Don’t Leave Me Hangin’ – Employee Leaves of Absence Under Minnesota and Federal Laws

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I. INTRODUCTION

Numerous federal and state laws grant employees the right to take leaves of absence from work for a variety of reasons, such as leaves occasioned by medical conditions of the employee or certain family members, parenting leaves, leaves for military service, voting time, and jury duty. In addition, disability discrimination laws require covered employers to reasonably accommodate disabled employees and such accommodations can include granting reasonable leaves of absence that could exceed the period of leave provided by other laws. State worker's compensation laws can also impose leave-related obligations on employers. These various leave laws encompass many employer obligations beyond simply providing time off from work. Many contain obligations for reinstatement, continuation of benefits, and anti-retaliation provisions. The myriad of leave laws can be confusing and complicated. These materials aim to provide a basic overview of employee leave entitlements, and tips for administering leaves of absence.

II. FAMILY AND MEDICAL LEAVES

A. The FMLA

The federal Family and Medical Leave Act ("FMLA") was implemented to help employees balance their work and family responsibilities. To this effect, employers covered by the FMLA must provide eligible employees up to twelve (12) weeks of unpaid, job-protected leave every twelve (12) months for certain types of parenting or medical leaves. Covered employers must maintain group health benefits for eligible employees during their leaves. In addition, employers may not interfere with an employee's exercise of FMLA rights or retaliate against an individual for exercising those rights.

1. Covered Employers

The FMLA covers private employers with 50 or more employees on the payroll during twenty or more calendar workweeks in either the current or preceding calendar year.

In some circumstances, employees of more than one entity can be added together to reach the 50 employee requirement. For example, in some situations the employees of a subsidiary and parent corporation may be added together to meet the 50 employee requirement for FMLA coverage. Factors considered in determining whether two or more entities are an integrated employer include: (i) common management; (ii) interrelation between operations; (iii) centralized control of labor relations; and (iv) degree of common ownership/financial control.

An employer also needs to consider whether a possible joint employment relationship with a separate company may result in the companies' employees being added together to determine FMLA coverage. In joint employment relationships, the "primary" employer is generally responsible for meeting the FMLA's obligations described in this section, such as giving required notices to employees, providing leave, and maintaining health

benefits during the leave. The following factors are generally considered in determining which employer is "primary": (1) the authority or responsibility to hire and fire the employee; and (2) the authority or responsibility to assign or place the employee. The identification of the primary employer is a factual inquiry that depends on the specific circumstances.

2. Covered Employees

An employee is eligible for FMLA leave if he or she works for a covered employer and:

(a) has been employed by the employer for at least **12 months**;

(b) has worked at least **1,250 hours** during the twelve-month period immediately preceding the commencement of the leave; and

(c) works for an employer with at least 50 employees working within a seventy-five-mile radius of the employee's worksite.

Courts sometimes interpret these eligibility rules liberally. For example, in *Borner v. Zale Lipshy Univ. Hosp.*, No. Civ. A. 301CV227-R, 2002 U.S. Dist. Lexis 4787 (N.D. Tex. Mar. 20, 2002), the court allowed an employee who was ten (10) days short of having worked for the employer for twelve months to take ten (10) days of personal leave under the company's voluntary personal leave policy to bridge to the twelve months of service required for FMLA leave.

Additionally, military leave time taken under federal law (*see* Section VIII below) must be counted for the purpose of determining an employee's length of service under the FMLA. For example, a returning military service members is eligible to take FMLA leave if the hours she would have worked had she not been called away to military duty would bring her up to the FMLA's eligibility threshold of 1,250 hours worked in the twelve-month period preceding the FMLA leave.

3. Covered Types of FMLA Leave

Employers covered by the FMLA are required to grant leave to eligible employees for the following reasons:

(a) the **birth, adoption, or foster care placement** of a child, so long as the leave is taken within twelve (12) months of the birth, adoption or foster care placement (unless the employer agrees otherwise);

(b) to **care for the employee's spouse, son, daughter or parent with a "serious health condition"** (as defined below);

(c) because of the **employee's own "serious health condition"** (as defined below) that makes the employee unable to perform the functions of his or her job; or

(d) to address **qualifying exigencies** arising out of the fact that the employee's spouse, child, or parent is either: called to active duty status in the National Guard or Reserves in support of a contingency operation; or is on active duty for any branch of the Armed Forces and is deployed to active duty in a foreign country or will be deployed to active duty in a foreign country. For purposes of this type of leave, a "child" is a son or daughter of any age. "Qualifying exigencies" may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

The FMLA also includes a special leave entitlement that permits eligible employees who are the spouse, parent, child or next of kin of a **covered servicemember** to take up to 26 weeks of unpaid leave in order to care for the covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, or a veteran who has left the Armed Forces within the five years preceding the date of the requested leave, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Covered servicemember leave is available on a per-covered-servicemember, per-injury basis. Employees may take more than one covered servicemember leave during their employment if the leave is taken to care for a different covered servicemember or to care for a subsequent serious injury or illness of the same covered servicemember, provided, however, that no more than 26 weeks of leave is available in each single 12-month period.

It can be challenging to determine whether some of the FMLA's qualification requirements are met. For instance, employers often have difficulty determining if a medical condition is a "serious health condition" and deciding if an employee's condition makes him "unable to perform the functions" of his job.

- **<u>Serious Health Condition</u>**:

A "serious health condition" under the FMLA is an illness, injury, impairment or physical or mental condition that involves either inpatient care *or* continuing treatment by a health care provider. Continuing treatment includes:

(a) three (3) or more consecutive calendar days of an employee's incapacity to perform his job, *plus* (i) two visits to a health care provider; *or* (ii) one visit to a health care provider and a regimen of treatment;

(b) incapacity due to pregnancy or prenatal care;

(c) a chronic and serious health condition;

(d) incapacity for a permanent and long-term condition; or

(e) treatment for medical conditions that, left untreated, would likely result in a period of incapacity for three (3) or more consecutive calendar days.

Determining whether an individual has a "serious health condition" depends on the facts of each case. It is generally recognized, however, that common illnesses of short duration, such as a common cold or virus, are not FMLA events. On the other hand, a chronic ailment, such as migraines, may qualify as a serious health condition if the condition requires either inpatient car or continued treatment and renders the employee unable to perform his or her job for periods of time. Other long-term and chronic conditions, such as a terminal illness, are easier to classify as FMLA events.

- **Inability to Perform Job Functions:**

An employee is unable to perform her job functions when a health care provider determines that the employee is unable to work at all or is unable to perform the "essential functions of the job." "Essential functions" are the fundamental duties of the position, and do not include marginal responsibilities. Discerning whether an employee is unable to perform the essential functions of his particular position is a case by case, largely factual determination.

