

Which leave comes first?

With a larger focus on supporting working families and individual needs, many states have started to implement paid family leave programs. When you take into consideration the Federal Family Medical Leave Act (FMLA), specific state leaves and short term disability, the once “simple” leave administration has become much more complicated for both the employee and the employer to monitor.

As an employer, it is our job to know the rules and what employees are eligible for. No different than any other employment law, employers are obligated to provide the employee with whichever is the most generous to their particular situation.

Before trying to administer all the qualifying leaves at once, it is important to recognize which leave(s) the employee is eligible for. In a situation where the employee’s event qualifies for leave both under Federal FMLA and State leave parameters, and the employer is covered under both laws, the employer can require FMLA and the State leave to run concurrent together. If this is the case, it is imperative the employer notify the employee that the requested leave qualifies for both unpaid FMLA and State leave (either paid or unpaid depending on the state) and it will be designated as such. Failure to notifying the employee will result in the potential of an extended leave as the employee was not notified. In other instances, the leaves may not run concurrently rather at separate times and lead into the next qualifying leave.

Let’s take a moment to review what this actually means in a real time example. An expecting female employee (in VT), and her husband who is also an employee, come to HR to request a maternity leave. The employee’s due date is October 1st however due to pregnancy complications, her doctor has requested an earlier than anticipated leave. What’s next?

The expecting employee is covered by both FMLA and VPFL. Under the FMLA, she is covered as this is considered a medical issue. Under the VPFL, she can take time *before* the baby is born. This time is considered unpaid leave for her. Under both FMLA and VPFL, the same applicable certifications and notices are required for administration purposes. However, since the employee went out prior to the baby’s birth, per the doctor’s instruction, this is considered a medical disability therefore potentially qualifying the employee for disability coverage and continuing for the additional time beyond the baby’s birth. The 12 week unpaid leave “clock” starts tracking when the employee stops working due to the medical issues. In VT, disability is not mandated as it is in other states like NY and NJ. In this particular example, the employer offers Short Term Disability (STD) which covers the expecting employee.

Does the expecting employee get paid during her 12 week leave? Under the FMLA, an employer can require an employee to use their accrued paid time off. Under the VPFL, employees have the option to use their accrued paid leave for up to 6 weeks of their time. As this employee is based in VT, VPFL will supersede FMLA in this particular situation. The employee does not need to use their accrued PTO time if they choose not to.

What about the dad? He also wants to take time off to bond with his new baby but not until 3 months after the baby is born. Is he covered? Under FMLA, the 12 week leave is a combined leave total for both employees as they work for the same employer. Under VPFL, **each** employee is entitled to 12 weeks of unpaid leave. Since the employees are based in VT, dad has job protection for 12 unpaid weeks, with the option to use his accrued time off should he choose to.

In the example listed above, there are a number of moving parts and pieces to keep track of and administer for both employees. It can become quite confusing and cumbersome if not tracked accurately.

Although the Federal and State leave laws remain the same, at least until further notice, no employee leave will ever be the same or administered the same. Employers may be reviewing a number of leaves such as paid sick leaves, paid family leaves, state mandated disability leaves as well as their own paid leave benefits all at once. Depending on the state the employee is located in, the leaves could run concurrently provided all the criteria is met.

Best practice when reviewing leave options:

- Know the leave laws and mandates for state the employee works in;
- Treat each leave situation like its own;
- Implement (if you haven't already) a uniform approach for leave(s) record keeping;
- Create a timeline for all applicable leave(s). This may help with mapping out all the applicable leave; and
- Communicate extensively along the way so nothing is missed and everyone is on the same page.

This may not get rid of all the headaches that come with leave administration, but it will certainly help with the process and ensure compliance along the way.

If you have any questions or need help, don't hesitate to reach out to HBHRIQ.