Leave Laws Overview
Workers' Comp

Presentation by

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Navigating the Employee Leave Maze | May 23, 2019

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I. Workers' Compensation Leaves and the FMLA & ADA

A. FMLA and Collecting Workers' Compensation Benefits

1. The FMLA is not a mandatory workers' compensation "light-duty" work statute but instead authorizes leaves of absence. Therefore, the employer *cannot* require an injured employee who is released to modified work to accept light-duty work during their FMLA–protected absence.

    - If an employee accepts a light-duty position, the employer cannot count the time the employee is actually working light-duty (even if it is a different position in a different department) against his FMLA entitlement.

2. In the case of an employee who is on an FMLA-protected workers' compensation absence, if the health care provider that is treating the employee for the workers' compensation injury certifies that the employee is able to return to modified duty work, but is unable to return to the same or equivalent job he/she held at the time of injury, the employee is allowed to decline the employer's offer of a light-duty job.

    - The declining employee will likely lose his/her right to collect workers' compensation weekly benefits (and may not be eligible to collect unemployment compensation benefits as well) as a result of declining suitable modified duty work, but the employee is still allowed to remain on unpaid FMLA leave until the entitlement is exhausted.

3. Unlike federal FMLA, Connecticut's FMLA requires employers to transfer to an available job an employee who, *upon expiration of the leave*, is unable to perform the original job with reasonable accommodation, if such work is available.

    - This is similar to the Connecticut Workers' Compensation Act ("Act") requirement. Such work could be part-time or at lesser pay, if it is suitable to the employee's medical restrictions.

B. Workers' Compensation Light-Duty Work Obligations & ADA's Interactive Process

The employer has no obligation under the Act (and the ADA) to convert a temporary light-duty position to a permanent one or to create a light-duty position or light-duty tasks. The Act provides that where an employee has suffered a *compensable injury* that disables him/her from his regular job, the employer at the time of the injury must transfer the injured employee to the full-time work suitable to his/her physical condition where such work is available.

1. The obligation to offer available suitable, temporary light-duty work continues during the time that the employee is:

    a. subjected to medical treatment or rehabilitation, or both;

b. continuing treatment on the advice of the physician or therapist; or

c. below the maximum level of rehabilitation, whichever of these 3 periods is the longest.

2. If an employee cannot return to his/her regular position with reasonable accommodation as required under the ADA, the partially disabled employee may be moved to a vacant position within his/her medical restrictions and qualifications. That vacant position may be a lower position than the one he/she was in prior to the injury.

   a. Non-Work Related Disability: If the pay for this lower position is less than that paid to the employee at his/her former position, the employer may need to make up the difference in pay if the employer made up the difference in pay for displaced employees who were not disabled.

   b. Work-Related Disability: If, however, an employee is unable to earn his/her former salary because of a workers' compensation injury, the employee will be entitled to workers' compensation benefits that provide the employee with a percentage of the difference between the amount he/she formerly earned and the amount he/she is now able to earn.

3. Remedy for Failure to Provide Light-Duty Work:

   a. If a Connecticut Workers' Compensation Commissioner ("Commissioner") finds that the employee is injured and the employer has failed to transfer the employee to available suitable light-duty work, he/she shall order the employer to transfer the employee to the available suitable job.

   b. If the employer fails to comply with the transfer requirements or with a Commissioner's order, the Commissioner may assess a civil penalty of not more than $500 against the employer. Penalties are paid to the Second Injury Fund.

4. Failure to Accept Suitable Light-Duty Work:

   a. A workers' compensation injured employee must accept a suitable light-duty position or work offered by the employer or another employer or risk forfeiture of his/her right to certain, additional weekly workers' compensation wage-like benefits.

   b. If no work has been offered by the employer, an injured employee has an obligation to make reasonable and diligent efforts to look for suitable light-duty work within his/her physical restrictions.

   c. The employee must exercise reasonable diligence to obtain employment; he/she must not refuse or neglect, without adequate excuse, to use such powers as remain to him/her, or decline employment reasonably within his capacity to perform.

d. The injured employee usually shows proof of contacting three to five prospective employers per week to satisfy the requirements of a good-faith effort to find light-duty work (also cynically referred to as the mini-mall job search).