4. Intermittent or Reduced-Schedule Leave

FMLA leave may be taken intermittently or on a reduced-schedule basis, rather than all at once, when leave is taken due to a covered individual's serious health condition and a health care provider has certified that such leave is medically necessary. In cases of FMLA leave for parenting reasons, an intermittent or reduced schedule leave may be taken only with the employer's consent.

When an employee is on intermittent or reduced-schedule FMLA leave, the employer may transfer the employee to an alternate position, with equal pay and benefits, that better accommodates the recurring periods of leave. Employers are also allowed to reduce an exempt employee's weekly pay to reflect an intermittent or reduced-schedule FMLA leave without the employee losing his or her status as an exempt employee under the Fair Labor Standards Act. When intermittent or reduced leave FMLA schedule is taken, only the amount of leave actually taken counts against the employee's twelve-week FMLA entitlement.

5. Employee Notice Requirements

Employees seeking a foreseeable FMLA leave, such as for parenting leave or planned medical treatment, are required to provide the employer with 30 days' advance notice of the need for leave. Additionally, employees are required to make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. If an employee fails to give 30 days' advance notice for a foreseeable leave with no reasonable excuse, the employer may consider delaying the employee's start of FMLA leave until 30 days after the date on which the employee provided notice of the need for leave. For an employer to delay the employee's start of FMLA leave, however, it must be clear that the employee *actually knew* about the FMLA's notice requirements, such as through the employer's proper posting of an FMLA poster at the employee's worksite. Additionally, the need for the leave and the approximate start time must have been clearly foreseeable by the employee 30 days in advance of the request. Employers should also consider whether delaying the start of leave might place the employee at any medical risk, in which case leave should not be delayed.

If the FMLA leave event is not foreseeable and an employee cannot provide 30 days advance notice, the employee is required to provide notice as soon as practicable.

6. Medical Certification

As a condition of granting FMLA leave for a covered individual's "serious health condition," an employer may require an employee to provide a medical certification form completed by a health care provider. The U.S. Department of Labor's website contains a "Certification of Health Care Provider" form for this purpose at http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf.[1] The employer may only request the information contained in the Department's certification form, and cannot request any additional information from the employee's physician. However, if the employee consents, the employer's physician is allowed to contact the employee's physician in order to clarify items on the Certification Statement.

If the employer has doubts about the original certification, a second opinion may be required. The employer may select an independent physician and pay the costs of the examination, as well as the employee's out-of-pocket costs connected with being examined. If the first two opinions are in conflict, the employer may require and pay for a third and binding opinion. The third physician must be mutually selected by the employer and employee. The employee is provisionally entitled to the benefits of the Act, pending receipt of any second and third opinions.

[1] If the employer's sick or other paid time off policy imposes medical certification requirements that are less stringent than the requirements of the FMLA form, and the employee or employer substitutes the employee's paid time off for unpaid FMLA leave, then only the employer's less stringent certification requirements may be imposed. To avoid the imposition of less stringent requirements, any certification requirements set forth in any leave policies (e.g., FMLA, sick, vacation, personal, etc.) should be evaluated for compliance with the FMLA's requirements.

Within two (2) working days of the beginning of an unforeseen leave or a leave request, the employer should request certification from the employee. In the case of planned leave, the employee should provide the certification prior to the start of the leave. The employer may require that the employee certify unplanned leave within fifteen (15) calendar days of the certification request or as soon as is reasonably possible. When requesting the certification, the employer must also inform the employee of the consequences of failing to provide adequate certification. In addition, if the information from the employee's health care provider is incomplete, the employee must be given "a reasonable time" to provide the missing information.[2]

Unless otherwise governed by state statute, an employer may request periodic (no more frequent than every 30 days) recertification of an employee's serious health condition during the FMLA leave. An employee has fifteen (15) calendar days from the date of the request for recertification in which to respond. Any recertification shall be at the employee's expense, unless the employer agrees otherwise, and no second or third opinion on recertification can be required.

Finally, if an employee has taken leave to attend to the employee's own serious health condition, prior to reinstatement, the employer may require certification from a health care provider that the employee is fit to return to work. Any policy of requiring fitness to return to work certifications for returning employees must be uniformly applied, job-related, and consistent with business necessity, in accordance with the ADA. Notice of the need for such a certification should be prominent in the employee handbook or policy manual. The return to work certification can only involve the particular serious health condition that triggered the FMLA leave, and the employer has no right to a second or third opinion.

7. Employer Obligation to Designate Leave

The employer is required to designate a requested leave as a FMLA or non-FMLA leave and as paid or unpaid. Employers must give the employee written notice of the leave designation, along with detailed information concerning the employee's FMLA rights and responsibilities, within a reasonable time after the employee provides notice of the need for leave – generally, within one or two business days if feasible. The Department of Labor has created a form, entitled "Employer Response to Employee Request for Family and Medical Leave", for this purpose, which is available at http://www.dol.gov/esa/forms/whd/WH-381.pdf. Employers should still notify employees as to whether a leave has been designated as FMLA leave or not as soon as possible after receiving a leave request.

8. Determination Whether Leave is Paid or Unpaid

The FMLA does not require paid leave, although an employer may require the substitution of accrued paid leave for any part of the twelve-week leave provided by the

[2] If a workers' compensation absence runs concurrently with an FMLA leave, the employer may contact the employee's health care provider if such contact is authorized by the workers' compensation statute.

Act. An employer may want to require employees to take paid leave concurrently with their FMLA leave, so that FMLA leave and other paid leave time overlaps. If neither the employee or employer elects to substitute paid leave for unpaid FMLA leave, the employee will remain entitled to all earned paid leave time, in addition to FMLA time.

9. Obligation to Parents Who are Both Employees

The FMLA provides that parents employed by the same employer are only allowed a collective twelve weeks of FMLA parenting leave, rather than each being allowed to take twelve weeks of leave. Employers in Minnesota, however, need to consider whether this provision preempts Minnesota's discrimination law prohibiting marital status discrimination, or whether employers must grant to grant each parent a full twelve (12) weeks of leave to avoid a marital status discrimination claim under state law.

10. Reinstatement After Leave

Generally, an employer must reinstate an employee who has taken FMLA leave to the same position the employee held before the FMLA leave or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

There is a "key employee" exception to this requirement. A "key employee" is a salaried employee who is among the highest paid ten (10) percent of people employed within the 75 miles of the eligible employee's worksite. A "key employee" does not have guaranteed reinstatement rights following an FMLA leave if this would cause "substantial and grievous" economic injury to the employer's operations. If an employer decides not to reinstate a key employee, the employer must notify the employee of the intent to deny reinstatement as soon as the employer determines that a "substantial and grievous" injury would occur.

In addition, as discussed above, an employer may require a fitness to return to work certification from an employee who has taken FMLA leave due to his own serious health condition, so long as is the employer requires this certification of all such employees. An employee's refusal to provide the certification or inability to become certified could impact the employer's reinstatement obligations.

