

Think Before You Speak: Navigating Employee Leave Scenarios

February 26, 2024

Littler[®]

Compliance **HR**

Today's Webinar Host:



Kimball Norup
CEO | ComplianceHR

Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



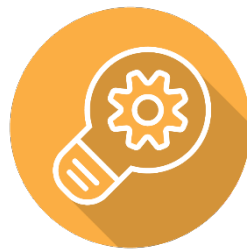
Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

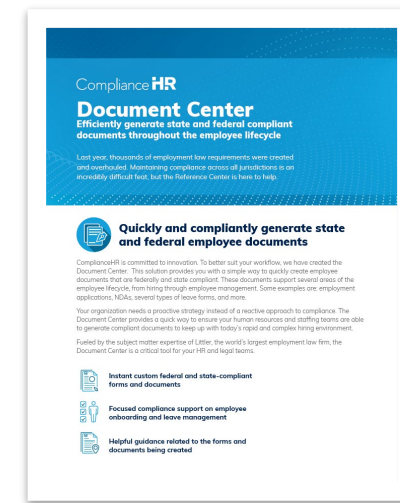
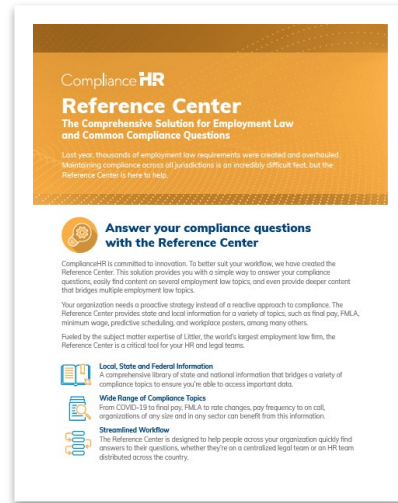
A Comprehensive Solution for Employment Law and Common HR Compliance Questions



The Document Center

Efficiently generate state and federal compliant documents throughout the employee lifecycle

HR Leave Essentials



The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics, such as: comprehensive guidance, final pay, FMLA, minimum wage, paid sick leave, and more

The ComplianceHR Document Center provides you with:

- Instant custom federal and state-compliant forms and documents
- Focused compliance support on employee onboarding and leave management
- Helpful guidance related to the forms and documents being created

When coupled, these two solutions provide you with comprehensive compliance program support

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

More Information About ComplianceHR's Leave Support

Navigator Leave

Welcome to Navigator Leave

This application generates and provides guidance regarding the forms of the management process. Each form is compliant with the federal Family and Medical Leave Act (FMLA) and state laws that mirror the FMLA.

Select the type of form you're interested in creating.

Notice of Eligibility

- Request for Leave
- Notice of Eligibility
- Employee Health Certification
- Family Health Certification
- Military Caregiver Leave
- Military Emergency
- Designation Notice
- Return to Work Certification

Eligibility Notice

Certification

This form informs the employee whether they are eligible for FMLA leave and provides notice of their rights and responsibilities.

When to create this form:

- ComplianceHR Marketing received notice that an employee needs a leave of absence.
- ComplianceHR Marketing may have created a Leave of Absence Request.

Navigator Leave

General Requirements

The entire federal Family and Medical Leave Act applies in states that do not have their own family and medical leave statutes that are more restrictive than the federal FMLA. The federal FMLA will apply in states that have family and medical leave statutes that are more restrictive than the federal FMLA.

Requirements for California

The requirements for employees in California are listed below. You can view the requirements for other states [here](#).

> Coverage and Eligibility

[Employer Coverage](#) [Employee Eligibility](#)

Employer Coverage

Federal

Family and Medical Leave Act (FMLA)

Employers who employ 50 or more employees in 20 or more workweeks in the current or last calendar year. [Jointly employed](#) employees must be counted by both employers in determining employer coverage and employee eligibility, regardless of whether the employee is on one or both of the employers' payrolls.

