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Legal Update: FLSA, MJ & Paid Family Leave, Locate the Landmines!

September 16, 2019



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Agenda

- Chapter Updates & Vendor Spotlight – 4:55p to 5:15p
- Presentation – 5:15p to 6:30p
- Raffle Prizes – 6:30p



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Non-Profit Spotlight



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Chapter Updates

We are successful, because of our members!



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Welcome New Members

We are successful, because of our members!



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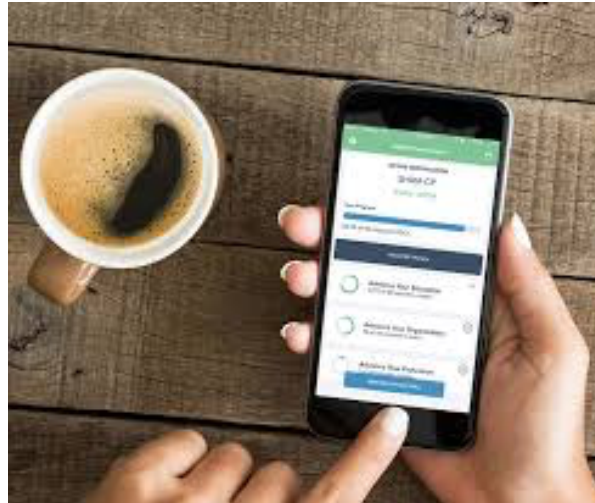
Mark your calendar

- October 22nd (Tuesday) – Mental Health Awareness Program
- November 12th (Tuesday) – Courageous Conversations
- December 9th – Cocktails & Credits3
- January 27th – David O’Brien – Workforce Readiness Program
- February 24th – Financials for the HR Professional
- March 17th - ½ Day Multi-Track Program – Are you ready for PFML
- April 20th – Diversity Program
- May 19th – HR Like Marketing



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SHRM Certification App



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HRMA Scholarship Scramble

Join us for the 1st Annual HRMA Scholarship Scramble

September 27th @ Ledges in South Hadley

\$29 per person with cart



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Bloggers wanted



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&



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Tri-State 2020



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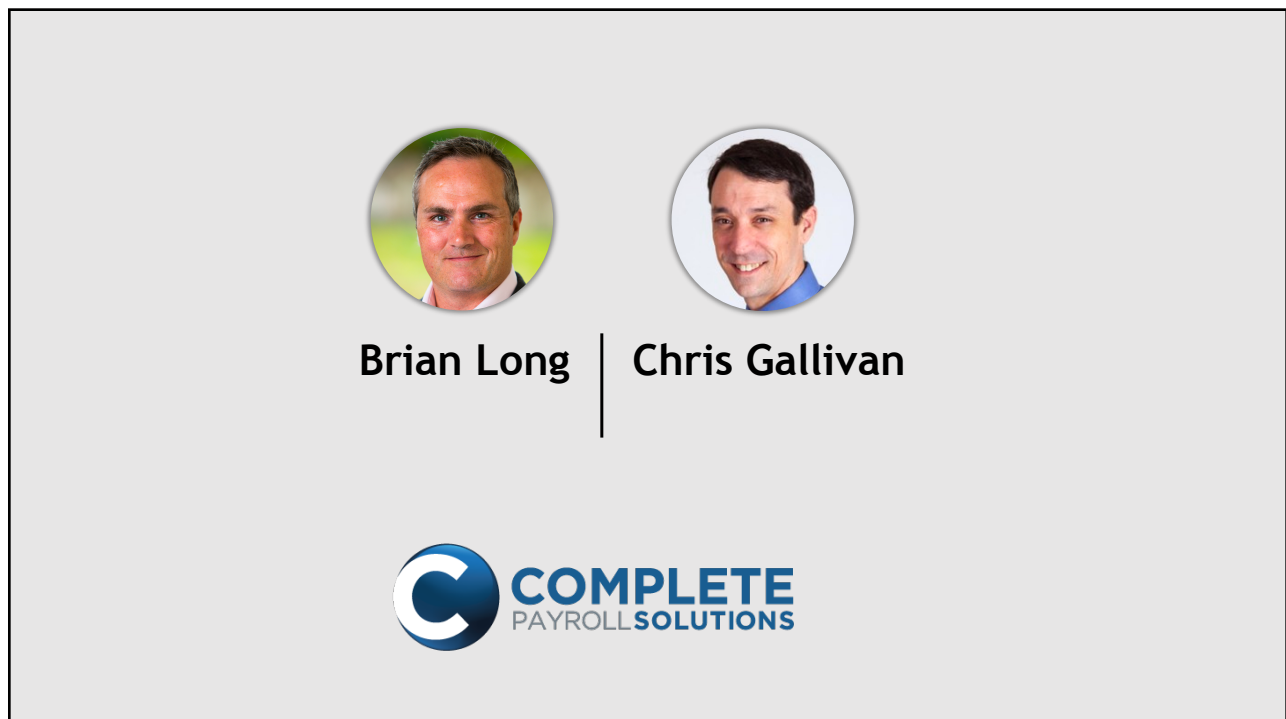
Premier Event Sponsor



