



FMLA State Law Updates, Compliance and Requirements for Employers

Jessica J. Watts, CEBS, PHR, SHRM-CP

VP, Compliance

Frost Insurance Agency

jessica.watts@frostinsurance.com

March 1, 2019

Please note that this information is provided to you for general informational purposes only and should not be considered an individualized recommendation or personalized advice. No warranty or representation, express or implied, is made by Frost Insurance Agency, Inc. or Frost Bank, nor does Frost Insurance Agency, Inc. or Frost Bank accept any liability with respect to the information set forth herein. Distribution hereof does not constitute legal, tax, accounting, investment, insurance or other professional advice. Recipients should consult their professional advisors prior to acting on the information set forth herein.

Overview of Session

- Between Paid Sick Leave laws popping up all over the country and generous employers creating unlimited paid sick time plans, the landscape of paid time off has never looked so different.
- For many employers, striking the balance between what is required versus what policies are keep employers competitive to hire and recruit the best employees, is a difficult task.

Bureau of Labor Statistics Report

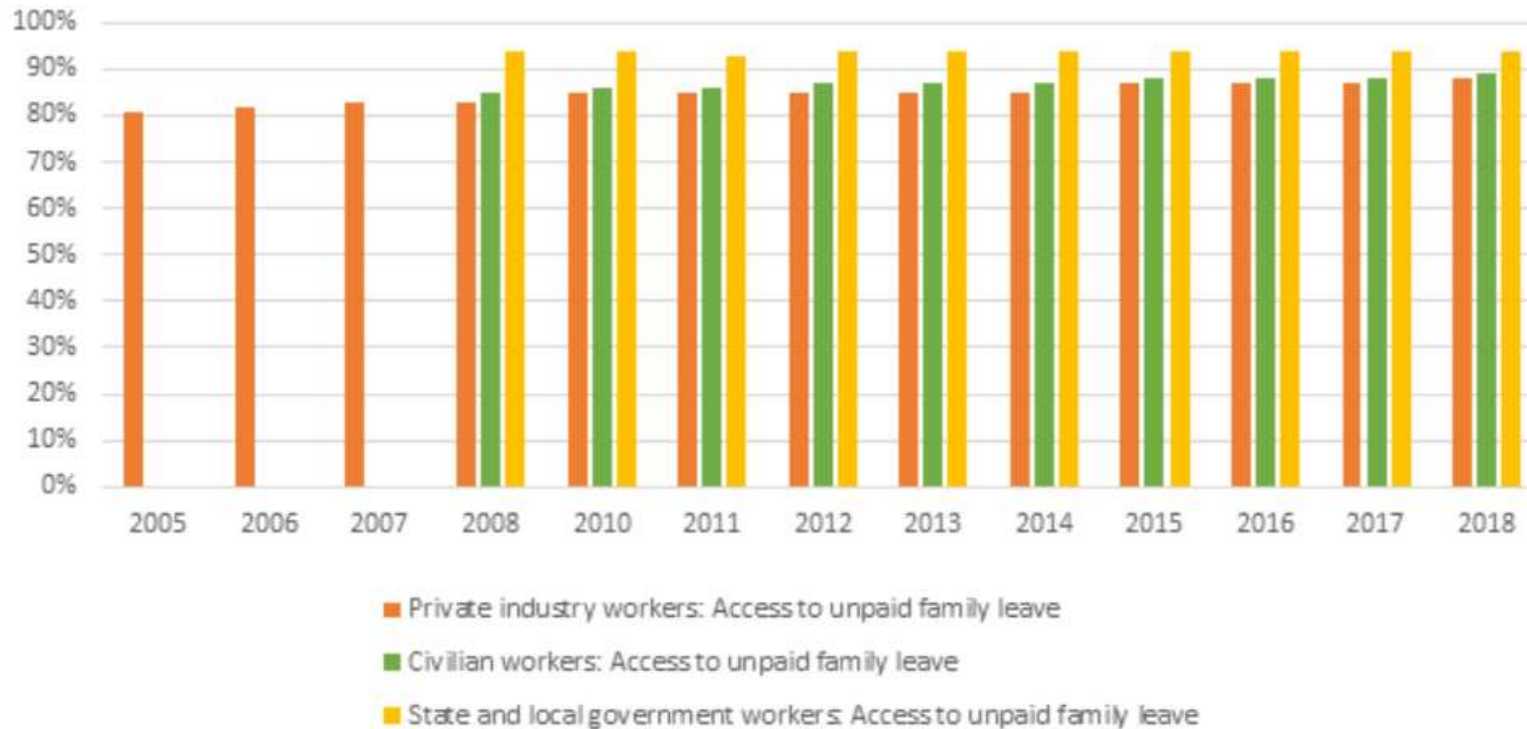
- Released Feb. 27, 2019:

