Interaction of Several Laws

- Family and Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- State Workers’ Compensation Laws
- ERISA and COBRA
- The Patient Protection and Affordable Care Act (health care reform)
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
  - provides leave entitlement for military duty but we will not cover in this presentation
FMLA Leave Entitlement

• Up to 12 weeks of job protected leave in a 12 month period for a FMLA purpose (26 weeks for military caregiver leave)

• Eligible Employees
  • 12 months of employment
  • 1,250 hours of work in 12 months preceding the start of leave
  • work at site with 50 or more employees within 75 mile radius
Benefits During FMLA Leave

• Employer must maintain employee’s group health plan coverage as if employee is actively working

• Payment options during unpaid FMLA
  • Employee may suspend coverage
  • Prepayment (only on voluntary basis)
  • Pay by date would have been made by payroll deduction
  • Pay on agreed upon prorata basis after return from leave
Benefits During FMLA Leave

• If employee fails to timely make his/her share of the premium payment, the employer may terminate coverage
  • after 30-day grace period; and
  • the employer provides 15 days advance written notice

• Cannot retroactively terminate coverage unless employer has a policy that provides retroactive termination for non-payment of premiums applicable to other forms of leave
Benefits During FMLA Leave

• Only group health plan coverage (health, dental, vision, health FSA) is required to be maintained during FMLA leave

• Follow terms of plan with regard to non-group health plan coverage (life, short-term disability, long-term disability)

• If employee returns to work on or before expiration of FMLA, reinstate employee to equivalent position, pay and benefits (no new waiting period)
ADA Leave as Accommodation

• The ADA requires employers to make reasonable accommodation for qualified individuals with a disability

• The EEOC and courts have held that granting a leave of absence for necessary treatment or recovery is a form of accommodation under the ADA

• How much leave must be granted under the ADA is based on the individual’s facts and circumstances
ADA Leave as Accommodation

- If employee will not be able to come back to work or ever be able to perform the essential functions of the job, generally additional leave may not be a reasonable accommodation.

- Leave of indefinite duration is generally not a *reasonable* accommodation although employer may need to allow some leave for an indefinite time for the employee’s doctor to assess.
State Workers’ Compensation Laws

- State laws vary but in general protect an employee who is injured by an accident which arose out of employment.

- Some state laws provide for job-protected leave, but most state laws simply prohibit retaliation against an employee who filed a workers’ compensation claim.

- Leave provided to an employee who suffered a workers’ compensation injury must generally be of a type and duration provided to similarly situated employees who have not suffered a workers’ compensation injury.
ERISA

- An employer has a fiduciary duty under ERISA to follow the written terms of its benefit plans.

- When an employee ceases to work the number of hours specified by the plan, as is the case when an employee is on a leave of absence, the employee loses his coverage under the plan.
  - unless plan contains a provision allowing coverage to continue.

- **Note:** There is an important difference between termination (loss) of coverage and termination of employment.
COBRA

• The reduction of an employee’s hours below the hours required to maintain eligibility for group health plan coverage is a COBRA qualifying event – “reduction in hours”

• A COBRA qualifying event does not occur during FMLA but may occur depending upon terms of group health plan if employee is unable to return to work at the expiration of FMLA

• COBRA applies even if coverage was suspended during FMLA at employee’s election or due to non-payment of the employee’s share of premiums
State Continuation Coverage

- If your company is not subject to COBRA (you don’t have 20 or more employees), you still may be subject to state continuation coverage laws.
Health Care Reform

• The Patient Protection and Affordable Care Act prohibits group health plans from rescinding coverage.

• A rescission of coverage is a cancellation or discontinuance of coverage with a retroactive effect.

