ▶ Caring for son or daughter if school or child care closed due to COVID-19 precautions (EFMLA)

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

FMLA EXPANSION

- ▶ Employee is unable to work or telework because caring for son or daughter if school or child care closed due to COVID-19 precautions
 - ▶ Employees who choose to keep children home are not eligible for FFCRA leave
- ▶ Employer: fewer than 500 employees
- ▶ Waiting period: 30 days of employment

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

FMLA EXPANSION – PAID CHILDCARE LEAVE

- ▶ 12 weeks total
 - ▶ First 2 weeks unpaid (but may be covered as emergency paid sick leave)
 - ▶ Next 10 weeks are paid
 - ▶ 2/3 regular rate of pay times hours normally scheduled to work
 - ▶ Capped: \$200/day, \$10,000 total
- ▶ Paid Leave:
 - ▶ Full-time employees: 80 hours
 - ▶ Part-time employees: hours equal to two-week average
- ▶ Intermittent with employer approval

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

TEMPORARY DRAMATIC FMLA EXPANSION

- ▶ Eligible employees: employed at least 30 days
[NOT 12 months/1250 hours]
- ▶ Eligible employers: fewer than 500 employees
[NOT 50 employees/75 mile radius]

SIGN OF THINGS TO COME?

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

OTHER IMPORTANT MISCELLANEOUS PROVISIONS

- ▶ Tax credit relief (IRS Forms and documentation)
- ▶ Documentation (very little for sick leave/school closures)
- ▶ Remote work/telework permitted and ineligible for FFCRA leave
- ▶ DOL encourages flexibility and dialogue

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

SEPTEMBER 2020 REVISIONS

- ▶ Intermittent Leave
 - ▶ Prior rule: leave could not be taken intermittently unless employer agreed
 - ▶ New rule: employee can take multiple continuous leaves for each qualifying reason
 - ▶ Hybrid school closures addressed
- ▶ Health Care Providers
 - ▶ Prior rule: exclude any employees
 - ▶ New rule: only providers/patient care positions excluded

CONFIRMATION: USE OF FFCRA LEAVE ONLY WHERE WORK IS AVAILABLE

FAMILY AND MEDICAL LEAVE ACT

BASIC CONCEPTS

- ▶ Unpaid, job-protected leave for specified family and medical reasons, with group health insurance as if the employees were not on leave
- ▶ Covered Employers: A private company with at least 50 employees for at least 20 workweeks in the current or preceding calendar year.
- ▶ Eligible employees: Employees who have worked for the company for at least 12 months before requesting the leave and who have worked at least 1,250 hours in those 12 months
- ▶ May be continuous or intermittent

FMLA QUALIFYING EVENTS

12 WEEKS IN A 12 MONTH PERIOD

- ▶ Birth of a child and to care for the child within a year of birth;
- ▶ Placement with the employee of a child for adoption or foster care and to care for the child within one year of placement;
- ▶ Care of the employee's spouse, child, or parent who has a serious health condition;
- ▶ A serious health condition that precludes the employee from performing the functions of the job;
- ▶ Any qualifying exigency arising out of the employee's spouse, child, or parent being on covered active military duty

FMLA QUALIFYING EVENTS

26 WEEKS IN 12 MONTHS

- ▶ Military Caregiver Leave
 - ▶ Care of a covered service member with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the service member

FMLA

SERIOUS HEALTH CONDITION

- ▶ An FMLA “serious health condition” is “an illness, injury, impairment, or physical or mental condition that involves. . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider.”
 - ▶ Incapacity (3 days) and treatment
 - ▶ Overnight stay in a hospital
 - ▶ Chronic conditions
 - ▶ Permanent conditions
 - ▶ Conditions requiring multiple treatments
 - ▶ Pregnancy/prenatal care

FMLA

CARE FOR A RELATIVE

- ▶ No requirement for a covered relative with a serious health condition receiving “treatment” in order to need “care.”
- ▶ “Care” is not defined in the FMLA or in the regulations
- ▶ Regulations discuss what might be required in a certification of a health care provider—including certification that the eligible employee, “is needed to care for” the qualified person with a serious health condition

FMLA NOTICE

- ▶ When an employee requests FMLA leave or an employer acquires knowledge that leave may be for an FMLA-qualifying reason, the employer must:
 - ▶ Provide the employee with specific notice regarding eligibility for FMLA leave and rights and responsibilities under the FMLA; and
 - ▶ Notify employee whether leave is designated as FMLA leave and the amount of leave that will be deducted from the employee's FMLA entitlement
- ▶ No "magic language" required

FMLA VIOLATIONS

- ▶ Employers may not
 - ▶ Interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the FMLA.
 - ▶ Discharge or discriminate against any individual for opposing any practice, or because of the employee's involvement in any proceeding, related to the FMLA

AMERICANS WITH DISABILITIES ACT

EMPLOYMENT LAW BASICS

- ▶ Prohibits discrimination against employees with disabilities and requires employers to provide reasonable accommodations for employees who are qualified individuals with disabilities.
- ▶ Imposes an affirmative obligation on employers through its “interactive process.”