*In March 2018, **16 percent of private industry workers had access to paid family leave**, and **88 percent had access to unpaid family leave**. Employers provide family leave for employees to care for family members. This leave includes maternity and paternity leave. The leave also may be available to care for a newborn child, an adopted child, a sick child, or a sick adult relative. Access to family leave varied by establishment size.*

Source: <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm>

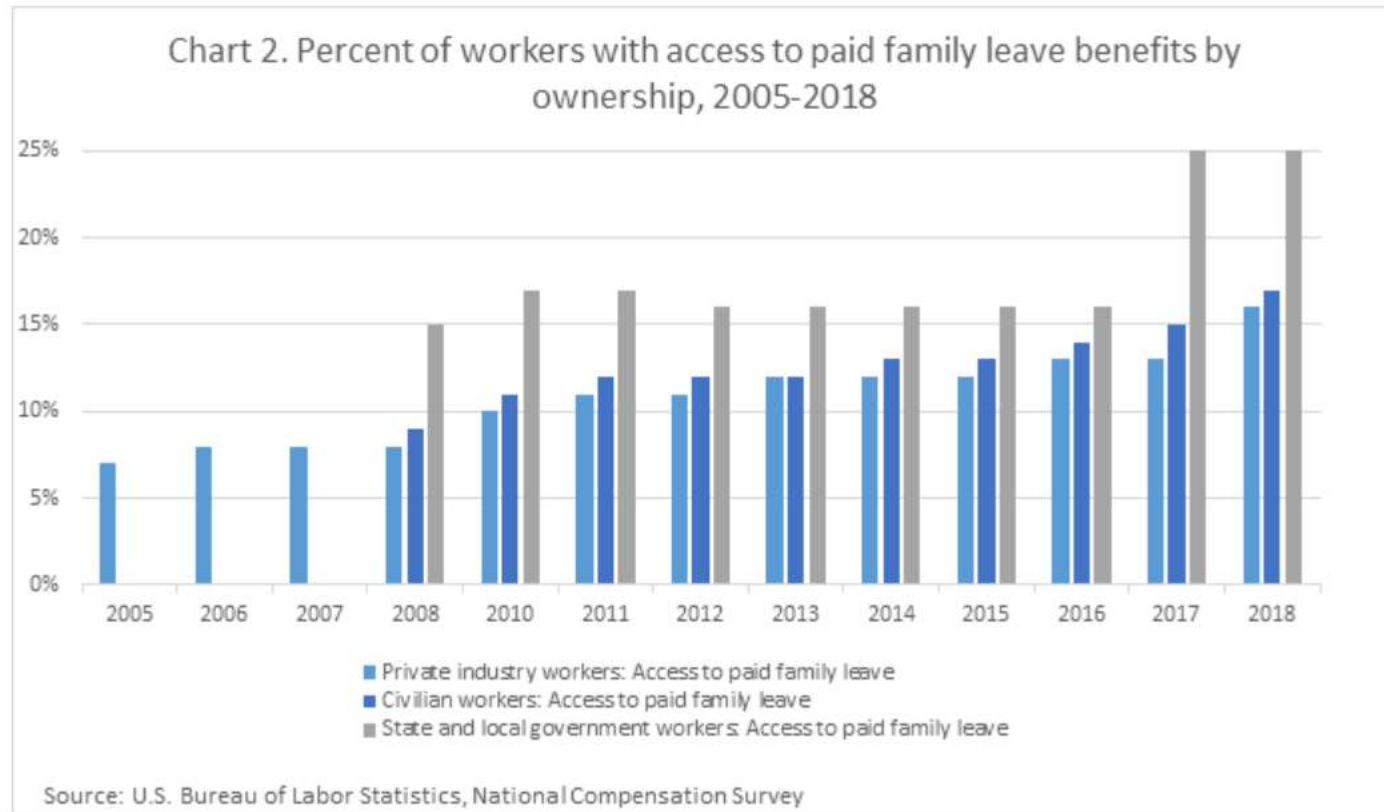
Workers with Access to Unpaid Family Leave

