TRENDS FOR 2019

- States and Municipalities Continue to Fill the Paid Leave Gap

By JAMES B. TAYLOR

Certain U.S. federal laws require employers to provide leave to their employees (paid or otherwise) in specific situations. While the leave provided to employees by federal law is often limited in scope and in context, many states and municipalities are stepping in to guarantee additional forms of paid leave to employees.

The Family and Medical Leave Act ("FMLA")

The FMLA entitles eligible employees of covered employers to take *unpaid,* job-protected leave for certain family and medical reasons. In the private sector, a "covered employer" for FMLA purposes is any employer who employs 50 or more employees in 20 or more workweeks in the current or preceding calendar year. An "eligible employee" under the FMLA means an employee who (1) works for a covered employer, (2) has worked for the employer for at least 12 months, (3) has worked at least 1,250 hours for the employer during the 12 month period immediately preceding the leave, and (4) who works at a location where the employer has at least 50 employees within 75 miles.

In terms of the amount of leave provided by the FMLA, eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons: (1) the birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care; (2) to care for a spouse, son, daughter, or parent who has a serious health condition; (3) for a serious health condition that makes the employee unable to perform the essential functions of his or her job; or (4) for any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. Additionally, an eligible employee may take up to 26 workweeks of leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is a close relative of the servicemember.

Notably, the FMLA requires that an employer continue its employee's group health insurance coverage under the same terms and conditions as if the employee had not taken leave. In addition, upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

The Uniformed Services Employment and Reemployment Rights Act ("USERRA")

The provisions of USERRA protect civilian job rights and benefits for veterans and military reserve members. Notably, employers are not required to compensate employees for periods of leave or absence covered by USERRA. Under USERRA, an employee who is subject to a military deployment may have the right to protected leave from employment or the right to re-employment after covered deployments of up to five years, depending on various circumstances. Generally, USERRA provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing "escalator" principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority – including health and pension plan coverage for service members.

The Americans with Disabilities Act ("ADA")

The ADA applies to employers with 15 or more employees and to employment agencies, labor organizations and joint labor-management committees with any number of employees. In terms of employees, the ADA protects individuals with a disability who are qualified for their job, meaning they have the skills and qualifications to carry out the essential functions of the job, with or without accommodations. An individual with a disability is defined as a 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.

Generally, the ADA requires that employers provide disabled employees with "reasonable accommodations" necessary for them to perform their job and which do not cause an "undue hardship" on the employer. While reasonable accommodations under the ADA can include workplace modifications, they may also include, in certain scenarios, allowing an employee to take a period of unpaid leave in order to accommodate that employee's disability. However, there is no set or specifically-mandated leave period required by the ADA as appropriate accommodations may depend on the individual employee's circumstances. As such, the amount of leave a disabled employee may be entitled to take under the ADA is examined on a case-by-case basis. Yet, despite this fact, employers are not required to provide leave under the ADA where such would result in "undue hardship" to the employer. Various cases have examined how much leave may constitute a "reasonable" accommodation in certain circumstances or whether a certain amount of leave is a de facto "undue hardship," but no bright-line rule has been established on this issue nationally.

The Fair Labor Standards Act ("FLSA")

Despite certain ongoing misconceptions regarding the benefits provided to employees by the FLSA, the FLSA does not require that an employer provide employees with leave, paid or otherwise. For example, the FLSA does not require leave to be provided to employees for bereavement or funerals, holidays (federal or otherwise), jury duty, personal or sick time, or vacation.

Federal Government Contracting Laws

While the FLSA does not require employers to provide their employees with paid or unpaid leave, where the employee is working under a federal government contract or subcontract, employers may nevertheless be required to provide certain forms of paid leave to their employees. In this context, two federal laws may apply: (1) the McNamara O'Hara

Service Contract Act ("SCA") or (2) the Davis-Bacon Act ("DBA"). The SCA applies to contractors and subcontractors providing services to the federal government on contracts in excess of $2,500. The DBA applies to contractors and subcontractors on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.

In addition to requiring the payment of specified prevailing wages to employees working under federal contracts and subcontracts, the SCA requires that employers provide covered employees with paid federal holidays and paid vacation – typically 80 hours after one year of service on the contract, with employee entitlement increasing with additional years of service. Further, the DBA may require employers to provide covered employees with paid vacation and/or paid federal holidays, depending on the requirements of the applicable DBA Wage Determination.

Trends for 2019: States and Municipalities Continue to Fill the Paid Leave Gap

As outlined above, federal leave laws provide relatively narrow coverage to employees and generally do not require that employees be paid during leave periods. In addition, these federal employee leave laws are not likely to be substantially expanded or added to in 2019 or the near future. However, over the past few years and continuing into 2019, a growing number of states and municipalities have made efforts to step in and fill the employee "paid leave gap."

While the FMLA requires leave to be provided to employees in certain cases, the required leave does not have to be paid (unless the employer allows the employee to substitute other paid leave during the FMLA leave period). On this front, a growing number of states have implemented paid family leave programs, which would require eligible employees to receive paid time off for family-related reasons, including paternity and maternity leave. In the past few years, California, New Jersey, New York and Rhode Island have all implemented programs to provide paid family leave to eligible employees. In addition, Washington State and Washington D.C. have enacted similar laws that will go into effect in 2020.

Additionally, while paid employee sick leave is generally not required by federal employment laws, ten states have enacted laws that mandate eligible employees receive paid sick time: Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Washington. Washington D.C. has also implemented a similar ordinance. Notably, the provision of paid sick leave to employees is a growing trend not only among states but also among municipalities. For example, Seattle, Los Angeles, San Diego, and San Francisco, among many other municipalities, have enacted paid sick leave ordinances granting (in many cases) very generous paid sick leave benefits to eligible employees.

Beyond paid family and sick leave benefits, several states and municipalities have started to aggressively implement policies requiring paid employee leave for a host of various reasons. In looking ahead to 2019 and beyond, employers should definitely review the applicability of state and municipal paid leave laws in addition to federal laws, as the states and municipalities appear to be increasingly working to fill the paid employee leave "gap."

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