- *These contacts should be made with prospective employers who are known to be hiring.*

e. The prospective employer should be offering the type of work the employee is physically and mentally capable of performing (e.g., an injured employee with no typing skills should not be looking for a secretarial job).

f. An employee who takes himself/herself out of the job market to attend school in order to enhance his/her work skills for prospective re-employment may still shockingly be found to be entitled to receive temporary weekly workers' compensation wage-like benefits from his/her employer.

5. ADA's Interactive Process Obligation & Light-Duty Work

a. It is very important to note that the ADA interactive process obligation requires direct interaction by management with the injured employee 1) to see if there are any regular positions that with reasonable accommodation are within the injured employee's physical or mental restrictions, and also within the qualifications and experience or 2) if there is an open position to which the employee could be transferred that is within his/her physical or mental restrictions as well as qualifications and experience; and 3) other options (such as asking the injured employee their thoughts on a reasonable accommodation that could be made to the employee's regular position).

b. Although a meeting is not required, it is strongly recommended to demonstrate that the employer has fulfilled this ADA requirement.

6. Important Case – Offer of Light-Duty Work:

a. A claimant-employee filed a workers' compensation claim against his employer, and was eventually cleared to return to light-duty work with restrictions in *Lopez v. Lowe's Home Improvement Center*. The employer argued that the injured employee should not have received further benefits because he was able to return to work. The injured employee argued that he was afraid that he was being returned to his prior cash register job, which he found too painful to perform. However, his employer offered testimony that the injured employee could have been accommodated in a different position, such as a telephone operator. Unfortunately, when the employer offered to take the injured employee back, the employer neglected to tell him what job he would be returning to in the work place.

b. As a result, the Connecticut Workers' Compensation Review Board held that the injured employee had been entitled to additional weekly wage-like benefits because he was

ready and willing to perform light-duty work, but had been unable to perform the work offered to him by the employer.

Impact: *The lesson to employers in Lopez is that when making an offer of light-duty work to an injured employee, it should be made clear that the employee's restrictions will be accommodated and put in writing.*

II. Pregnancy Disability, Light-Duty Work Leaves & More

A. Pregnancy, Childbirth or Related Conditions Covered

1. The Pregnancy Discrimination Act ("PDA") and Connecticut's version of the ADA, Connecticut Fair Employment Practices Act ("CFEPA"), apply not only to employees who are currently pregnant or recently gave birth, but also to employees who are trying to get pregnant or have any number of medical conditions related to pregnancy or childbirth.

2. New CHRO Legal Enforcement Guidance – Pregnancy, Childbirth & More –

   The Connecticut Commission on Human Rights and Opportunities ("CHRO") issued new legal enforcement guidance on April 23, 2019 that addresses employment discrimination related to pregnancy, childbirth, or related conditions, including an employer's obligation to provide reasonable accommodations, such as light-duty work or leaves of absence. According to CHRO, the following non-exhaustive list of pregnancy-related symptoms or conditions could require an accommodation:

   - Nausea; morning sickness; dehydration; lower blood sugar; swelling of extremities; increased body temperature; need for bed rest; anemia; abnormal placentation; bladder disfunction; fatigue; migraines; sciatica; carpal tunnel syndrome; severe morning sickness; gestational diabetes; pregnancy-induced hypertension; preeclampsia; postpartum depression; infertility or need for fertility treatments; loss or termination of pregnancy; and lactation conditions such as mastitis. (CHRO Guidance, p. 3)

3. *Under CHRO's Guidance, an expansive class of employees and applicants may qualify for a reasonable accommodation, even well after they give birth, meaning that employers could be required to offer accommodations and leaves (including intermittently) a year after childbirth.*

4. Additionally, there is no "length-of-employment requirement" before an employee becomes entitled to the protections of the CFEPA, meaning that, unlike under the FMLA, an employee may request a reasonable accommodation, including a leave of absence for pregnancy, childbirth or post-birth related condition (e.g., post-partum depression) upon hire. (CHRO Guidance, p. 1)

B. Leaves

1. It is illegal for an employer: (1) to terminate a woman's employment because of her pregnancy, childbirth, or related condition; (2) to refuse to grant that employee a reasonable leave of absence for disability resulting from her pregnancy, childbirth, or related condition; (3) to deny to that employee, who is disabled as a result of her pregnancy, childbirth, or related condition, any compensation to which she is entitled as a result of the accumulation of her disability or leave benefits accrued pursuant to plans maintained by the employer; (4) to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits upon her signifying her intent to return, unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so; (5) to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which any employee gives written notice of her pregnancy to her employer, and the employer or pregnant employee believes that continued employment in the position held by the employee may cause injury to that employee or fetus.