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CPS Updates

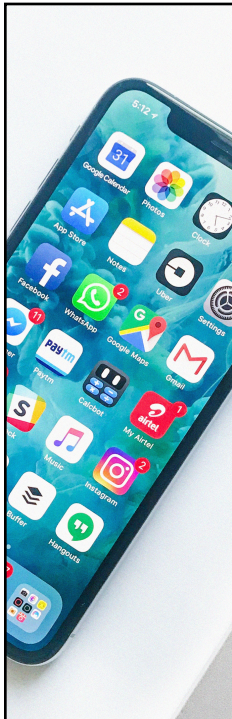
- **Opened 3 New Processing Locations**
 - Bringing CPS to 6 Processing Locations throughout the Northeast
- **Human Resource Outsourcing**
- **Introduced iSolved to the Marketplace**

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- **Enterprise Software with local support for companies of all sizes**
- **Simplifying People Management**
- **Industry Leaders in Cloud HCM Technology**

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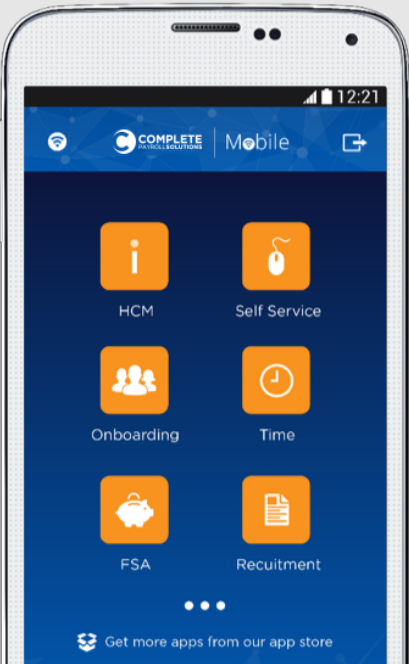


Technology

One Database, One Interface and One Employee Record

- Payroll
- Time and Labor Management
- ACA
- Scheduling
- HR
- Recruitment
- Onboarding
- Performance & Compensation Management

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Employee Management on the Go

COMPLETE
PAYROLLSOLUTIONS

Get more apps from our app store

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Security

- Multi-factor Authentication
- SOC-2 Compliance
- Encryption At Rest & In Transit
- Disaster Recovery
- Microsoft Azure Proprietary Security

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Why CPS...

- On-site Implementation Training
- Project Management Tracker
- The People That Support You

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Real Experience

- Dawn, FPC, Implementation Lead – 20 years of experience
- Hayden, CPP, TLM Implementation – 17 years of experience
- Stacey, FPC, HR Implementation – 14 years of experience
- Jeannine, FPC, HCM Team Support — 31 years of experience

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Schedule a Demo Today!

