

Laws in the Workplace



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Agenda

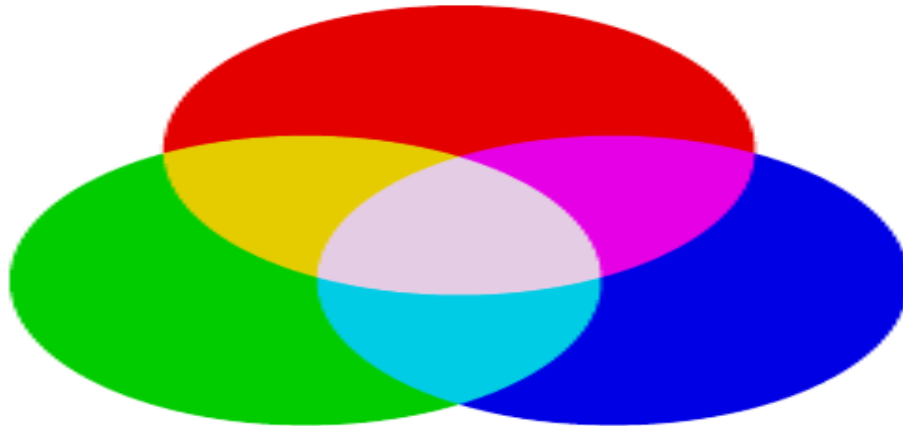
1. New York State Taylor Law
(<https://perb.ny.gov/taylor-law/>)
2. 1st Amendment
3. Non-Discrimination Laws
(<https://www.eeoc.gov/prohibited-employment-policiespractices>)
4. NYS Sexual Harassment Training Requirements
(<https://www.ny.gov/programs/combating-sexual-harassment-workplace>)
5. Family Medical Leave Act
(<https://www.dol.gov/agencies/whd/fmla>)
6. NY Paid Family Leave
(<https://paidfamilyleave.ny.gov/>)

Objective

To provide an overview of major federal and state laws applicable to employees and employers in the workplace to enable you to identify issues in your workplace and ask relevant questions that can help your members.

Sources of Power

- A. Collective Action
- B. Collective Bargaining Agreement (Union Contract)
- C. Laws



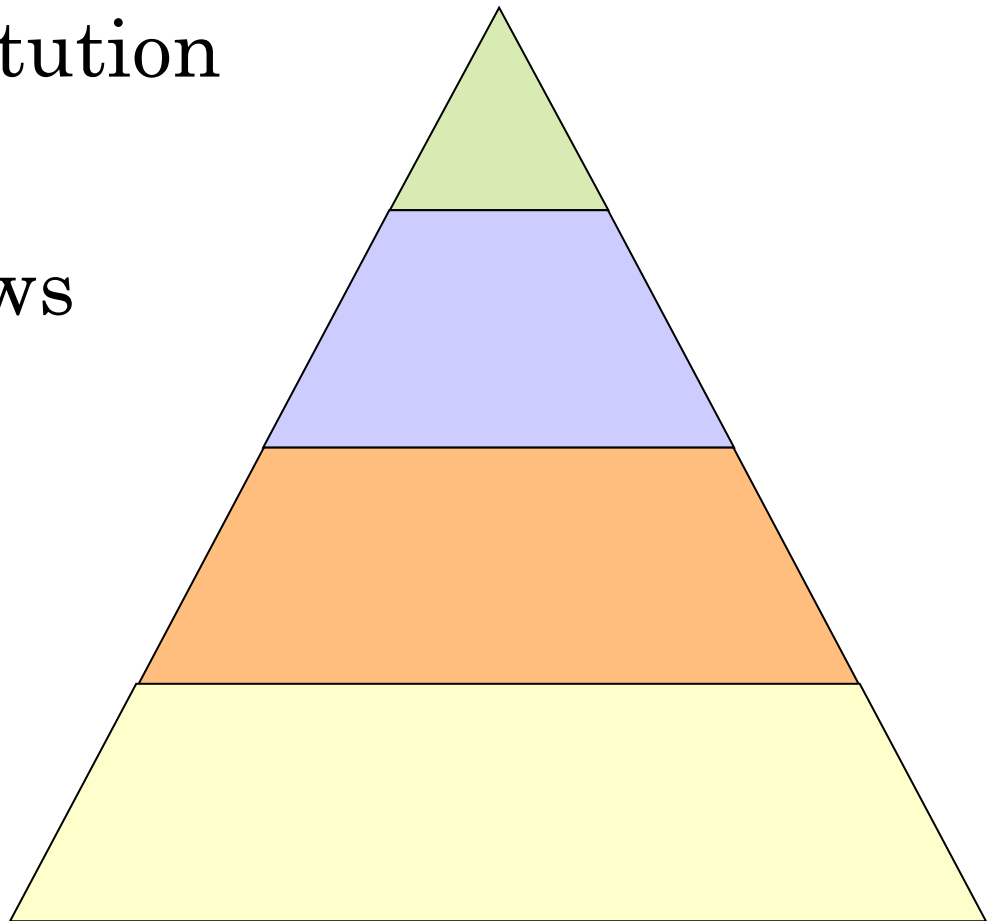
Hierarchy of Laws

1. U.S. Constitution

2. Federal Laws

3. State Laws

4. Local Laws



Federal Laws

- Title VII of the Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission--EEOC)
- Title I of the Americans with Disabilities Act of 1990 (EEOC)
- Family and Medical Leave Act of 1993 (U.S. Dept. of Labor)