2. CHRO points out that while an employee generally requires six (6) weeks of leave following a vaginal delivery or eight (8) weeks of leave following a caesarian section for a typical pregnancy with no complications, "an employee has the right to take more or less of a reasonable leave of absence as needed." (CHRO Guidance, p. 2)

3. Medical Certifications and Fitness-for-Duty Certifications

   a. Employers may require an employee to provide a medical certification for a reasonable leave of absence due to pregnancy, childbirth, or related conditions only if the employer requires a medical certification from other employees requesting leaves of absence for reasons unrelated to pregnancy, childbirth or related conditions.

   b. Likewise, an employer may only require a fitness-for-duty certification to allow an employee to return from leave related to pregnancy, childbirth, or related conditions if the employer requires such certification for all employees returning from temporary disability leaves unrelated to pregnancy.

   c. For more detail on this topic, see page 3 of the CHRO Guidance.

4. Equitable Maintenance of Pay, Health Coverage, Fringe Benefits, and Seniority and Reinstatement to Original Job or Equivalent Position

   a. While an employee is on leave due to pregnancy, childbirth, or related conditions, she should be treated the same as "any other similarly situated employee during temporary disability leave" with regard to pay, health coverage, other fringe benefits

and seniority in accordance with the employer's policy and applicable laws. See page 8 of the CHRO Guidance for more information.

- *CAVEATS:*

i. *With regard to pay, a pregnant employee would only be entitled to paid leave if the employer provides paid leave, not including workers' compensation benefits, to similarly situated employees on temporary disability leave for a non-work-related injury or condition.*

ii. *Make certain your external short-term disability and/or long-term disability carrier covers pregnancy and childbirth-related disabilities, in a similar manner as all other covered disabilities.*

b. Connecticut law requires an employee to reinstate an employee to her original job or equivalent position upon return from a reasonable leave due to pregnancy, childbirth or related conditions, "unless circumstances have so changed as to make it impossible or unreasonable for the employer to do so." C.G.S. § 46a-60(b)(7)(D). Such "circumstances" are those events that would have happened regardless of whether the employee took leave (e.g., mass layoff). See page 8 of the CHRO Guidance for more information.

c. According to CHRO, an equivalent position is "virtually identical" to the employee's original position in the following respects:

ii. Equivalent pay, benefits, work schedule/shift, and working conditions, including privileges, prerequisites, and status;
iii. Substantially equivalent duties and responsibilities;
iv. Entailing substantially equivalent skill, effort, responsibility, and authority; and
v. Performed at the same worksite or at a worksite that is geographically proximate to the employee's original position. (CHRO Guidance, p. 8).

C. Light Duty Work Accommodations

1. An employer may not force an employee to: (1) accept an accommodation that is not necessary to perform the essential duties of the job; or (2) take a leave of absence if another reasonable accommodation can be provided instead.

- *Note: This is different from the well-established court rule that an employer must only offer a reasonable accommodation, and not necessarily the reasonable accommodation the employee requests.*

2. Employer Must Engage in a Good Faith, Interactive Process Whenever Accommodations or Leave is Needed

a. According to CHRO, an employer must engage in a "good faith interactive process" with an employee – meaning communication about the request for leave or an accommodation and the limitation that is causing the request – anytime (i) an employee requests an accommodation or leave, or (ii) the employer knows or has a reasonable basis to believe that the employee may be in need of an accommodation. (CHRO Guidance, p. 5)

b. CHRO even suggests that if the employer is: "considering taking adverse employment action against an employee and has knowledge or a reasonable basis to believe that the employee's performance deficit is related to pregnancy, childbirth, or a related medical condition, the employer should first initiate a cooperative dialogue to ask the employee if a reasonable accommodation might address the performance deficit." (CHRO Guidance, p. 5)

c. An employer can show that they engaged in the interactive process in good faith "if they (1) consulted pre-existing policies regarding accommodations or temporary leave; (2) responded in a timely manner; and (3) explored alternatives if an initial proposal for accommodations or leave was rejected." (CHRO Guidance, p. 6) For examples of the interactive process, please see page 6-7 of the Guidance.

d. The employer must provide the accommodation or leave of absence unless it could cause undue hardship to the employer. "If the employer reasonably determines that the request constitutes an undue hardship, the employer must explore alternative accommodations that might meet the employee's needs." (CHRO Guidance, p. 5).

   i. To prove undue hardship, the employer must show that the accommodation or leave of absence would cause significant difficulty or expense to the employer.

   ii. CHRO points out that this is a "high bar" and it rarely finds undue hardship exists. The factors it considers are: (1) cost of the accommodation; (2) size and resources of the employer; (3) impact of the accommodation on the operations of the employer; and (4) whether the employer has an existing policy to accommodate work-related or non-pregnancy, non-work-related injuries. (CHRO Guidance, p. 7).