If the employee is unable to perform the essential functions of the position upon exhaustion of FMLA leave, the Act does not require the employer to grant more leave time or to restore the employee to a different position. As discussed below, however, disability discrimination laws may require the employer to grant the employee additional leave time or other forms of reasonable accommodation even after an FMLA leave has expired (*see* Section III).

An obligation to reinstate an employee also ceases if and when the employment relationship would have terminated even if the employee had not taken FMLA leave. For example, if an employer closes the facility at which the employee worked and the

person would have been terminated due to the closing regardless of being on FMLA leave, the employee may be terminated and does not have to be reinstated to work.

The employer's obligation also ends when an employee unequivocally advises the employer of his intent not to return from leave. The obligation to rehire the employee may continue, however, if the employee is medically unable to return to work, but expresses a continuing desire to do so.

Lastly, an employee's exhaustion of his FMLA leave entitlement ends the employer's obligation under the FMLA. Again, however, an employer may need to consider whether additional leave time must be granted if an employee is a qualified disabled individual with protections under disability discrimination laws (*see* Section III below).

11. Continuation of Group Health Insurance Coverage

An employer must continue to provide group health insurance coverage at the same level and under the same conditions as if the employee had been continuously working during the entire leave period. An employer has no obligation regarding the maintenance of a health insurance policy which is not a "group health plan." The employee must continue to pay any share of group health plan premiums which he paid prior to FMLA leave. If the employee misses any payments, the employer may pay the premiums and recover the payments from the employee. If the employee fails to return from unpaid leave for a reason other than the continuation, recurrence, or onset of a serious health condition that would entitle the employee to FMLA leave, or for some other reason beyond the employee's control, the employer may recover any premium it paid to maintain the employee's coverage during the unpaid portion of the leave.

An employee may choose not to retain health coverage during the leave, but the employer must restore coverage at the end of the leave, without any qualifying period, physical examination, or exclusions for preexisting conditions. In addition, if coverage lapses because an employee has not paid the premiums during a leave, the employer is still obligated to restore the employee's full benefits upon his return from leave. Hence, as a practical matter, the employer may have to pay the employee's portion of premiums to ensure the ability to restore the employee to the same coverage he or she had prior to being on leave.

Except as required by COBRA, an employer's obligation to maintain group health insurance coverage during FMLA leave generally ceases when (1) the employment relationship would have terminated had the employee not taken FMLA leave; (2) an employee informs an employer of an intent not to return to from leave; or (3) the employee fails to return from leave or continues on leave despite exhausting the FMLA allotment. This requirement is somewhat different for "key employees," as the employer's obligation to maintain group health insurance coverage for a key employee during FMLA leave ceases when (1) the employee advises the employer that she does not desire restoration to employment at the end of the leave period; (2) FMLA leave

entitlement is exhausted; or (3) reinstatement to the employee's previous position (discussed below) is actually denied.

Lastly, an employer is also relieved of the obligation to continue any employee's group health benefits if the employee's premium payment is more than thirty (30) days late (if the employer has no established policy providing a longer grace period), and the employer has given the employee written notice at least 15 days before coverage is to be discontinued advising the employee that coverage will cease if the payment is not received.

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is determined by the employer's established policy for providing such benefits when employees have taken other kinds of leaves provided by the employer.

12. Employer's Administrative Requirements

Employers also have the following administrative responsibilities under the FMLA.

a. Posting

Covered employers must conspicuously post a notice explaining the FMLA and providing instructions for filing complaints regarding violations of the Act.

b. Calculating the Twelve-Month Period For Leaves

Employers must establish a method for calculating the twelve-month period during which an employee may take FMLA leave. Employers may choose: (a) a fixed period, such as a calendar year, a fiscal year, or anniversary date; (b) the 12-month period measured forward from the date any employee's first FMLA leave begins; or (c) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

c. Recordkeeping Requirements

The FMLA requires employers to maintain the following records for three years:

(i) Basic payroll and identifying employee data;

(ii) Dates that FMLA leave has been taken. Leave must be designated as FMLA leave and may not include leave required by state law or provided by an employer plan that is not covered by FMLA;

(iii) The hours of FMLA leave taken if leave is taken in increments of less than a full day;

(iv) Copies of written requests or applications for leave, as well as copies of all general and specific written notices provided by the employer as required by the Act;

(v) Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;

(vi) Premium payments of employee benefits;

(vii) Records of any disputes regarding the designation of leave as FMLA leave, including any written statement from either party regarding the reasons for the designation and disagreement; and

(viii) Records and documents relating to medical certifications, recertifications, or medical histories of employees or their family members which were created for FMLA purposes. These documents must be maintained as confidential medical records and filed separately from the usual personnel files.

d. Written FMLA Policy

Covered employers must provide employees with a written policy on their FMLA rights obligations. This policy must, among other things, expressly state the method the employer uses to calculate the twelve-month period during which an employee is eligible for FMLA leave or the method most favorable to the employee will apply.

B. The Minnesota Parenting Leave Act (MPLA)

Numerous states have their own versions of a family and medical leave law or parenting leave law. While Minnesota does not have an express medical leave law, it does have a parenting leave law (the "MPLA"). The FMLA expressly requires employers to comply with state laws that do not contradict the FMLA or which provide greater rights to an employee than the FMLA. Thus, any covered employer needs to be familiar with and comply with the requirements of *both* the FMLA and any applicable state leave law, such as the MPLA.

1. Overview of the MPLA

Employers covered by the MPLA must provide eligible employees with up to 12 weeks of unpaid leave for the birth or adoption of a child, or for a female employees needing time away due to prenatal care or incapacity due to pregnancy, childbirth or related health conditions. The Act covers employers with 21 or more employees on at least one site. An employee is eligible for leave under the MPLA if the employee works at least half-time, as defined by the employer, and has been employed with the employer for at least 12 months. Prior to changes made under the Women's Economic Security Act (WESA),

which took effect in July 2014, only employees who had been employed for the 12 consecutive months immediately preceding the request were eligible for leave. WESA made several other significant changes to the MPLA.

Employers may require employees seeking leave to provide reasonable notice of the date leave will commence and estimated duration of the leave. For leave occasioned by the birth or adoption of a child, the leave must commence within 12 months of the birth or adoption except in circumstances where the child must remain in the hospital longer than the mother. In these instances the leave must begin no later than 12 months after the child leaves the hospital.

III. LEAVE RIGHTS UNDER DISABILITY DISCRIMINATION LAWS

A. Leave As a Form of "Reasonable Accommodation"

Federal and state disability discrimination laws do not usually contain express leave requirements, but instead address leaves as a possible reasonable accommodation that may need to be provided to a qualified employee with a disability. As such, even when an employee has exhausted other leave time to which she may be entitled, such as FMLA leave, an employer will need to determine whether the employee may be entitled to further leave time as a form of reasonable accommodation for a disability.

