



15th Annual
**EMPLOYMENT LAW
FORUM 2023**

October 4, 2023



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Family Matters: 30 Years of FMLA (and Counting!)

Weston J. Kulick

30 Years of FMLA

CELEBRATING 20 YEARS OF THE
FAMILY & MEDICAL LEAVE ACT

1993-2013

“OVER THE LONG RUN,
THE LESSONS OF THE MOST
PRODUCTIVE COMPANIES IN
THE WORLD, HERE AT HOME
AND AROUND THE WORLD,
ARE THAT THOSE WHO PUT
THEIR PEOPLE FIRST ARE
THOSE WHO WILL TRIUMPH
IN THE GLOBAL ECONOMY.”

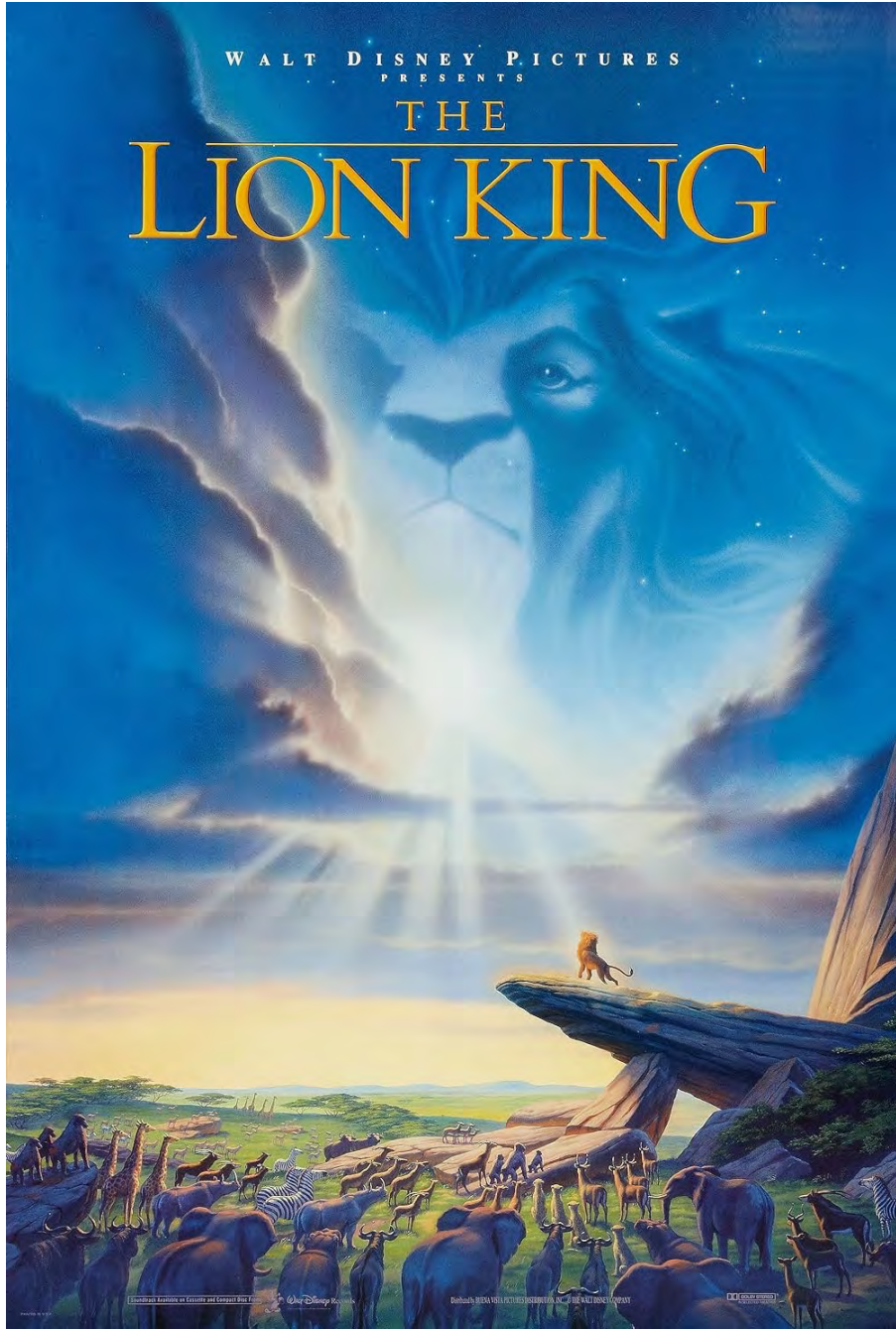
— PRESIDENT BILL CLINTON



30 YEARS:
WHAT HAS
CHANGED?



WHAT ELSE
HAS
CHANGED?

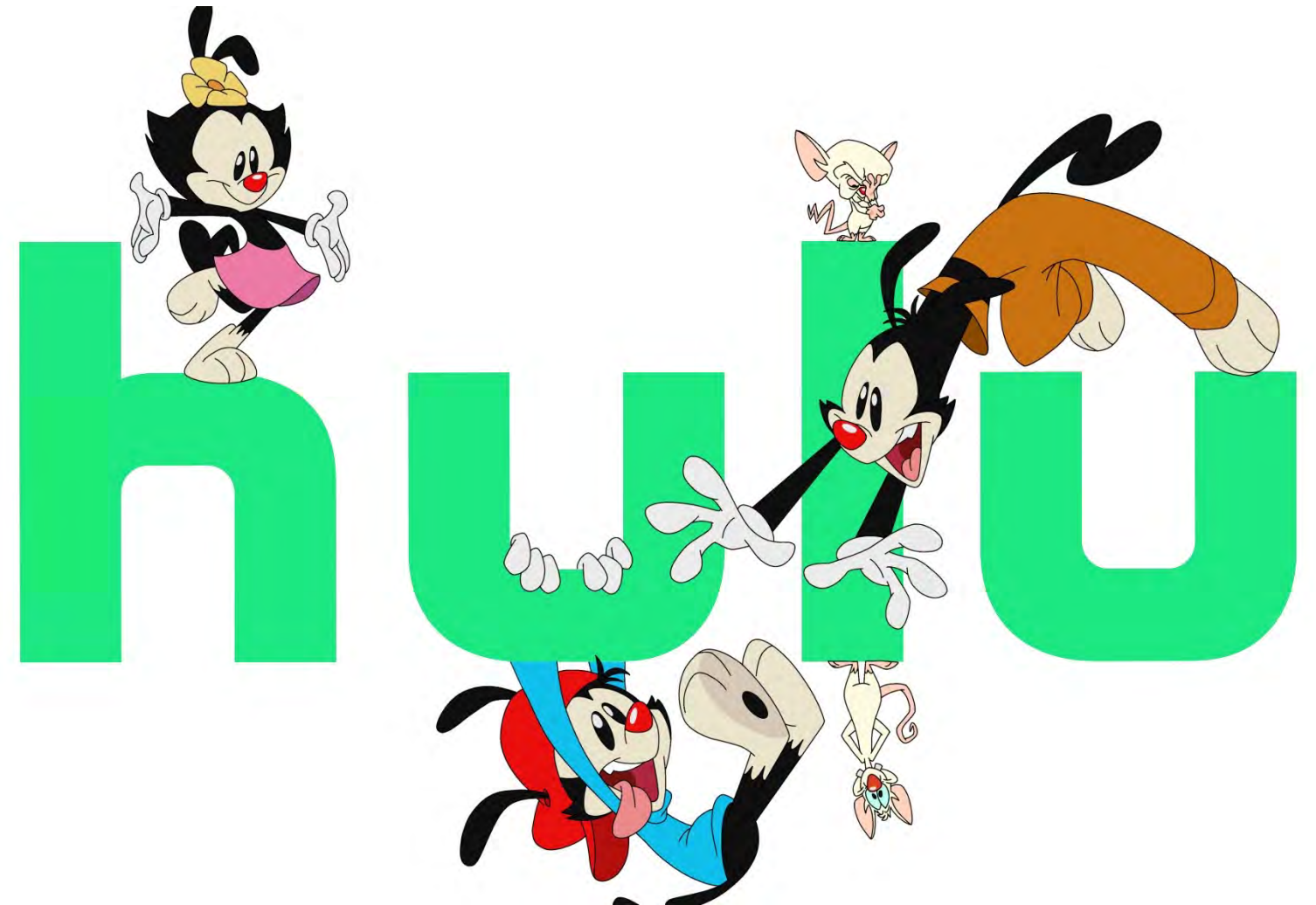




WHAT ELSE
HAS
CHANGED?



