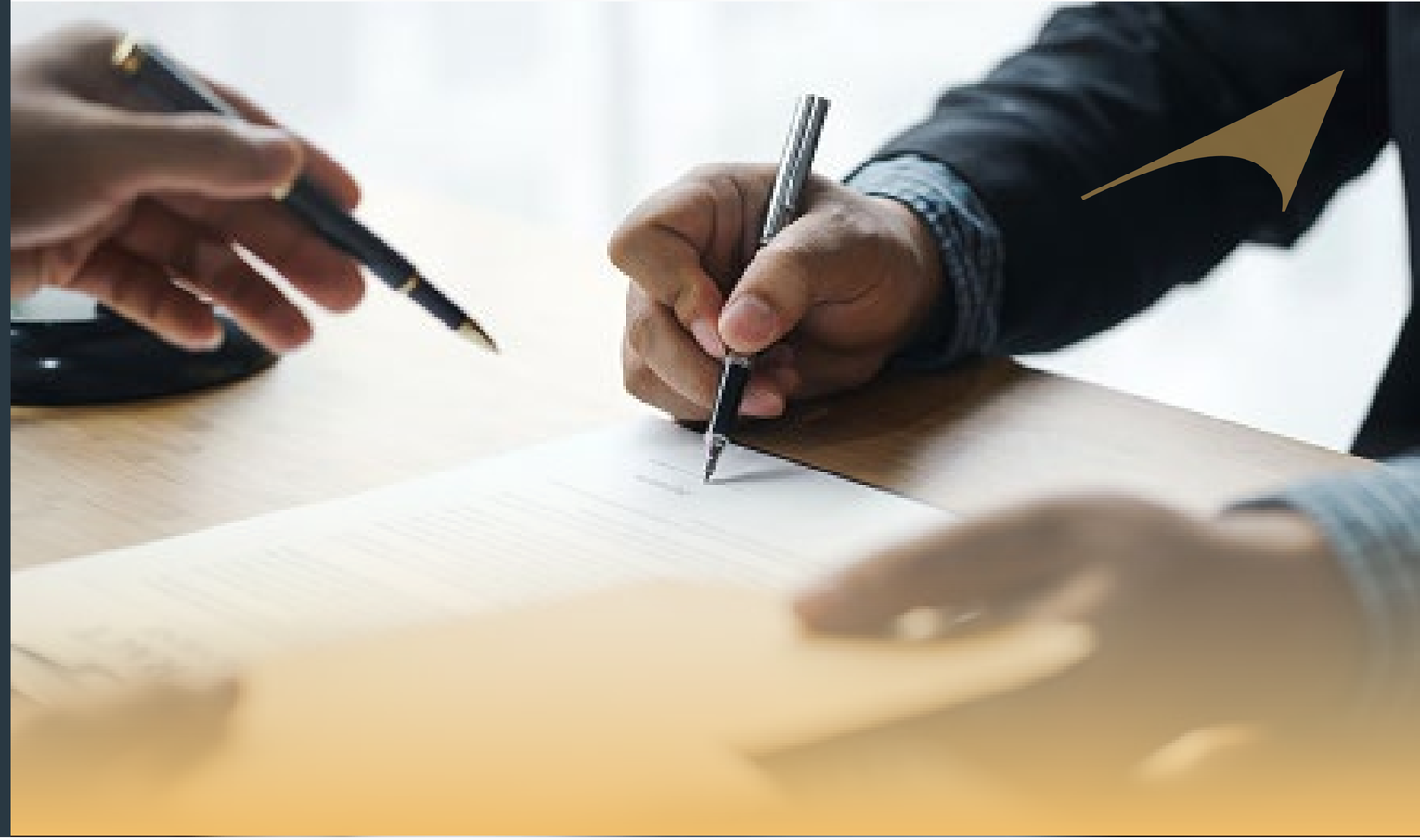
Injured and Disabled Employees: Managing Public Employee Leave and Disability Protections

School Client Conference
January 17, 2025



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Elizabeth D. McPhail, Esq.
Andrew D. Drilling, Esq.