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Raffle Drawing – Reminder...

Reminder for all business cards...



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SHRM PDCs & HRCI RCs

- This program has been authorized for 1.25 SHRM-CP, SHRM-SCP Professional Development Credits and HRCI HR General Recertification Credits
- Reminder: You must be present for the **entire** presentation of the program to obtain credits
- Please remember to sign your name at the registration desk at the end of the program to verify your attendance and request your credit certificate, all certificates will be emailed shortly after the program.



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Legal Update: FLSA, MJ & Paid Family Leave, Locate the Landmines!

Presented by Meghan Sullivan



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HRMA Legal Updates

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Agenda

1. Fair Labor Standards Act (FLSA)
2. MA Medical Marijuana
3. MA Paid Family Medical Leave

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FLSA

Proposed Rule Increase:

- Minimum salary for exempt positions from \$455 to \$679 per week (\$35,308 per year)
- Highly compensated from \$100,000 to \$147,414
- Allow nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary level

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FLSA

Anticipated Proposed Rule Making:

- **Changes to Fluctuating Work-Week**

Intention: provide greater flexibility to employers

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Medical Marijuana

Still not obligated to allow on-site or on-duty use

MA Disability Discrimination Laws – reasonable accommodation and the interactive process

Nothing in the law requires the violation of Federal Law

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MA Paid Family and Medical Leave

1. General Overview
2. Dates and Deadlines
3. Immediate Action: workforce analysis and required notices
4. The Law and Final Regulations
5. Managing PFML, Intermittent Leave and the Certification Process
6. Action Items

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MA Paid Family and Medical Leave

In 2021, MA workers will have up to:

- 12 weeks of paid leave to: care for a sick family member; related to military exigency; military injury; or for birth bonding
- 20 weeks of paid medical leave to attend to their own serious medical need
- Maximum 26 paid weeks every year

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Important Dates and Deadlines

September 30 th :	Written notice to workforce (paper or electronic) Acknowledgement receipt — Retain Update notice regarding rate sheet Deadline for applying for private plan exemption
October 1 st :	Start date for making payroll withholdings based on contribution rates
December 20 th :	Application deadline for private plan exemption
Jan. 31, 2020:	Complete filing quarterly reports and contributions via MassTaxConnect
Jan. 1, 2021:	Paid benefits become available to covered individuals for the purposes of leave for self, birth bonding or service-related leaves
July 1, 2021:	Paid benefits become available to covered individuals related to leave for family members

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Immediate Action

Step 1: Does your business have anyone doing anything in MA?

Step 2: How many W-2 employees perform work in Massachusetts?

How many 1099-MISC contractors do you have? Do they make up more than 50% of your total workforce?

The W-2 employees and the 1099s (if greater than 50%)
= the number of covered individuals

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Immediate Action

Step 3: Determining the contribution rates for your organization

- The number of covered workers impacts contribution rates

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Immediate Action

Generally:

- **New tax is 0.75% of earnings up to \$132,900 (individual) stated differently:**
\$7.50 per \$1,000 of the first \$132,900 of an individual's earnings
- The \$7.50 is split between the different types of leave, Medical or Family, and is split between the employer and worker

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Paying for Paid Leave

Splitting the .75%

- 62% for Medical Leave
- 13% for Family Leave

Next slides: Who owes the payments – the employer or the worker?

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Contribution Rate Split: Over 25 Workers

25 or more covered workers

Medical Leave: 0.62% of eligible wages

Employer minimum share: 60% (of the 0.62%)

Individual maximum share: 40% (of the 0.62%)

Family Leave: 0.13% of eligible wages

Employer share: 0%

Individual share: All of it

Translation: 60% of medical is 0.327% of eligible wages

40% of medical is 0.234% of eligible wages

Business can pay it all

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Contribution Rate Split Under 25

Not required to pay the employer share of Medical Leave Contribution

Medical Leave: 0.248 % of eligible wages

Covered Worker responsible for entire amount

Family Leave: 0.13% of eligible wages

Covered Worker responsible for the entire amount

The employer can choose to pay all or part of it.