State

California Family and Medical Leave Act (CFRMA)

The CFRMA covers employers with 25 or more employees doing business in California, including such employees doing business in California.

Pregnancy Disability Leave (PDL)

Employers of female employees who are on medical leave due to pregnancy, childbirth, or related medical conditions.

Bereavement Leave

Employers with 25 or more employees are required to provide up to 5 days of unpaid bereavement leave.

- > Purpose and Length
- > Employer Obligations
- > Employee Rights and Obligations

PAID SICK LEAVE REPORT

REPORT OVERVIEW

This report provides an overview of the current and future laws within states, counties, and cities that generally require non-governmental contractor private employers to allow employees to accrue and use paid sick leave (PSL) and/or paid time off (PTO).

Certain exceptions and industry-specific minimum wage standards are not included in this report.

[More Information](#)

Arizona

- > Coverage
- > Permitted Uses
- > Accrual and Cash Out
- > Posting and Recordkeeping
- > Miscellaneous

California

- > Coverage
- > Permitted Uses
- > Accrual and Cash Out
- > Posting and Recordkeeping
- > Miscellaneous

Presented by:



Rocio Blanco Garcia

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Agenda

- Quick Refresher
 - FMLA
 - ADA
 - PWFA
- Practice Time



FIRST THINGS FIRST.... **(the fine print)**



Federal Medical Leave Act ("FMLA")



FMLA Benefits

- Unpaid, job-protected leave
- Benefits continuation
- Job Reinstatement
- 12 or 26 workweeks of leave in a 12-month period
- No interference, no retaliation
- **It doesn't matter how inconvenient this is**



Ways You May First Learn of the Need for Leave

- You realize that a time sheet or hours worked report looks different than usual;
- An employee has poor attendance that is about to lead to discipline;
- Employee raises an issue about her work schedule as it relates to a medical condition;
- Employee explains during the course of a counseling or disciplinary meeting that he has a medical problem causing the performance deficiencies;



More Ways You May First Learn of the Need for Leave

- Employee provides information—in person, via telephone, from a family member, etc.—about a medical problem that may require time off work, either on occasion, or all at once;
- Manager notices a significant change in an employee's behavior, work patterns or conduct and has reason to believe they may be related to a medical condition; and/or
- Employee has an on-the-job injury which renders him unable to work for a period of time.



Eligible Employees Are Those Who...

1

Experience a qualifying reason for leave;

2

Work for a covered employer (private employer with 50+ employees or a public agency of any size);

3

Work at a jobsite with 50+ employees within a 75-mile radius

4

Have accumulated **12 months** of service; and

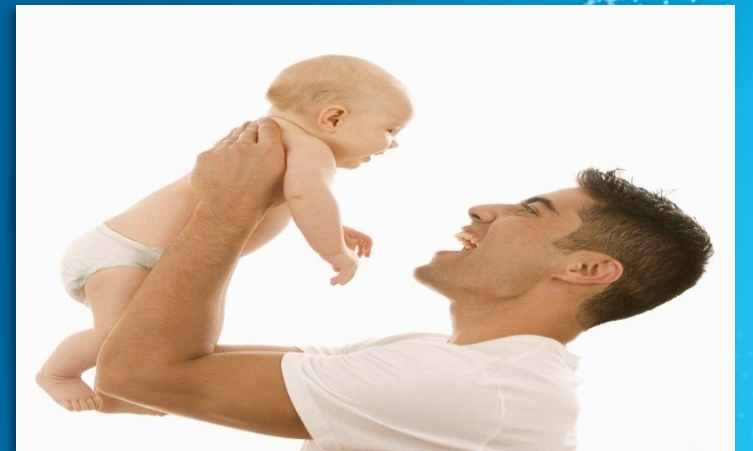
- Breaks in service may count
- Time out for a workers' comp injury counts
- Consider temporary work, work as an intern, and more
- Non-FMLA leave can transition to FMLA leave

5

Have worked **1,250 hours** in last 12 months.

