

36th Annual Workforce Management Briefing

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Managing Workforce Compliance in an Unpredictable World



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Managing Workforce
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Navigating and Managing the Complex Intersection of Paid and Unpaid Leave

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Presenters



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Agenda

-  1 An Overview of Federal, State, and Local Leave Laws

-  2 Leave Entitlement

-  3 Pay While on Leave

-  4 The Intersection of Leave Laws

-  5 Developing Leave Policies

-  6 Managing and Administering Leaves

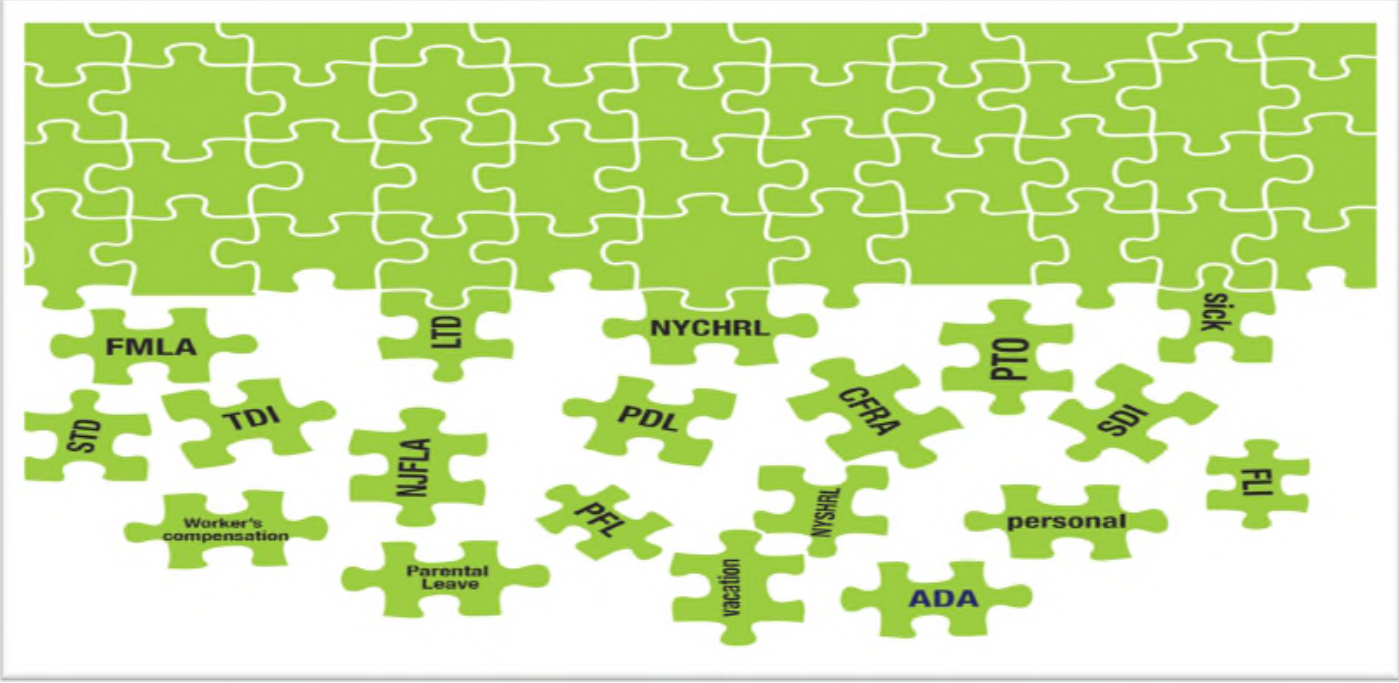
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Overview of Federal, State, and Local Leave Laws