B. The Americans With Disabilities Act ("ADA").

The Americans with Disabilities Act ("ADA") prohibits covered employers from discriminating against qualified individuals with disabilities because of their disabilities. In addition, the ADA requires employers to reasonably accommodate qualified individuals with disabilities unless to do so would impose an "undue hardship."

The ADA applies to all employers with fifteen (15) or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

To be covered by the ADA, an employee must be a "qualified person with a disability," meaning a "disabled" person who can perform all essential functions of his job with or without a reasonable accommodation. In turn, a "disability" means (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) being regarded as having such an impairment. With the recent amendments to the ADA, the definition of disabled is now much more broad, encompassing many more employees.

Again, the ADA requires employers to grant "reasonable accommodations" to disabled individuals protected by the ADA. "Reasonable accommodations" may include making "modifications and adjustments" to the job application process and work environment and can include such things as:

(a) Job restructuring;

(b) Part-time or modified work schedules;

(c) Acquisition or modification of equipment or devices;

(d) Appropriate adjustment or modifications of examinations;

(e) Training materials or policies;

(f) Reassignment to a vacant position; and

(g) Provision of readers and interpreters.

An employer does not have to make a requested accommodation that would be an "undue hardship." An "undue hardship" exists when an employer will incur "significant difficulty or expense" in providing a particular accommodation, thereby making the accommodation unreasonable. Employers should consider the following factors in deciding whether an accommodation creates an "undue hardship":

(a) Nature and cost of the accommodation;

(b) Financial resources of the facility;

(c) Number of persons employed at the facility;

(d) Impact of the accommodation upon the facility's operations; and

(e) The type of operation.

Open-ended, indefinite leaves are generally not considered to be a form of a reasonable accommodation. On the other hand, employers must grant additional leave time beyond the expiration of FMLA or other types of leave when they could do so without any "undue hardship."

C. The Minnesota Human Rights Act.

Most states, including Minnesota, have disability discrimination laws that mirror or may be more protective of employees than the ADA. In Minnesota, the Minnesota Human Rights Act ("MHRA") prohibits employers with one (1) or more employees from discriminating against qualified disabled employees. Like the ADA, the MHRA also requires employers with fifteen (15) or more employees to reasonably accommodate disabled employees, including granting leaves as a form of reasonable accommodation.

The MHRA is similar in most respects to the ADA. There are, however, some differences between the two laws. For example, a person is disabled under the ADA if he is ***substantially*** limited in a major life activity. The MHRA, however, sets forth a less

stringent standard, providing that a person is disabled if he has a physical sensory or mental impairment which ***materially*** limits one or more major life activity, has a record of such impairment, or is regarded as having such impairment.

IV. WORKER'S COMPENSATION

Employees with work-related injuries may also require time away from work. Workers' compensation coverage is determined by state law. In Minnesota, an employer with one (1) or more employees is covered by the state's workers' compensation laws. Moreover, an employer specifically includes any corporation, partnership, limited liability company, association, group of persons, state, county, town, city, school district, or governmental subdivision. Other states vary and require minimum levels of one to five employees. Independent contractors, sole proprietorships, and some agricultural and certain construction employers may be exempt from workers' compensation laws.

Workers' compensation laws apply when an employee suffers an injury that arises out of and occurs within the course of employment. The employee bears the burden of proving that employment was the major cause of the injury. Injuries sustained during a normal commute to and from work are generally not covered by workers' compensation laws, but injuries sustained while driving within the course of employment are usually covered. Injuries arising out of horseplay during the work day and at the workplace are generally also not covered under workers' compensation.

In many cases, an injured employee will need time away from work for recovery from the injury. Particular state statutes or collective bargaining agreements may specify how much leave time is allowed for different injuries. As part of the rehabilitation process, an employer may need to provide intermittent leave, part-time work, or a more flexible than usual work schedule, until maximum medical improvement is reached.

If an employee is unable to work as a result of a work-related injury, he or she is entitled to temporary total disability benefits under worker's compensation laws. If an employee can work, but at wage loss (i.e., reduced hours and reduced pay), he or she is entitled to temporary partial disability benefits. An employee who is off work due to a work-related injury cannot be required to use paid time off. The employee is obliged, however, to keep the employer apprised of his or her return-to-work status and current medical restrictions status.

Although there is no absolute requirement to hold an injured employee's job open indefinitely during the entire length of time for which an employee is out on temporary total disability leave, an employer must be able to establish valid business justification (not unlike the undue hardship analysis applicable under the ADA) before properly filling such a position. Also, under Minnesota law (and the laws of several other states), an employer can be found liable to an injured employee if the refusal to hold open the job, or to rehire upon resolution of the injury, is proven to have been done in retaliation for the pursuit of rights under the workers compensation law.

V. REQUESTING MEDICAL INFORMATION IN CONNECTION WITH A MEDICAL LEAVE

Many employers request medical verification when an employee requires a medical absence from work, as well as medical information to help determine fitness for a return to work. Not surprisingly, the various laws discussed above differ as to the amount of information or medical exams an employer may request. The statute that gives the employee the most protection is the one that must be followed in any particular case.

A. ADA.

The ADA contains a number of sections dealing with when medical information or examinations may be required of applicants or employees. With respect to leaves, once an employee has started work, any medical examination must be job-related and consistent with business necessity. Similarly, the Minnesota Human Rights Act requires that any post-offer examination test be for "essential job-related abilities."

In addition, an employer may only request as much information as is needed to determine an employee's leave entitlement or ability to return to work and should not ask for extraneous information.

An employer may use a post-offer medical examination to determine if the prospective employee poses a direct threat to himself or others. A post-offer medical examination may also be used to determine if an employee is qualified to perform certain types of work. For example, the DOT has certain standards for truck drivers and the FAA for pilots. A post-offer examination could be used to determine whether an individual meets the statutory standards, even if such an examination is likely to elicit information about the nature and severity of the individual's disability.

A medical examination to certify the employee's fitness to return to work may be required if it is necessary to determine the employee's ability to perform the essential functions of the job or if the examination is necessary to determine a reasonable accommodation.

All medical information obtained pursuant to the ADA must be kept in locked, confidential files separate from the ordinary personnel files. The information about an individual's disability may only be disclosed under very limited circumstances. Supervisors may be told of necessary work accommodations or restrictions. Safety and first aid workers may be informed if the disability may involve specialized emergency treatment. Employers may comply with government requests for information that shows compliance with the ADA.

B. MHRA.

Under the Minnesota Human Rights Act, medical records must be collected and maintained on separate forms and in separate files. If any medical records adversely

effect an employment decision, the employer must notify the effected party within ten days.