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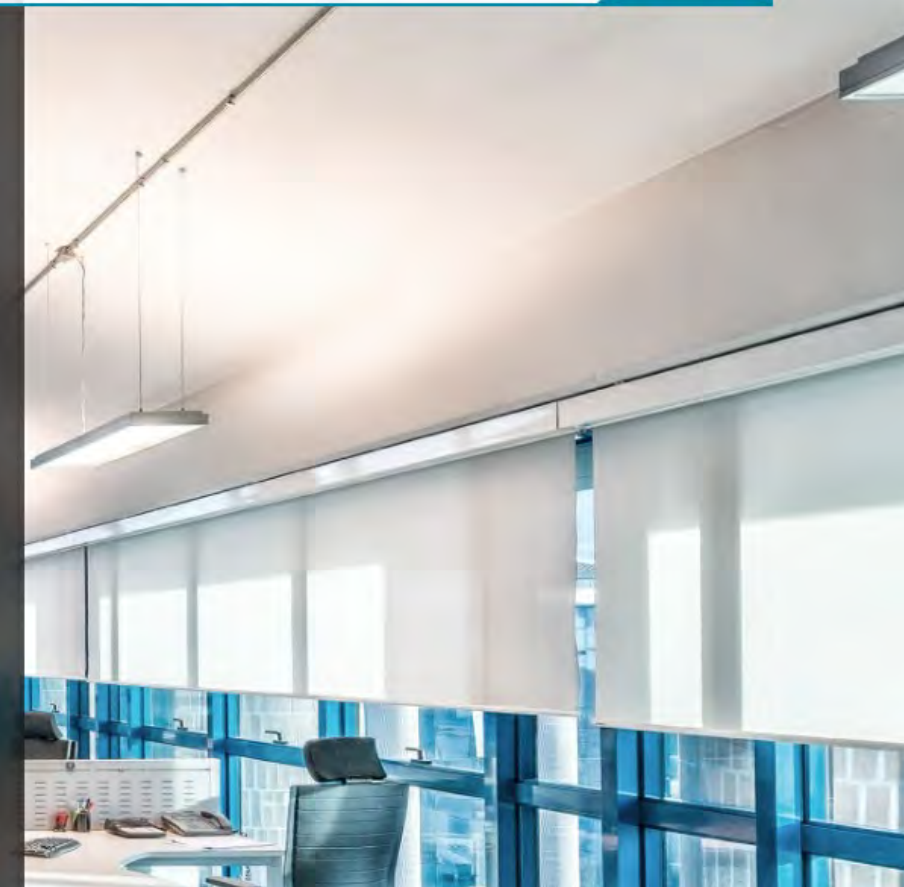


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90+ Attorneys Bringing
Clarity to Your Legal
Needs.



WHAT ELSE
HAS
CHANGED?



30 YEARS OF FMLA

We're protecting #WorkersRights so people don't have to choose between work and family.



Since the Family and Medical Leave Act became law, we've reached:

1,000,000+
EVENT PARTICIPANTS

Since the FMLA became law, we've helped:

18,000
WORKERS
who had been **unjustly terminated**

13,000
WORKERS
who were **denied FMLA leave**

1,000
WORKERS
whose **benefits weren't maintained**

13,000
WORKERS
who **faced discrimination** as a result of FMLA leave

RECOVER \$63M
in **back wages** for affected workers

12,000+
WORKERS
who **weren't restored** to the same or equivalent jobs

Don't forget the first step! Does the FMLA even apply?

The FMLA applies to covered employers and eligible employees:

Covered Employers

- Private sector
- Public agency
- Schools

Eligible Employees

- Employed at least 12 months
- At least 1,250 hours of service
- Worksite of 50+ employees within 75 miles



Coverage and Eligibility

The 12-Month Leave Period

- An employer has options for establishing the 12-month leave period, including:
 - The calendar year
 - The year beginning on the employee's anniversary of date of hire
 - The fiscal year
 - **A rolling 12-month period**

Who Counts?

- Temporary Workers?
- Independent Contractors?
- Secondary Employees (through agency)?



Permitted Reasons

Oh you say that you're taking
FMLA? ok enjoy your cruise



your  cards
someecards.com

Permitted Reasons



When can an employee take FMLA leave?

Pregnancy-
Related Leave

Family Member
with a Serious
Health Condition

Personal
Serious Health
Condition

Military
Qualifying
Exigency Leave

Military Family
Member with
Injury or Illness

Pregnancy-Related Leave

- Leave for pregnancy
- Leave for birth
- Leave for adoption/foster care
- Definition of son/daughter
- Definition of spouse



Caring For A Family Member

- What tasks qualify as “care”?
 - Directly involve the physical or psychological care
 - Arranging for care
- Who is “needed” to care?
 - Can be multiple
- Monitoring?
- Vacation?



Care: Does Location Matter? (Vacation!)

- Location may not matter so long as care is provided
- Beware of care as only an “incidental consequence” of a trip





What do I have to do? What does my employee have to do?

The FMLA imposes notice requirements on both employers and employees:



Employer Obligations

- Poster
- Notice of eligibility
- Designation notice

Employee Obligations

- Foreseeable
- Unforeseeable/Exigent

Notice Requirements

Your Employee Rights Under the Family and Medical Leave Act

What is FMLA leave?

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees with **job-protected leave** for qualifying family and medical reasons. The U.S. Department of Labor's Wage and Hour Division (WHD) enforces the FMLA for most employees.

Eligible employees can take **up to 12 workweeks** of FMLA leave in a 12-month period for:

- The birth, adoption or foster placement of a child with you,
- Your serious mental or physical health condition that makes you unable to work,
- To care for your spouse, child or parent with a serious mental or physical health condition, and
- Certain qualifying reasons related to the foreign deployment of your spouse, child or parent who is a military servicemember.

An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness **may take up to 26 workweeks** of FMLA leave in a single 12-month period to care for the servicemember.

You have the right to use FMLA leave in **one block of time**. When it is medically necessary or otherwise permitted, you may take FMLA leave **intermittently in separate blocks of time, or on a reduced schedule** by working less hours each day or week. Read Fact Sheet #28M(c) for more information.

FMLA leave is **not paid leave**, but you may choose, or be required by your employer, to use any employer-provided paid leave if your employer's paid leave policy covers the reason for which you need FMLA leave.

Am I eligible to take FMLA leave?

You are an **eligible employee** if **all** of the following apply:

- You work for a covered employer,
- You have worked for your employer at least 12 months,
- You have at least 1,250 hours of service for your employer during the 12 months before your leave, and
- Your employer has at least 50 employees within 75 miles of your work location.

Airline flight crew employees have different "hours of service" requirements.

You work for a **covered employer** if **one** of the following applies:

- You work for a private employer that had at least 50 employees during at least 20 workweeks in the current or previous calendar year,
- You work for an elementary or public or private secondary school, or
- You work for a public agency, such as a local, state or federal government agency. Most federal employees are covered by Title II of the FMLA, administered by the Office of Personnel Management.

How do I request FMLA leave?

Generally, **to request FMLA leave you must:**

- Follow your employer's normal policies for requesting leave,
- Give notice at least 30 days before your need for FMLA leave, or
- If advance notice is not possible, give notice as soon as possible.

You **do not have to share a medical diagnosis** but must provide enough information to your employer so they can determine whether the leave qualifies for FMLA protection. You **must also inform your employer if FMLA leave was previously taken** or approved for the same reason when requesting additional leave.

Your **employer may request certification** from a health care provider to verify medical leave and may request certification of a qualifying exigency.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

State employees may be subject to certain limitations in pursuit of direct lawsuits regarding leave for their own serious health conditions. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress.

What does my employer need to do?

If you are eligible for FMLA leave, your **employer must:**

- Allow you to take job-protected time off work for a qualifying reason,
- Continue your group health plan coverage while you are on leave on the same basis as if you had not taken leave, and
- Allow you to return to the same job, or a virtually identical job with the same pay, benefits and other working conditions, including shift and location, at the end of your leave.

Your **employer cannot interfere with your FMLA rights** or threaten or punish you for exercising your rights under the law. For example, your employer cannot retaliate against you for requesting FMLA leave or cooperating with a WHD investigation.

After becoming aware that your need for leave is for a reason that may qualify under the FMLA, your **employer must confirm whether you are eligible** or not eligible for FMLA leave. If your employer determines that you are eligible, your **employer must notify you in writing:**

- About your FMLA rights and responsibilities, and
- How much of your requested leave, if any, will be FMLA-protected leave.

Where can I find more information?

Call **1-866-487-9243** or visit [dol.gov/fmla](https://www.dol.gov/fmla) to learn more.

If you believe your rights under the FMLA have been violated, you may file a complaint with WHD or file a private lawsuit against your employer in court. **Scan the QR code to learn about our WHD complaint process.**



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR



Employer Actions

- Record-keeping



- Investigating potential fraudulent leave

Enforcement

- The DOL's Wage and Hour Division enforces the FMLA.
- Private employees can sue! An employer who violates the FMLA can be liable:
 - Lost compensation or any other actual monetary losses (including cost of providing substitute care), plus interest.
 - Reinstatement or promotion.
 - Attorney and expert witness fees and other costs.



Questions?

Goodnight Everybody



Weston J. Kulick



Understanding NJ Sick Leave & NJ FLA...Hooray

David L. Disler

GLOSSARY

FMLA

FAMILY MEDICAL
LEAVE ACT

NJ FLA

NEW JERSEY FAMILY
LEAVE ACT

NJ FLI

NEW JERSEY FAMILY
LEAVE INSURANCE

MEET THE DISLERS



Husband

Attorney (Employment
and Education Law)



Wife

Director, Communications

MEET THE DISLERS



LEAVE ENTITLEMENT



- December 2018
- 38 weeks pregnant
- Is either Husband or Wife entitled to any leaves?

LEAVE ENTITLEMENT



- YES
- FMLA
 - 12 weeks of unpaid leave for serious health conditions.
 - 4 weeks before giving birth presumptively disabled.

LEAVE ENTITLEMENT



- MAYBE
- FMLA/NJ FLA
 - Possibly to care for spouse during pregnancy.