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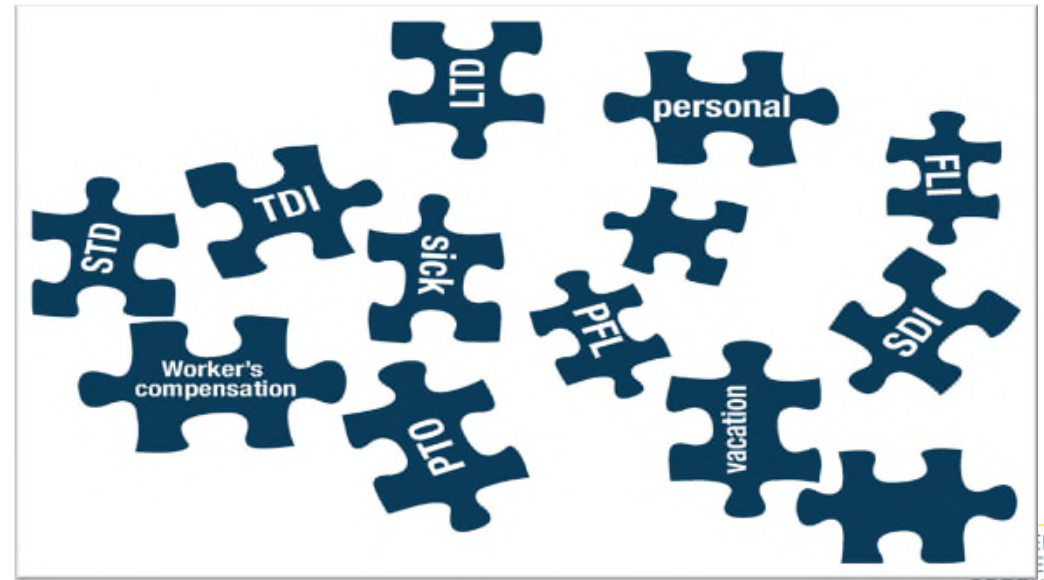
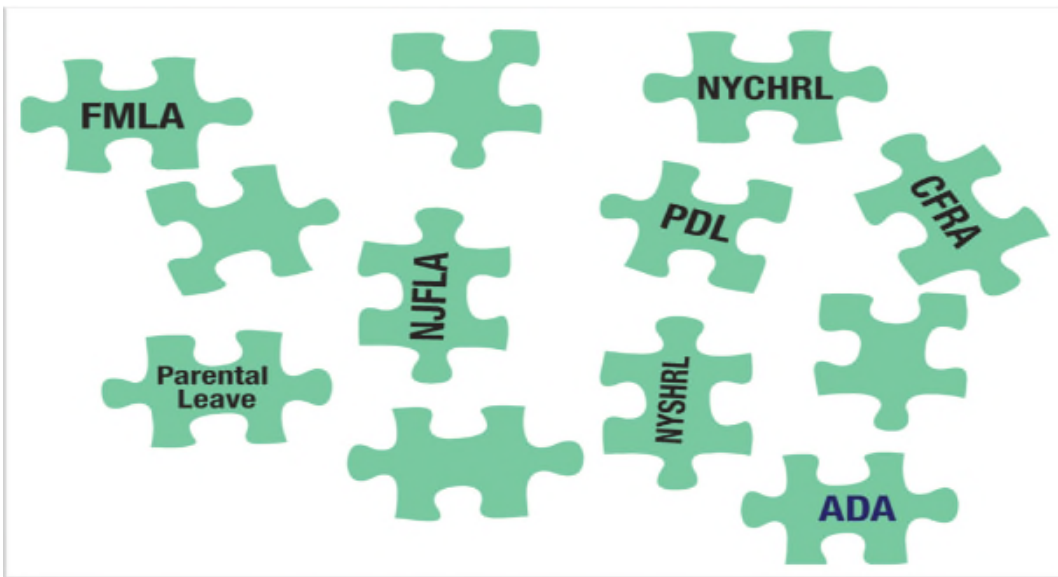
Determining whether an employee is eligible for leave—and, then, whether the leave will be paid—can seem like an overwhelming endeavor....