Medical* Reasons for FMLA Leave

- Birth or placement of a child
- To care for a spouse, parent or child with a serious health condition
- The employee's own serious health condition



What is a “Serious Health Condition?”



- An illness, injury, impairment or physical or mental condition that involves:
 - Inpatient Care (overnight stay or subsequent treatment in connection with that stay); or
 - Continuing Treatment
 - Incapacity of more than 3 consecutive days and
 - Visit 2+ times within 30 days; or
 - Visit plus a regimen of treatment (including Rx)
 - Pregnancy or prenatal care
 - Chronic conditions
 - Permanent or long-term conditions
 - Condition requiring multiple treatments

Family Members for SHC Leave

- Parent
 - Biological, adoptive, foster, step
 - No in-laws
 - In loco parentis
- Child
 - Biological, adoptive, foster, step
 - In loco parentis
 - Under age 18 (unless mental/physical disability, or qualifying exigency leaves)
 - Grandma wants leave for her grandbaby?
- Spouse
 - As long as “married” under state law
 - Including common law if state recognizes it



What if they Can't Come Back After 12 Weeks?

(or Never Qualified in the First Place?)

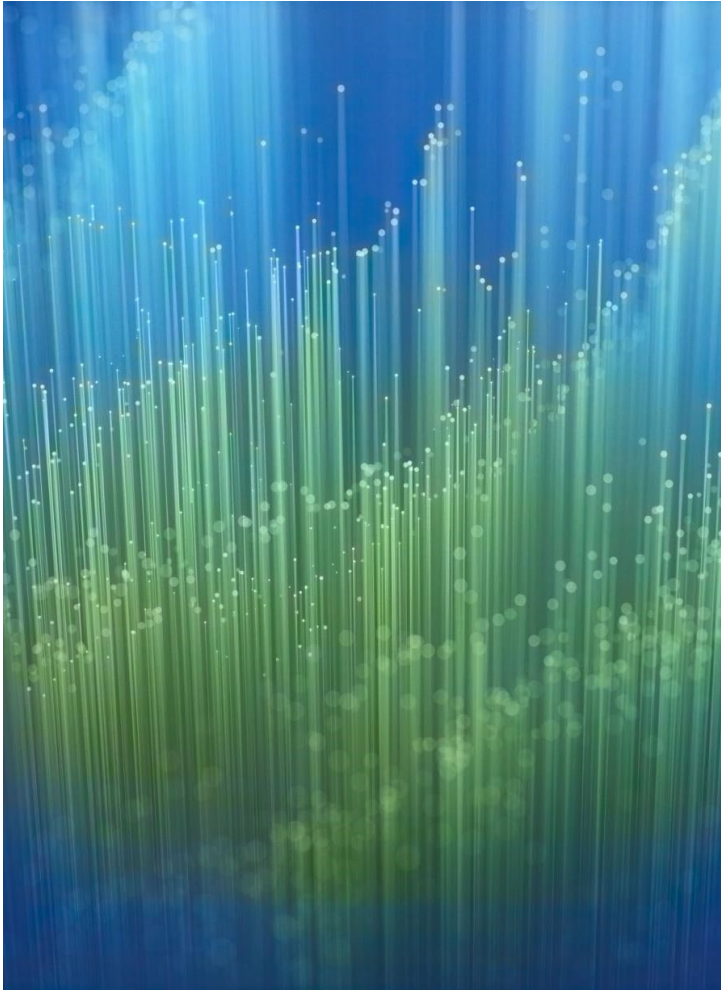


Leave Under the ADA

- Leave is one form of reasonable accommodation under the ADA (*i.e.*, the Company may have leave obligations to its employees under the ADA regardless of FMLA eligibility and/or your policies and practices).