MEET THE DISLERS



MEET THE DISLERS



MEET THE DISLERS



MEET THE DISLERS



MEET THE DISLERS



LEAVE ENTITLEMENT



- Is Husband entitled to any leaves?
- YES
- NJ FLA (NEW JERSEY'S FAMILY LEAVE ACT)
- FMLA (FAMILY MEDICAL LEAVE ACT)

LEAVE ENTITLEMENT



- Is Wife entitled to any leaves?
- YES
- NJ FLA (NEW JERSEY'S FAMILY LEAVE ACT)
- FMLA (FAMILY MEDICAL LEAVE ACT)

LEAVE ENTITLEMENT



- Is Child # 1 entitled to any leaves?
- NO
- No FMLA or NJ FLA leave to get out of school.

Who It Applies To

FMLA

- Public sector employers
- Private sector employers with 50 or more employees who have worked 20 or more weeks during the calendar year.

NJ FLA

- 50 or more employees (including out-of-state employees) who worked 20 or more weeks during the current or prior year.

FMLA vs. NJ FLA

Who Is Eligible

FLMA

- Employees who have worked for their employer for:
 - 12 months
 - Worked 1,250 hours during that time

NJ FLA

- Employees who have worked for their employer for:
 - 12 months
 - Worked **1,000** hours during that time

How Much Leave

FLMA

- 12 months of leave in a 12-month period.*

*12 months

- Calendar year
- Fixed period (i.e. fiscal year or employee's anniversary date)
- First day of leave (measured forward)
- Measure backward from any leave.

NJ FLA

- 12 months of leave in a 24-month period*

*24 months

- Calendar year
- Fixed period (i.e. fiscal year or employee's anniversary date)
- First day of leave (measured forward)
- Measure backward from any leave.

Leave is Permissible

FLMA

- To give birth to and care for a newborn child;
- To care for an adopted child or child placed through foster care;
- To care for a spouse, child, or parent with a serious health condition;
- To take time to recover from his or her own serious health condition; or
- To take time away from work due to a family member's active duty status in the military.

NJ FLA

- To give birth to and care for a newborn child;
- To care for an adopted child or child placed through foster care; or
- To care for a spouse, child, parent, or parent-in-law with a serious health condition.
- **NJ FLA DOES NOT PROVIDE LEAVE TO CARE FOR ONE'S OWN MEDICAL CONDITION**

What Is a Serious Health Condition

NJ FLA same as FMLA

- An illness, injury, impairment, or physical or mental condition that involves:
 - Inpatient care in a hospital, hospice, or residential medical care facility; or
 - Continuing treatment by a health care provider.



Can an Employer Run Both FMLA & NJ FLA Concurrently?

- Yes, but ...
- The leaves only can run concurrently if the reason for the leave qualifies for both.
- Make sure to have updated:
 - Policy
 - Handbook

LEAVE ENTITLEMENT

BEFORE THE BIRTH



Not eligible for FMLA or NJFLA (unless care for spouse required - then FMLA)



Not eligible for NJ FLA, but eligible for FMLA (4 weeks before giving birth presumptively disabled)

LEAVE ENTITLEMENT

AFTER THE BIRTH



Eligible for 12 Weeks of FMLA or NJFLA, which can be made to run concurrently.



Eligible for 12 Weeks of FMLA or NJFLA, which can be made to run concurrently.

As she already used 4 weeks of FMLA, the first 8 weeks will be both FMLA/NJ FLA running concurrently.

The last 4 weeks will only be NJ FLA.

LEAVE ENTITLEMENT



Before Birth

FMLA	NJ FLA
0 weeks	0 weeks

Birth

FMLA

12 weeks

(can be run concurrently)

After Birth

NJ FLA

12 weeks



4 weeks	0 weeks
---------	---------

8 weeks

(can be run concurrently)

12 weeks

LEAVE ENTITLEMENT

AFTER THE BIRTH



Takes 12 weeks of FMLA/NJ FLA leave immediately after the birth.



Decides not to take FMLA/NJ FLA leave after the birth. Instead, would like to start his leave on Week 13 following the birth. Can he do so?

YES

LEAVE ENTITLEMENT

Same Employer



FMLA

- Limited to combined 12 weeks
- But can be split among both employees (i.e. 6 weeks/6 weeks)

NJ FLA

- No restriction under NJ FLA
- Each spouse entitled to full allotment of NJ FLA leave

MEET THE DISLERS



MEET THE DISLERS



MEET THE DISLERS



Child #1

Almost 5 years old

Strength: Running

Weakness: Sitting still



Child #2

16 months old

Strength: A Daddy's Girl

Weakness: Doesn't like it when she doesn't get her way

MEET THE DISLERS



LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule



Due to Child #1's injury, he requires weekly physical therapy over the next month.

Wife requests every Monday off? Is this allowed under NJ FLA?

YES

LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule



Due to Child #1's injury, he requires weekly physical therapy over the next month.

Husband requests to leave early on Mondays and Wednesdays? Is this allowed under NJ FLA?

YES

LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule

Intermittent Leave

- Leave taken in multiple blocks of time

Reduced Schedule

- Reduce an employee's usual number of working hours per week or day.



LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule

Under NJ FLA - intermittent or reduced schedule available:

In connection with the serious health condition of a family member

To care for or bond with a newly born, adopted or foster child

Unlike FMLA, NJ FLA permits intermittent or reduced leave schedule to care for a newly born, adopted or foster child

FMLA - employer must agree to allow for this use.

LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule



Due to Child #1's injury, he requires weekly physical therapy over the next month.

Husband requests to leave early on Mondays and Wednesdays?

In response, employer wishes to temporarily transfer him to another position to better accommodate this change in schedule. His pay will remain the same.

Is this allowed?

YES

LEAVE ENTITLEMENT

Intermittent Leave/Reduced Schedule

For foreseeable intermittent leave

Employers may require the temporarily transfer to an available alternative position for which the employee is qualified and better accommodates recurring periods of leave than the employee's regular position.

The alternative position must have equivalent pay and benefits to the employee's regular position.

MEET THE DISLERS



New Jersey's Paid Sick Leave Act



Paid Sick Leave



Almost all employers are required to provide paid sick leave under the new law.

There is no small business exemption.

Part-time, temporary, and seasonal employees are covered by the law as well as exempt and non-exempt employees.

How Much Paid Sick Leave

Up to 40 hours per year



Two Accrual Methods

Accrue one hour for every 30 hours worked

Front load all 40 hours of sick leave at the beginning of the benefit year

Paid Sick Leave

Paid Sick Leave

Permissible Uses

Illness/Injury

Diagnosis, care, treatment, and/or recovery from mental or physical illness, injury or other adverse health condition of the employee or the employee's **family member***

Care

Preventive medical care

Violence

The employee or a family member's status as a victim of domestic or sexual violence

School Closure

Closure of the workplace, school, or childcare facility issued by a public health authority due to a public health emergency

School Meeting

School-related conference or meeting

Paid Sick Leave

Who is a Family Member?

The law broadly defines "family member".

Includes:

Children, grandchildren, siblings, spouses, domestic partners, civil union partners, parents, and grandparents

“Any person with whom the employee has a **significant personal bond** that is, or **is like, a family relationship**, regardless of biological or legal relationship.”



Paid Sick Leave

Notice

Foreseeable Leave

Employee must give 7 days' notice

Unforeseeable Leave

Employee must give notice "as soon as practicable"



Paid Sick Leave

Black Out Dates



- Black out dates permitted
- Foreseeable earned sick leave may not be taken
- Require medical documentation for unforeseeable leave taken.
- Employees are required to make a reasonable effort to schedule the use of earned sick leave in a manner that does not unduly disrupt the operations of the employer.

MEET THE DISLERS



LEAVE ENTITLEMENT



FMLA

Possibly

NJ FLA

Possibly

Available Leave

FLMA

- To care for an adopted child or child placed through foster care;
- To care for a spouse, **child**, or parent with a **serious health condition**.

NJ FLA

- To care for an adopted child or child placed through foster care; or
- To care for a spouse, **child**, parent, or parent-in-law with **a serious health condition**.
 - Requires “**serious health condition**”
 - An illness, injury, impairment, or physical or mental condition that involves
 - **Inpatient care in a hospital**, hospice, or residential medical care facility; or
 - **Continuing treatment by a health care provider**.

