Leaves of Absence in 2022: Out with the Old, In with the New

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FMLA Refresher

- FMLA provides leave for a serious health condition:
  - Overnight hospitalization
  - 3-day absence + treatment (doctor visit + prescription or 2 doctor visits in 30 days)
  - Chronic conditions
  - Employee, parent, spouse, child
- Employee notice
- Intermittent leave
- Plus: Childbirth/bonding leave, military exigency and military caregiver provisions

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What Has Changed?

- Threshold for coverage became 1,000 hours on 1/1/2022.
- Other eligibility requirements remain unchanged.
  - Must have worked for at least 12 months at the time of leave.
- State law incorporates the FMLA by reference.

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What About The FFCRA?

- Expired on 12/31/20
- Allowed to extend leave benefits voluntarily in exchange for credit on employment taxes
- Voluntary extension lapsed on 9/30/21

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Sick Leave Refresher

The *School Code* defines when sick leave can be used:

- Sick leave shall be interpreted to mean personal illness, quarantine at home, or serious illness or death in the immediate family or household.
- "Immediate family" includes parents, spouse, brothers, sisters, children, grandparents, grandchildren, parents-in-law, brothers-in-law, sisters-in-law, and legal guardians.

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What Has Changed?

Childcare Leave:

Previously: Sick leave included up to 30 days for birth, adoption, or placement for adoption.

"We find the most reasonable and consistent reading of the statute is that it allows an employee who experiences a qualifying event to use accumulated paid sick leave at the time of that event, not later at the employee's discretion. We thus hold that under section 24-6, teachers may use up to 30 days of accumulated paid sick leave during the six-week period immediately following the birth. Once that six-week period has elapsed, a teacher may not use her paid sick days for birth unless he or she provides a physician's certificate as set forth in the statute."

Dynak v. Bd. of Ed. of Wood Dale Dist. 7, 164 N.E.3d 1226, 1234, 444 Ill.Dec. 651, 659 (2020)

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What Has Changed?

Effective August 6, 2021:

Sick leave shall also be interpreted to mean **birth, adoption, placement for adoption, and the acceptance of a child in need of foster care**. Teachers and other employees to which this Section applies are entitled to use up to **30 days of paid sick leave** because of the birth of a child **that is not dependent on the need to recover from childbirth**. Paid sick leave because of the birth of a child may be used absent medical certification for up to 30 working school days, which days may be used **at any time within the 12-month period following the birth of the child**. The use of up to 30 working school days of paid sick leave because of the birth of a child **may not be diminished as a result of any intervening period of nonworking days** or school not being in session, such as for summer, winter, or spring break or holidays, that may occur during the use of the paid sick leave.

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What Has Changed?

Effective August 6, 2021 (cont.):

For paid sick leave for adoption, placement for adoption, or the acceptance of a child in need of foster care, the school board may require that the teacher or other employee to which this Section applies provide evidence that the formal adoption process or the formal foster care process is underway, and such sick leave is limited to 30 days unless a longer leave has been negotiated with the exclusive bargaining representative. **Paid sick leave for adoption, placement for adoption, or the acceptance of a child in need of foster care need not be used consecutively once the formal adoption process or the formal foster care process is underway, and such sick leave may be used for reasons related to the formal adoption process or the formal foster care process prior to taking custody of the child or accepting the child in need of foster care, in addition to using such sick leave upon taking custody of the child or accepting the child in need of foster care.**

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What Has Changed?

Key Concepts:

- Up to 30 days of paid sick leave
- Unrelated to the need to recover from childbirth
- Absent medical certification
- At any time within the 12-month period following the birth of the child
- Right to leave not affected by any intervening period of nonworking days or school not being in session
- Documentation permitted for adoption or foster care
- But adoption or foster care leave can be used non-consecutively and prior to taking custody of the child or accepting the child in need of foster care, in addition to using such sick leave upon taking custody of the child or accepting the child in need of foster care.