C. FMLA.

The medical certification requirements of the FMLA are discussed above in Section II(A)(6). Records of medical certifications and examinations must be kept separate from the regular personnel files and must be kept confidential. 29 C.F.R. §825.500. Since the confidentiality requirements of the ADA are more stringent and since the same individual may be covered by both the ADA and the FMLA, employers will avoid problems with compliance and unnecessary duplication of records if the ADA standards are used.

D. Workers' Compensation.

Under most workers' compensation laws, the employer has a right to require one or more independent medical examinations of an employee, and the employee must cooperate or risk losing benefits. The examination will determine whether the employee is entitled to benefits, should continue receiving workers' compensation benefits, or has reached maximum medical improvement. The examination is at the employer's expense and in most cases the employer can select the physician. In cases where the employee has selected a physician, the employer can require a second opinion by a physician of the employer's choosing. If the two opinions differ, the state workers' compensation authority will hold a hearing to mediate the difference.

After an examination, the employer's physician should inform the employer if the disability is partial or total, and temporary or permanent. An employer will also want to know if the employee is capable of light duty work, or if intermittent leave will be required as part of the recovery process. Generally, an employer may require that an employee furnish certification from a physician that the employee is fit to return to work, including any applicable restrictions. Medical information relating to a work injury should be kept confidential and separate from the employee's personnel file.

E. Privacy Laws.

Many states, including Minnesota, recognize claims for invasion of privacy. As such, employers should make sure to narrowly tailor any requests for medical information to ask for only the information needed to address the employee's work situation. In requesting medical information from an employee or medical care provider, employers should be clear about the limited scope of their request and instruct the employee or provider not to provide extraneous medical information.

VI. OTHER MINNESOTA LEAVE LAWS

Many states, including Minnesota, have unique leave laws that employers must be aware of to ensure legal compliance.

A. Adoptive Parents Leave

Minnesota law does not require employers not covered by the FMLA or MPLA to grant parenting leaves. That being said, employers that voluntarily provide parenting leave to biological mothers and fathers must also, upon request, grant time off to an adoptive father or mother. The leave can be paid or unpaid, and the minimum leave period is four weeks, unless the employer allows less time for biological parents. The leave period can begin before or at the time the child is placed in the home.

B. Minnesota Sick Or Injured Family Leave and Safety Leave

The Minnesota Sick or Injured Family Leave law permits eligible employees to use their own personal sick leave (or personal time off) benefits to care for an ill or injured family members on the same terms that the employees could use the sick leave. Family members include spouse, children (including adult children), sibling, parent, parent-in-law, grandchild, grandparent, or stepparent. Unlike under the FMLA, the family member does not need not to have a "serious health condition" to trigger the Minnesota law.

An employee may also use personal sick leave (or other personal time off) benefits for so-called "Safety Leave." This is leave used for assistance to the employee or the relatives described above. Safety leave is leave for the purpose of providing or receiving assistance because of sexual assault, domestic abuse or stalking.

An employer may limit safety leave or sick or injured family leave for any family member (other than the employee's minor children) to up to 160 hours in any 12 month period.

C. School Conference and Activities Leave

Minnesota's School Conference and Activities Leave law permits eligible employees to take up to sixteen (16) hours of leave in a twelve-month period to attend school conferences and school-related activities that cannot be scheduled during non-work hours.

D. Pregnancy Accommodation

An employer must provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests, with the advice of her licensed health care provider or certified doula, unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer's business.

A pregnant employee may not be required to obtain the advice of her licensed health care provider or certified doula, nor may an employer claim undue hardship for the following accommodations: (1) more frequent restroom, food, and water breaks; (2) seating; and (3) limits on lifting over 20 pounds.

In order to determine an accommodation and whether the accommodation is reasonable, the employee and employer are required to engage in an interactive process. "Reasonable accommodation" may include, but is not limited to, temporary transfer to a less strenuous or hazardous position, seating, frequent restroom breaks, and limits to heavy lifting. Employer are not required to create new or additional positions in order to accommodate an employee, and they are not required to discharge any employee, transfer any other employee with greater seniority, or promote any employee in order to provide a reasonable accommodation under this law.

E. Nursing Mothers

Minnesota's Nursing Mother law requires all employers to provide nursing mothers reasonable, unpaid break times each day to express milk for their children, unless doing so would unduly interrupt the employer's operations. Employers must also make reasonable efforts to provide lactation spaces, other than a bathroom, that are private (shielded from view and free from intrusion by others), and that includes an electrical outlet.

F. Leave For Bone Marrow Donations

Minnesota law requires employers with 20 or more employees to grant paid leaves to employees who undergo medical procedures to donate bone marrow. To be eligible for this leave, an employee must be employed at least 20 hours per week. The employee may determine the total length of leave, but it may not exceed 40 work hours, unless the employer agrees. If a health care professional determines the employee does not qualify as a donor, the employee does not forfeit any paid leave of absence granted prior to that decision.

G. Leaves Related To Elections

All employees who are eligible to vote in regularly scheduled state primary or general elections, elections to fill vacancies for a Unites States Senator or Representative, or presidential primary elections are entitled to be absent from work, without any deduction in pay, to vote during the day of the election. Any interference with an employee's voting rights is a misdemeanor.

Additionally, a person selected to serve as an election judge may be absent from work to perform this service. The employer may reduce the employee's pay by the amount paid by the appointing authority for the hours the employee was absent. Any employee desiring leave under this law must give the employer 20 days' written notice, accompanied by certification from the appointing authority.

Finally, an employee elected to public office must be allowed time off from regular employment to attend meetings required by her official duties. The time off may be without pay, with pay, or made up with other hours, as agreed between the employee and employer.

H. Leave For Service On Juries

Employers are prohibited from taking adverse action against an employee who receives or responds to a jury summons, serves as a juror, or attends court for prospective jury service. Violating this law is criminal contempt and offenders can be fined or imprisoned. If an employee is discharged in violation of this law, the employee may bring a civil action to recover lost wages and for an order requiring reinstatement, as well as reasonable attorneys fees.

I. Leaves For Victims Of Crimes And Witnesses

Employers must allow victims or witnesses who are subpoenaed or asked by the prosecutor to attend court to give testimony reasonable time off from work to attend court proceedings. Employers must also allow victims of heinous crimes (as defined by relevant sections of Minnesota's criminal code), as well as their spouses or next of kin, reasonable time off from work to attend court proceedings related to the victim's case.

An employee entitled to leave under this law must provide 48 hours' advance notice to the employer, unless such notice is impracticable under the circumstances or precluded by an emergency. Upon the employer's request, the employee shall provide verification of his or her reason for being absent from work. All information related to the employee's leave must be kept confidential.