LEAVE ENTITLEMENT



FMLA/NJ FLA

Possibly

Paid Sick Leave Act

Yes

Permissible Uses

Illness/Injury

Diagnosis, care, treatment, and/or recovery from mental or **physical illness**, injury or other adverse health condition of the employee or the **employee's family member**

Care

Preventive medical care

Violence

The employee or a family member's status as a victim of domestic or sexual violence

School Closure

Closure of the workplace, school, or childcare facility issued by a public health authority due to a public health emergency

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MEET THE DISLERS

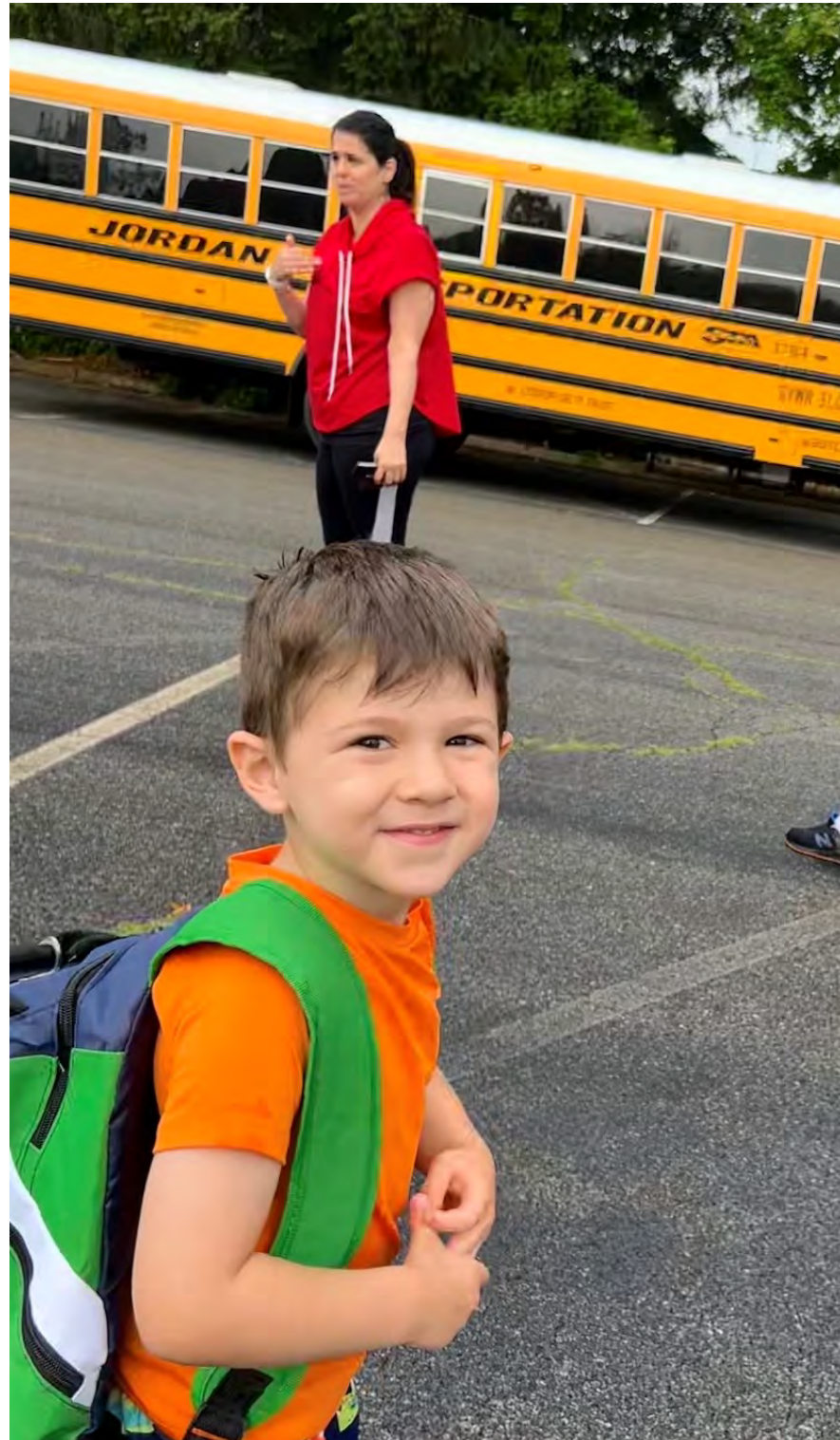


MEET THE DISLERS



PARENT  TEACHER
CONFERENCES

LEAVE ENTITLEMENT



FMLA/NJ FLA

No

Paid Sick Leave Act

Yes

Paid Sick Leave

Permissible Uses

Illness/Injury

Diagnosis, care, treatment, and/or recovery from mental or physical illness, injury or other adverse health condition of the employee or the employee's family member*

Care

Preventive medical care

Violence

The employee or a family member's status as a victim of domestic or sexual violence

School Closure

Closure of the workplace, school, or childcare facility issued by a public health authority due to a public health emergency

School Meeting

School-related conference or meeting

Recommendations

Updated Policy

Concurrent leave under FMLA/NJ FLA

Interplay with contractual leaves (if offered)

Black Out Dates for Paid Sick Leave

Update Handbook

Ensure consistency with Policy

Clearly outline leave entitlements

Training

HR Personnel correctly apply FMLA, NJ FLA, NJ FLI & Contractual Leave

Sick Leave Is Correctly Tracked

Sick Leave Is Applied Correctly

Documentation

Document all leave requests

Document reasons for leave

Document response

Ensure medical documentation remains confidential

Properly file all documentation

“Help! My Employee is on Leave. What about Pay and Benefits?”

Rahool Patel
Kerri A. Wright

Wage and Hour & Benefits Issues During Leave

- What can I ask an employee to do while on leave?
- What do I need to pay an employee on leave?
- What benefits do I need to provide an employee taking leave?
- Who pays for these benefits?
- Under what circumstances can I stop paying for these benefits?

What Can I Ask an Employee on Leave to Do?

- Under the federal Family and Medical Leave Act (“FMLA”) and the New Jersey Family Leave Act (“NJ FLA”), you cannot *interfere with* an employee’s exercise of their statutory rights.
- A handful of work-related communications requiring minimal time and effort may be permissible. Anything else is likely a problem.

Pop Quiz



- May I ask an employee on leave for a copy of a document that is readily available to that employee?



Pop Quiz



- May I ask an employee on leave to complete a detailed status update about a longstanding project?



Pop Quiz



- May I ask an employee on leave to check emails on a regular basis?



Pop Quiz



- May I ask an employee on leave with institutional knowledge of a longstanding project to share this information with a colleague unfamiliar with the project?



Pop Quiz



- May I ask an employee on leave to attend an in-person training session or other work event?



Pop Quiz



- May I offer an employee on leave the option to attend a virtual training program being offered to other employees?



**Proceed
with
Caution**

What Can I Ask an Employee on Leave to Do?

- Most courts reject arguments that employees have “volunteered” to do work while on leave unless the evidence clearly shows that the employee did the work on their own accord and there was no implicit pressure whatsoever from the employer.
- If a non-exempt (eligible for overtime) employee does work on leave, you must pay them.

What About Pay for Employees on Leave?

- Sources of salary continuation when an employee is on paid leave:
 - Regular salary or wages
 - State of New Jersey
 - Private plan (company paid and/or employee paid)
- The total amount paid should not exceed limit in private plan or 100% of regular salary or wages, whichever is lower.

What About Bonuses for Employees on Leave?

- Some bonuses may be pro-rated:
 - Billable hours
 - Individual sales or revenue targets
- Other bonuses may not be pro-rated:
 - Perfect attendance
 - Holiday
 - Company performance

What About Benefits for Employees on Leave?

- **General Rule:** You must provide employees on a statutory leave of absence with all employment benefits on the same terms and conditions as the employee would have received when not on leave.
- What benefits need to continue if an employee is on leave pursuant to the Americans with Disabilities Act or New Jersey Law Against Discrimination?

What About Benefits for Employees on Leave?

- Health benefits must continue under the FMLA & NJFLA at the same coverage level (employee, spousal, head of household, family).
- Continue pre-tax deduction of employee portion of health insurance premium if employee is receiving salary continuation from employer.
- Arrange for payment of employee portion of health insurance premium if third-party salary continuation or leave is unpaid.

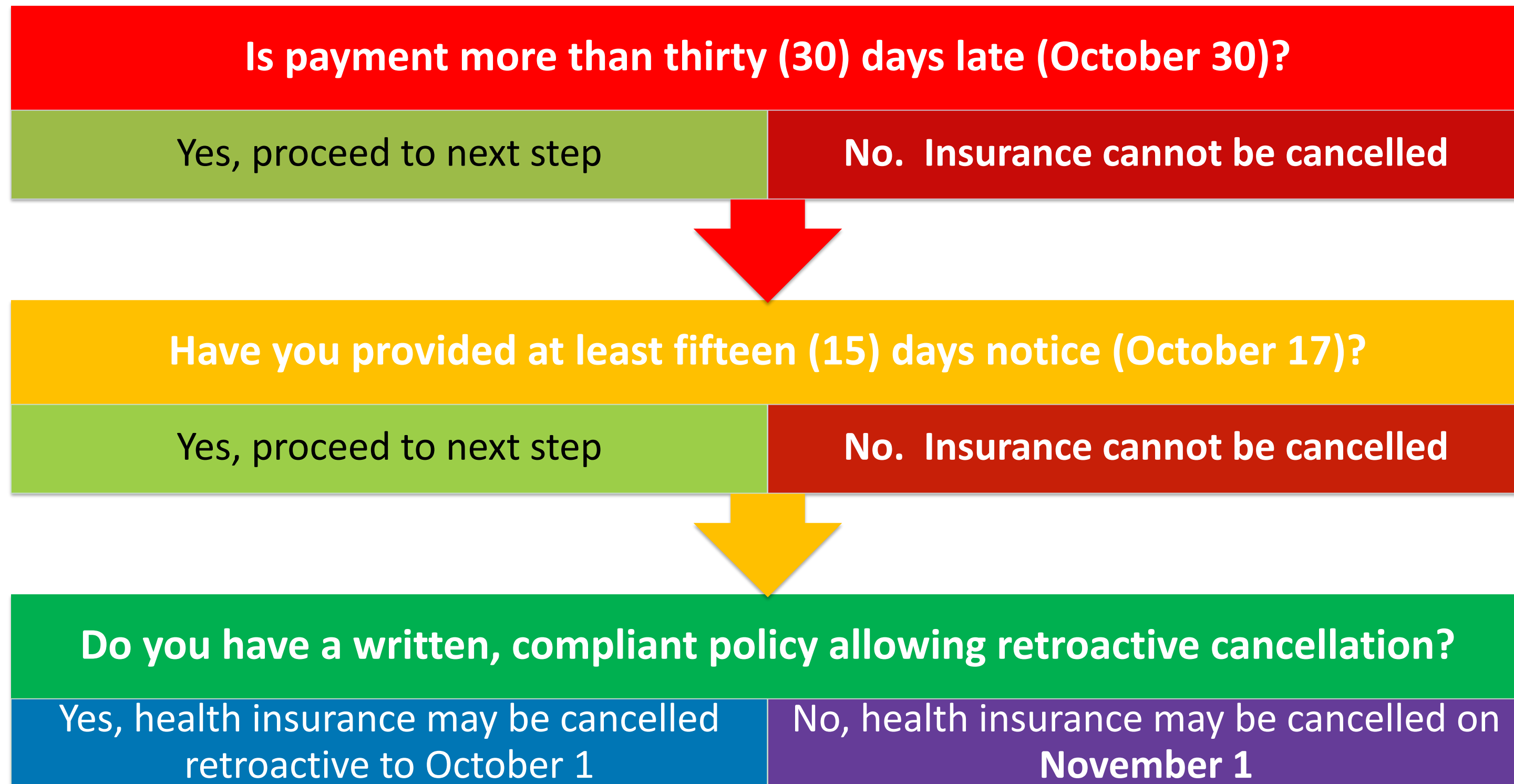
What About Benefits for Employees on Leave?