Agenda

- Sources of Employee Leave Rights/Protections
  - Family Medical Leave Act (FMLA)
  - New York Paid Family Leave (NYPFL)
  - Sick/Prenatal Leave
  - Leave as a Reasonable Accommodation
  - Pregnant Worker Fairness and Lactation Accommodation
  - NY Civil Service and Education Law
  - Other Sources of Leave Rights
- Case Studies & Practical Application

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Family and Medical Leave

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FMLA

Applicability

- The FMLA requires employers with 50 or more employees to provide eligible employees up to 12 weeks of leave in a designated 12-month period.
- Eligible employees are those who:
  - Have been employed by the employer for at least 12 months;
  - Have worked at least 1,250 hours for the employer during the 12-month period preceding the leave; and
  - Work in a location where the employer has 50 or more employees within a 75-mile radius.
    - For remote employees, employers must consider the physical office location to which the remote employee reports and from which he or she receives work as the work location.
    - If a remote employee's reporting office employs 50 or more employees within a 75-mile radius (and he or she otherwise meets the eligibility requirements), the remote employee would be eligible for FMLA leave.
- **Note: Special rules apply for certain local educational agencies.**

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FMLA

Qualifying Reasons for Leave

- Eligible employees may take FMLA leave for any of these qualifying reasons:
  - Birth of a child or placement of a child with the employee for adoption or foster care, to care for the child within one year of birth or placement.
  - To care for a family member (i.e., child, spouse, or parent) who has a serious health condition.
  - For an employee's serious health condition rendering the employee unable to perform the functions of his or her position.
  - Qualified exigencies resulting from a covered servicemember being called to duty in the Armed Forces.
  - To care for a covered servicemember who is injured or becomes ill while on covered active duty.

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FMLA

Leave for Pregnancy or Childbirth

- Expectant mothers are entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for their own serious health condition following the birth of a child.
  - In appropriate circumstances, the leave may begin before the birth of the child.
  - An expectant mother is entitled to FMLA leave for prenatal care or if her condition renders her unable to work.
    - Leave is available for incapacity due to pregnancy even if the expectant mother does not receive treatment from a healthcare provider because of the absence and even if the absence does not last for more than three consecutive days.
- A spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated, if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition.

FMLA

Intermittent Leave

- Leave can be taken intermittently where it is occasioned by a serious health condition, a covered servicemember's injury or illness, or a qualifying exigency.
  - Intermittent includes (a) leave taken in separate blocks of time, or (b) on a reduced schedule basis.
  - Intermittent leave may be taken in the smallest increment of time the employer allows for the use of other forms of leave, as long as no more than one (1) hour.
  - Intermittent leave can be taken for birth, placement, or bonding, but only if the employer and employee agree.

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FMLA

Intermittent Leave

- An employer may temporarily transfer an employee who is taking intermittent or reduced schedule leave to an available alternative position for which the employee is qualified, and which better accommodates recurring periods of leave than the regular position.
  - The position to which the employee transfers must have the same pay and benefits as the previous position, although the duties may be different.
  - This option may be used only in situations where the need for intermittent or reduced schedule leave is foreseeable. It is not available for unforeseeable intermittent or reduced schedule leave.

FMLA

Employee's Notice Obligations

- An employee must provide notice of the need to take FMLA leave.
  - Where the need for leave is **foreseeable**, an employee must give the employer at least 30 days' notice when it is possible and practical to do so.
  - Where the need for leave is **unforeseeable**, the employee must give notice as soon as is practicable under the circumstances.
    - It should generally be practicable for the employee to provide notice of leave that is unforeseeable within the time required by the employer's usual and customary notice requirements.

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FMLA

Employer's Notice Obligations

- Within five (5) business days of the employee's leave request, the employer must provide the employee with (a) the FMLA Eligibility Notice & Rights and Responsibilities Notice, and (b) if requiring an FMLA certification form, the appropriate certification form with the employer portion completed.
- An employer may request an FMLA medical certification form when an employee has requested leave due to a serious health condition (employee or family member), a covered servicemember's illness/injury, or a qualifying exigency.
    - An employer may also request reasonable documentation or a statement to establish the relationship between the employee and the family member at issue (e.g., child's birth certificate, a court document, documents regarding foster care or adoption-related activities).

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FMLA

Employer's Notice Obligations

- Within five (5) business days of having enough information to determine whether leave is FMLA-qualifying, the employer must provide the employee with notice that the leave will be designated as FMLA-qualifying.
- This FMLA Designation Notice should:
  - Be provided for each FMLA-qualifying reason per applicable 12-month period.
  - Identify any substitution of paid leave or fitness-for-duty requirements.
  - Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known.
    - If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but not more often than once in a 30-day period and only if leave is taken in that period.
- If the requested leave is not FMLA-qualifying, the notice may be a written statement that the leave does not qualify and will not be designated as FMLA.