An employer who threatens to or causes the discharge or discipline of a victim or witness due to their leave under this law is guilty of a misdemeanor and may be punished for contempt of court. In addition, any victim or witness who is terminated in violation of this law is entitled to reinstatement and back pay, attorneys' fees, and other relief.

VII. MILITARY LEAVES

To fight the war against terror and address other situations around the world, the United States has called thousands of military personnel to active duty in Iraq and other areas. In view of these events, the rights of employees with military obligations have taken on a new significance in the workplace. Employers must be aware of federal and state laws that grant employees leaves of absence to satisfy military obligations. Employers also need to understand their obligations to these employees, particularly their obligations to preserve benefits for these employees and reinstate them upon their return from service.

A. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

The federal USERRA law requires employers to provide employees with leaves of absence to serve in the military, to reinstate employees returning from military leave, and to train or otherwise qualify employees for reinstatement. The law also guarantees continuation of the employee's health benefits for the first twenty-four (24) months of

leave and protects pension benefits upon the employee's return from leave. Finally, the Act contains stringent non-discrimination provisions, protecting employees from adverse actions against them based on past, present or future military obligations.

Like the FMLA, USERRA does not take precedence over any state or local law that provides greater military leave rights. States, therefore, are free to implement greater protections and, to the extent a state provides greater rights than those available under USERRA, those greater rights apply.

1. Covered Employers

USERRA covers all employers without regard to the number of employees.

2. Employee Eligibility

An eligible employee is any person who is absent from work due to "service in the uniformed services." An "employee" includes a U.S. citizen or national or permanent resident alien of the U.S. working in a foreign country at the direction of a U.S. employer.

The "uniformed services" covered by USERRA include: (a) the Armed Forces; (b) the Army National Guard; (c) the Air National Guard; (d) full-time National Guard duty; (e) the commissioned Corps of the Public Health Service; and (f) any other category of persons designated by the President in time of war or national emergency.

3. Covered Military Service

The performance of the following duties, voluntarily or involuntarily, constitutes "service" that qualifies for leave under USERRA: (a) active duty; (b) active duty for training; (c) initial active duty for training; (d) inactive duty training; (e) full-time National Guard duty; and (f) absence from work for an examination to determine an individual's fitness for any of the foregoing types of duty.[3]

4. Employee Notice Requirements

USERRA requires employees to provide employers with advance written or oral notice of their military service obligations. However, no advance notice is required if military necessity precludes notice or notice is otherwise impossible or unreasonable.

5. Duration of Leave

Under the Act, the cumulative length of an employee's military leave may not exceed five years. There are a number of exceptions to this requirement, and the following categories of service may not be counted against the five-year allotment:

[3] Merchant seamen may also be entitled to USERRA benefits in certain circumstances.

(a) Service required beyond five years to complete an initial period of obligated service.

(b) Service from which an individual, through no fault of her own, is unable to obtain a release within the five-year limit. For instance, the time limit will not be applied against persons whose service dates expire while they are at sea.

(c) Required training for Reservists and National Guard members. Also excluded are additional training requirements that the Secretary of the particular service has certified as necessary for professional development or completion of skill training or retraining.

(d) Service under an involuntary order to, or retention on, active duty during a domestic emergency.

(e) Service under an order to, or retention on, active duty (other than for training) during a war or national emergency declared by the President or Congress.

(e) Active duty (other than for training) by volunteers supporting "operational missions" for which selected reservists have been ordered to active duty.

(f) Service by volunteers ordered to active duty in support of a "critical mission or requirement" of the uniformed services.

(g) Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

6. Employee Entitlements During Leave

Employers are not required to pay employees for absences due to military service, although employees may elect to use accrued paid time off in lieu of unpaid military leave. However, unlike under many other leave laws, employers may not require the substitution of paid time off for unpaid military leave.

Under the Fair Labor Standards Act, an exempt employee generally must be paid the same weekly salary, without deductions in pay, to maintain exempt status. Employers are permitted, however, to deduct from the weekly pay of a military employee who misses a partial week of work without losing an employee's FLSA exemption. If an employee misses an entire workweek due to military service, the employer is not obligated to pay the employee's salary.

USERRA requires employers to offer individuals on military leave the option of continuing their health insurance coverage for up to twenty-four (24) months by self-paying the cost of the coverage. If an employee's period of military service does not exceed 31 days, the employee cannot be required to contribute more than his or her customary share of any premium. If military service exceeds 31 days, the employee may be required to contribute up to 102 percent of the full premium under the health plan. If a multi-employer plan is involved, the plan may allocate the responsibility to pay for this coverage. If it does not, the last employer assumes the liability. If the last employer is not functional, the plan retains the liability. If an employee's health insurance is terminated because of military service, a waiting or exclusion period cannot be imposed upon the employee when reinstatement occurs if health coverage would have been provided had the employee not been absent for military leave. If, however, an employee suffers a service-related illness or injury, the exclusion or waiting period may apply.

7. Reinstatement Rights

a. Employee Notice of Intent to Return

Under USERRA, the time by which a service member must notify an employer of his or her intent to return to work following a leave varies with the length of the military service:

- If the service is 30 days or less, or the absence is to take an exam to determine fitness for service, the employee must report to his employer at the beginning of the first regularly scheduled workday that begins at least eight hours after the employee returns home. If reporting within that period is impossible or unreasonable, the employee must report as soon as possible.

- If the length of the service is between 31 and 180 days, the employee must submit an application for reemployment no later than fourteen (14) days after completing service. If, through no fault of the employee, this deadline is unreasonable or impossible, he must submit it as soon as possible.

- If the service exceeds 180 days, the employee must submit the application to the employer within 90 days of completing the service.

All of these time limits can be extended for up to two (2) years if the employee is hospitalized for or convalescing from a service-related injury or illness.
Even this two (2) year period can be extended, if necessary.

An employee who fails to comply with the above applicable time limits does not automatically lose reinstatement rights. Rather, he becomes subject to the employer's regular policies on unexcused absences from work.

b. Honorable Separation from Service

To be eligible for reinstatement under USERRA, employees must complete their military service under honorable conditions. The Act lists four separation from services situations under which an employee's reinstatement rights terminate: (i) a dishonorable or bad conduct discharge; (ii)separation from service under other than honorable conditions; (iii) dismissal of a commissioned officer due to a court martial or by order of the President in time of war; and (iv) dropping of a commissioned officer from the rolls when the officer has been absent without authority for at least three months or imprisoned by a civilian or military court.

c. Request for Reinstatement Documentation

An employer may ask an employee who has been absent for more than 30 days to provide documentation showing that the application for reinstatement was timely, that the employee has not exceeded the five-year limit on leave, and that his or her separation from service was honorable. If the documentation is not readily available, the employer must still reemploy the individual. If, after reemployment, the employer receives documentation establishing that one or more of the employee's requirements for reinstatement have not been met, the employer may discharge the employee.

d. Reinstatement Rights.