Chart 3. Percent of workers with access to unpaid family leave benefits by ownership, 2005-2018



Source: U.S. Bureau of Labor Statistics, National Compensation Survey

Workers with Access to Paid Family Leave Benefits



Paid vs. Unpaid Leave

CHART IMAGE

CHART DATA

Percent of workers with access to paid and unpaid family leave by establishment size and ownership, March 2018

Establishment size	Civilian, paid	Civilian, unpaid	Private industry, paid	Private industry, unpaid	State and local government, paid	State and local government, unpaid
1 to 49 workers	12%	80%	11%	80%	23%	93%
50 to 99 workers	15	88	15	88	20	91
100 to 499 workers	19	95	18	95	29	93
500 workers or more	25	94	25	94	25	95

FMLA Background

- When was FMLA enacted?
 - 1993
- What does it provide?
 - Help employees better balance the demands of the workplace with the demands of their family and health.
- More recently expanded to include Military caregiver leave, and leave for Military families during times of deployment
- Regulated by the Wage & Hour Division of the Department of Labor

Paid Sick Leave

- Eleven states (Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Oregon, Vermont, and Washington), plus the District of Columbia and the Commonwealth of Puerto Rico, have now passed ***statewide*** paid sick leave laws.

Paid Sick Leave

- More than 30 local jurisdictions have passed paid leave laws across the country (though the 13 local laws in New Jersey are preempted by state law as of October 29, 2018).
- Though only one new law (Rhode Island) was passed in 2017, six more passed as of October 1, 2018:
 - Statewide in New Jersey and Michigan
 - Countywide in Westchester County, and
 - Locally in Duluth, Minnesota, and *Austin and San Antonio, Texas*).

Texas Paid Sick Leave Developments

- Austin City Code §§ 4-19-1 to 4-19-9, Ordinance No. 20180215-049 (Earned Sick Time)
- Eligible Employees: Individual who perform at least 80 hours of work for pay within the City in a calendar year for an employer, including work performed through a temporary or employment agency, but not including:
 - Independent contractors.
 - Unpaid interns.
- Leave Amount and Accrual: 1 hour accrued for every 30 hours worked, subject to the following limitations based on employer size:
 - 15+ employees (excluding family members): Accrual capped at 64 hours per year.
 - 1-14 employees (excluding family members): Accrual capped at 48 hours per year.

Austin- Status Update

- Original Effective Date: Oct. 1, 2018, except Oct. 1, 2020 for employers with no more than 5 employees at any time in the preceding 12 months.
- Challenge filed in Travis County District Court on April 24, 2018, arguing that it is preempted by the state Texas Minimum Wage Act (TMWA) and unconstitutional (*Texas Ass'n of Business v. City of Austin*, Cause No. D-1-GN-18-001968)
- The Texas Attorney General intervened in the action on April 30, 2018, on preemption grounds only.
- The District Court denied a request for a temporary injunction and the plaintiffs filed an appeal.
- On Aug. 17, 2018, the Texas Court of Appeals for the Third District granted a stay against the ordinance, pending the appeal.
- On Nov. 16, 2018, the Texas Court of Appeals reversed the district court decision and remanded, holding that the plaintiff business association and business owners are entitled to a temporary injunction against implementation of the Austin law as unconstitutional because it is preempted by the TMWA (2018 WL 6005551 (Tex. App. Nov. 16, 2018)).

Texas Paid Sick Leave Developments

- City of San Antonio – Ordinance
- #2018-08-16-0620
- Amended Chapter 15, Health of the City code of SA

- The City of San Antonio submitted enough signatures, however, the Mayor did not want it on the ballot, so the city council passed the ordinance on August 16th which took effect January 1, 2019, but has no enforcement process until August 1, 2019.
- Effective Date: Aug. 1, 2019, except Aug. 1, 2021 for employers with no more than 5 employees at any time in the preceding 12 months.

