LEAVE LAWS: COMPLIANCE, COORDINATION, AND BEST PRACTICES

I. LEGALLY REQUIRED LEAVE POLICIES

A. What are the various leave laws?

1. Minimum required under the law and more generous policies.

a. FMLA

b. ADA

c. PMLA

2. Paid and unpaid.

3. Best practices in managing these policies and business reasons for having generous leave policies.

B. Family and Medical Leave Act (FMLA)

1. Covered Employer: employs 50 or more employees within a 75-mile radius of the worksite during a 20 week period of the calendar year or the previous calendar year.

a. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.

b. Once an employer meets the requirements of a covered employer they are covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.

2. Eligible Employee: works for a covered employer, has worked for at least 12 months and for at least 1250 hours.

a. Historically in Michigan the courts have held that if an employer, regardless of whether it is covered under FMLA, offers FMLA. benefits, it can be subject to FMLA job protection requirements

and notification guidelines. This position may change with a recent DOL opinion which held that states an employee who does not meet FMLA requirements cannot be designated as receiving FMLA benefits.

i. Example: A pregnant employee has been with an employer for 11 months at the time of the birth of her child. She has otherwise met the eligibility requirements for FMLA, except the 12 months of service requirement. The employee takes leave for the birth of her child prior to becoming eligible for FMLA at 11 months of service. One month later, upon reaching 12 months of service, the employee is eligible for 12 weeks of job-protected leave.

ii. This is not the law in Michigan yet, but there is clearly a split in circuits and between the DOL and Michigan's application of the rules.

3. Qualifying Reasons for Leave: Birth or placement of a child for adoption (applies to women and men equally), a serious health condition, to care for certain family members with a serious health condition, qualifying exigency arising out of employee's select family members is a member of the military on covered active duty.

a. Department of Labor Opinion August 28, 2018 – Organ Donation is a Serious Health Condition.

i. The last DOL opinion letter on FMLA was from 2009 and it has issued three in the last year.

ii. Because organ donation requires an overnight stay in a hospital and requires ongoing care.

iii. Even elective surgery that requires overnight stay in a hospital meets the definition of a serious health condition.

b. Seeing a rise in employees using FMLA for treatment and recovery from mental illness and claims for FMLA interference from employers. Important for employers to treat this use of FMLA as any other and maintain confidentiality, and treat it as any other permissible use of FMLA. If there is a concern about the legitimacy of the use of FMLA for a particular reason, follow the procedure of requesting certification no more than every 30 days, apply existing policies uniformly to all employees and keep accurate records.

4. Obligation on the part of an employer to provide timely notice of FMLA eligibility after acquiring knowledge that an employee's leave may be for an FMLA qualifying reason.

   a. 5 days to provide the employee an eligibility notice and rights and responsibilities notice and FMLA designation notice.

   b. An employer's request for medical certification must also be included in the notice of rights and responsibilities.

   c. The employee has 15 days to return the medical certification.

   d. The employer may require, at its own expense, a 2nd and 3rd opinion if there are concerns about the validity of the certification. The 3rd opinion is permissible when the 1st and 2nd opinion differ.

   e. If the employee fails to produce a medical certification, the leave is not considered protected under FMLA.

      i. Employers risk exposing themselves to FMLA interference claims by failing to timely provide an eligibility determination.

5. Coordination of other leaves with FMLA.

a. FMLA is not required to be paid. Employers may be more generous than the minimum requirement of the law and pay employees for some or all of an FMLA leave.

b. Employers are also allowed to require that other paid leave run concurrently with FMLA.

    i. Employers must be careful to apply the standard uniformly.

        (a) Example: If a female employee receives 6 weeks of paid FMLA leave after the birth of a child, the employer should also extend that same benefit to another employee who uses FMLA for a different, qualifying reason, or a male employee who is using FMLA to bond with a newborn child.

c. Employers should have a return to work policy.

    i. This is not required under FMLA, but is permitted.

    ii. This sub-policy to FMLA and other leave polices allows employers the option to require workers to provide certification from their health care provider of their ability to return to work – and perform the essential functions of their job

        (a) Employers should have job descriptions that contain the essential job functions for a position. Being able to provide this to an employee to give their physician to review in determining the employee's ability to return to work is also a good idea, as job titles sometimes do not reflect all of the duties an employee is expected to perform.