3. Examples of Reasonable Accommodations According to CHRO

   a. Being permitted to sit, eat, and/or drink while working;
   b. More frequent or longer breaks, including but not limited to bathroom, water or rest breaks or breaks to express breastmilk or breastfeed as frequently as needed;

c. Assistance with manual labor;
d. Providing assistive equipment, such as a stool, chair, or lifting equipment;
e. Job restructuring;
f. Light duty or desk duty assignments;
g. Temporary transfer to less strenuous or hazardous work;
h. Modified or flexible work schedules, including option to telework;
i. Modified dress code or uniform requirements;
j. Moving a workstation to permit the movement or stretching of extremities, or to be closer to a bathroom;
k. Time-off to attend appointments related to pre-natal care, post-natal care, or fertility treatment.

- *If anyone would like a copy of this Guidance or to briefly discuss the same at no charge, please call or email Attorney Letizia or Attorney Mack.*

4. Pregnancy Discrimination Case States Workers' Compensation Only Light-Duty Policy Discriminates Against Pregnant Employees

a. *In Young v. UPS, the U.S. Supreme Court held that a pregnant worker may be able to prove discrimination under the PDA if the employer refuses to accommodate her light-duty restrictions, but accommodates others similar in their ability or inability to work. UPS only provided light-duty work to employees with work-related injuries, disabilities under the ADA, and drivers who lost their DOT certification. Although the UPS policy was neutral on its face, the Supreme Court struck down the light-duty policy and held that an employer may be liable for intentional discrimination if its light-duty policy imposes a "significant burden" on pregnant workers without having a "sufficiently strong" justification. The Court suggested that a showing that the employer temporarily accommodates a large percentage of non-pregnant, disabled workers while failing to accommodate a large percentage of partially disabled pregnant workers would be sufficient for the plaintiff to defeat summary judgment and proceed to a jury trial.*

- *Under the expanded ADAAA, as amended in 2008, pregnancy-related complications could be covered under the ADA when they substantially limit a major life activity.*

b. Legg v. Ulster County, 2d Cir. Court of Appeals, April 26, 2016

i. This is the first decision from the Second Circuit Court of Appeals applying the new standard set forth by the U.S. Supreme Court in the Young v. UPS case discussed above.

ii. Facts: Ann Marie Legg was a corrections officer at the Ulster County Jail. Because she had a high-risk pregnancy, Ms. Legg's doctor

provided a note stating that she was able to work, but shouldn't have direct contact with inmates. Ms. Legg's request for light-duty was denied because the County had a policy that offered light-duty assignments only to employees with work-related injuries/illness. A Lieutenant called Ms. Legg and advised her that he would give her a light-duty position if she obtained a revised doctor's note stating she could work, which she did. For a time, the Lieutenant assigned Ms. Legg to light-duty tasks as promised, but she eventually was required to work with inmates again. When Ms. Legg was seven months pregnant, she came upon two inmates fighting in the bathroom and was bumped as one ran past her. As a result of that incident, Ms. Legg left work and did not return until after she gave birth.

iii. Appellate Court Decision: While this case was pending before the Second Circuit, the U.S. Supreme Court decided Young v. UPS. The Second Circuit found that Ms. Legg had established a prima facie case of discrimination under Young because she sought a light-duty accommodation, the County did not accommodate her, and the County provided light-duty accommodations to other employees who were similar in their ability or inability to work. The Court stated that those facts were enough for a reasonable jury to conclude that it is more likely than not that the policy was motivated by a discriminatory intent.

iv. Impact: *This case is disconcerting for Connecticut employers because they are governed by decisions of the Second Circuit Appellate Court. In addition, employers with 50+ employees who are self-insured or fully insured for workers' compensation and wish to avail themselves of a medical care plan provider network must have a light-duty work program. Now, these employers will need to add pregnant employees (who are partially disabled due to their pregnancy) as eligible to participate in the employer's workers' compensation light-duty work program, in addition to those with work-related injuries or illnesses.*