FMLA

Interaction with Paid Time Off

- During any unpaid leave under the FMLA, employers may require employees to use any type of accrued and unused paid time off (including vacation, sick, and personal time) concurrently with FMLA leave.
  - Because an employee is not “unpaid” while receiving, for example, paid disability benefits or workers’ compensation benefits, the above rule does not apply, and an employer cannot require employees to use their paid time off concurrently with FMLA leave.
  - But where an employee’s pay is only partially replaced by disability benefits or workers’ compensation (as is typically the case with such benefits), the employer and employee may be able to agree to have paid leave supplement such benefits.

FMLA

Interaction with Paid Time Off

- If the employer does not require the use of paid time off during unpaid FMLA, employees have the right to use their paid time off during such FMLA leave.
- Employers must make employees aware of any additional procedural requirements in conjunction with the use of paid leave.
  - This information should be provided to employees in the Rights & Responsibilities Notice.

FMLA

Special Rules

- The FMLA regulations contain special rules that apply to employees of "local educational agencies," including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools.
  - The special rules do not apply to other kinds of educational institutions, such as colleges, universities, trade schools, or preschools.
- Covered "educational institutions" are subject to FMLA and the Act's 50-employee coverage test does not apply.
  - The usual requirements for employees to be covered continue to apply (e.g., employment at a worksite where at least 50 employees are employed within 75 miles).

FMLA

Special Rules

- The special rules introduce the concept of “instructional employees”.
- “Instructional employees” are those whose principal function is to teach and instruct students in a class, small group, or individual setting.
  - Includes teachers, athletic directors, driving instructors, and special education assistants.
  - Does not include teacher assistants or aides who do not have the principal job of teaching or instructing or other “auxiliary personnel” such as counselors, psychologists, or curriculum specialists.

FMLA

Special Rules – Limitation on Intermittent Leave

- If an eligible instructional employee needs intermittent or reduced schedule leave to care for a family member's, covered service member's, or their own serious health condition that is foreseeable and based on planned medical treatment, and the employee would be on leave for more than 20% of the total number of working days over the period the leave would extend, a covered employer may require the employee to choose either to:
  - Take leave for a period of a particular duration (not greater than the duration of the planned treatment); or
  - Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits, and which better accommodates recurring periods of leave.
- If an eligible instructional employee does not give the required notice for foreseeable FMLA leave to be taken intermittently or on a reduced schedule, the employer may require the employee to exercise either of the options above or to delay the taking of leave until the notice requirement is met.
- Leave taken for a period that ends with the school year and begins with the next semester is considered leave taken consecutively not intermittently.
  - The summer break period is not counted against the employee's FMLA entitlement.

Examples – Special Intermittent Leave Rules

- **Leave of a Particular Duration**
- **Example**: Anne is a high school swim team coach who works three days a week. She needs to receive treatment for a serious health condition, and her health care provider is only available on the days she is scheduled to work. She requests one day of FMLA leave per week for four weeks, which is more than 20 percent of the total number of days Anne would work during her requested period of FMLA leave. In response to her FMLA leave request, Anne's school district asks her to either use leave three days a week for the four weeks she needs leave (using leave for a "particular duration") or accept a temporary reassignment coaching middle school swimmers who are training at the high school two days a week.
- Anne declines the temporary reassignment and uses FMLA leave three days a week (her full workweek) for four weeks for her own serious health condition. The entire period of leave taken will count as FMLA leave.
- **Temporary Transfer to Alternative Position**
- **Example**: Paul is a third-grade teacher at a local elementary school who requests FMLA leave to provide care for his father who has a qualifying serious health condition. Paul, who normally works five days a week, requests FMLA leave on Tuesdays and Thursdays for the next six weeks, which is more than 20 percent of the days he would work in the six-week period for which he needs leave. In response to his FMLA leave request, Paul's school district gives him a choice of taking leave five days a week during the six-week period that he needs to care for his father (using leave for a "particular duration") or transferring to a position tutoring elementary students.
- Paul chooses the alternative position for the six weeks he needs FMLA leave. He is qualified for the job, and his pay and benefits stay the same. He uses FMLA leave two days a week for six weeks for the care of his father and is restored to his third-grade teaching position at the end of the six weeks.

FMLA

Special Rules – Limitation on Leave Near End of Term

- Special Rules apply for instructional employees who begin leave more than 5 weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term.
- The usual FMLA rules apply except that:
  - An instructional employee who begins leave more than 5 weeks before the end of the term may be required to continue taking leave until the end of the term if (i) the leave will last at least 3 weeks; and (ii) the employee would return to work during the three-week period before the end of the term.
  - An instructional employee who begins leave during the 5-week period before the end of the term, where the need for leave is occasioned by the birth/placement of a child or the need to care for a covered family member or servicemember with a serious health condition, may be required to continue taking leave until the end of the term if (i) the leave will last more than 2 weeks; and (ii) the employee would return to work during the two-week period before the end of the term;
  - An instructional employee who begins leave during the three-week period before the end of a term for bonding leave or to care for a covered family member or service member with a serious health condition may be required to continue taking leave until the end of the term if the term of the leave will last more than 5 working days.
- **Note**: If an employee is required to continue leave until the end of an academic term, the extended leave period does not count against the employee's FMLA entitlement.