- If the employer changes health plans or the benefits under an existing plan while an employee is on leave, the employee is entitled to participate in the changes.
- If an employee declines health insurance coverage during leave, they have the right to immediate reinstatement at the same coverage level upon return from leave (no waiting periods, examinations, or exclusions may be applied).

Under What Circumstances Can I Stop an Employee's Health Insurance While on Leave?

- **Scenario:** Employee goes on unpaid leave and is required to make his share of the health insurance premium by the first day of the month.
- What happens if the employee fails to make a payment on October 1? May I cancel the employee's insurance?

Under What Circumstances Can I Stop an Employee's Health Insurance While on Leave?



Under What Circumstances Can I Stop an Employee's Health Insurance While on Leave?

- To recap:
 - Under the FMLA, an employer is not required to continue maintaining health insurance coverage for an employee on leave if the employee's portion of the premium is more than 30 days late.
 - However, the employer must provide at least 15 days of notice to the employee first.
 - Coverage may only be cancelled retroactively if the employer has a written policy to that effect applicable to all forms of leave.

Under What Circumstances Can I Seek Reimbursement for Health Insurance Premiums?

- If an employee on leave does not return to work under the FMLA, the employer may be able to recover its share of health plan premiums under certain circumstances.

Pop Quiz



- May I recover premiums when an employee does not return to work because she has accepted a new job?



Pop Quiz



- May I recover premiums when an employee does not return to work because his newborn child has a serious health condition?



Pop Quiz



- May I recover premiums when an employee does not return to work because he wishes to bond with his newborn child?



**Proceed
with
Caution**

Pop Quiz



- May I recover premiums when an employee does not return to work because her aunt has a serious health condition requiring care?



Pop Quiz

- May I recover premiums when an employee does not return to work because his spouse was unexpectedly transferred to a new job location?



**Proceed
with
Caution**

Under What Circumstances Can I Seek Reimbursement for Health Insurance Premiums?

- To recap:
 - If an employee on leave does not return to work under the FMLA, the employer may be able to recover its share of health plan premiums unless the inability to return to work arises from a serious health condition or circumstances beyond the employee's control.
 - An employee who comes to work for at least 30 calendar days after leave or transfers directly to retirement (or does so in the first 30 days) is deemed to have "returned to work."

What About Benefits for Employees on Leave?

- Accrual of:
 - Paid sick leave
 - Vacation time or other paid time off (“PTO”)

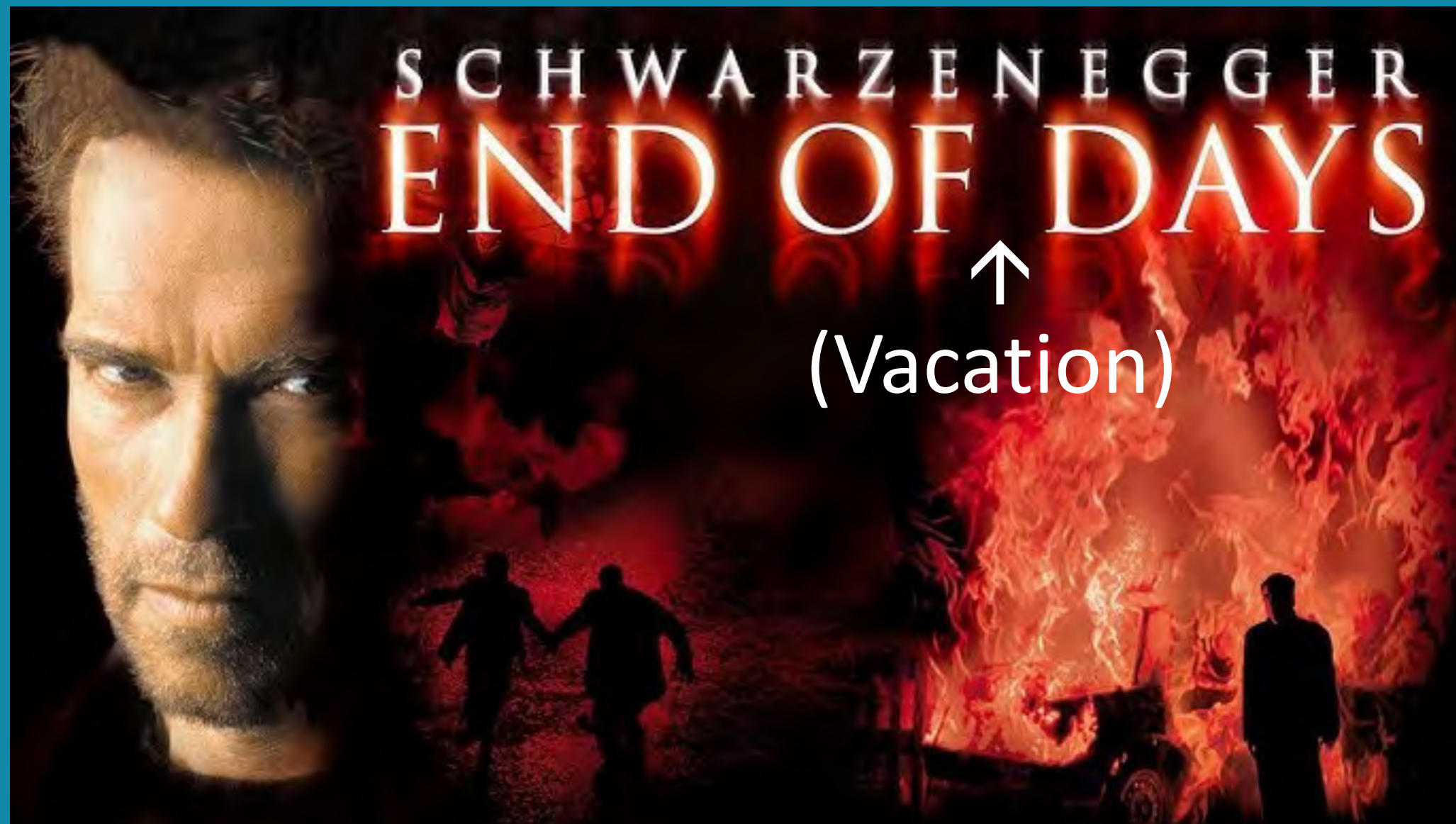
- Retirement account contributions

- FSAs and HSAs

Discipline & Termination While on Leave: End of (Vacation) Days

Brian Giardina
Thomas J. Reilly

Discipline & Termination While on Leave: End of (Vacation) Days



Why this topic?

Types of Leave

- Sick Leave
- Personal Day
- Vacation Day
- Other Paid Time Off
- Bereavement
- Suspension with/without pay
- FMLA
- NJFLA
- Temporary Disability

Employee Leave Protected

- Employees who take leave are protected from retaliation
- Employees must comply with the terms of their leave, including when to return



Documenting Reasons for Discipline/Termination



- Document all conduct & performance issues
- Used to support and articulate non-discriminatory reason for adverse employment action

The Employee Handbook While on Leave

- Your handbook/manual applies to employees on leave
- Ensure that it covers potential misconduct on leave:
 - Arrest overseas;
 - Social Media incident(s);
 - Inappropriate communication with current employees/clients/customers.

For
Example...



Junior

- **Facts:**
 - Employee is employed by a school district as a teacher.
 - She requests, and is granted, leave due to a high-risk pregnancy.
 - Upon her return, the Board decides not to renew her contract (i.e., she is fired).





Why Was the Decision Lawful?

- *Ramirez v. Bd. of Educ. of Twp. of Orange*, No. A-5286 (App. Div. Oct. 26, 2018)
 - Employee had **well-documented** performance problems.
 - These problems existed *before* her pregnancy.
 - Objective and verifiable documentation is key.

- **Facts:**
 - Employee is employed by an armored car company in a strenuous, physically demanding position.
 - He takes leave for heart surgery.
 - At the end of his leave, he still was not medically cleared to return to work.
 - Employer terminates him, but encourages him to return when he is cleared to work.

Total Recall





What Did the Employer Do Wrong Here?

- *Brown v. Dunbar Armored, Inc.*, No. 08-3286 (D.N.J. 2009).
 - Failure to engage in *interactive process*.
 - Needless, self-inflicted errors.
 - Fact disputes arose from lack of documentation.