The Americans with Disabilities Act (ADA)



The ADA prohibits discrimination because of a disability (or a history of a disability, or because someone is perceived as having a disability, or because of someone's association with someone with a disability)

Employers must also **reasonably accommodate** qualified individuals with disabilities unless it poses an undue hardship

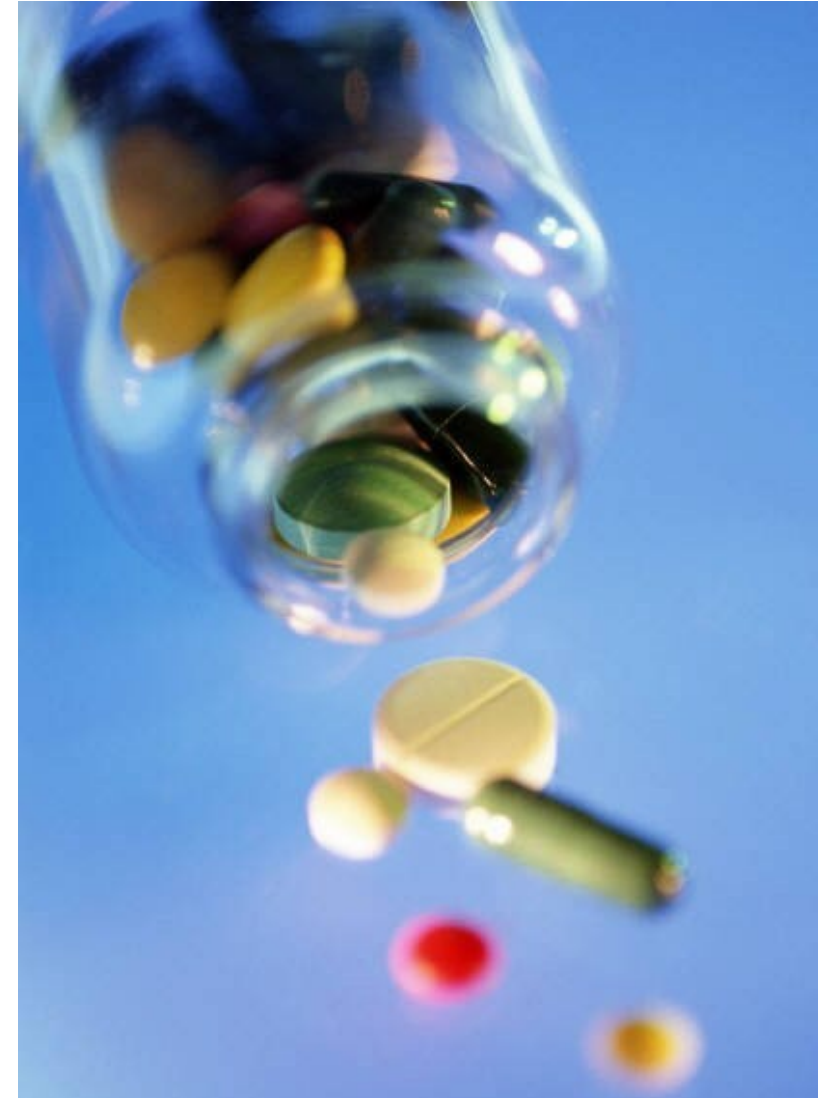
Requires an interactive process with the employee and possibly his/her healthcare provider

Highly individualized, fact-specific analysis (the interactive process)

Net Result: the end of FMLA is not the automatic end of job protection for those on leave—we have to go through the interactive process

Expanded Understanding of “Disability”

- **A physical or mental impairment that [substantially] limits one or more major life activities.**



Six Facts That Can Kill Your “Undue Hardship” Argument

- A policy that provides for leaves of that length. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).
- The employee’s past leaves, without incident. *Mallon v. U.S. Physical Therapy Ltd.*, 16 A.D. Cas. 818 (D. Minn. 2005).
- Successful coverage during this leave by co-workers or subordinates. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998).