But it actually can be reduced to two core questions:

1. Is the employee entitled to leave?
2. Is the leave paid?

LEAVE ENTITLEMENT



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Leave Entitlement

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The Family and Medical Leave Act (FMLA)



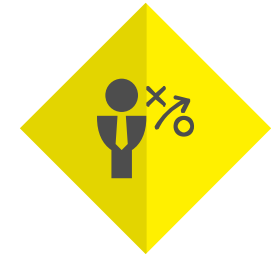
Eligibility:
Requires 12 months of employment, at least 1,250 hours of service in the 12 months preceding leave



Entitlement:
12 weeks of unpaid leave during any 12-month period or 26 weeks for service member leave



Job-protected,
with medical
benefits



Substitution of
paid leave is
elective

The Family and Medical Leave Act (FMLA)



Reasons for leave:

The employee's own "serious health condition"

The birth and care of a newborn child of the employee

The placement with the employee of a child for adoption or foster care

The care of an immediate family member with a serious health condition

Medical leave when the employee is unable to work because of a serious health condition

Exigency leave for family member of service member

Service member leave

The Americans with Disabilities Act (ADA)



The ADA requires employers to provide **reasonable accommodations** to **qualified individuals** with a disability who can perform the essential functions of the job with or without accommodation, unless doing so would constitute an **“undue hardship”**

Individualized inquiry -context-specific

Focus on whether the worker can perform the essential functions of the job

The Americans with Disabilities Act (ADA)



“Disability” is defined as “a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having an impairment”

- Note that under some state and local laws, such as in California and New York, a “disability” can be defined more broadly



A leave of absence **may** be a reasonable accommodation, even if the employee is not eligible for job-protected leave under the FMLA or other leave laws



Must engage in the **interactive process**

Leave as a Reasonable Accommodation Under the ADA



Leave can be a reasonable accommodation under the ADA and state/local human rights laws, provided it does not create an undue hardship for the employer



Often, ADA leave is sought as an extension beyond 12 weeks of FMLA leave








Under the ADA, the employer must hold the employee's job open or provide the employee with an alternative position with equivalent pay and benefits



Employers must evaluate if any requested extension of leave is an undue hardship

State and Local Anti-Discrimination and Accommodation Laws

-  Protections under state laws are generally similar to federal standards (e.g., requirement to not discriminate and to provide reasonable accommodation)
-  Be aware that state and local law definitions, including that of “disability,” vary
-  Definitions are generally more protective of employees under state law, and even more so under local law
-  In California, employers *cannot* ask about the actual diagnosis when an employee is seeking a reasonable accommodation
-  In New York City, there is no requested accommodation that is *per se* unreasonable, including a request for indefinite leave

Overview of Sick Leave Laws



Generally, these laws require paid sick leave as well as leave to care for family members

These laws typically apply to all types of employees, including part-time and seasonal employees

Each year, employees are typically able to accrue from 24 to 72 hours and use from 24 to 80 hours

These new sick leave laws will often trump employer sick policies, particularly if the employer is trying to create a nationwide policy

States and Municipalities with Paid Sick Leave Laws

Arizona

California

Connecticut

Georgia

Massachusetts

Oregon

Vermont

Washington State

San Francisco, CA

Oakland, CA

Emeryville, CA

Santa Monica, CA

Los Angeles, CA

San Diego, CA

Washington, DC

Chicago, IL

Cook County, IL

Montgomery County, MD

Minnesota, MN

Jersey City, NJ

Newark, NJ

Plainfield, NJ

Elizabeth, NJ

Bloomfield, NJ

East Orange, NJ

Irvington, NJ

Montclair, NJ

Morristown, NJ

New Brunswick, NJ

Passaic, NJ

Paterson, NJ

Trenton, NJ

New York, NY

Philadelphia, PA

Seattle, WA

Spokane, WA

Tacoma, WA

California Law



Pregnancy Disability Leave (PDL)

During periods of actual disability due to pregnancy (i.e., a doctor certifies that the employee is unable to work), an employee may take up to four months (or 17 $\frac{1}{3}$ weeks) of leave

Most uncomplicated pregnancies: 6-8 weeks disability

Runs concurrently with FMLA but does not overlap with the California Family Rights Act (CFRA)

PDL may be followed by the right to take up to 12 weeks of additional time off for baby bonding under CFRA

California Law



Pregnancy Disability Leave (PDL)

Employees have a *protected right to reinstatement* following PDL

The leave may also be intermittent

Employees may have the right to reasonable accommodations and/or a transfer to a less strenuous position as well

California Law

California Family Rights Act



Eligible employees may be entitled to take up to 12 weeks of unpaid, job-protected leave in any 12-month period



For own or a family member's serious health condition, or to care for newborn or newly placed child