The Expendables

- Facts:
 - Employee, who was not entitled to FMLA or NJFLA leave, requested leave due to pregnancy.
 - Employer granted the leave, subject to condition that position did not become “surplus” during leave.
 - Employee was terminated during her leave after corporate restructure.





What Did the Employer Do Wrong Here?

- *Lapidoth v. Telcordia Technologies, Inc.*, 420 N.J. Super. 411 (App. Div. 2011).
 - Imprecise language created fact issue regarding what employer actually promised.
 - Employers have to follow their own policies.
 - Needless, self-inflicted errors (again).



Recommendations



Questions?



Brian Giardina



Thomas J. Reilly



Up Next



Janelle Edwards-Stewart



15th Annual **EMPLOYMENT LAW FORUM 2023**

October 4, 2023



Employee Mental Health: Mind Your Business!

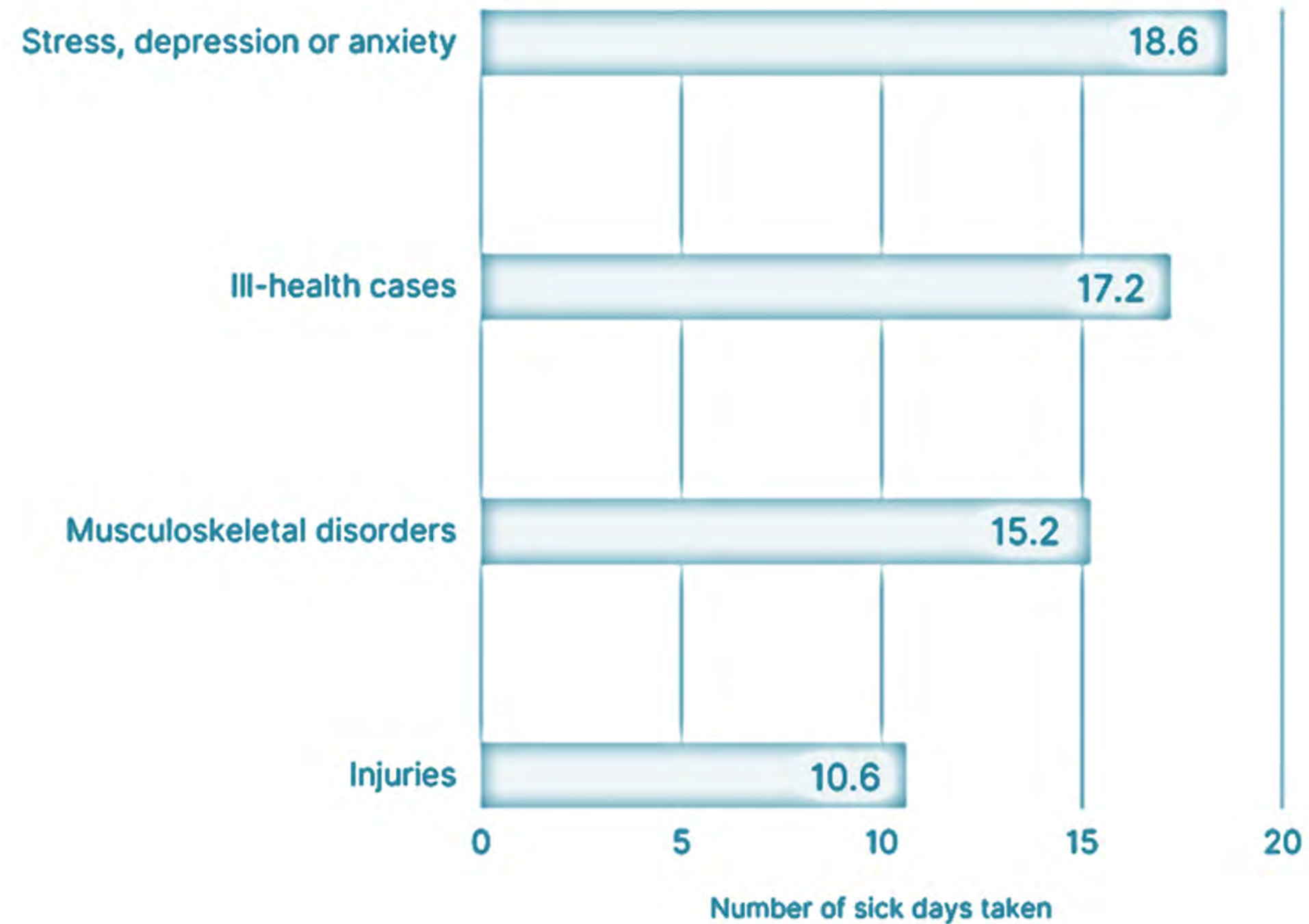
Janelle Edwards-Stewart

The Diagnosis



Average number of annual sick leave days taken per employee

Source: Deloitte, 2022





86%

of finance organisations
experienced an increase in
demand for mental health
support in 2021



45%

of workers in construction
and engineering have
taken time off due to poor
mental wellbeing



The education sector had
a turnover rate of

70%

in 2020-2021, showing a steep
decline in mental wellbeing



1 in 6

people experience
mental health
problems in the
workplace



12 billion

working days are lost
every year to
depression and
anxiety.



Happy employees are

13%

more productive

The Treatment



Lawfully



Legal Authorities

The Family and Medical Leave Act

Federal job protected leave for specified family and medical reasons

Americans with Disabilities Act

Federal law that prohibits discrimination against individuals with disabilities in employment

New Jersey Family Leave Act

Provides job protected leave to care for a sick family member

New Jersey Law Against Discrimination

Prohibits employment discrimination based on disability

Occupational Health and Safety Administration

Federal agency that ensures safe and healthful working conditions

Worker's Compensation

Insurance policy that provides medical treatment, wage replacement, and long-term disability compensation

Occupational Health and Safety Administration



- Duty to record serious work-related injuries
- Mental illnesses are recordable if the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional stating that the employee has a mental illness that is work-related

Worker's Compensation

- In New Jersey, mental health claims for worker's compensation are permitted.
- Employee must prove that his/her stress, illness, or mental health condition is a direct result of his/her work or occupational exposure.

Americans with Disabilities Act

- Prohibits
 - Disability discrimination against **job applicants** and **employees**;
 - Harassment against individuals based on disability; and
- Requires
 - **Reasonable accommodations**
 - Engagement in the interactive process
 - No retaliation against an employee for requesting a reasonable accommodation

Americans with Disabilities Act

A physical **or mental impairment** that **substantially limits** a major life activity

Mental impairment - any mental or psychological disorder, including the following:

- **Emotional or mental illness**
- An intellectual disorder
- An organic brain syndrome
- Specific learning disability



Documentation

Employer may request documentation to verify disability if the...

- disability is not obvious **or**
- employee has not provided sufficient information to substantiate the ADA disability



Documentation should come from the employee's mental health professional

Documentation need not provide a diagnosis, but can instead provide how the disability substantially limits the employee

Verification

Inquiries - Pre-employment

CAN ask

- Do you need a reasonable accommodation to perform the essential function of the of the job you're applying for?
- What reasonable accommodation do you need?
- Other inquires to determine if something more is required of you, the employer.

CANNOT ask

- For a diagnosis or inquire as to the nature of the disability.
- For applicant to take a medical examination until after a *bona fide* offer of employment has been made.



Verification

Inquiries - Post employment

CAN ask

- Are you okay?
- Do you need assistance?
- Do you need medical attention?
- Do you need a reasonable accommodation?
- What reasonable accommodation do you need?
- Other inquiries to determine if something more is required of you, the employer.

CANNOT ask

- Do you have a disability?
- What have you been diagnosed with?
- What kind of treatment are you seeking/receiving?
- What medication are you on?



Verification

Fitness for Duty Exams

ADA

For current employees, medical examinations must be the following:

- Job-related; and
- Consistent with business necessity

FMLA

Employers may obtain medical documentation supporting an employee's fitness for duty upon returning from leave



Verification

The Cost



- Lost productivity ↓
- EEOC reports thousands of charges of discrimination based on mental health conditions each year
- EEOC recovered \$20 million in one year ↓

Proactively



Invest

Early intervention and prevention are key.



Global mental illness is estimated to **cost \$2.5 trillion** in lost productivity.

Companies can **save \$2-4** for every \$1 invested in early intervention and prevention.

Good Business

Employee Assistance Programs (EAP)



- Designed to address mental and wellness issues
- Voluntary work-based program that often provides **free and confidential** access to the following:
 - Assessments
 - Short-term counseling
 - Referrals
 - Crisis management
 - Grief counseling

Consider These Too!



- Manager Mental Health Training
- Digital Tools and Programs
- Mental Health Programs through Benefits Plan
- Employee Resource Groups
- Meditation Facilitation

And These!



- Workplace Coalitions and Campaigns
- Meditation Facilitation
- Energy Management Training
- Back-up Dependent Care
- Workplace Mental Health Policies

Multidisciplinary - ily!





Employee Mental Health Panel

Kevin M. Craig
David C. Hesse
Dr. Deborah Foulkes Bert
Dr. Stephen M. Neff, M.Div., MSN,
APN-BC PMHNP

The Wild Wild Web

An employee at a business serving individuals with mental health needs posted content on his social media account, which was set to public view. In the postings, the employee could be seen wearing apparel associated with the business. In one post, the employee referred to a child with a disability as “retarded”. In other message and video posts, the employee wished for his ex-girlfriend’s death and accused her of having casted spells on him that were responsible for negative occurrences in his life. The employer received notice of the postings from an anonymous member of the public who recognized the employee’s work paraphernalia.