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Immediate Action: Paying for Paid Leave

An employer can have different contribution rates for different categories of covered workers such as:

Exempt / Non-Exempt

High vs. Low Wage

Union vs. Non-Union

458 CMR 2.05

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Notice by September 30th

- Notice to all covered workers (1099 if >50%)
- Poster
- Foreign language(s)
- Proof of notice
- Proof of notice to new hire or time of contract (if applicable)
- Different Notices for W-2 and 1099

If issued Notice before June 30th, need to revise because the contribution rates changed

Sample Notice(s) and Poster published by the Massachusetts Department of Family and Medical Leave

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Notice and Penalties

After September 30th

Failure to provide notice (failure to have proof of notice):

First violation	\$50 per MA W-2 employee or MA 1099-MISC contractor
Subsequent violations	\$300 per MA W-2 employee or MA 1099-MISC contractor

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Application of the Law

Applies to almost all employers (municipalities and political subdivisions or instrumentalities must adopt)

Applies to virtually all employees (no waiting period or minimum hours like federal FMLA) but not students on work study

Potential Exception: New employee had a period of unemployment before joining the employer

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Who Gets Paid Leave and Why?

Earnings eligibility requirement for any individual who wants to take paid leave under the law.

- Approximately 15 weeks or more of earnings in Massachusetts
- Earned at least \$4,700 in MA in the previous 12 months

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Not Identical to Federal FMLA

Definitions and Terms:

- Same or greater benefit than that which is provided in the federal Family and Medical Leave Act
- No length of service or hours-worked requirement
- Will run concurrently with FMLA and state leave laws if applicable
- Potential issues: where FMLA is not triggered, FMLA eligible employee has a right to another 12 weeks

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MA PFML Benefit

“Employee” includes former employees up to 26 weeks

Annually, Covered Individuals will have up to:

- 12 weeks of paid leave to care for a family member with serious health condition or newborn
- 20 weeks of paid medical leave to attend to their own serious medical need
- Also, military caregiver and/or military exigency
- Maximum 26 weeks
- Not rolling like Federal FMLA

Family: parents, spouse, children, domestic partner, grandparents, grandchildren, siblings and the parents of a spouse or domestic partner

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Sampling of “Family” Definitions -

See 458 CMR 2.02

Domestic Partner

- As evidenced by factors articulated in the regulations; or, as registered as such under the employer policy (of either partner) or with a government entity

Child

- Biological, adopted, foster, step, legal ward, *in loco parentis* (currently or in the past)

Sibling

- Biological, adopted, step

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Qualifying Reason and SHC –

See 458 CMR 2.02

“Serious Health Condition” is more broadly defined

Includes illness, injury, impairment or physical or mental condition that involves:

1. In-patient care in hospital, hospice or residential medical facility; or
2. Continuing treatment by a health care provider.

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MA PFML Right to Reinstatement

Right to reinstatement to previous or an equivalent position.

Lay-off if specific factors are met.

- PFMLA factors may be different from policies and collective bargaining agreements.

Statutory language regarding collective bargaining agreement is not consistent with other laws.

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What is Paid?

Following a seven-day waiting period (which counts for the total amount of PFMLA time):

- 80% of their wages (up to 50% of the state average weekly wage, and then 50% of their wages above that amount)
- Capped at \$850 per week (which may be adjusted annually)
- Paid by state trust fund or equivalent private insurance
- No right to receive more than regular earnings

Current average weekly wage \$1,338.50

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No Double Dipping

- \$\$ from trust reduced by pay from another source (wages, wage replacement under any government program or law, including workers' compensation and federal or private disability benefits) if weekly amount would exceed \$850
- Employer payments of an excess amount shall be reimbursed by the trust fund
- Cannot force an employee to use paid time off. But if they do, Employer is to provide notice that it runs concurrently

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What is Paid?