On the Federal Level

The 115th Congress is No More

H.R. 4219 – known as the *Workflex in the 21st Century Act*

- Would have amended ERISA, provided for Paid Sick Leave
- Would have been a voluntary opt-in

116th Congress

This bill allows a Patriot employer a business-related tax credit equal to 10% of up to \$15,000 of wages paid to any employee in a taxable year.

- maintain its headquarters in the United States and not expatriate to avoid payment of U.S. income taxes,
- comply with the employer mandate to provide minimum essential health care coverage to its employees under the Patient Protection and Affordable Care Act,
- provide employees with **paid sick leave or paid family and medical leave**,
- compensate at least 90% of its employees at an hourly rate that is at least 218% of the federal poverty level for an individual for the calendar year divided by 1,750 and provide at least 90% of its employees with a basic level of retirement benefits,
- provide for differential wage payments to its employees who are members of the Uniformed Services,
- have a written policy in place for the recruitment of employees who have served in the Uniformed Services or who are disabled, and
- increase the number of its employees performing substantially all of their services inside the United States to offset the number of employees who work outside the United States.

116th Congress

H.R. 802- Patriot Employer Act of 2019

Co-Sponsors:

Rep. Janice Schakowsky (D-IL-9)

*Served since 1999

Rep. Brendan Boyle (D-PA-2)

*Serves on **Ways and Means**

Rep. Marc Veasey (D-TX-33)

*Serves on small business

Currently referred to House **Ways and Means** Committee

116th Congress

S.223 - Patriot Employer Tax Credit Act

Currently referred to **Senate Finance** Committee

Co-Sponsors:

Richard Durbin (D-IL)

*Served since 1983

Sherrod Brown (D-OH)