CFRA does not cover PDL but includes baby bonding



- Runs concurrently with FMLA, except for pregnancy disability
 - Does *NOT* run concurrently with CA's PDL
 - For maternity leave only, CFRA starts after the PDL period
-



After an employee's protected leave time expires, he or she may be entitled to additional leave time under the Fair Employment and Housing Act (FEHA) as an accommodation if the leave was because of the employee's own disability

New York Law

New York State's Paid Family Leave Benefits Law

PROGRAMS

Paid Family Leave: Strong Families, Strong NY

On March 31, 2016, New York State Governor Andrew Cuomo signed a bill enacting a paid family leave benefits law

Beginning January 1, 2018, full-time employees who have worked for a covered employer for 26 or more consecutive weeks (and part-time employees who have worked for 175 days) will be eligible for paid family leave (PFL) and benefits

New York Law

New York State's Paid Family Leave Benefits Law

PROGRAMS

Paid Family Leave: Strong Families, Strong NY

The law will provide job protection and pay during leave

The law will initially provide eight weeks of leave and gradually increase to 12 weeks of leave by 2021

New York State's Paid Family Leave Benefits Law:

Permissible Uses



Family leave benefits may be used for the following purposes:

to participate in providing care, including physical or psychological care, for a family member of the employee made necessary by a serious health condition of the family member

to bond with the employee's child during the first 12 months after the child's birth, or the first 12 months after the placement of the child for adoption or foster care with the employee

because of any qualifying exigency as interpreted under the federal FMLA arising out of the fact that the spouse, domestic partner, child, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the U.S. Armed Forces

New York State's Paid Family Leave Benefits Law: Permissible Uses



For maternity leave, New York State's Paid Family Leave Benefits Law starts after the PDL period and does not run concurrently. **This presents a major shift in how much protected maternity leave NY employees will have** (similar to CA and NJ).

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Pay While on Leave

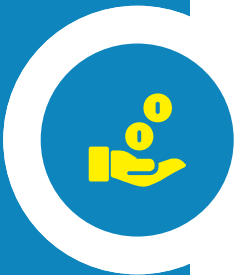
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Pay While on Leave

Leaves of absence while on FMLA, under state disability laws, and under most state family and medical leave laws *do not require the employee to be paid*

Employees may receive pay based on *statutory* salary-replacement schemes:

- Short-term disability
 - New York and California each have state-paid disability insurance (SDI)
 - California: SDI provides 55% of pay, up to \$1,173/week
 - New York: Short-term disability insurance provides 50% of pay, up to \$170/week



Pay While on Leave

Employees may receive pay based on *statutory* salary-replacement schemes:

- Workers' compensation
-

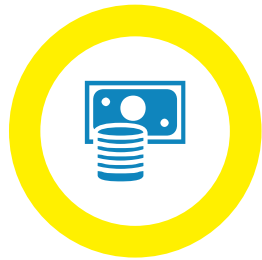
Employees may receive pay based on *statutory* salary-replacement schemes:

- Paid Family Leave Benefits
 - California has, and New York soon will have, state-paid family leave insurance
 - California: PFL provides 55% of pay, up to \$1,173/week
 - New York: PFL will provide 50% of pay, up to \$652.50/week

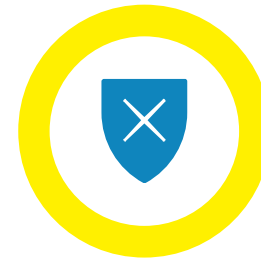


California

Paid Family Leave Benefits



California's Employment Development Department (EDD) provides eligible employees with wage replacement benefits for time taken off due to PFL



PFL generally overlaps with job-protected leaves, such as CFRA/FMLA, but PFL is not itself a job protection law

California

Paid Family Leave Benefits



PFL provides benefits for up to six weeks (up to 55% of an employee's wages, up to a max of \$1,173 per week) within a one-year period to individuals who need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner

- Benefits are also available to new parents who need time to bond with a new child entering their life either by birth, adoption, or foster care placement
- Employers may require that PFL run concurrently with FMLA/CFRA
- PFL generally overlaps with job-protected leaves, such as CFRA/FMLA, but PFL is not itself a job protection benefit

