



When Sick Leave Runs Out: Managing Employee Absences and Balancing Legal Obligations

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PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

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Nichole Atallah counsels clients in a broad range of employment matters, including compliance with Title VII, ADA, ADEA, FLSA/wage and hour, FMLA, wrongful termination, and reduction in force. She advises clients in general business matters, including interpreting and drafting employee compensation and benefit arrangements, confidentiality, non-compete and non-solicitation agreements, as well as separation agreements.

Ms. Atallah has substantial experience assisting government contractors with FAR Part 22 compliance, including the Davis Bacon Act, the Service Contract Act, and Equal Employment Opportunity requirements specific to government contractors. Additionally, she has advised tribally-owned entities on unique labor and employment issues, including Native American preferences, sovereign immunity questions, and Title VII jurisdiction.

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Matt Feinberg is an accomplished litigator with over a decade of experience in all aspects of state and federal civil and appellate litigation, in addition to alternative dispute resolution. His advocacy for corporate clients -- from local small businesses to publicly traded companies -- gives him a unique perspective on successful litigation strategies for achieving the best possible outcome for clients.

Mr. Feinberg has significant first-chair trial and appellate experience over a wide range of practice areas, including labor and employment, wage and hour disputes, corporate defense litigation, class actions, shareholder direct and derivative litigation, securities fraud defense, government and private sector contracts, commercial transactions, restaurant and hospitality litigation, and appeals.

Overview

- Types of Leave
- Legal Issues Relating to Leave
- Options when Employees Exceed Leave Balances

Types of Leave

- Company leave policy
- Families First Coronavirus Response Act
- State or federal sick leave
 - Sick leave for federal contractors; FAR 54.222-62
 - State sick leave laws, as amended if applicable

Families First Coronavirus Response Act

- Under 500 employees
- Sick leave
 - 80 Hours
 - Own illness or recommended isolation (100% pay up to \$511 plus healthcare)
 - Care of others (2/3 pay up to \$200 plus healthcare)
- Extended family and medical leave
 - School and daycare closures
 - 10 weeks of leave (2/3 pay up to \$200 plus healthcare)

Families First Coronavirus Response Act

- Paid dollar for dollar through a payroll tax credit
- Expires December 31, 2020
- Must have provided employee's notice effective April 1, 2020
- Does not generally provide paid leave if work is not otherwise available
 - NY decision this week held that work does not need to be available for self-quarantine, experiencing symptoms, and seeking healthcare
- Leave can be intermittent
- In addition to employer-provided leave

State Sick Leave Expansions

- Check state and local law
- Extensions to FFCRA for employers with over 500 employees
- Extensions to state sick leave

New York	Oakland/San Jose	Oregon/Vermont/ Minn
Additional SL	Additional SL	Clarifies existing sick leave
Addition to FFCRA	Add to Reg Leave	Uses incl. COVID
Amount varies by # ees	Offset against other COVID leave	Add care for others
Expands to state isolation orders	Expands reasons for leave	

Paid Leave Programs

- Short-term and long-term disability insurance
- State Disability and Paid Sick Leave Programs
 - Where states offer paid disability and sick leave programs, many states have clarified that employees may apply for COVID-related reasons
 - Examples: New York, Washington, District of Columbia
- These benefits do not promise that an employer has an obligation to provide the time off. Rather, should the employee be eligible for time off, the benefits may apply

Legal Considerations

- FFCRA
- Americans with Disabilities Act
- Family and Medical Leave Act
- Workers' Compensation
- No-Retaliation Provisions
- Other Claims

Americans with Disabilities Act

- Applies with 15 or more employees
- No discrimination and reasonable accommodation
- COVID or underlying health condition
- Interactive process
- Undue burden – Significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business

Americans with Disabilities Act

- No inquiries regarding disability unless job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:
 - An employee's ability to perform essential job functions will be impaired by a medical condition; or
 - An employee will pose a direct threat due to a medical condition
- “Reasonable belief” must be based on objective evidence obtained, or reasonably available to the employer
- Must be kept confidential
- COVID may be considered a direct threat

Americans with Disabilities Act

- Other accommodations
- An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. Because of the pandemic, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed
- An employee has been teleworking while the office was closed. Now the office has reopened and she is requesting a reasonable accommodation of continued telework. The employer must determine whether continued telework is reasonable

Americans with Disabilities Act

Hiring Questions

- May I screen employees for COVID? Yes, after offer
- May I take temperatures? Yes, after offer
- May I delay a start because of COVID symptoms? Yes
- May I withdraw a job offer when I need the applicant to start immediately but the individual has COVID-19 or symptoms of it? Yes

Americans with Disabilities Act

Questions During Employment

- May I screen employees for COVID? Yes
- May I take temperatures? Yes
- May I request a doctor's note? Yes (check state law)
- May I terminate if an employee is unable to return?
 - Maybe. See undue burden and sick leave laws

Family and Medical Leave Act

- 50 employees within 75 miles
- 12 weeks of leave (not necessarily paid)
- Serious health condition
- Self or family
- Interaction with FFCRA leave

Employer-Required Absence

- Employer shuts down to quarantine vs. employer furloughs because of lack of work
- May affect accessibility to paid leave such as FFCRA
- Establishing policy relating to use of leave and payment
- Salaried employees and wage and hour considerations

Voluntary Travel or Exposure

- Employer travel or off-work conduct policies
- Out-of-state travel quarantine requirements
- In some states, an employee is able to decide they cannot return because of safety concerns and be eligible for unemployment

School Closure

- Expected school closures or remote learning
- Plans to accommodate parents
- No legal requirement to maintain employment outside of FFCRA or state law

Suspected Abuse of Leave or Excessive Leave

- Have you gone through the request process?
- Does the leave fall into a protected category?
- Can the employee produce appropriate documentation?
- What does your policy say?
- How have you treated others?

Complaint Process

- Through a supervisor or human resources (consult policy)
- Department of Labor
- EEOC or state equivalent
- Office of Federal Contract Compliance Programs
- Lawsuit

Questions



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