ADA

KEY COVERAGE CONCEPTS

- ▶ Covered employers: Private employers with 15 or more employees must comply with the ADA.
- ▶ Qualified employees: The ADA protects “qualified employees with disabilities.”
- ▶ “Qualified” individuals are those who have the skill, experience, education, and other job-related requirements for the position sought or held, and who can perform the essential job functions of the position, with or without reasonable accommodation.

ADA

KEY COVERAGE CONCEPTS

- ▶ “Employees” are persons employed by an employer.
- ▶ Fact-specific analysis depends on if the employer controls the means and manner of the worker’s work performance.
- ▶ “Disability” means a person who either:
 - (1) Has a physical or mental impairment that substantially limits one or more major life activities;
 - (2) Has a record of a physical or mental impairment that substantially limits one or more major life activities; or
 - (3) Is regarded as having such a physical or mental impairment.

ADA

REASONABLE ACCOMMODATIONS

- ▶ A “reasonable accommodation” is an adjustment of a job, the work environment, or the way things are done to give qualified individuals with a disability an equal employment opportunity.
- ▶ Triggered when know/should know of potential need: no magic words

ADA

INTERACTIVE PROCESS

- ▶ Purpose:
 - ▶ Analyze job functions to establish essential/non-essential tasks
 - ▶ Identify the barriers to job performance by consulting with the employee to learn his/her precise limitations
 - ▶ Explore the types of accommodations which would be most effective
- ▶ Limitations: No duty to
 - ▶ Make a reasonable accommodation if the accommodation would impose an “undue hardship” upon the operation of the business
 - ▶ Reallocate “essential” functions of the position
 - ▶ Choose the specific accommodation requested by the employee

ADA

FREQUENTLY REQUESTED REASONABLE ACCOMMODATIONS

- ▶ Make existing facilities readily accessible (ramps)
- ▶ Job restructuring of non-essential functions
- ▶ Part-time or modified work schedules (earlier start time)
- ▶ Reassignment to a vacant position
- ▶ Modification of workplace policies (eating at desk)
- ▶ Adjustment of location (work from home)
- ▶ Job-protected leave

ADA

INTERACTIVE DIALOGUE: MEDICAL INQUIRIES

- ▶ When it comes to ADA and reasonable accommodations
 - certain medical inquiries permitted
- ▶ Reasonable inquiry/legitimate business reason
- ▶ Get information from health care provider (e.g., questionnaire)
 - ▶ Provide cover letter and job description
 - ▶ Determine if employee is qualified individual with disability
 - ▶ Determine functional limitations as they relate to the position/job
 - ▶ Determine permanence/timing of limitations/scope of limitations
 - ▶ Probe for reasonable accommodations and options/alternatives

FMLA/ADA INTERSECTION ON LEAVE

- ▶ FMLA leave ends after 12 (or 26) weeks (or employee ineligible)
- ▶ And not all FMLA eligible employees are qualified individuals with disabilities
- ▶ ADA may require further job-protected leave as a reasonable accommodation
 - ▶ Not a leave law, but ADA has been interpreted, without much guidance, as to requiring leave as a reasonable accommodation
- ▶ Obligations under ADA must be considered before terminating employment after FMLA is exhausted or if ineligible for FMLA

EXTENDED/UNPAID LEAVE UNDER ADA

- ▶ Do separate analysis under ADA and FMLA
- ▶ ADA technically not a “leave law” but extended leave might be reasonable accommodation
 - ▶ EEOC: “when it enables an employee to return to work following the period of leave”
 - ▶ EEOC mandates that employer “consider providing leave to an employee with a disability” if the employee requires it in order to return to work
 - ▶ True even if employer policy for leave or FMLA leave exhausted (individualized assessment)
- ▶ EEOC: leave must be granted unless leave would cause the employer undue hardship
 - ▶ “significant difficulty or expense” – fact specific question that looks at overall resources of and impact on operations
 - ▶ Look at length of leave, frequency of leave, alternatives to leave, etc.