Under the Act, the conditions governing reinstatement are determined by the length of the military service:

- ***90 Days or Less of Service.*** An employee with 90 days or less of service must be "promptly reemployed" in the position she would have attained had she not taken leave. If, however, the employee is not qualified for that position and can't become qualified after the employer's "reasonable efforts" to qualify the individual, the employee is entitled to the position she held prior to military service. If the employee is not qualified or cannot become qualified for the former position, she must be placed in the "nearest approximation" to these positions, with full seniority. According to the Act, "qualified" means the ability to perform the essential tasks of the job. "Reasonable efforts" means actions, including training, that do not place an undue hardship on the employer.

- ***More than 90 Days of Service.*** The employer's reinstatement obligations for employees who have served more than 90 days of military service are similar. These employees must be "promptly reemployed" in the positions they would have attained had they not taken leave. If, however, an employee is not qualified for that position and cannot become qualified after the employer's reasonable efforts to qualify the individual, she must be placed in her former position, or a position of equivalent seniority, status, and pay. If an employee cannot qualify for any of these positions, the employee must be placed in another position that is the "nearest approximation" to these positions, with full seniority.

e. Service-Related Disability

Employers have additional obligations to employees returning from leave with service-related disabilities. First, employers must make reasonable efforts to accommodate a disability incurred in or aggravated during service. If, despite reasonable accommodations, an employee is not qualified for the position he would have obtained, but for military leave, he must be reemployed in a position of equivalent seniority, status and pay for which he is qualified or could become qualified to perform. Failing that, the employee must be reemployed in a position which is the "nearest approximation" in terms of seniority, status and pay consistent with the circumstances of the employee's case.

f. Conflicting Reemployment Rights

USERRA protects individuals with conflicting reemployment claims. Under the Act, if two or more persons are entitled to reemployment in the same position, the person who left the position first has a superior right to it. The other returning employees, however, are entitled to reemployment with full seniority in any other position that provides similar status and pay or in a position which is the nearest approximation of such position.

g. Exceptions

There are three exceptions to an employer's duty to reemploy a returning service member: (1) an employer need not reinstate an employee if the employer's circumstances have so changed as to make reemployment impossible or unreasonable; (2) an employer is not required to reemploy an individual if he is no longer qualified, despite the employer's efforts at requalification, and reemployment would impose an undue hardship on the employer; and (3) employers need not reemploy persons who worked for brief, nonrecurrent periods where there was no reasonable expectation of continued employment.

h. Seniority

Upon reemployment, employees are entitled to all seniority and seniority-based rights and benefits they had at the time service began, plus any additional seniority rights they would have attained if continuously employed. As for non-seniority based rights and benefits, employers must treat returning service members the same way they would treat employees on furlough or other leaves of absence. An employee waives the right to receive non-seniority based benefits by knowingly providing written notice of an intent not to return to employment after service. The Act contains no waiver provision for seniority-based benefits.

i. Pension Benefits

USERRA also provides expanded pension rights for employees on military leave. The Act requires reemployed individuals to be treated as not having incurred any break in

service for pension plan purposes. Additionally, periods of military service must be considered as service for purposes of vesting and benefit accrual. Employers are also required to make any pension contributions they would have made if the employees had been continuously employed. For contributory plans, which offer benefits only if the employee contributes, returning employees must be given three times the period of the absence (not to exceed five years) to make up missed contributions. Under these kinds of plans, an employer is obligated to match the employee's contributions only to the extent that the employee makes the required contributions to the plan.

8. Protection of Reinstated Veterans from Discharge

After reinstatement, re-employed veterans are protected from discharge without cause for a period of time that depends on their length of service:

- Employees reemployed after leaves of more than 180 days may not be discharged without cause for one year after the date of the reemployment.

- Employees reemployed after military leaves of 30 to 180 days may not be discharged without cause for six months after the date of reemployment.

- Employees who are reemployed after military leaves of less than 30 days are not protected from discharge without cause.

B. Minnesota Military Leave Laws

Minnesota has multiple statutes governing military leaves. Generally, the provisions of Minnesota's military leave statutes provide benefits and obligations similar to USERRA, with some differences. Because employers must provide employees with the greater of the leave rights under either USERRA or Minnesota law, they should act carefully when administering a military leave.

1. Covered Employers and Employees

The Minnesota military leave law for active duty applies primarily to state and local government entities, including school districts. If the Governor declares a time of emergency, however, private employers are required to provide the same unpaid leave and reinstatement that public employers are required to provide. The paid leave and pension provisions of the law do not apply to private employers.

Minnesota's military leave protects "any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state who is a member of the national guard, the officers' reserve corps, the enlisted reserve corps, the naval reserve, the marine corps reserve, or any other reserve component of the military or naval forces of the United States."

The statute applies when such employees take leave (1) to engage in active service in a time of war or other declared emergency, (2) to engage in an initial period of active duty for training of not less than three consecutive months, or (3) to perform active duty for training or inactive duty training in the military.

2. Employee Rights

a Length of Leave

Qualifying employees may take up to a four (4) year leave of absence without pay. If the employee is required by law to serve for more than four years, however, the unpaid leave may be extended.

b. Paid Portion of Leave

Public officers and employees who take military leave are entitled to be paid for up to 15 days of leave in any calendar year. To qualify for paid leave, the employee must (1) return to his or her position immediately upon being relieved from service and no longer than the expiration of the 15 day period; (2) be prevented from returning to the position due to a disability or other reason that is not the fault of the employee; or (3) be required to continue military service for more than 15 days.

Private employers are not required to offer this paid military leave.

c. Reinstatement

1. Active Service

Public employees who engage in active service and private employees who engage in active service during a declared emergency have a right to be reinstated to the same position they held at the start of the leave, or a position of similar seniority, status, and pay if such is available, and must be paid the salary that the employee would have received if leave had not been taken. Four conditions must be met, however: (aa) the position must still exist; (bb) the employee must not be disabled from performing the duties of such position; (cc) the employee must apply in writing for reinstatement within 90 days after termination of service, or 90 days after discharge from hospitalization or medical treatment which immediately follows the termination of service; and (dd) the employee must submit an honorable discharge or other form of release indicating that the employee's service was satisfactory.

No officer or employee that has been reinstated after active service may be removed or discharged within one year after service except for cause, after notice and hearing.

2. Initial Period of Active Duty Training

Any employee who is a member of the military forces and is ordered to an initial period of active duty for training of not less than three (3) consecutive months is entitled to reinstatement as outlined above. To qualify for such reinstatement, the employee must reapply within 31 days after that member's (aa) release from that active duty for training after satisfactory service, or (bb) discharge from hospitalization incident to that active duty for training, or one year after a scheduled release from that training, whichever is earlier. Any person so restored to a position may not be discharged from the position without cause within six months after reinstatement.