Special Rules – Job Restoration

- In general, upon return from FMLA leave an employee must be restored to their original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.
  - For an employee of a public school board or public or private elementary or secondary school, the determination of whether the employee is restored to their original job or to an equivalent job may be based on school board or private school policies and practices, and collective bargaining agreements.
- For public school board policies and practices, private school policies and practices, or collective bargaining agreements to apply, they must:
  - Be in writing,
  - Be made known to the employee prior to the taking of FMLA leave,
  - Clearly explain the employee's restoration rights upon return from leave, and
  - Provide substantially the same protections as other reinstated employees receive under the FMLA—including restoring the employee to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

New York State Paid Family Leave

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NYSPFL

NY Paid Family Leave

- Applies to all private sector employers with limited exceptions.
  - **Public employers (such as public school districts) are covered only if they elect to be covered.**

- Eligible employees are entitled to up to 12-weeks of paid time off in a 52-week period to (i) care for a family member with a "serious health condition," (ii) bond with a child during the first 12 months of birth or placement; or (iii) to meet "qualifying exigencies" arising from the fact that a spouse, domestic partner, child, or parent of the employee is on active duty or has been called to active duty.

- Beginning January 1, 2025, employees are paid 67% of their Average Weekly Wage up to a maximum of $1,177.32/week.

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NYSPFL

NY Paid Family Leave

- Benefits are paid out through an insurance policy/program.
  - PFL may be funded by employees via payroll deductions at a contribution rate established by the NYS Department of Financial Services (currently 0.388% of gross wages each pay period up to an annual contribution of $354.53).

- Employers cannot require the use of any type of accrued time off (e.g., vacation, sick, etc.) concurrent with PFL.
  - But employers may permit employees to elect whether to use any accrued but unused paid time off to receive full salary.

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Key Distinctions with FMLA

- PFL covers employees who are not covered by the FMLA (i.e., employees who have not worked 1,250 hours in preceding year, employees who work for smaller employers).
- PFL does not apply to the employee's own "serious health condition".
- "Family member" under the PFL is broader than under the FMLA. Specifically, it includes:
  - Domestic partners
  - Grandparents
  - Grandchildren
  - Parents-in-law
  - Domestic partner's child
  - New as of 2023: Siblings (including biological, adopted, step, half)
- Employer cannot require employees to use paid time off concurrently with PFL leave. May only permit an employee to elect to do so.

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New York Paid Sick/Prenatal Leave

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NYPSL

New York Paid Sick Leave

- **Federal, state, and local government employees are <u>not</u> covered, but employees of charter schools, private schools, and not-for-profit corporations are covered.**
  - Employers with 0-4 employees:
    - If net income is $1 million or less, must provide up to 40 hours of unpaid sick leave.
    - If net income is greater than $1 million, must provide up to 40 hours of paid sick leave.
  - Employers with 5-99 employees must provide up to 40 hours of paid sick leave per year.
  - Employers with 100+ employees must provide up to 56 hours of paid sick leave per year.
- All employees, whether full-time, part-time, seasonal, per diem, etc., are covered by the New York Paid Sick Leave Law.

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New York Paid Sick Leave

- Eligible employees may take paid sick leave for (i) their own mental or physical illness, injury or health condition or that of a covered family member (regardless of whether the condition has been diagnosed or requires medical care); (ii) their own diagnosis, care, or treatment of a mental or physical illness, injury or health condition or that of a covered family member; and (iii) to obtain services in connection with instances of domestic violence, family offense matters, sexual offenses, stalking, and human trafficking (as defined by applicable law).

- Sick leave must accrue at a rate not less than one hour for every thirty hours worked.

- There are no specified notice or time requirements an employee must satisfy.
  - The regulations do, however, require that the employee make a verbal or written request prior to the use of accrued sick leave, unless otherwise permitted by the employer.

- There is a limited right to require supporting documentation. The employer is responsible for any costs or fees associated with obtaining any required certification.