Six Facts That Can Kill Your “Undue Hardship” Argument

- Successful coverage, or ability to cover this leave by temporary employees. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000); *Nunes*, supra.
- Termination right before the employee’s expected return. *Miller v. Hersman*, 759 F. Supp. 2d 1 (D.D.C. 2011); *Austin v. Better Bus. Bureau of Middle Tenn. Inc.*, 24 A.D. Cas. (BNA) 535 (M.D. Tenn. 2011).
- Failure to quickly replace the employee after termination. *Haushmann*, supra (took 6 months to replace); *Garcia-Ayala*, supra (never replaced).

Pregnant Workers Fairness Act

Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions.

Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

It is intended to prevent women from being forced out on unpaid leave or out of their jobs.

Known Limitation

- Physical or mental condition related to, affected by, or arising out of:
 - Pregnancy;
 - Childbirth; or
 - Related medical conditions
- Must be communicated to the employer

Is This Just Another Version of the ADA?

Similarities

- Interactive Process
- Reasonable accommodation
- Undue hardship

Distinctions

- No requirement of “impairment” that “substantially limits” a “major life activity” – covers temporary conditions
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available

KEY DIFFERENCE: Must accommodate even if unable to perform essential job functions for a temporary period so long as that function can be performed in the near future and otherwise accommodated

LET'S PRACTICE



Scenario 1

- John calls you and tells you he has been hospitalized due to hypertension and heart issues. He will need to remain at home for three weeks and has been advised to avoid stressors, including work
- John is two weeks shy of his 1-year work anniversary
- John's state does not have its own medical leave statute
- This is your busiest time of the year

What do you do?

Scenario 2

- Mary joined ABC Corp. two (2) months ago. She works on-site as a care coordinator for a healthcare facility. Although she interacts with care providers every now and then her work primarily involves speaking with different parties over the phone
- She walks into HR to announce she is pregnant and will need to work from home because she has not been "feeling well" due to her pregnancy

What do we need to do first?

Scenario 2... Cont'd

- Mary's provider fills out paperwork stating Mary has been experiencing severe morning sickness and often feels lightheaded. The provider recommends work from home for the duration of the pregnancy
- You learn that two other employees in Mary's role (but reporting to another individual) work from home—one due to seizures, the other because she moved 2 hours away during Covid, but she is "awesome" so we allowed it.

What do you do?

Scenario 3

- Jane is a single mom. Her son has autism
- She needs to take her son to therapy every day 1-3 PM
- Her usual schedule is 9 AM to 5 PM, for a total of 40 hours per week
- She has asked for flexibility in her schedule. She wants to work 9 AM to 1 PM, take a two-hour break from 1-3 PM, and then resume work 3-6 PM.
- This flexible schedule, if granted, will result in her working 35 hours per week instead of 40

What do you do?

Scenario 4

- Employee wanted to take vacation around Labor Day but was out of vacation time
- She submitted FMLA paperwork to cover her absence for back pain, which was substantiated by an MRI and CT scan
- Paperwork showed her to be “completely incapacitated” for three weeks
- Attended a Medieval festival and went bar hopping with friends, who took pictures and posted them on Facebook. The employee also posted them
- Employee’s co-workers (and Facebook “friends”), who felt betrayed having to cover her work, brought the photos to the attention of the supervisor, who was also a Facebook “friend”

What do you do?

Scenario 5

- Mary works in the warehouse of a trendy furniture store
- While lifting some boxes, she feels a sharp pain on her back and falls to the floor
- The injury is reported using your usual workers' compensation protocols
- Mary takes a four-week leave of absence and is released back to work with a 10-lb restriction

What do you do?

Scenario 6

- Susan has been on a medical leave of absence 12 weeks
- While on leave, the business underwent a reorganization, and her position was eliminated with her peer assuming her responsibilities as part of the company's cost-saving strategy
- Susan does not yet have a return-to-work date, but she thinks in 6-8 weeks she should be able to return

What do you do?

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Questions?

Please add any additional questions to the Q&A box

Thank you!