            (i) It's important for employers to be careful to only request certification for the health

condition that led the employee to use FMLA leave.

(ii) Employers also want to be careful about requiring an employee obtain a certification to return to "full duty" work. As discussed below, this can get an employer into trouble with ADA compliance.

(iii) If requiring a return to work certification its important to apply the policy uniformly to avoid discrimination or harassment claims.

d. DOL Opinion Letter: Employers may not designate extended job protected leave as FMLA.

i. This is inconsistent with how Michigan courts have applied the law.

ii. March 14, 2019 DOL Opinion Letter.

(a) Some employers are more generous than the requirements of FMLA by allowing employees to exhaust some or all of their paid leave (vacation, PTO, sick time) and extend the period of leave under FMLA.

(b) FMLA allows for other paid leaves to run concurrently with FMLA so that the employee may receive income while on leave. It does not allow for the extension of the period of time that an employee has job-protected leave.

(c) Under FMLA an eligible employee is entitled to 12 weeks of job-protected leave. If an employer chooses to offer another type of leave as its own policy, that is permissible, and it can run

concurrently with FMLA, or start after the 12 weeks has ended, however, an employer must be cognizant that once it becomes aware of an employee's potential eligibility under FMLA, it must be designated as FMLA and the clock starts to run on documentation requirements and failure to follow the notice requirements may constitute an interference, restrains, or denial of the exercise of an employees' FMLA rights.

(d) This is in conflict with the equitable argument that has been accepted in Michigan which allows FMLA to apply to employees who were treated as being eligible but were technically ineligible.

(i) We always caution clients against inadvertently extending FMLA benefits to ineligible employees because if offered they will have to honor those benefits. This new DOL opinion may help Michigan courts change that

(ii) *Dobro's v. Jay Dee Contractors, Inc. 6th Cir.* case holding that in an equitable argument the employer can be prevented from challenging eligibility and entitlement to FMLA benefits. This case is from 2009, so this rule has been in place for 10 years and may soon be challenged with the DOL position letter.

(a) Employee took leave for surgery and recovery from surgery. Employer provided FMLA notices and

documentation and for all purposes treated the lease as FMLA leave and told the employee his job was protected for at least 12 weeks pursuant to FMLA. Upon early return from leave the employee was terminated for the reason his job was eliminated. In the resulting lawsuit the company argued that the employee was not eligible for FMLA protections because it employed fewer than 50 people in 75 mile radius. Court held that because the company offered FMLA benefits it was bound by FMLA requirements.

(b) Note that DOL opinion letters do not carry the same weight as court decisions but courts often use them to guide their decisions.

(e) The DOL opinion letter serves as a reminder of how technical the FMLA is and how little room there is for deviation from its requirements. If there is any deviation, it must be classified as non-FMLA.

(f) The DOL letter specifically states that "neither the employer nor the employee may decline FMLA leave if the leave is needed for an FMLA-qualifying reason."

e. Employers' points-based attendance policies do not violate FMLA

i. August 28, 2018 DOL Opinion Letter

(a) If an employer has an attendance policy that awards points when an employee is late, leaves early, etc. does that violate FMLA?

(i) As long as the point system is applied in a non-discriminatory manner, it is lawful.

(ii) If employees on FMLA are not awarded points because they are taking FMLA – being penalized for taking FMLA, Employers cannot consider using FMLA leave as a "negative factor" in employment actions.

(iii) If employees taking other types of leave are treated similarly, i.e., points "frozen" while on leave, any renewal period calculation is continued upon return to work.

(iv) Employees cannot be treated more favorably for taking FMLA – attendance points cannot be wiped away; best practice is to simply freeze the points system while on leave.

f. Employers can deny an employee who uses FMLA an attendance-based bonus.

i. An employer that has a policy that awards a bonus to employees who meet a certain attendance goal can deny the bonus to an employee who used FMLA leave IF the employer applied the policy uniformly and denied other employees who used an equivalent leave for a reason that does not qualify for FMLA.

ii. The key here is treating similarly situated employees the same when applying policies, and being able to prove this if investigated.