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Prenatal Leave

Amendment to NY Labor Law § 196-b (i.e., the Paid Prenatal Leave Law)

- The New York State Paid Sick Leave Law was amended to add prenatal leave, effective **January 1, 2025**.
  - Like the Paid Sick Leave Law, this requirement does not apply to federal, state, and local government employees, but does apply to employees of charter schools, private schools, and not-for-profit corporations.
- Every employer will be required to provide employees 20 hours of paid prenatal personal leave during any 52-week calendar period.
  - Prenatal personal leave means leave taken for the health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy.
- This leave is **in addition to** the Paid Sick Leave already provided under the New York State Paid Sick Leave Law.

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Prenatal Leave

Amendment to NYPSL

- Paid prenatal leave may be taken in hourly increments, and benefits for prenatal leave must be paid in hourly installments.
- There is no accrual provision for paid prenatal leave—all employees are entitled to up to 20 hours.
- Employers are not permitted to require identifiable health information for employees seeking paid prenatal leave.

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Leave as a Reasonable Accommodation

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ADA & HRL

General Applicability

- An employee who is a "qualified individual with a disability" may be eligible for leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) and/or the New York State Human Rights Law (HRL).
- To be "qualified" under the ADA/HRL, the individual must:
  - Have the requisite skills, experience, education, licenses, etc. for the job; and
  - Be able to perform the essential functions of the job, either with or without reasonable accommodation.

ADA & HRL

Applicability Under the ADA

- Under the ADA, an “individual with a disability” is “any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.”
  - The ADA was amended in 2009 to make it easier for individuals to qualify as disabled.
  - For instance, “major life activities” and “substantially limits” are interpreted quite broadly and do not impose a high bar for establishing a “disability”.

ADA & HRL

Applicability Under the HRL

- Under the HRL, disability means “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
  - Also includes having a record of such impairment or a condition regarded by others as such an impairment.
  - The HRL’s definition of “disability” is broader than under the ADA; thus, the HRL covers more conditions as compared to the ADA.

ADA & HRL

Reasonable Accommodations

- An accommodation is defined as a modification or adjustment to the job application process, the work environment, or the manner or circumstance under which the position is customarily performed that enable a qualified individual with a disability to perform the essential functions of that position.
- A **reasonable** accommodation is one that "seems reasonable on its face, i.e., ordinarily or in the run of cases."
- Examples of potentially reasonable accommodations include modified work schedule, extra break time, change in workspace location, exceptions from certain policies, job restructuring, reassignment, and **unpaid leave**.

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ADA & HRL

The Interactive Process

- Generally, it is the employee's responsibility to inform the employer that an accommodation is needed.
- The employer is entitled to know that the individual has a covered disability and that he or she needs an accommodation because of the disability.
- The employer should engage in an "interactive process" with the employee to obtain relevant information and explore potential accommodations.
- Ultimately, the employer has the right to choose among multiple reasonable accommodations, if the chosen accommodation is effective.

ADA & HRL

Undue Hardship Defense

- An employer has a defense to providing a reasonable accommodation if the accommodation would impose an “undue hardship”.
- “Undue hardship” is defined as “significant difficulty or expense incurred” by the employer. Factors considered include:
  - The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
  - The overall financial resources of the facility or facilities, the number of persons employed at such facility, and the effect on expenses and resources;
  - The overall financial resources of the employer, the overall size of its business, the number of its employees, and the number, type and location of its facilities;
  - The type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer; and
  - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

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Pregnant Workers Fairness Act & Lactation Accommodation

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PWFA

Pregnant Workers Fairness Act

- The PWFA became effective in June 2023 and applies to employers with 15 or more employees. Final regulations were issued on April 15, 2024.
- Similar to the ADA, the PWFA requires employers to provide reasonable accommodations to employees for “known limitations” related to pregnancy, childbirth, or related medical conditions, unless doing so would cause undue hardship to the employer.
  - “Known limitations” may be modest, minor, or episodic and need not meet the definition of “disability” under the ADA.
- If an employee/applicant cannot perform all essential job functions with reasonable accommodation, he or she can still qualify for accommodations under the PWFA if (a) the inability to perform an essential job function is for a temporary period; (b) the essential job function(s) could be performed in the near future; and (c) the inability to perform the essential function(s) can be reasonably accommodated.

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PWFA

Reasonable Accommodations

- The final rule provides that a "reasonable accommodation" includes "modifications or adjustments" to the "job application process" or "work environment" or "modifications or adjustments" that enable a qualified employee with known limitations under the PWFA "to enjoy equal benefits and privileges of employment," or the "temporary suspension of essential function(s)."
  - An employer cannot require leave from work (whether paid or unpaid) if another reasonable accommodation exists.
- The regulations identify several "predictable assessments" that will "virtually always" be found to be reasonable accommodations that do not constitute an undue hardship:
  - (1) allowing an employee to carry or keep water near and drink, as needed; (2) allowing an employee to take additional restroom breaks, as needed; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing an employee to take breaks to eat and drink, as needed.