All Angles Review

15th Annual
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Accommodating Employees in the Workplace

Richard H. Bauch
Marie-Laurence Fabian

Americans with Disabilities Act



ADA Requires Employers provide:

1. Reasonable accommodation to
2. Qualified individuals with disability
3. Unless doing so would cause an undue hardship.

**A request for an
accommodation is
made ...**

What do you do next?



Unreasonable Accommodations



1.

Impose an undue hardship



2.

Relieve the employee from performing the essential job functions



3.

Creates a direct threat to the safety of the employee or others

Common Accommodation Requests

Leave of
Absence

Light Duty

Work from
Home



Leave

Long-Term

Long-term leave of absence may not be reasonable

Intermittent

Intermittent leave may be reasonable

Indefinite

Indefinite or open-ended leaves are likely not reasonable

Flexible

Flexible schedule may be reasonable

Interactive Process



Explore Accommodation Options



- Review information provided by employee
- May need to consult with outside resources
 - Job Accommodation Network
- Accommodations can be provided on a “trial” basis. If the accommodation causes an undue hardship, a new accommodation can be offered.

How To Make A Business Disability Friendly



Better Accommodate Employees



- Create a business space that makes it easy for employees with disabilities to work with your company and advertise that fact.
 - *Offer a quiet space for employees*
 - *Use person-first language (i.e., employee with a disability, not disabled employee)*
 - *Where possible, be flexible with time and location*
- Remember that appearing disengaged is often just a sign of exhaustion

Look Inside and Outside

- Create a tolerant, respectful, and empathetic culture through focused staff training (consider utilizing employee surveys)
- Make hiring practices disability friendly
 - Increase work opportunities for people with disabilities
 - Proactively recruit employees with disabilities
 - Reach out and connect with disabled community
 - Write job descriptions that are appealing to people with disabilities

Raise The Bar

- During interview process make clear that diversity & inclusion are important company priorities
- Create employee resource groups for employees with disabilities
 - Provide space for employees to raise issues, network, and explore career development
- Have a strong and clear reporting mechanism for employees facing discrimination that does not tolerate retaliation against employees raising complaints

Improve Processes



- Streamline accommodation process
 - Process requests as quickly as possible
 - Adopt and train employees on efficient process to receive, evaluate, and respond to accommodation requests
 - Empower managers to act quickly, in part, by providing clear standards for accommodations that should not require further approvals
 - Subject managers' denials of requests to extra scrutiny
 - Have a feedback process to determine if employee is satisfied with how process was handled and result
 - Communicate to employees that this is a priority

Remember

Accessibility

Accessibility is being able to get in the building.



Diversity

Diversity is getting invited to sit down at the table.



Inclusion

Inclusion is being invited to speak at the table.



Belonging

Belonging is having your voice heard at the table.





Hiring, Respecting, and Thriving With Transgender and Nonbinary Employees

Brian Giardina
Melanie D. Lipomanis

Why Do We
Need To Talk
About This
Topic?



Identity Explained

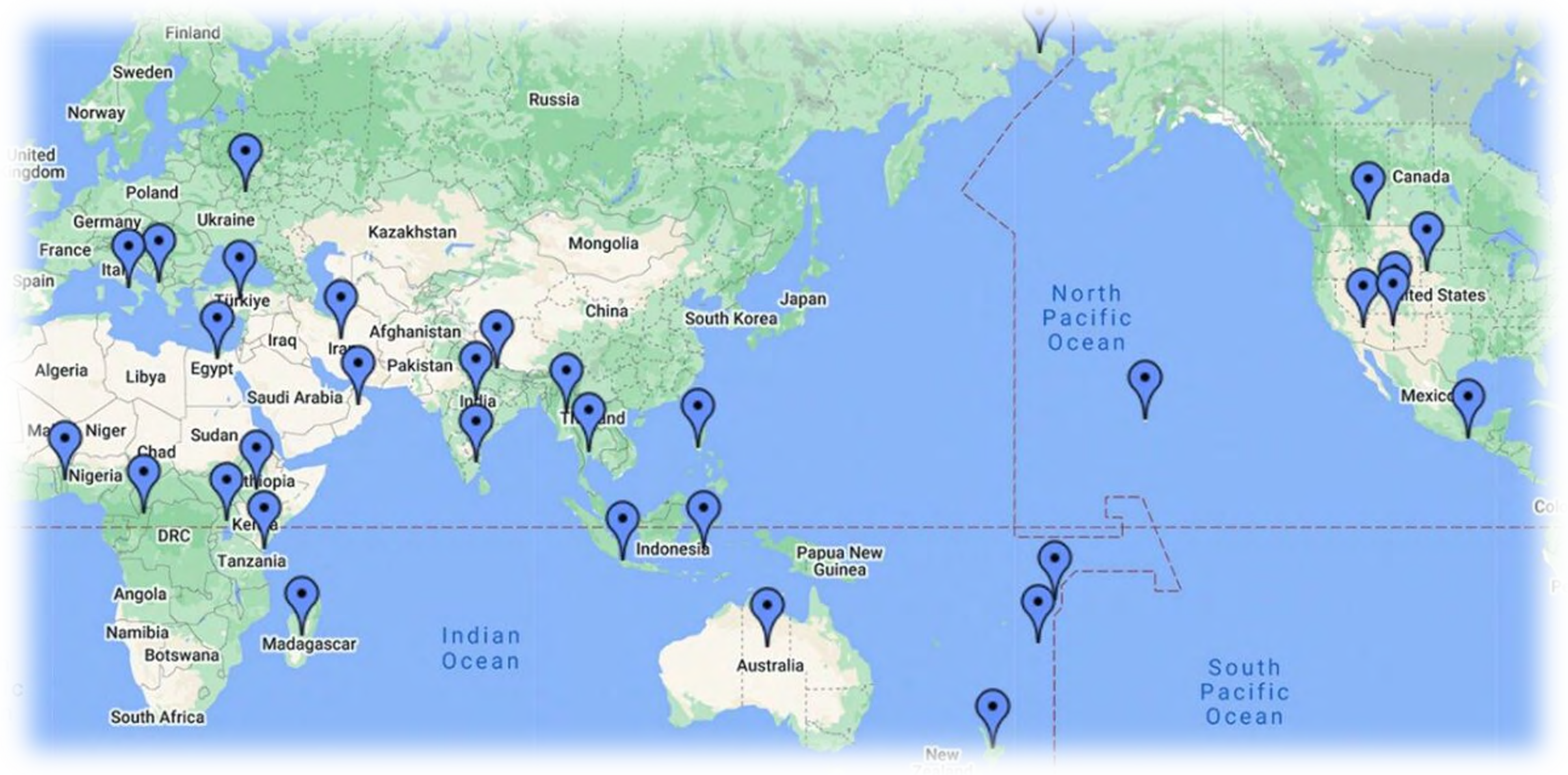
- **Transgender**
- **Non-Binary**



Terms and Conditions of Gender Identity

- Sex
- Gender
- Gender Identity
- Cisgender
- LGBTQ+
- Gender Expression
- Gender Spectrum
- Gender Transition
- Gender Dysphoria

Since the Beginning of Recorded History



Transgender Portrayal in Media



State

The New Jersey Law Against Discrimination (LAD) prohibits discrimination and harassment in employment, places of public accommodation, business transactions, and housing.

Federal

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020)



Evolving Gender Identity Law

The EEOC's Proposed Enforcement Guidance

Published in the Federal Register October 2, 2023

Sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including how that identity is expressed.

Examples of discrimination include:

- Epithets regarding sexual orientation or gender identity;
- Harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender;
- Intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering); or
- Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

Communicating with Respect and Acceptance



- Pronouns
 - she/her/hers, he/him/his and they/them/theirs
- Deadnaming

Special Considerations for Transgendered and Nonbinary Employees

Gender Care is Medical Care

And encompasses a range of social, psychological, behavioral, and medical interventions “designed to support and affirm an individual’s gender identity”

Gender Affirming Care

Broadly, gender-affirming care is any kind of medical care that people obtain to bring their minds and bodies into more alignment with their sense of gender

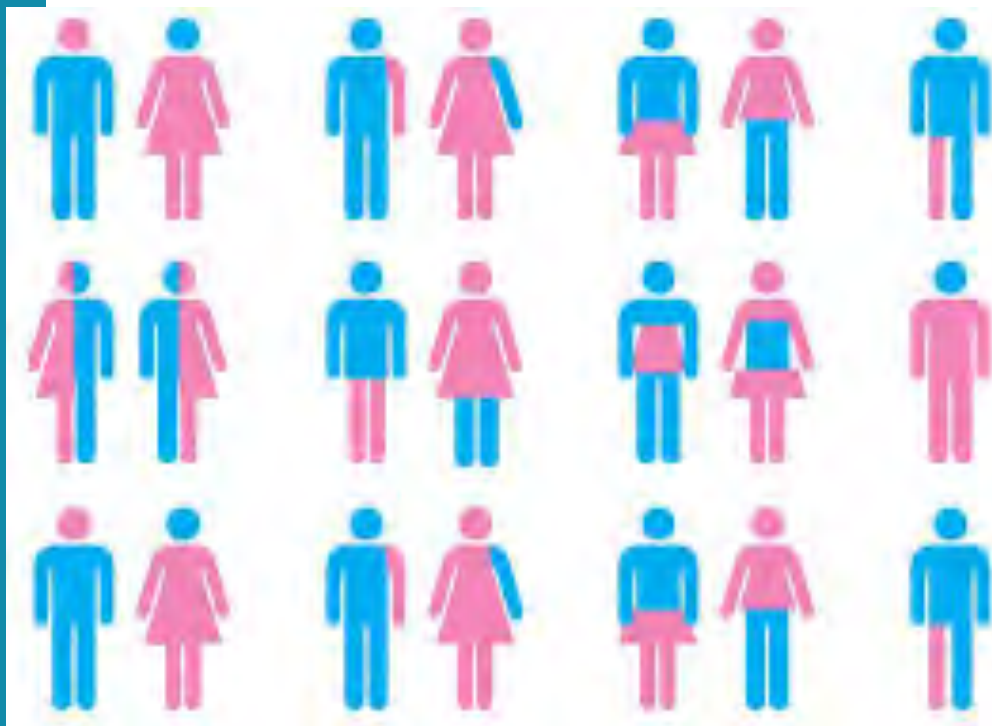
Transition Care

Included in affirming care, transition care helps people psychologically and physically to align their persona with the gender with which they identify



Accommodating Gender Identity

Workplace Scenario



Rest and Locker Rooms

Your employee approaches you and indicates that they are transitioning from female to male. The employee asks which restroom they can use on your floor. What do you say?