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FMLA Childcare Leave Refresher

- Childcare leave must be taken within 1 year after birth, placement, adoption
- If both husband and wife are employees, only 12 weeks total for this child
- Can only be taken intermittently with consent of employer

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Childcare Leave Compliance Tip

- FMLA leave is unpaid.
- Employers can and should designate available paid leave to run concurrently with unpaid FMLA leave.
- FMLA leave for the birth of a child has two components:
  - Medical leave
  - Bonding leave
- Employers can and should obtain documentation of the medical component to coordinate the different components.

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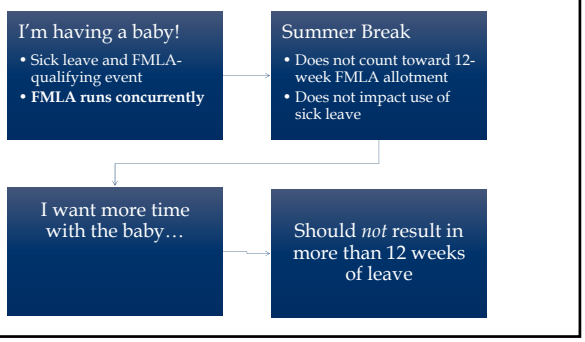

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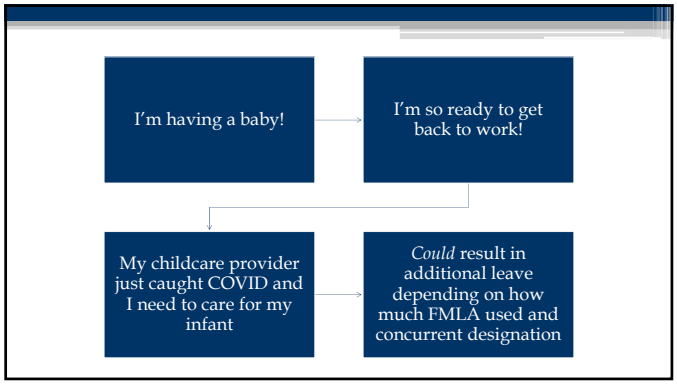

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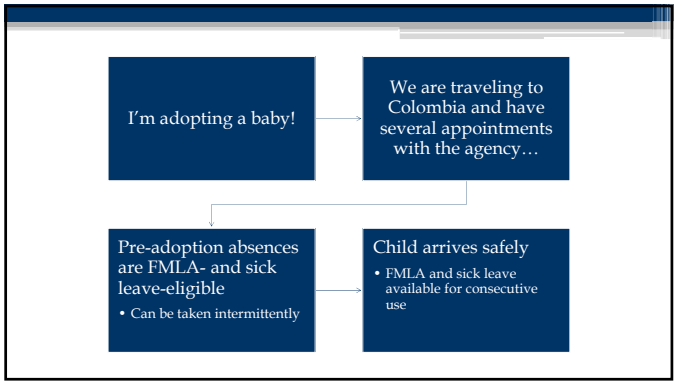

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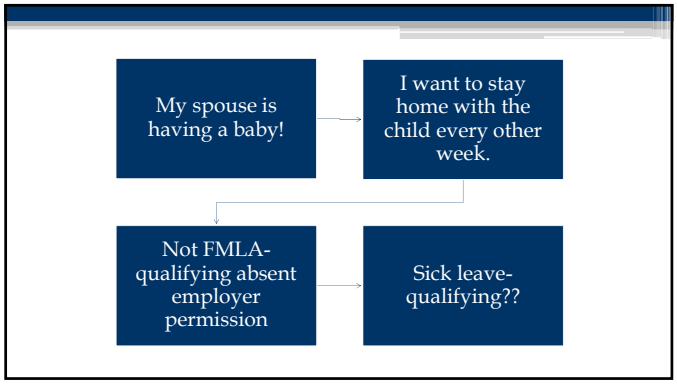

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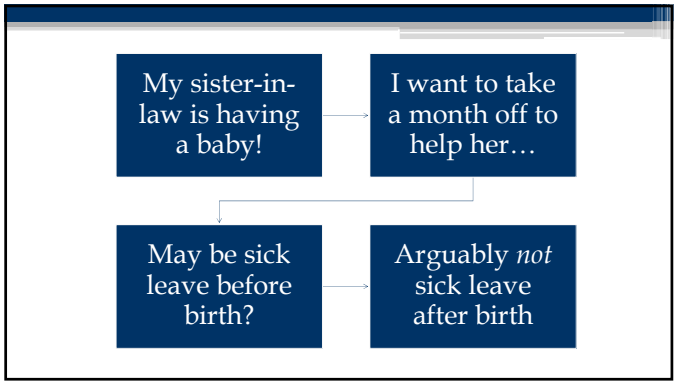

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ADA Refresher

The ADA covers qualified individuals with disabilities.