- Leave Allotments Based on Hours Worked. The number of hours or days an employee would otherwise have worked will be used to calculate leave periods. When an employee works part-time or has variable hours, the leave is calculated on a proportional basis.

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Health Insurance While on PFML

458 CMR 2.16

- During leave, employer continues to pay its share of health insurance “at the level and under the conditions that coverage would have been provided...”
- Employee share “shall be remitted...in accordance with the uniformly applied policies or practices.”

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Other Benefits

- Upon reinstatement: employee's right to accrue vacation time, sick time, bonuses, advancement, seniority, length-of-service credit or other employment benefits plans or programs shall not be affected because of the leave
- The leave period, however, need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate

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Retaliation Prohibited and Presumed

- Retaliation for exercising rights under this law, and any negative change in status or adverse employment action during a leave or *within six months of the leave will create a rebuttable presumption of retaliation*
- The employer can rebut the presumption with clear and convincing evidence that such action was based on a non-retaliatory independent justification

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Retaliation

- Threatened or actual
- Discharge, terminate, suspend, expel, discipline, through the application of attendance policies or otherwise, threatening or in any other manner discriminating against an employee for exercising any right to which entitled...or with the purpose of interfering with the exercise of any right
- Making or supporting a complaint is protected against retaliation

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Lawful Management of PFML

- Required compliance with reasonable attendance and call in procedures established by the employer
- Fitness-for-duty (if obligations are met) - See 458 CMR 2.11 (not what you're used to)
- Intermittent leave – “not to unduly disrupt operations”
- Intermittent or reduced leave – failure to work during the agreed upon schedule can result in discipline
- Failure to return from leave can result in discipline
- Proof of willfully false statements or fraud

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How Will the Process Work?

See 458 CMR 2.08, *et seq.*

- a) Individual files a claim using DFML forms
30 days' notice of start date, length, type and expected date of return (unless for reasons beyond "reasonable control" then as soon as practicable)
- b) Can require compliance with usual and customary notice and procedural requirements including specific person to contact
- c) If notice and procedure are not followed, and absent unusual circumstance to justify, leave can be delayed or denied
- d) Scheduling planned treatment – must consult with employer and make reasonable effort to schedule in a manner not unduly disruptive to operations, subject to approval of health care provider

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How Will the Process Work?

- e) DFML notifies employer in five days and "shall facilitate the discourse and exchange of relevant information or records..."
- (f) Certifications
- (g) Information from Employer

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How Will the Process Work?

Upon request, Employer has five days to provide information:

- a) Wage and/or earnings information for the past 12 months;
- b) A description of the employee's or covered individual's position;
- c) Whether the employee or covered individual currently works a full- or part-time schedule;
- d) Weekly hours worked;
- e) Prior requests/approvals for a qualifying reason;
- f) Amount of paid leave already taken for a qualifying reason during the current benefit year;

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How Will the Process Work?

- (g) A description of the employer's or covered business entity's own paid leave policies and whether the employee or covered individual has received paid leave during the last 12 months under any plan or practice of the employer or covered business entity, and whether the employee or covered individual will receive any paid leave benefits from the employer or covered business entity during the requested leave period at issue;
- (h) Whether the covered individual has applied for concurrent FMLA or other leave and whether the employer has approved the application;
- (i) Any other relevant information or records related to the claim, including any evidence of a potentially fraudulent claim.

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How Will the Process Work?

Notice of approval (or not) within fourteen days

- a) The reason for the approved leave benefits;
- b) The duration of the approved leave benefits;
- c) For intermittent leaves, the frequency and duration of the leave benefits;
- d) The expiration of the approved leave benefits;
- e) Amendments or Extensions Possible.