Accommodating Gender Identity

Workplace Scenario



What's In a Name?

Your transitioning employee approaches asking to be addressed by their new name and pronoun in the office. What are some of the types of changes you can make to ensure an inclusive workplace?

EEOC Guidance Example



Jennifer, who identifies as female, is a cashier at a fast-food restaurant. She alleges her supervisors and co-workers regularly and intentionally use the wrong pronouns in referencing her (misgender); her supervisor frequently calls her by her prior male name (deadname); and customers often ask her about her about her sexual orientation and sometimes make threatening remarks to her, although her supervisors do nothing to stop it.

Accommodations Request and Compliance with Other Laws

Name Changes on Official Records, Licenses, and Registrations

- **Official Identifying Information**
 - e.g., nameplates, business cards, organization charts, phone directories, website bios
- **Legal or Quasi-legal Documents**
 - work authorization (I-9), payroll, health benefits, certifications, degrees



Supporting Employees in Transition



- Workplace transition plan
- Review policies for gender neutrality
- Set expectations on time off if needed
- Maintain confidentiality upon request
- Announce change in name and pronouns
- Change official identifying information



Legal Update

Sal M. Anderton
Vito A. Gagliardi, Jr.
Patricia C. Morgan

THE EVER- EVOLVING STANDARDS OF THE NLRB



National Labor Relations Act



Section 7 of the NLRA provides that employees have the right to “self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

Moment in Time



Growth in union membership and union activity



NLRB not bound by precedent

Stericycle (August 2, 2023)

- NLRB holds that workplace rules are now “presumptively unlawful” if they can reasonably be interpreted as infringing on employee’s rights
- Focus now on whether an employee could reasonably interpret a rule to chill Section 7 rights, even if a contrary meaning is equally plausible
- Employer’s intent in adopting or maintaining the rule will no longer be considered



Takeaways

1. Ensure any workplace rules are grounded in a legitimate and substantial business interest, are narrowly tailored to achieve those interests and the wording is clear and unambiguous

2. Review and update confidentiality rules, policies, forms, and documents to comply with the new standard

3. Blanket requirement to keep workplace investigations confidential violates the rights of employees

4. Understand that the “Stericycle” standard will be applied to all types of workplace rules

Impending Changes to TITLE IX



Proposed Gender Identity Rules for Athletics

- Eliminating bans on transgender participation on teams reflective of gender identity
- “Case-by-case” analysis, especially for different grade levels
- Limiting participation consistent with gender identity, for example to ensure fairness in competition or to prevent sports-related injury



- Expanding definitions to prohibit discrimination on the basis of “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender orientation”
- Complaints could be informal
- Looser definition of hostile environment
- Need to address conduct outside the school’s education program or activity



Proposed Grievance Procedure Rule

Wage & Hour Laws



Boston Market Lockdown

Wage and Hour Compliance

New Jersey Department of Labor - Division on Wage and Hour Compliance investigated Boston Market for unpaid/late wages, unpaid overtime, failure to pay minimum wage, and failure to pay earned sick leave

STOP-WORK ORDER

The DOL issued a stop-work order after concluding its investigation, shuttering doors to 27 locations

REPAYMENT

More than \$630,000 have been paid in back wages across 314 employees



Don't be a Chicken

- New Jersey requires that all employees are paid at least twice monthly, and within 10 days of the end of the pay period
- Exempt employees & nonexempt employees - what's the difference?
- Overtime: hours worked over 40 in a single week
 - Requires that employers pay 1.5 times salary for any time worked over 40 hours
 - PTO does not count towards overtime; hours actually worked
- Wage and Hour laws are strictly interpreted and should be followed closely

Penalties

- First offense: \$1,000 fine or 10-90 days in prison
- Second Offense: \$2,000 fine or 10-100 days in prison
- 200x time wages withheld
- Attorney's fees and costs





NEW JERSEY'S MINIMUM WAGE

Date	Most Employers	Seasonal & Small Employers (fewer than 6)	Agricultural Employers	Cash Wage for Tipped Workers	Wage for Long-Term Care Facility Direct Care Staff Members
January 1, 2020	\$11	\$10.30	\$10.30	\$3.13	\$11, \$14 as of 11/1/20
January 1, 2021	\$12	\$11.10	\$10.30	\$4.13	\$15
January 1, 2022	\$13	\$11.90	\$11.05	\$5.13	\$16
January 1, 2023	\$14.13	\$12.93	\$12.01	\$5.26	\$17.13
January 1, 2024*	\$15.13	\$13.93	\$12.81	\$5.26	\$18.13

* The minimum wage rates for 2024 will be at least the amounts listed above, but could be higher based on the Consumer Price Index (CPI).

Raising Minimum Wage



Aptly named A15 was NJ legislation passed into law in 2019 which placed NJ along side of states such as NY, MA and CA implementing a phased in \$15/hour minimum wage by 2024.

This was an increase from \$8.85 in 2019 to the greater of \$1 more per year until 2024.

During 2024, Cost of Living Increment adjustments to the minimum wage will take place.

While NJ's minimum wage allows for increases for CPI it does not allow for reductions in the event of other economic conditions.

The Bill of Rights defines “Temporary laborer” as a person who contracts for employment in a designated classification placement *with* a temporary help service firm

- Other Protective Service Workers (Miscellaneous Manufacturers
- Food Preparation and Serving Related Occupations
- Building and Grounds Cleaning and Maintenance Occupations;
- Personal Care and Service Occupations;
- Construction Laborers;
- Helpers, Construction Trades;
- Installation, Maintenance, and Repair Occupations;
- Production Occupations;
- Transportation and Material Moving Occupations; or
- Any successor categories as the BLS may designate.



New Jersey Temporary Worker’s Bill of Rights

- Staffing firms must pay temporary laborers assigned to work for a third-party client the same average rate of pay and equivalent benefits as a permanent employee performing the same or similar work of the third-party client.
- Employers lose the ability to hire temporary employees for less than their full-time workforce who perform similar job functions.
- This is just one demonstration of the direction of legislation - employee friendly legislation continues to be implemented.



Implications

New Federal Precedent in Religious Accommodations Cases



U.S. Supreme Court Ruling in *Groff v. DeJoy*



New Standard of “Undue Hardship”
Under Title VII



Showing just more than a *de minimus*
cost does not suffice to establish
undue hardship under Title VII

Groff v. DeJoy - Factual Background



- Gerald Groff worked for the United States Postal Service (USPS) as a rural mail carrier in Pennsylvania
- When the USPS started limited package deliveries for Amazon, Groff's supervisors informed him that he would be required to work on Sundays
- As an evangelical Christian, Groff refused because he believed that Sundays were a day for rest, not labor
- When Groff failed to show up for his Sunday shifts, the USPS progressively disciplined him, and Groff eventually resigned from his job

Groff v. DeJoy - Title VII

TITLE VII

- Employers may not “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion”
- Employers are required to respect “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate an employee’s . . . **religious observance or practice without undue hardship on the conduct of the employer’s business**”
- Groff argued that the USPS could have accommodated his request not to work on Sundays without experiencing “undue hardship” to its operations
- The federal district court ruled in favor of the USPS, the Third Circuit affirmed

Groff v. DeJoy - New Standard



New Title VII Standard - More than a *de minimis cost*

- Now, an employer has to show that “the burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business**”
- The Supreme Court instructed lower courts to take into account “all relevant factors” including “**the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer**”
- It also noted that “a hardship that is attributable to employee animosity to a particular religion, or religion in general, or to the very notion of accommodating religious practice” was antithetical to the purpose of Title VII

Groff v. DeJoy - What Now?



Revise Forms

Review and revise forms for religious accommodations

Train Staff

Ensure supervisors and HR Teams are well-versed in this new standard when reviewing religious accommodations

Determine Alternatives

Examine if suitable alternatives exist that may be offered to an accommodation request

Substantial Cost

If denying a request, ensure documentation of the substantial costs that the accommodation would have on the business

THANK YOU!

SCAN TO FILL OUT OUR
EVALUATION FORM



SCAN TO CHECK OUT
OUR EVENTS PAGE





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