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CHART – Transfers, Accommodations & Termination*

	ADA	FMLA	WORKERS' COMPENSATION	PREGNANCY LEAVE
1. Right to a Leave of Absence	**Possibly**	**Yes**		**Yes**
2. Obligation to Reasonably Accommodate in Regular Position				
a) If not a workers' compensation injury	**Yes**	**N/A**	**N/A**	**Under the ADA**
b) If a workers' compensation injury	**Yes**	**N/A**	**Possibly**	**N/A**
3. Offer to Transfer to Available Suitable, Temporary Light-Duty Work with Qualifications, Experience & Education				
a) If not a workers' compensation injury	**Yes**	**N/A**	**No**	**Yes**
b) If a workers' compensation injury	**Yes**	**N/A**	**Yes**	**N/A**
4. Permanently Transfer to Open Permanent Position within Medical Restrictions and within	**Yes**	**Possibly**	**Probably****	**Probably****

* This Chart is being provided as a guide, but every situation should be considered in light of its unique facts and circumstances and after consultation with appropriate legal counsel.
** To avoid a CHRO/EEOC discrimination complaint

Qualifications				
5. Right to Return to Regular or a Substantially Equivalent Position	**Probably****	**Yes**	**Probably****	**Yes**
6. Right to Terminate – If permanently, medically unable to return to regular position with reasonable accommodation or other open position, and after exhaustion of all legally-required leaves	**Yes**	**Yes**	**Yes**	**Yes**

* This Chart is being provided as a guide, but every situation should be considered in light of its unique facts and circumstances and after consultation with appropriate legal counsel.
** To avoid a CHRO/EEOC discrimination complaint

PERSONAL LEAVE POLICY*

1. Personal leave is an approved period of unpaid absence from work for those employees who are not eligible for or have exhausted other leaves of absence and have exhausted all vacation and personal time and sick time, if applicable. Personal leaves, including the length, are granted at the discretion of Agency X and are based on the following: (a) the operational needs of Agency X; (b) reason for the leave (e.g., personal, work-related injury, elective surgery); (c) the employee's work performance and attendance record; (d) prior personal leaves taken by the employee; (e) advance notice; and (f) requested length of leave.

2. Full-time and part-time employees must exhaust any accrued vacation, floating holidays, personal days and, if applicable, sick time prior to requesting a personal leave.

3. There is no right to a personal leave, but a leave may also be considered a temporary accommodation due to an injury or illness.**

4. If you are temporarily working in a light-duty position or under a modified-duty schedule, you may be given up to a 30-day, part-time leave as an additional accommodation to facilitate your return to your regular position and schedule from an injury or illness.

*** If you are a union facility you have to negotiate this policy with the union and cannot simply implement the policy.**

**** Sections 3 and 4 would be internally classified as ADA accommodation leaves.**

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EXTENDED ABSENCES OR EXTENDED PART-TIME, LIGHT-DUTY WORK* POLICY

A. Policy

Agency X has implemented a termination policy for extended absences or employees on extended part-time light-duty work, of nine (9) **[but no shorter than 6 months is recommended]** consecutive months or more for any reason, except as otherwise protected by law (e.g., FMLA, ADA, pregnancy disability, military leave).

B. Return to Work

1. The employee will not be considered to have returned to regular work for purposes of this termination policy until such time as the employee has returned and worked his or her regular position and schedule for four (4) consecutive weeks, without an unauthorized absence **[ADA protected absences or ADA accommodation leaves are authorized, if part of a reasonable accommodation and cannot be counted as an unauthorized absence under the policy]**.

2. All paid and unpaid leaves of absence as allowed by the law will be counted for determining if the employee is absent nine (9) consecutive months.

3. The employee will be notified by Agency X, in writing, thirty (30) days prior to the expiration of the nine (9) month period. This notice will inform the employee that his or her employment is to be terminated if the employee does not return to his/her regular work and schedule within the next thirty (30) days. If the employee fails to return upon the expiration of the nine (9) month period, employment will be terminated.

4. For employees on extended part-time, light-duty work, termination will not occur at nine (9) months if the employee still has leave time remaining under the FMLA or other leave law.

Where applicable, the employee may be required to obtain an acceptable medical release and have a fitness-for-duty examination by a physician of the Agency's choosing before being considered for return to work.

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* **If you are a union facility you have to negotiate this policy with the union and cannot simply implement the policy.**

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