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Fitness-for-Duty

- Return to work
- Own serious health condition
- Uniformly applied policy or practice
- “Present certification from their health care provider”
- About the condition causing the need for leave

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Fitness-for-Duty

- Ability to perform essential job functions if a list of essential functions issued within five days of the leave approval
- Notice that return to work certification addresses the ability to perform those essential functions
- If required notice provided by employer, the employee's failure to provide fitness-for-duty certification can eliminate the PFML entitlement to reinstatement

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Fitness-for-Duty and Intermittent Leave

Every thirty calendar days if reasonable safety concerns exist regarding the ability to perform their duties based on the serious health condition for which they took leave

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Discipline and Intermittent Leave

- Approved and takes intermittent or reduced schedule “and who fails to work during the times or on the agreed schedule”
- May be disciplined
- Employer shall notify the Department

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Appeals

- The individual can appeal a denial
- The appeal can include a hearing or be based on the record
- The individual can appeal into court

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Action Items

Glaring

- Workforce analysis
- Determination(s) regarding the tax
- All required employee notices
- Application for private plan and/or withholding of the tax, etc.

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Action Items

Retaliation – includes threats and interference arising from the application of an attendance (or related) policy.

- Review all policies.
- Review contracts and collective bargaining agreements.

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Action Items – Breaks in Service

- Right to be out of work for up to 26 weeks every year, and retaliation is presumed for 6 months
- Every benefit calculated on “years of service” should be reviewed and determinations made regarding the same

Think:

401K vesting, paid time based on “years”, longevity bonuses, etc.

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Action Items – Essential Job Function

- A “Function” may not describe a physical or mental task
 - Example: “Lift up to 25 pounds”
 - Walk for periods of time lasting x# hours
 - Safely push rolling container while walking
 - Repetitive bending of legs, squatting (other description)
 - Able to grab, hold and lift, without aid of a device, bags, containers, objects of various size and weight
 - Repetitively lift object being held over larger, rolling container and release object(s) lifted and held

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Action Items – Employee Share of Health Insurance

“Shall be remitted...in accordance with uniformly applied policies or practices.”

- What is existing policy or practice?
- Potential options?
- Proof of “uniform application”?

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Action Items – Rebuttable Presumptions

- The employer must have proof (evidence)
- Uniformly enforced rules and policies
- Ability to generate data regarding uniform enforcement – 3 or more years later
- Management Training?
- HRIS systems or data entry?
- Objective performance evaluations?
- Personnel files ... other?

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Action Item – Risk Avoidance - Who?

- What trained employee will be responding to the DFML “within five days of receipt of an inquiry” regarding:
“Any other relevant information or records related to the claim, including any evidence of a potentially fraudulent claim;” without violating a different right or benefit?
- Benefits based on a willfully false statement exempt the person from job protection
- Notice of concurrent time
- Application and interplay of other laws and rights

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Action Item – Examples: Other Laws

- PFMLA – safe for employee as determined by his HCP
- ADA/151B – safe for employee and others
- ADA & FMLA – processes for employer HCP
- PFMLA – cannot work specific job
- PFMLA – break in service with employer
- Pay Equity – difference in pay and self-audit
- PFMLA for non-FMLA reason
- PTO for a PFML purpose

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Action Item – Evidence Preservation and Considerations

- Automatic Purging
- Management Turn-over without preservation
- Sweeping, unclear coding systems (may need new code)
- Documentation / procedure for call-outs
 - Accountability
 - Supervisors and absent employee

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Rights and Obligations

REMEMBER: Unlawful to retaliate – ASSUMPTION that employer retaliated. Harder for employer to prove it did not retaliate.

Right to Sue

Three-year statute of limitations for violation of job restoration, benefit accrual and continuation and retaliation

Job restoration, benefits accrual and continuation, injunctive relief, treble damages for lost wages, benefits and other remuneration, interest and attorneys' fees and costs

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THANK YOU!



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Raffle Drawing

Thank you to everyone that has donated!



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Thank You!

Please remember to sign for your re-certification credits. Enjoy dinner!