New York State's Paid Family Leave Benefits Law

Payments and Annual Increases

Date	Length of Benefits Within a 52-Week Calendar Period	Amount of Benefits
January 1, 2018	8 weeks	50% of average weekly wage, not to exceed 50% of the state average weekly wage
January 1, 2019	10 weeks	55% of average weekly wage, not to exceed 55% of the state average weekly wage
January 1, 2020	10 weeks	60% of average weekly wage, not to exceed 60% of the state average weekly wage
January 1, 2021	12 weeks	67% of average weekly wage, not to exceed 67% of the state average weekly wage

Based on the current average weekly wage, the maximum amount of PFL benefits will be \$652.50/week

Workers' Compensation



Provides coverage for employees who are injured or become ill on the job



Administered by and governed by each state through state insurance programs that are funded by employers



Benefits are provided regardless of fault



Generally prohibits employee from suing employer

Paid Leave Policy



Alternatively (or additionally), pay can be achieved through employer policies, including policies governing

Supplemental short-term disability

Long-term disability

Vacation and sick days

Paid maternity and parental leave

Paid Leave Policy

- Be prepared to explain any disparities in parental leave
- Emerging litigation



During periods of leave that are unpaid or partially paid (i.e., by workers' comp, short-term disability), company policies often provide that the employee may request use of vacation or sick days so that he or she is at full pay

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The Intersection of Leave Laws

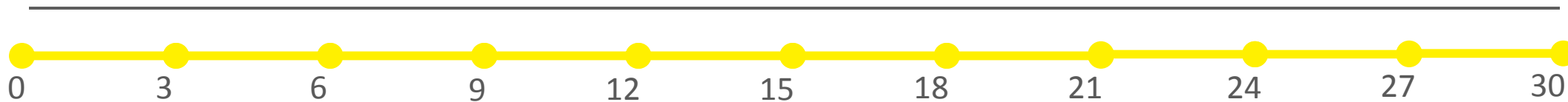
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The Intersection of the FMLA, the ADA, and Workers' Compensation

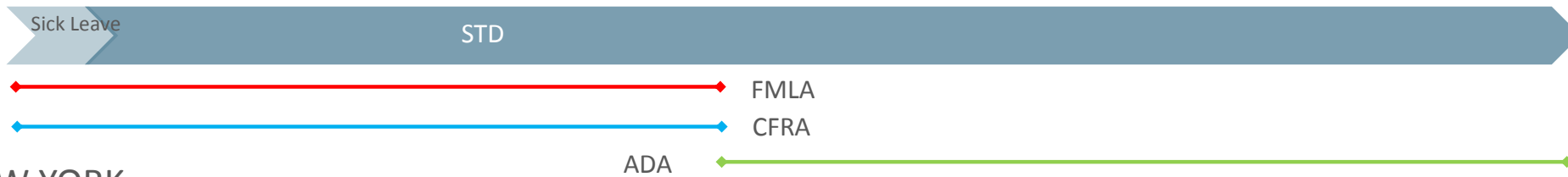
Example	"Impairment that substantially limits one or more major life activities"	"Serious health condition"	On-the-job injury or illness	Non-work related injury	Local sick leave (LSL)
Loss of leg; on the job	ADA	FMLA	WC	DBL	LSL
Loss of leg; not on the job	ADA	FMLA	WC	DBL	LSL
Blind; no treatment	ADA	FMLA	WC	DBL	LSL
Broken leg in cast; on the job; full recovery	ADA	FMLA	WC	DBL	LSL
Hearing impairment; on the job; no ongoing treatment	ADA	FMLA	WC	DBL	LSL
Sick child	ADA	FMLA	WC	DBL	LSL
Pregnancy	ADA (unless disabled due to pregnancy)	FMLA	WC	DBL	LSL