PWFA

PWFA Accommodations

- Examples of reasonable accommodations:
  - Frequent breaks;
  - Schedule changes, part-time work, and paid and unpaid leave;
  - Telework;
  - Parking;
  - Light duty;
  - Making existing facilities accessible;
  - Modifying the environment;
  - Job restructuring;
  - Temporarily suspending one or more essential functions;
  - Acquiring or modifying equipment, uniforms, or devices; and
  - Adjusting or modifying examinations or policies.

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PWFA

Documentation

- Employers may seek documentation verifying the need for an accommodation only when it is reasonable under the circumstances for the employer to determine whether to grant an accommodation.
- Employers may not seek documentation when: (1) need for an accommodation is obvious; (2) the employer has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; (3) the employee is pregnant and requests a work adjustment listed as a "predictable assessment"; (4) the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during work hours; and (5) the requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.
- Even when an employer is justified in seeking verification, employers may only require the minimum information needed to confirm the physical or mental condition that is related to pregnancy, childbirth, or related medical conditions, and that a modification is necessary.
  - Employers may not require a specific form but may require documentation from a healthcare provider (which includes a doula, lactation consultant, or industrial hygienist).

PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act")

- As part of the Consolidated Appropriations Act of 2023, the federal PUMP Act expanded on the 2010 Break Time for Nursing Mothers Act ("Break Time Act").
  - Break Time Act was an FLSA amendment that entitled most employees to a reasonable break time and private space, other than a bathroom, in which to pump breastmilk during the workday.
  - Overtime-exempt employees (Executive, Administrative, Professional, etc.) were originally excluded from the Break Time Act's protections.
- Under the PUMP Act, time spent pumping breastmilk is paid working time for purposes of calculating minimum wage and overtime if it is taken during an otherwise paid break or if the employee is not completely relieved from duty.
  - No deductions should be taken from the salary of an exempt employee because of pumping breaks.
- Employers with fewer than 50 employees do not need to comply with the Break Time Act and/or PUMP Act when doing so would create an "undue hardship."

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PAID LACTATION BREAKS

New York Labor Law § 206-C

- The New York Labor Law was amended, effective June 19, 2024, to further expand the protections of employees to express breast milk at work.
- This law applies to all public and private employers in New York, regardless of the size or nature of their business.
- Employers must provide all employees with **paid break time** to pump breast milk at work.
  - Specifically, the employer must provide a **30-minute paid** lactation break each time a covered employee has a reasonable need to express breast milk.
  - The employer must also allow employees to use existing paid break time or meal periods for any lactation break in excess of 30 minutes.
  - Employees are entitled to this paid break time for up to **three years** following the birth of a child.

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New York Civil Service Law and Education Law

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NY Civil Service Law Section 71

- Employees who are out of work due to a Workers' Compensation-covered illness or injury are entitled to a leave of absence for at least one year (two years if the injury is a result of an assault sustained in the course of employment).
  - Exception: if the disability is permanently incapacitating, the employee may be discharged immediately.
- Within one year after the disability termination, the employee can apply for reinstatement if the employee recovers sufficiently to return to work.
- The employee will be subject to a medical examination. If the medical officer certifies that the individual is fit to perform the duties of the individual's prior position, the individual is entitled to reinstatement to the position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which the employee was eligible for transfer.
- If no vacancy exists, or if the workload does not warrant filling the vacancy, the individual must be placed on a preferred list for their former position, and they shall be eligible for reinstatement from such preferred list for four years.

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NY Civil Service Law Section 71

- Caution: Section 71 is supplemented by detailed regulations (4 N.Y.C.R.R. § 5.9).
- In particular, when an employee is to be terminated under Section 71, the employee is entitled to advance notice (30 days) of their right to a hearing and notice of other legal rights. 4 N.Y.C.R.R. § 5.9(c).
- Although these regulations provide that they are applicable only to employees of the State, several New York State court decisions have reversed public employee terminations under Section 71 for failing to provide employees with rights at least as extensive as those provided by the regulations. *See e.g., Cooke v. City of Long Beach*, 247 A.D.2d 538, 669 N.Y.S.2d 312 (2d Dept. 1998).