- Qualified = Able to perform the essential job functions with or without an accommodation
- Disability = Individual has a mental or physical impairment that substantially limits one or more major life activities

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What Has Changed?

- COVID!
- Reasonable Accommodations:
  - Leave of absence?
  - Remote work?
  - Masking, vaccination, or testing exemptions?
  - Other?

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Will Our Employees Ever Work?

- Yes!
- Employers can and should request documentation for leaves.
- Employers can and should request documentation for accommodation requests.

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What Can We Ask Our Employees?

- The ADA limits employers' ability to make a "disability-related inquiry" of an employee, meaning a question that is likely to elicit information about a disability. For example:
  - Asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
  - Asking an employee to provide medical documentation regarding his/her disability;
  - Asking an employee's co-worker, family member, doctor, or another person about an employee's disability

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Permissible Inquiries--ADA

- What is not a "disability-related inquiry?"Anything that is not likely to elicit information about a disability. For example:
  - Asking generally about an employee's well being (e.g., "How are you?")
  - Asking an employee who looks tired or ill if s/he is feeling okay
  - Asking an employee who is sneezing or coughing whether s/he has a cold or allergies or COVID
  - Asking how an employee is doing following the death of a loved one or the end of a marriage/relationship
  - Asking about COVID vaccination status

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Permissible Inquiries--ADA

- **Note:** Just because a question may be a "disability-related inquiry" does not mean that you can't ask the question. Remember, an employer can still ask the question if "job-related and consistent with business necessity."

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Permissible Inquiries--ADA

- Asking an employee about non-disability-related impairments (e.g., "How did you break your leg?")
- Asking an employee whether s/he can perform job functions
- Asking an employee whether s/he has been drinking
- Asking an employee about his/her current illegal use of drugs
- Asking a pregnant employee how she is feeling or when her baby is due
- Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency

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Permissible Inquiries--FMLA

- **Note:** Employees do not have to expressly mention the FMLA when requesting protected leave and notice may be verbal. 29 C.F.R. § 825.302(c).
  - Even "strange behavior" may be enough to trigger FMLA protections. See, *e.g., Stevenson v. Hyre Elec. Co.*, 505 F.3d 720 (7th Cir. 2007).
- Once leave is approved, however, employees do need to tell employers that an absence is due to an FMLA-qualifying reason.

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Permissible Inquiries--FMLA

- Don't be fooled by the employee who says: "I'm not asking for FMLA leave, so I don't need to answer your question."
  - The DOL and most courts agree that an employer has an absolute legal obligation to provide FMLA leave, whether or not the employee wants it! See *Harvender v. Norton Co.*, 1997 WL 793085 (N.D.N.Y. 1997); FMLA-83 Op. Ltr. (1996) ("The employee may not, however, bar the employer from designating any qualifying absence as FMLA leave.")
- Also, don't worry about the ADA – questions permitted by the FMLA are *per se* "job related and consistent with business necessity." See *EEOC FMLA-ADA Fact Sheet Q. & A 10* (1996).

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HIPAA

- But, what about the employee who says: "You can't ask me that under HIPAA, it's private." WRONG!
- Generally, "employers" do not have to follow HIPAA privacy and security rules.
- Medical information in employment records is not PHI under HIPAA.
  - But still must maintain the confidentiality of an employee's medical information

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Leave Reboot Action Items

- Update FMLA and sick leave policies to account for new laws.
  - Check out the list of other leave laws and other leave policies.
    - VESSA and School Visitation Rights leave have also undergone recent changes.
- Refresh FMLA procedures to ensure proper designation and coordination of applicable leaves.
- Review attendance screening and monitoring procedures for compliance with applicable laws.
- Develop accommodation request and review procedure to support and monitor accommodations.

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