C. Americans with Disability Act (ADA) and Michigan Persons with Disabilities Civil Rights Act.

1. ADA Applies to employers with 15 or more employees.

2. The MI Persons with Disabilities Civil Rights Act applies to all employers in Michigan with 1 or more employees.

    a. Specifically excludes anyone employed in domestic service.

3. Title I of ADA requires covered employers to provide reasonable accommodation to employees/applicants with a disability unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

    a. Determining what a reasonable accommodation is for a disabled employee requires the employer, employee, and their health care provider to engage in an interactive process to determine what the accommodation would be and whether it would impose an undue hardship/safety issue on the employer.

        i. This interactive process should include an evaluation of whether the employee is disabled for purposes of the ADA

            (a) Definition of disabled has been expanded to include those who are regarded as disabled or have a physical or mental impairment that limits a major life activity.

        ii. Interactive process should also include an evaluation of the essential functions of an employee's job.

            (a) It's important to make sure that the actual essential functions of the job are listed and not non-essential job duties.

            (b) Example: Listing a lifting requirement of 50 lbs. when in practice lifting is limited to 20 lbs.

Especially important if there are other safety rules in place that would contradict the heavier lifting requirement (i.e., a requirement that a lifting equipment be used or a team lift be utilized for items over a certain weight).

(c) Example: Limitation on how long someone can sit. Possible accommodation would be a sit/stand desk or restructuring of responsibilities so the employee can walk periodically during the day.

b. In reviewing possible "reasonable" accommodations under the ADA an employer should look at the cost and the financial stability of the company.

i. According to the EEOC, unreasonable accommodations are those that are "unduly expensive or disruptive, or those that would fundamentally alter the nature or operation of the job or business."

(a) *Johns v. Brennan* 9th Cir. where the court held that the Postal Service did not engage in an interactive process when it determined that the employee's accommodation request was *per se* unreasonable.

(b) McDonald v. UAS-GM Center for Human Resources

(i) The court rejected an employee's claim that the employer violated the ADA by not allowing her to extend her lunch breaks or add a separate 10 minute break so she could work out longer at the on-site gym. The employee did have a genetic disorder that was improved with exercise. When making the request the employee did not mention her disability or indicate that a longer period

of time would help her perform her job. The request was denied and the employee subsequently resubmitted her request with a letter from her physician requesting that the employee be allowed to engage in strengthening exercises daily for 30 to 60 minutes. Before the decision based on the medical documentation was made the employee was disciplined for behavior reasons and ultimate resigned. Employee then sued for discrimination under the ADA. The employer prevailed at both levels of court proceedings. The courts held that the doctor's note was too vague to show a need for an extended lunch break and determined that a decision was never rendered regarding the second request before the employee resigned.

(ii) Takeaway: A case by case analysis of accommodation requests is key for compliance.

c. After determining whether an accommodation will be made, communicate this decision to the employee.

i. It is imperative that employers document the entire process and make sure the decision is documented.

ii. Be aware that a period of leave, or a reduced schedule, but not indefinite leave, is considered to potentially be a reasonable accommodation.

iii. *Hostettler v. Wooster College*

(a) Employee started work 4 months pregnant and negotiated a 12 week unpaid maternity leave (did not qualify for FMLA). Prior to returning she experienced severe post-partum depression and anxiety and received a physician recommendation for a reduced schedule. The employer allowed the reduced schedule and ultimately terminated for the reason that a full-time schedule is an essential function of the job. The lower court sided with Wooster College. The employee appealed and the court found in favor of the employee, holding that "an employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employer needed a full-time schedule. Merely stating that anything less than full-time is per se unreasonable does not relieve the employer of its ADA responsibilities." *Hostettler.*

(b) If an employee uses leave as an accommodation, when the employee returns to work, it's important to require documentation stating that the employee is cleared to return to work and is able to perform their essential job functions.

4. The Michigan Persons with Disabilities Civil Rights Act applies to employers with 1 or more employees in Michigan.

   a. The analysis of reasonable accommodation and interactive process is similar to the ADA, and interestingly, the Michigan statute speaks directly to what is considered to be an undue hardship on employers of various sizes.

i. The law breaks employers down in to categories based on number of employees. Depending on which category the company falls into dictates the cost of the accommodation that will be considered reasonable.