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NYCSL

NY Civil Service Law Section 72

- Section 72 is an employer's tool to require an employee to take leave when the employee is unable to perform their duties because of a non-work-related disability.
- The statute contains detailed procedures which must be strictly followed:
  - First, the employer must provide the employee and the civil service department with written notice of the facts providing the basis for the appointing authority's judgment that the employee is not fit to perform their duties;
    - Effective January 1, 2025, employees must also receive copies of any written, electronic or other communication by the appointing authority to a medical officer or any other entity regarding the claim that the employee is unable to perform their duties.
  - Second, the employee is submitted to a medical examination by a medical officer;
  - Finally, if the medical officer certifies that the employee is not fit to perform their duties, the employer must notify the employee that they may be placed on leave and provide the employee with a detailed written statement of the reasons for such leave and of the employee's right to a hearing.

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NY Civil Service Law Section 72

- Exception: if the employer finds that there is "probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations," it may place the employee on an involuntary leave of absence *immediately*.
  - The medical examination will take place after the employee has been removed from work.
  - However, such an employee is entitled to draw all accumulated unused sick leave, vacation, overtime and other time allowances available and is entitled to back pay, seniority, etc., lost if the employee is determined not to be physically or mentally unfit to perform the duties of the position.
- Employees placed upon Section 72 involuntary leave may appeal the decision and have the right to apply for reinstatement within one year, subject to a medical examination to determine mental or physical fitness. Civil Service Law § 72(2).
- After one year, employees placed on leave pursuant to Section 72 are subject to termination in accordance with Section 73 of the law. Civil Service Law § 72(4).

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NYCSL

NY Civil Service Law Section 73

- Guarantees public employees a one year leave of absence for non-work-related disabilities.
- An employee who recovers sufficiently to return to work may make an application for reinstatement.
  - Such an application must be made within one year after the termination of the disability (not one year after termination of employment).
  - The employee will be subject to a medical examination to determine fitness to perform the duties of the employee's prior position.
  - If the medical officer certifies that the individual is fit to perform the duties of said employee's prior position, the individual is entitled to reinstatement to the position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which the employee was eligible for transfer.
  - If no vacancy exists, or if the workload does not warrant filling the vacancy, the individual must be placed upon a preferred list for said employee's former position, and he shall be eligible for reinstatement from such preferred list for a period of four years.
- For employees who are unable to return after one year, Section 73 leave may be terminated – but they are entitled, as matter of federal due process, to some pre-termination notice and opportunity to be heard, in addition to post-termination procedures. *Prue v. Hunt*, 78 N.Y.2d 364, 575 N.Y.S.2d 806 (1991).

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NY Ed. Law

New York Education Law § 913

- N.Y. Education Law § 913
  - Allows the Board of Education to require a teacher or other employee to submit to a medical examination in order to determine the employee's **physical or mental capacity** to perform said employee's job duties.
  - Primarily aimed at ensuring fitness for duty but can be an effective and powerful tool to assess legitimacy of absences.

"In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require ***any person*** employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician or other health care provider of his or her choice or the director of school health services of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his or her duties."

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NY Ed. Law

NY Education Law § 913

- The employee may be placed on administrative leave pending the examination.
- Refusal to submit to the exam is insubordination and can result in leave without pay until the employee complies. *See, e.g., Strong, 902 F.2d 208; Kurzius v. Board of Education, Washingtonville Central School District*, 81 A.D.2d 827, 438 N.Y.S.824 (2d Dept. 1981).
- The employee has the right to be accompanied by a physician or other person of the employee's choice during the examination.
- "The determination based upon such examination… shall be reported to the board of education… and may be referred to and considered for the evaluation of service of the person examined or for disability retirement."

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Other Sources of Leave Rights

- Collective Bargaining Agreements/Statutory Leave
  - Parental Leave
  - Personal Time
  - Bereavement Leave
  - Other Applicable Statutory Leave (e.g., Voting Leave; Cancer Screening Leave).
    - Critical for CBAs to carefully define purposes for which each leave category may be taken.
- District policies may also create leave rights if they award time off not addressed by CBAs or other written policies.

Case Studies and Practical Applications

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Case Study 1

- Lindsay is frequently absent or late to work. She has used all available sick and vacation time and misses a shift due to a migraine. She requests an FMLA leave of absence due to her own serious health condition. During the request process, Lindsay shares with the HR representative that her migraines are a chronic condition and that she does not see a doctor but relies on home remedies such as ginger root tea and Tylenol.

- **True or False: Lindsay is entitled to FMLA leave for the time she cannot work related to her migraine?**

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Case Study 1

- **Answer: False**

While evaluation of whether a specific employee has a qualifying “serious health condition” is highly fact specific and must be analyzed with care, the fact that Lindsay has not treated with a healthcare provider prior to the absence likely would disqualify her from FMLA leave. The FMLA defines a “serious health condition” as one that requires periodic treatment from a healthcare provider—at least twice per year for chronic condition like migraines.