CHECKLIST FOR HANDLING ADA LEAVE REQUESTS

- ✓ Determine if FMLA Eligible/Applies
- ✓ Do ADA Analysis
- ✓ Have Employee Submit ADA Questionnaire Form from Treating Physician
- ✓ Consider Whether Other Reasonable Accommodations Are Effective Other than Leave
- ✓ Consider Whether Leave Request is Definite or Excessive
- ✓ Do Undue Hardship Analysis: CONTEMPERANEOUS NOTES TO FILE
- ✓ Have Employee Check-in/Recertify Need when Appropriate
- ✓ Monitor Return to Work Dates
- ✓ Require Fitness for Duty Certificate Before Returning to Work
- ✓ Phrase Termination Language Carefully

ADA & COVID

DIRECT THREAT: WHEN CAN YOU REQUIRE LEAVE

- ▶ Individuals with a disability who pose a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
- ▶ Direct threat: Significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation

ADA & COVID

DIRECT THREAT

- ▶ Assessments must be based on objective, factual information, not on subjective perceptions or irrational fears
- ▶ Regulations identify four factors to consider
 - ▶ the duration of the risk
 - ▶ the nature and severity of the potential harm
 - ▶ the likelihood that potential harm will occur and
 - ▶ the imminence of the potential harm
- ▶ As of March 2020, the COVID-19 pandemic meets the direct threat standard (until health authorities revise assessment of spread and severity)

ADA & COVID

MEDICAL EXAMINATIONS IN A PANDEMIC

- ▶ Only during a pandemic, EEOC guidance permits:
 - ▶ Temperature checks
 - ▶ Sending employees home with COVID-19 or associated symptoms
 - ▶ Asking employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19
 - ▶ Follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons
 - ▶ Delay start of applicants who have COVID-19 or associated symptoms
 - ▶ Withdraw a job offer when the employer needs applicant to start immediately but the applicant has COVID-19 or associated symptoms

ADA PANDEMIC COMPLIANCE

RETURN TO WORK/FITNESS FOR DUTY

- ▶ EEOC permits employers to require a doctor's note certifying fitness to return to work
- ▶ Guidance notes that doctors and other health care providers may be too busy to provide this documentation, in which case employers should consider accepting forms, stamps, or email certifications

ADA-COMPLIANT

PRE-EMPLOYMENT EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- ▶ If schools or day-care centers were closed, you would need to care for a child;
- ▶ If other services were unavailable, you would need to care for other dependents;
- ▶ If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- ▶ If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ , NO _____

CURRENT CASES

FACTS ALLEGED

Estling v. GIDB TIKI, LLC d/b/a Tiki Hut

- ▶ Manager at Tiki Hut was required to quarantine or isolate because he was
 - ▶ In proximity to a person experiencing COVID symptoms for whom he was helping to care
 - ▶ Experiencing COVID symptoms
 - ▶ Tested positive for COVID
 - ▶ Advised to be in quarantine
- ▶ No notice of rights or paid leave was provided

CURRENT CASES

FACTS ALLEGED

McJunkin v. Lake Keowee Chrysler Dodge Jeep Ram LLC

- ▶ Plaintiff missed 16 days of work between March 1 and June 29, 2020.
 - ▶ April, missed five days of work because daycare closed due to pandemic
 - ▶ June (?) 22-30, missed seven days while ill with COVID-like symptoms, instructed to stay home by physician
- ▶ Employment terminated July 1: documentation noted “employee was out sick under medical instructed quarantine”
- ▶ No notice of rights or paid leave was provided

CURRENT CASES

FACTS ALLEGED

Bishop v. TRP Construction Group, LLC

- ▶ Plaintiff started work March 16, 2020 as a foreman. He and his wife have four children aged seven and younger
- ▶ Saturday, April 4 spouse began experiencing COVID symptoms
- ▶ April 5: took spouse to ER, where they were turned away for lack of tests and instructed to self-quarantine
- ▶ April 6: notified supervisor he was not reporting to work due to spouse experiencing COVID symptoms
- ▶ April 7: supervisor requested additional information about exposure
- ▶ April 8: employment terminated, leave not paid