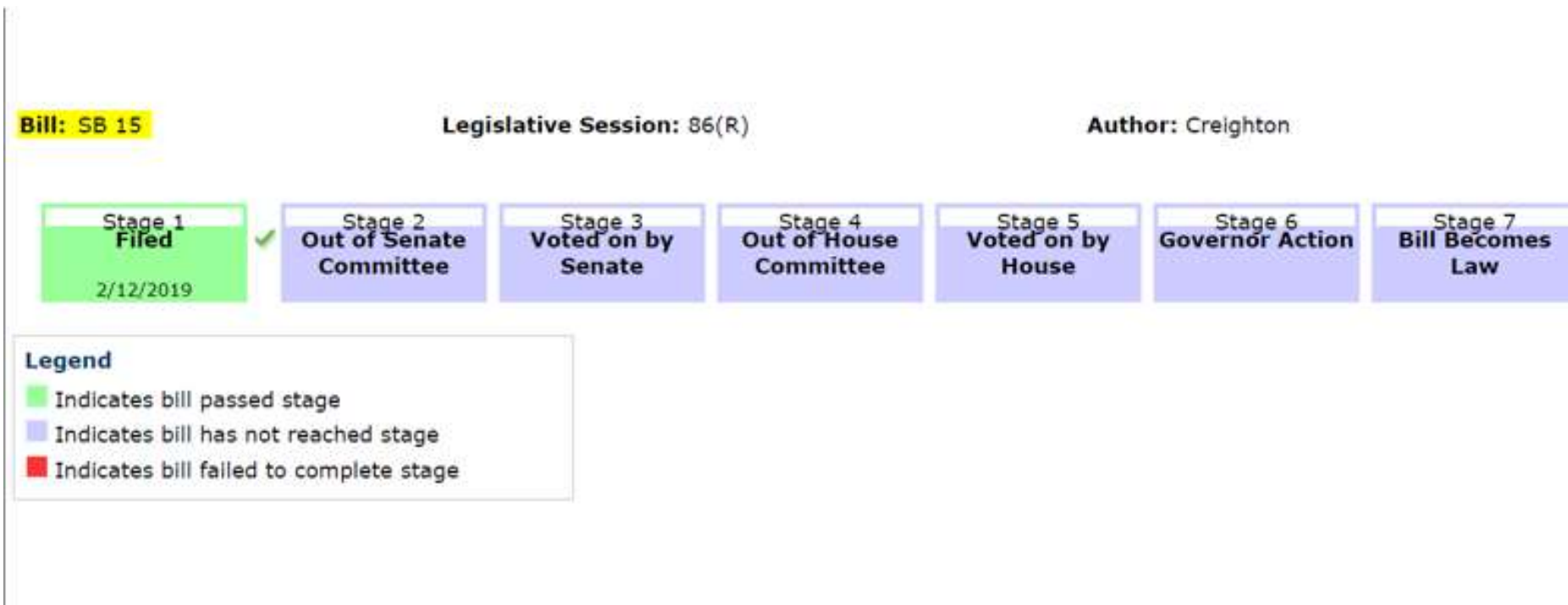
*Serves on **Senate Finance** Committee

On the State Level- Texas Legislature

BREAKING NEWS

- *Texas Senate panel advanced legislation on Feb. 28 banning cities from adopting sick leave ordinances. The bill would also nullify mandates some local city councils in major Texas cities have already tried to put in place. The measure is now eligible to be taken up by the full Senate.*
- Texas Senate State Affairs Committee
- Senate Bill 15, as amended
- House Bill 1654- Companion Legislation
- Citation: <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB15>

How SB 15 Will Become Law



Covered employers - FMLA

- Public employers of all sizes
 - Includes federal government, state government, political subdivision of a state
- Local educational employers
 - Public school boards
 - Public and private elementary and secondary schools
- Private employers
 - 50 or more employees
 - For each working day in 20 or more weeks
 - In the current or preceding calendar year

Covered employers- Paid Sick Leave

- Some laws mandate paid sick leave only for employers of a certain size
- Some delineate leave provisions based on the size of the employers.
- Many laws contain exclusions for government employees or employees in certain industries covered by a collective bargaining agreement.

Qualifying use of leave- FMLA

- **Reason #1: Birth of child**
 - To care for newborn
 - Bonding time up to the baby's 1st birthday
 - Applies to mothers and fathers
 - Combined 12 weeks when parents work for the same employer

- **Reason #2: Placement for adoption or foster care**
 - Within 1 year of placement

Qualifying use of leave- FMLA

- **Reason #3: To care for spouse, child, parent with serious health condition**
 - Spouse- same or opposite sex
 - Child- stepchild, foster, adopted, biological, legal ward, or a child of a person standing *in loco parentis* (*Clarification provided June 22, 2010*)
 - Separate 12 week entitlement when parents work for the same employer
 - Includes care for an adult child because of a disability (incapable of self-care).
- Parent- Includes those *in loco parentis*, those with day-to-day responsibilities to care for and financially support a child. Biological or legal relationship not necessary

Definition of family member- Paid Sick Leave

- The definition of family member varies significantly, but most jurisdictions expressly recognize the step, foster, and adopted parent-child relationship to the same degree as blood relatives.
- Where covered "child" relationships are defined (such as step, foster, and guardianship relationships), the converse parental relationships are also covered, unless otherwise specified.
- Some jurisdictions specifically cover "legal spouses" and civil union or domestic partners. Other jurisdictions simply afford protections to "spouses" (whether same or opposite-sex).
- **AUSTIN** and **SAN ANTONIO**-
"or any other individual related by blood or whose close association is the equivalent of a family relationship"

Qualifying use of leave- FMLA

- Reason #4- The employee's own serious health condition
 - Inpatient care or continuing treatment by a health care provider
 - More than 3 consecutive full days incapacity
- Reason #5- Exigency of child, spouse, parent who is an active duty service member
 - Short notice deployment (7 days)
 - Military events and activities (ceremony, program, informational briefings)
 - Childcare and school activities
 - Financial and legal arrangements
 - Counseling
 - Rest and recuperation
 - Post-deployment activities
- Reason #6- To care for a covered service member with a serious injury/illness (spouse, child, parent, next of kin)

Litigation Abounds

- *Jaszczyszyn v. Advantage Health Physician Network*, the employee submitted certification that stated she was “completely incapacitated” due to a back injury.
- However, the employee attended a Polish heritage festival and posted pictures on Facebook showing her spending more than 8 hours at the festival, including standing, drinking, dancing.
- The employer called the employee in for a meeting, confirmed that she knew they took fraud seriously, presented her with pictures, as well as her voicemail to the supervisor stating that she was in pain and not able to come in, and asked her to explain. She was terminated.