However, the answer may be different under an accommodation framework, particularly under New York law.

Case Study 2

- Andy has been employed by ABC School on a full-time basis for over two years. Starting in January 2023, he takes 12 weeks of FMLA leave for his own serious health condition.
- Andy returns to work. Three months later, his child is born. He asks to take another 12 weeks off to bond with his child.

True or False: Andy is entitled to the 12 weeks of bonding leave?

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Case Study 2

Answer: It depends. Is the employer covered by Paid Family Leave?

Assuming Andy and his employer are covered by the Paid Family Leave Law, Andy is entitled to an additional 12 weeks of PFL to bond with his new child. Andy's first period of leave was covered only by FMLA, because PFL is not available for an employee's own serious health condition. Therefore, when he returns to work, Andy still has his full 12-week PFL allotment available to him.

If Andy and/or the employer is not covered by PFL, Andy may no longer have any FMLA leave available.

Case Study 3

- ABC Central School District is located in Buffalo, NY, and employs 300 employees in the area. The District also employs Asia, its Policy Development Coordinator, out of her home office in San Francisco, CA. Asia is the only District employee living and working in California, but she reports to and receives assignments from the District's employees working out of the Buffalo office. Asia has an accident and requests FMLA leave for a medical procedure.

- **True or False: Asia is not entitled to FMLA leave?**

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Case Study 3

- **Answer: False.**

Since Asia is the District's only California-based employee, she does not *physically* work at a location where the employer has at least 50 employees within 75 miles.

BUT, for remote employees, employers must consider the physical office location to which the remote employee reports and from which he or she receives work.

Here, Asia reports to the Buffalo office, and there are 50 or more employees within a 75-mile radius of that office. Thus, assuming Asia meets the other FMLA eligibility requirements, she is qualified for FMLA leave.

Case Study 4

- Elizabeth takes 12 weeks of FMLA for her serious health condition. At the end of 12 weeks, she submits a doctor's note clearing her to return to work, with a restriction of working a maximum 4 days per week until her next evaluation, which is in 2 months.
- Elizabeth's employer, XYZ Central School District, has a "no fault" or "points-based" attendance policy. Under the policy, two points are assessed for each full-day absence. An employee who accumulates 10 points in a six-month period is automatically terminated.
- The District allows Elizabeth to return to work on a reduced 4-day-per-week schedule per her medical restriction.
- After missing one-day-per-week for five weeks, Elizabeth reaches 10 points and is automatically terminated under the attendance policy.

True or False: the District complied with the ADA and HRL because it provided Elizabeth with FMLA leave and its termination was based on its neutral, no-fault attendance policy?

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Case Study 4

Answer: False.

According to the EEOC and NYS Division of Human Rights, employers cannot take action under a “no fault” or “points” attendance policy where the employer is aware that the absences are due to an employee’s disability and the employee has requested an accommodation.

The District should have granted the requested accommodation and not pointed the medically-related absences under its attendance points policy.

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Case Study 5

- Lisa, an employee of ABC School, is pregnant. In her second trimester, she begins to experience intense morning sickness and requests a change in her schedule to accommodate her symptoms. The School determines that Lisa's morning sickness does not constitute a qualifying disability under the Americans with Disabilities Act and therefore denies the requested accommodation.

- **True or False: ABC Co. is not required to accommodate Lisa's morning sickness?**

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Case Study 5

- **Answer: False.**

Even though Lisa does not have an ADA-qualifying disability, she may still be entitled to an accommodation under the state equivalent of the ADA (such as the NYS Human Rights Law), which may define a qualifying "disability" more broadly than the ADA.

In addition, under the recently passed Pregnant Worker Fairness Act, employers (with at least 15 employees) are required to provide reasonable accommodations to a qualified employee or applicant's "known limitations" related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship

A qualifying "limitation" may be modest, minor, and/or episodic and need not meet the ADA's definition of "disability."

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Case Study 6

- After Lisa returns to work, she requests a modified break schedule to allow her to pump breast milk for her newborn baby.

- **True or False: Lisa is entitled to additional break time to pump?**

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Case Study 6

- **Answer: True.**

- Under the recently amended NY Labor Law 206-c, all public and private employers are required to provide lactating employees with a 30-minute paid lactation break each time the covered employee has a reasonable need to express breast milk. Lisa is eligible for this benefit until her child reaches three years of age.

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Questions?

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HODGSON RUSS

Contact Us

Elizabeth D. McPhail

Partner

716.848.1530

emcphail@hodgsonruss.com

Andrew D. Drilling

Associate

716.848.1412

adrillin@hodgsonruss.com

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