• Can only rescind coverage in cases of fraud or intentional misrepresentation or for employee’s failure to timely pay required premiums but not for the employer’s inadvertent failure to terminate coverage in accordance with terms of plan.
Health Care Reform

- If you have variable hour or seasonal employee look back and stability measurement periods

- You will not terminate coverage during a stability period due to a reduction in hours or a leave of absence

- You will also not count FMLA leave and other special leave time when averaging hours during a look back period
Putting It All Together

Designating Leave

- FMLA leave must be designated in writing

- As a best practice all other forms of leave should be designated in writing and include the period of approved leave and the expectations of the employer as to requests for extended leave and required medical documentation

- Workers’ compensation leave can run concurrent with FMLA

- Workers’ compensation leave can also be a reasonable accommodation under the ADA
Putting It All Together
Medical Certification

- Requirement that employee submit medical certification within 15 days (with some flexibility) allowed under the FMLA

- Medical certification for non-FMLA leave including ADA reasonable accommodation leave allowed provided that certification does not go beyond a request for information beyond need for leave

- Employer can require return to work certification at conclusion of all forms of leave
  - consider sending health care provider the employee’s job description
Putting It All Together
Duration of Leave

• FMLA allows up to 12 weeks within a 12-month period (26 weeks for military caregiver leave)

• ADA provides no specific duration of leave as a reasonable accommodation
  • based on facts and circumstances
  • some courts have held that up to 6 months of additional leave can be a reasonable accommodation
  • reasonable accommodation leave is an exception to a maximum leave policy

• State workers’ compensation laws generally provide for no specific duration of leave
  • anti-retaliation provisions would require the employer to treat employee on workers’ compensation leave as favorable as any other employee
Putting It All Together
Employee Benefits

• During FMLA, continue group health plan coverage

• After expiration of FMLA or for non-FMLA, follow terms of plan and offer COBRA when health plan coverage would otherwise end – generally, even during ADA or workers’ compensation leave

• For benefits other than group health plan coverage (life and disability coverage) follow terms of plan as to when coverage ends and notify employee in writing

• Notify employee in writing (in the leave designation or otherwise) about status of benefits and requirements as to the timing and payment of premiums
Putting It All Together
Termination of Employment

• During FMLA, continue employment with access to same or similar job
  • unless job would otherwise be terminated (example: a reduction in force)

• Under most state workers’ compensation laws, leave is not job protected but cannot retaliate based on employee’s workers’ compensation claim

• Under the ADA, the EEOC takes the position that reasonable accommodation leave should generally be job protected leave
Putting It All Together
Best Leave Policies

• Different types of leave provided by the employer

• How to request leave and to whom

• Timing for requests for extended leave and the requirement for submission of medical certification (even for workers’ compensation leave in most cases)
  • Example: If you are unable to return to work upon expiration of your approved leave, you must contact human resources at least three days before your scheduled return to work date and provide medical certification to support your request for additional leave

• How leave coordinates with paid leave benefits (PTO and short-term disability)
Putting It All Together
Best Practices

• FMLA Policy
  • Designate FMLA Counting Period
  • Include retroactive termination of benefits for non-payment of premiums
  • Consider statement that policy applies to only those eligible

• Non-FMLA Leave of Absence Policy
  • Include ADA reasonable accommodation language for maximum leave period
  • Include retroactive termination of benefits for non-payment of premiums
Putting It All Together
Best Practices

• Discrimination and Harassment Policy
  • Include ADA reasonable accommodation language
  • Consider designating one point of contact for request for accommodation

• Ensure benefit plans clearly outline when coverage terminates when employee on leave of absence

• Add retroactive termination for non-payment of premiums to benefit plan language
Putting It All Together
Best Practices

• Review benefit plan language with broker/consultant and seek clarification from carriers if needed as to when coverage terminates during a non-FMLA leave of absence.

• Implement a wraparound SPD if needed to clarify benefit plan language.

• Ensure practice is consistent with plan language.

• Consider drafting an internal “procedure” and template for employee communications to use for any leave of absence (must use certain FMLA notices).

• Train managers/supervisors on leave laws, confidentiality of medical information and appropriate inquiries regarding medical conditions.