3. Active Duty Training or Inactive Training

Upon request, employees shall be granted a leave of absence from public employment for the period required to perform active duty for training or inactive duty training in the military forces. After such leave, they are entitled to reinstatement if they report to work at the beginning of the next regularly scheduled work period following the last calendar day necessary to travel from the place of training to the place of employment. If the employee does not so report, he or she is subject to the employer's rules and policies concerning unexcused absences from scheduled work.

4. Benefits

Upon reinstatement following military leave, an employee is entitled to the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if the employee had been actually employed during the time of such leave. The reinstated employee is entitled to vacation and sick leave with pay as provided in any applicable civil service rules, collective bargaining agreement, or compensation plan, and accumulates vacation and sick leave from the time the employee entered active military service until the date of reinstatement, without regard to any otherwise applicable limits on civil service rules limiting the number of days which may be accumulated.

In addition upon reinstatement, an employee (but, not an employee of a private company) is entitled to receive all rights that accrued under the pension, retirement, or relief system just as if he or she had been employed during the time of the leave. This provision may require public employers to contribute to any pension, retirement or relief system during leave. Furthermore, if the pension, retirement or relief system conditions any increase in monetary benefits during leave upon the payment of any contributions or assessments by the employee, rights to such an increase are conditioned upon the employee's payment of the contribution/assessments "within such reasonable time after the termination of such leave and upon such terms as the authorities in charge of the system may prescribe." To the extent this provision provides fewer benefits to eligible employees than the relevant USERRA provisions, USERRA will control.

C. Civil Air Patrol

Minnesota law requires employers to grant employees unpaid leave to serve as members of the civil air patrol at the request of the State or any of its political subdivisions, unless allowing such leave would unduly disrupt the employer's operations. For the purposes of this section, "employer" means public and private employers that employ 20 people on at least one worksite. "Employee" means a person who is not an independent contractor and works at least twenty hours per week for the employer.

D. Leave for Non-Military Employees But For Military Family Members

Minnesota provides protections to employees whose family members serve in the military.

1. Family Member Killed or Injured

Under this leave, an employer must give an employee up to ten working days of leave without pay when the employee's immediate family member is killed or injured while engaged in active service. An immediate family member is defined as an employee's parent, child, grandparents, siblings, or spouse. This leave may not run concurrently with any paid leave that may be covered – i.e., an employee may use any paid time off and add that to any unpaid time off.

2. Attend Military Ceremonies

Minnesota also requires employers to give employees unpaid time off necessary to attend a send-off or homecoming ceremony for an immediate family member. An immediate family member is a person's grandparent, parent, legal guardian, sibling, child, grandchild, spouse, fiancé, or fiancée. An employer may limit the amount of time off to the actual time needed to attend the ceremony.

VIII. VOLUNTARY LEAVE POLICIES – NONDISCRIMINATION

Employers are free to adopt voluntary leave policies that are more generous than the law requires. For instance, some employers maintain policies allowing personal leaves of absence for reasons not covered by the law. That being said, an employer must ensure that any voluntary leave policy complies with non-discrimination requirements imposed by federal, state, and local laws. An employer that adopts a voluntary leave policy may not adopt a policy that discriminates against employees on the basis of any legally protected class status, such as race, religion, color, national origin, sex, age or disability, or the like. Such a policy will also be looked to in cases where an employer claims that it can no longer hold open the job of an injured employee out of work with an injury covered by the workers compensation law.

IX. TIPS FOR ADMINISTERING LEAVES

A. FMLA Rights are Cumulative. They do not replace any rights which an employee has under other state or federal laws.

B. Some Leaves May Be Counted Concurrently. An employee may qualify for leave under a variety of laws, with leave time running concurrently.

C. An Absence Covered By Workers' Compensation May Run Concurrently with FMLA Leave. Even if an employee is receiving workers' compensation benefits while on leave, this leave may be counted as FMLA leave. An employee who suffers a work-related injury may lose his workers' compensation benefits if he or she refuses a suitable light duty position, but an employee on FMLA leave has no obligation to accept a light duty position.

D. Leave Law Rights are Absolute And Employers May Not Retaliate. Employers may not reduce or diminish the leave rights available to employees under the law. In addition, employers may not retaliate against an employee for exercising legal leave rights. Employers may, however, provide greater rights or enhanced benefits beyond those provided in the FMLA.

E. FMLA and Other Medical Leave Laws Are Distinct from the Reasonable Accommodation Requirement under the ADA. Employers covered by the FMLA must provide twelve (12) weeks unpaid leave for the specific purposes under the law without regard to the impact on business or operations. Beyond those 12 weeks, however, an employee may or may not be entitled to additional leave or other reasonable accommodation, depending on whether the accommodation imposes an undue hardship on the employer.

F. Other Discrimination Laws Continue to Apply to Those on FMLA Leave. Federal and state laws prohibiting all types of discrimination, including disability discrimination, apply to employees on FMLA leave. The MHRA prohibits marital status discrimination, which may come into play if the employee is taking leave to care for a spouse with a serious health condition. State laws also require that women affected by pregnancy, childbirth or disabilities relating to pregnancy or childbirth be treated the same as others with similar work limitations. These laws protect employees on leaves of absence, and may offer an independent source of rights to such employees.

G. Medical Certification and Examinations Must Comply with the FMLA and Anti-Discrimination Laws. The FMLA, ADA, and the Minnesota Human Rights Act contain limitations on medical examinations and inquiries regarding employees, and, therefore, employers must limit their inquiries to comply with these laws. When writing to employees or medical providers to request information, employers should make sure that the request is properly limited and instructs the employee and medical provider that the employer does want any extraneous information about the employee's background or

medical condition unrelated to the scope of the request. In addition, the MHRA requires that employees consent to a medical examination or inquiry.

H. Medical Information and Records Must Be Kept Confidential. Whether medical information or records relate to the illness of the employee or the employee's family member, these documents are to be treated as confidential and must be kept separate in a locked, secure place away from the employee's personnel file.

I. Communicate with the Employee in Writing. Employers should communicate up-front and in writing with employees about the details of any leave, including designating the type of leave being taken, the anticipated length of the leave, any medical certification requirements, benefits continuation rights and payment requirements, and reinstatement rights, if any.

J. Consider Creating Leave Checklists and Form Letters. Employers might consider creating leave checklists for administering various types of leaves to ensure that details are not missed. Similarly, an employer might want to create form letters for use in communicating with employees or, where appropriate, medical providers about various types of leaves.

X. CONCLUSION

Because of the number of leave requirements and the administrative details inherent in any leave, leaves can be difficult to administer. Implementing the notice, certification and reinstatement requirements of the federal laws is a daunting task, particularly when they have to be reconciled with conflicting state rules. It is advisable to consult with counsel whenever complicated leave situations arise.