(a) The cost is based on a percentage of the average weekly wage in Michigan.

(b) In 2019 the Michigan Workers' Compensation Agency lists the average weekly wage as $1,022.92.

(i) Example: If an employer has 4-15 employees and is required to purchase equipment for a disabled employee, the reasonableness test would cap the cost of equipment at 1.5 times the average weekly wage or $1,534.48.

(ii) This is a more definitive test than that in the ADA and provides clear guidelines for employers. Whether this is good or bad depends on the situation.

b. Best Practices under the Michigan Persons with Disabilities Civil Rights Act is to engage in the interactive process, document the process, and be aware that the statute contains clear language on reasonable costs of equipment based on the size of the employer. If challenged the disabled employee has the burden of proof of first showing that there was a failure to accommodate. After that showing the employer has the burden of showing an undue hardship. This is where the cost analysis set forth in the statute would come into play.

D. Paid Medical Leave Act

1. Took effect on March 29, 2019.

2. Applies to employers in Michigan with 50 or more employees.

    a. Employees are defined in the statute by their exceptions.

        i. Note: Exempt employees, covered by a CBA, federal employees, employees of another state, employees subject to the Railway Labor Act or Railway Unemployment Insurance Act, employees whose primary work location is not in Michigan, employees who receive a trainee wage under applicable law, temporary employees, variable hour employees, and employees who worked less than 25 hours per week in the preceding calendar year.

        ii. Essentially, covered employees are non-exempt, regular, employees who have averaged at least 25 hours per week during the preceding calendar year.

            (a) Receive a lot of questions about how to handle new employees.

                (i) They are not specifically addressed in the statute. This may be revised in an amendment to the law. At this point there are two approaches we have identified. Under the letter of the law the new employee did not average at least 25 hours during the preceding calendar year and so they arguably are not eligible until they have met that 25 hour average, presumably in the next calendar year.

                (ii) The other approach is to allow new employees who are expected to average 25 hours per week to accrue/receive paid leave

either in the weeks they actually work 25 hours or after a look-back period.

(iii) It's important to apply your approach uniformly.

(iv) Remember that when completing the analysis of whether the employee meets the hourly requirement you will use the "calendar year" and not benefit year. Benefit year could be the employee's anniversary date.

(v) Also, important to remember that eligible employees should start accruing paid leave on the first day of employment, and not starting on the 90th day of employment, if using an introductory period.

II. DISCRETIONARY LEAVE POLICIES

A. What types of policies are out there?

1. Maternity/Parental Leave.

2. Leave of Absence.

3. Paid time off.

B. In addition to legally required leave policies, employers have options for providing additional time off benefits to employees. As the job market becomes increasingly competitive, we are seeing an increase in employers revising their leave policies to entice talent to stay with their organization and to also keep up with competitors in terms of the benefits that are offered.

1. Maternity or Parental Leave.

a. In the United States, parental leave is not required under the law. There is culturally a big push in the past 15 years of increasing work – life balance. Parental leave policies are an excellent example of where companies can show employees they value that balance.

b. Often times employers consider FMLA to be synonymous with maternity leave. While bonding with a child is a covered reason for using FMLA, employers should not end their review of parental leave policies at FMLA eligibility.

c. The younger workforce that is rising through the ranks is demanding more in terms of parental leave options. This means offering competitive maternity leave as well as paternity leave that include compensation while on leave.

    i. Competitive employers are offering enticing leave options that are often times in excess of the 12 weeks that many employees have come to expect as the maximum allowable under FMLA, continued payment of full compensation while on leave, and a change in the culture regarding men utilizing leave.

    ii. These benefits are significant and often the difference between an employee choosing to stay with a company or choosing between two offers.

d. There are often questions regarding how maternity leave and FMLA interact.

    i. As explained earlier, FMLA is a federal law that requires covered employers to provide up to 12 weeks of job-protected unpaid leave to eligible employees. Bonding with a child after birth is a covered reason to use FMLA. Women and men are equally entitled to use FMLA for this purpose.

ii. The EEOC has taken this issue on and has held it an unlawful practice to offer inferior parental leave benefits to male employees.

iii. Maternity/Parental Leave can be offered by any employer, regardless of size.