CURRENT CASES

FACTS ALLEGED

Gates v. Lejeune Motor Company d/b/a Lejeune Honda Cars

- ▶ Plaintiff started work March 2018
- ▶ March 31, 2020, notified HR and GM via email that effective April 2, she needed leave because her son's school closed due to COVID
- ▶ GM requested to meet with plaintiff and indicated the owner was "furious" with request for leave and suggested plaintiff take unemployment
- ▶ Later, GM told plaintiff not to worry about previous statements, she could receive 2/3 pay but "you need to still be involved with the dealership while you are out."
- ▶ Plaintiff notified HR who told her to stay involved as much as she could because GM was unhappy

CURRENT CASES

FACTS ALLEGED

Gates v. Lejeune Motor Company d/b/a Lejeune Honda Cars

- ▶ Plaintiff performed intermittent work for which she received no compensation
- ▶ May 8, GM met with plaintiff and informed her she was being removed from position because of poor performance, but she could remain employed if she took a demotion with significantly lower compensation
- ▶ Sales Manager told plaintiff that GM told him that anyone who took off work during the pandemic would not have a job when they returned
- ▶ May 9, plaintiff declined demotion and pay cut
- ▶ May 11, plaintiff provided accounting of dates, times, and tasks performed on leave

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

Alleged: FMLA interference, FMLA and ADA Retaliation

- ▶ Plaintiff hired in 2013, requested intermittent FMLA in 2015 due to severe anxiety
- ▶ Promoted in 2017 to a position where responsibilities required occasional early arrival or departure
- ▶ In graduate school and had a son with asthma
- ▶ Children's appointments regularly took place within work hours, and employer granted personal, non-FMLA leave for those absences and her graduate work
- ▶ May 2017, intermittent leave was renewed and approved for another year
- ▶ June 2017, employer withdrew accommodations of non-FMLA absences and departures, and Plaintiff indicated she would seek additional intermittent FMLA to cover them

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

- ▶ Supervisor began demonstrating hostility toward need for leave, excluded plaintiff from meetings and stopped mentoring her in June 2015
- ▶ July 2017, plaintiff and children were in a car accident, and plaintiff reported concerns about disability discrimination and retaliation to HR
- ▶ Plaintiff's anxiety and depression worsened, resulting in hospitalization in August 2017, and FMLA was approved for her partial inpatient care
- ▶ September 14, 2017, plaintiff and others informed positions would be eliminated in a RIF effective November 2017
- ▶ Another Supervisor not on FMLA leave without any ADA accommodations was demoted rather terminated.

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

Bradford v. Molina Healthcare of South Carolina LLC, 2020 WL 373194, Civil Action 2:18-cv-649 (D.S.C. January 23, 2020)

- ▶ Held:
 - ▶ Summary judgment granted on FMLA interference because plaintiff received all leave requested
 - ▶ Summary judgment denied on retaliation claims

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

- ▶ Plaintiff diagnosed in August 2014 with hypertension, severe sleep apnea, vertigo and heart arrhythmia (and also experienced sleepiness, dizziness, anxiety)
- ▶ September 2014, emergency pacemaker surgery
- ▶ Requested accommodation of working from home, which was allowed for 2.5 years
- ▶ February 2017, Employer discontinued work from home program and required all employees to return to workplace
- ▶ March 2017, plaintiff raised concerns about needing to work from home as a disability accommodation

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

- ▶ Plaintiff resubmitted request to work from home and medical documentation and authorized employer to speak with his doctor about his medical condition and needs.
- ▶ June 2017, Employer denied accommodation request
- ▶ July 2017, Employer sent letter stating plaintiff must return to the office by August 11, 2017 or seek short term disability and offering to explore other reasonable accommodations
- ▶ Plaintiff returned to the office for two weeks, but contended he was unable to continue so resigned to pursue short term disability.
- ▶ Defendant contended plaintiff refused to consider other accommodations, and Plaintiff alleges Defendant made no further efforts to accommodate.

CURRENT CASES

RIPPED FROM THE HEADLINES (OR RECENT CASE LAW)

Cannon v. Charter Communications, LLC, 2020 WL 3128598, Docket No. 3:18-cv-657-FDW-DCK (W.D.N.C. June 12, 2020)

- ▶ Held:
 - ▶ Motion to dismiss denied. Construing complaint liberally, plaintiff alleged all elements of failure to accommodate claim
 - ▶ Plaintiff suffers from a disability,
 - ▶ Defendant had notice,
 - ▶ Plaintiff could perform the position with a reasonable accommodation, and
 - ▶ Defendant refused to accommodate.



NEXT CHALLENGE. NEXT LEVEL.

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