Qualifying use of leave- Paid Sick Leave

- Most paid leave laws allow leave to be used for more than an employee's own illness
- May be used for such as for preventive medical care or medical care (including preventive care) for a family member.
- Some jurisdictions also allow employees to use leave for reasons related to domestic violence, stalking, or abuse, or necessitated by a public health emergency.

Covered employees- FMLA

- Worked for the employer for a total of 12 months (52 weeks)
- Weeks including paid time (sick, vacation) included
- 12 months/52 weeks do not have to be consecutive, but within 7 years
- Worked 1,250 hours within the last 12 months
- Only time “worked” counted. Not sick, vacation, etc.
- Work within 75 miles of 50 employees
- Remote employees- worksite is the site that is their “home base” from which their work is assigned or to which they report
- Have a qualifying reason

Covered employees- Paid Sick Leave

- Some laws require employees to work a certain number of hours within the covered jurisdiction or be employed for a minimum time period before becoming eligible for paid leave.
- Other laws exclude certain categories of workers, such as nonexempt employees, independent contractors, and work-study program participants.

Employer Responsibilities- FMLA

- Provide 12 weeks of unpaid leave within a 12 month period
 - Can be taken intermittently for serious health condition of employee or family member.
- Maintain coverage under group health plan
 - Does not apply to life or disability
- Same contribution rate as any other active employee
 - Pre-pay
 - Post tax payment directly to employer
 - Catch up upon return)
- COBRA offered **as of the last day of the leave**, if employee does not return
- Job restoration- to same or equivalent position
- Equivalent benefits
 - Pay, working conditions, privileges, status, and other terms of employment.
 - Similar duties, responsibilities, skill, effort, and authority

Notice Requirements- FMLA

- Display General Notice/Poster
 - Where it is viewable by employees *and applicants for employment*
- Include General Notice In Employee Handbook
 - Distribute to new employees upon hire
- No requirement to post on an intranet or benefits administration system

This is required of private employers with 50 or more employees *regardless of whether the employer has 50 employees within 75 mile radius.*

Notice Requirements- Paid Sick Leave

- Most laws require some combination of workplace posting and individual notice to employees.
- They commonly require employers to retain records for between two and four years.

Leave accrual and usage- Paid Sick Leave

- Paid sick leave laws generally specify how much leave employees accrue and when they accrue it
- Paid sick leave laws govern when employees can use accrued leave, and whether employers can frontload leave entitlement in lieu of accruals based on hours worked.
- Many laws allow employers to cap annual leave accrual, and some vary these caps based on employer size.
- Many laws also require employees to work for a minimum time period before they can use leave.

Carryover of unused paid sick leave

- Many laws require employers to carry over accrued unused sick leave, often with an annual cap.
- Some laws restrict further accruals until some portion of the sick leave is used.
- Others allow or require employers to pay for unused leave annually or frontload annual leave entitlements in lieu of carryover requirements.

Employee Benefit Considerations

When must the employer notify their insurance carrier of the reduction in hours for unpaid non FMLA leaves of absence?

- Some carriers puts the responsibility to manage eligibility on the employer, but here are some general parameters because it's not as simple as it sounds:
 - 1) The employer must notify the carrier within the timeframe outlined in the contract if there is a change which impacts eligibility under the plan and
 - 2) The employer must keep business records to back up the eligibility status of each person, including any change in status of the employee (i.e. that a reduction of hours has occurred) and
 - 3) If there is a delay or error and the employer does not communicate that to the carrier, they will not backdate or make retroactive changes
 - 4) The carrier typically reserves the right to conduct an audit of the employer's records with respect to eligibility and the employer will have to indemnify the carrier for any loss, expense or liability due to inaccurate data.
 - 5) The employer is typically responsible for providing the Notice of Continuation Rights Under COBRA to covered employees and covered spouses

ADA Considerations

What if the employee does not return within 12 weeks?

“FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation.” (Labor Code § 825.702)

ADA Considerations

The EEOC states the following on their website:

Question: “May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs additional leave?”

Answer: If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must provide the employee with the additional leave even if it has a “no-fault” policy. An employer, however, does not need to provide leave if: (1) it can provide an effective accommodation that allows the person to keep working, or (2) it can show that granting additional leave would cause an undue hardship.”

<http://eeoc.gov/facts/accommodation.htm>



Questions?