(a) Employees are not subject to the same protections as under FMLA.

i. If an employer is subject to FMLA, maternity/parental leave can run concurrently for up to 12 weeks.

ii. This is a good place to add value to the benefits package that you offer and retain valuable employees.

iv. Leaves of Absence.

(a) Outside of federally-required leaves such as FMLA, ADA, and USERRA, employers may also provide the benefit of a discretionary leave of absence.

(b) We often see employers look to their leave of absence policy (if they have one) when an employee has exhausted their 12 week FMLA leave and needs additional time from work.

(c) A leave of absence policy is an important policy to have in the employee handbook because it will provide employers something to look to and guidance when faced with an employee who is seeking more leave.

(1) Employers need to take ADA considerations into account.

(a) If faced with a request to extend leave beyond FMLA requirements, the employer must evaluate the request under an ADA framework.

(i) This is the reasonable accommodation analysis that discussed earlier.

(ii) This can be a difficult analysis. Courts have held that a short leave, beyond FMLA leave, could be a reasonable accommodation, but an indefinite or even multi-month leave would remove an employee from the class protected by the ADA.

(2) *Severson v. Heartland Woodcraft.*

(a) Employee took FMLA due to back pain. At the end of FMLA he advised employer that he needed additional time away from work for surgery. Employer terminated employee immediately after end of FMLA and invited employee to reapply when able to perform work. Employee was ready to return several months later but rather than reapply, filed an ADA lawsuit claiming employer failed to provide a reasonable accommodation. Court held that ADA is not a leave of

absence statute and extended months-long leave is not a reasonable accommodation. This decision is from the 7th Circuit, so not controlling in MI, but persuasive.

(3) *Golden v IHA*

(a) This is also a 7th Circuit case that held that a multi-month leave is not a reasonable accommodation under the ADA.

(b) Employee needed additional, indefinite time off beyond FMLA. The employer agreed to provide an additional 4 weeks and terminated the employee after the end of the 4 additional weeks of leave. 7th Circuit held that indefinite leave is not reasonable.

e. These cases are not controlling in Michigan but are persuasive. If the subject of a complaint, the EEOC looks closely at whether the employer was to blame in any breakdown in the interactive process. Best practice is to diligently engage in the process and document each phase of the process to show compliance, and make sure it is an individualized process.

2. We often recommend that employers include an unpaid leave of absence policy that addresses leave beyond other leave programs (FMLA or PTO) and for non-medical reasons. The policy states that it is not job-protected leave, is up to the discretion of the company to determine whether to grant it, requires a specific amount of notice prior to the leave, and addresses how an employee who does not return when expected is handled.

a. Having solid policies that reflect the practices of the company are important in assisting the organization in communicating expectations to employees and having something to fall back on when an action is questioned.

3. Paid Time Off.

a. This is a combination of multiple paid leave policies: sick time, vacation, personal days, floating holidays, and in some cases, legally required Paid Medical Leave.

i. Having a single policy is more convenient for employers and employees to manage.

ii. Studies supporting finding that combined paid leave policy reduces unplanned absences.

b. In the current employment climate there is a valid argument for taking a second look at your PTO policy. The demand for talent is high, and employers are seeing the value in offering competitive time off benefits.

c. We've all heard stories of extreme paid time off policies from startups and tech companies on the West Coast. While not as extreme, the idea of offering an enhanced benefits beyond two weeks and 8 holidays is taking hold across the country in all industries.

i. How a company approaches a PTO policy depends on the workforce, business demands, and the benefit that the company wishes to ultimately realize.

ii. Additionally, having a generous PTO policy can alleviate a companies' need to have multiple statutorily required policies for paid leave, such as PMLA in Michigan. A covered employer is presumed to be compliant if it offers

the minimum required by the PMLA under a different paid leave policy.

d. Employees' desire for more flexibility in their time off options spans generations within the workforce. After the lean recession years employees want a balance between work and play.

e. Other than the amount of time that an employee receives, employers should also look at their longevity requirements. Employees are more transient, staying in jobs 18-36 months on average. Policies that require certain seniority before using paid time off don't reflect the reality of the current workforce. They also may contradict policies like PMLA that require employees to start accruing paid leave on the first day of employment.