Disability Leave

Maximum Amounts Allowable



CALIFORNIA

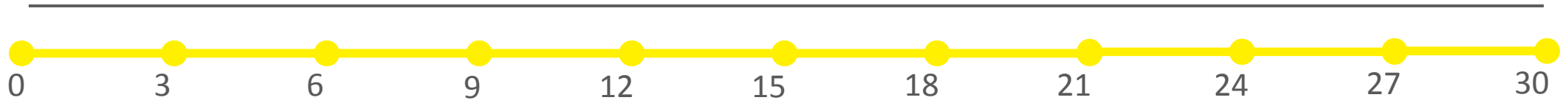


NEW YORK

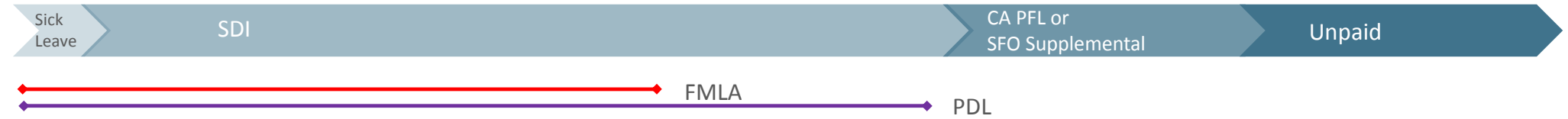


Maternity and Parental Leave

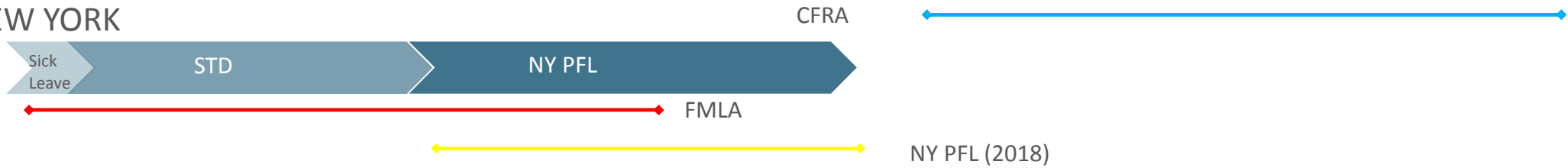
Maximum Amounts Allowable



CALIFORNIA



NEW YORK



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Developing Leave Policies

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Developing Leave Policies



Considerations for Drafting Sick Time Policies

Nationwide policy that works in all locations vs. multiple policies that are specific to locations

Consideration within the policy, such as:

- Eligibility (full-time vs. part-time)
- Amount of benefit
- Use and accrual
- Caps and carryovers
- Purposes for use of sick time

Developing Leave Policies



Considerations for Drafting Sick Time Policies

Paid time off (PTO) policies

- Traditional leave is generally divided into vacation, sick, and personal days
- PTO policy: One bank of time

Nationwide Vacation, Sick, and Personal Day Policies

Local Vacation, Sick, and Personal Day Policies

Nationwide PTO Policy

Local PTO Policies

Developing Leave Policies

Think about pros and cons prior to switching to PTO

- National vs. local policies
 - PTO vs. separate allocations
-



Before implementing any policy, be sure that it complies with applicable laws, including the laws of the state and locality where you have operations

Communicate transition with care

Consistently enforce policy

Best Practices When Considering a Paid Leave Policy

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Managing and Administering Leaves

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Managing and Administering Leaves



Best Practices

Clarify who is responsible for leave policies and any required legal updates

Develop procedures on who is responsible for administering leaves

Train HR or benefits administrators to apply policies consistently

If using a third-party leave administrator (TPA), ensure an understanding of rights and responsibilities of information flow

Make sure that medical documentation provided is sufficient and updated, as permitted

Investigate potential abuse, e.g., an employee posts photos on social media that suggest that the need for leave or accommodation is false

Managing and Administering Leaves

Pros and Cons of Third-Party Leave Administrators

Advantages of TPAs

- Standardization of administrative processes and limitation of access to employee medical records

Disadvantage of TPAs

- Outsourcing leave administration will not relieve employers of their compliance obligations



Best Practice :

Periodic audits of the TPA's forms and processes to ensure compliance with all applicable federal, state, and local laws

Managing and Administering Leaves



Misconceptions

Can the employee be terminated if unable to return at the end of FMLA?

Must an employee on leave be restricted to home or medical appointments?

Can you deny a reasonable accommodation request or leave of absence to a poorly performing employee?

Does employee medical privacy prohibit employer scrutiny of a leave request?

Questions?