State Laws

(and relevant administrative agency)

- Taylor Law (Public Employment Relations Board)
- Human Rights Law (Division of Human Rights)
- Paid Family Leave Law (Workers' Compensation Board)

State Laws

(and relevant administrative agency)

Relevant to public sector union advocacy
but not covered in this workshop:

- Education Law (Department of Education)
- Civil Service Law (NYS and Local Civil Service Commissions)

Laws and Collective Action

The Taylor Law prohibits a public employer from:

- Interfering with, restraining, or coercing employees in the exercise of their rights to organize or participate in a union; or
- Retaliating against employees for exercising their rights to organize or participate in a union.

Laws and Collective Action

The Taylor Law also prohibits strikes & other job actions.



Laws and the Union Contract

The Taylor Law requires that a public employer bargain in good faith over terms and conditions of employment with the union.

The duty to bargain extends beyond the contract to non-contractual past practices.

Failure to bargain in good faith constitutes an improper practice charge.

Laws and the Union Contract

Laws establish a floor that can be enhanced by contract language.

Contract provisions that violate a law are unenforceable.

Scenario 1 (Taylor Law)

For the past 5 years the employer has given employees a \$25 gift certificate inside each employee's holiday card as a token of appreciation. This year, citing fiscal problems, the employer decided not to give out the gift certificates along with the cards.

Did the employer do anything wrong by failing to give its employees the gift cards?

If so, what, if anything, can the employees' union do about it?

Duty of Fair Representation

The union has a duty to represent all bargaining unit members in good faith without respect to membership status.

The DFR does not extend beyond enforcement of the contract.

Scenario 2 (Taylor Law)

A non-member approaches a union representative and says she thinks that she is being laid off improperly by the District. She is a remedial reading teacher in a public school and says that she thinks there are at least two other remedial reading teachers who are not being laid off who have less seniority than she does.

What, if anything, can be done to assist her?

What, if anything, can this remedial reading teacher do to assist herself in this situation?

First Amendment of the U.S. Constitution

“Congress shall make no law ...
abridging the freedom of speech...”

Note: This right is applicable to the States as a result of the 14th amendment.

General Principles

- The 1st amendment prohibits government actors from limiting the speech rights of individuals
- It also prohibits government actors from retaliating against individuals for exercising their right to speech
- The right to free speech is limited in the public sector employment context and non-existent in the private sector.

Elements of a 1st Amendment Claim

Individual is a public employee who:

- 1) Suffered an adverse employment decision;
- 2) Was speaking as a private citizen;
- 3) The speech addressed a matter of public concern (political, social or other concern to the community);
- 4) The speech was a substantial motivating factor in the adverse employment action.

Defenses to a 1st Amendment Claim

The claim will be defeated if the employer can prove that:

- 1) The speech disrupted the workplace;
- 2) The employer's interest in promoting an efficient workplace outweighs the employee's interest in commenting on matters of public concern;
- 3) The employer would have taken the adverse action even without the employee's speech
- 4) The statement at issue was made pursuant to the employee's official duties.

What is the Union's Role?

- 1st amendment issues are typically presented in the context of employee discipline.
- If the Union represents the individual, it may assert a 1st amendment defense in the disciplinary proceeding.

Scenario #3 (1st Amendment)

Amanda is a probationary special education teacher in a district. Amanda also has a son that attends school in the same district. Amanda attends a Board meeting one night and criticizes the district's failure to impose discipline on students who violate the Board's code of conduct. Amanda explains that such undisciplined students pose safety concerns to the rest of the students in the school.

The next day Amanda is told her probationary employment is being terminated because she embarrassed the Board with her speech.

Do you think Amanda has a viable First Amendment claim against the District? Why or why not?

Student 1st Amendment rights

Public schools may censor student speech which materially disrupts the work and discipline of the school.

A recent Supreme Court case clarified that the ability to regulate student speech applies both to speech that occurs at school and, to at least some extent, away from school.

Scenario #4 (1st Amendment)

Several students in a large city school district have created false Facebook accounts pretending to be teachers. The accounts post photoshopped pictures of the teachers in unflattering poses and have various fake comments linked to the fake pages. The Union wants the District to take action against the students engaged in the fraudulent social media activities.

Do you think, assuming the district can discover who engaged in the conduct, it can discipline the students without violating the students' first amendment rights?

Why or why not?

Title VII of the Civil Rights Act of 1964

This law makes it unlawful to discriminate against someone on the basis of *race, color, religion, national origin, or sex*.

The law also makes it unlawful to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

It also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.

UPDATE: What does it mean to discriminate on the basis of sex

Gender identity and sexual orientation are not explicitly listed as a protected categories.

However, in 2020 the Supreme Court found in *Bostock v. Clayton County* that Title VII prohibits discrimination on the basis of someone's gender identity (protects transgender people) and the basis of someone's sexual orientation.

UPDATE: What does “undue hardship” mean in the context of religious accommodations?

Past 40+ years = more than a de minimis cost

June 29, 2023 = substantial increased costs in relation to the conduct of its particular business

What is the Union's Role?

The Union can help members with claims of discrimination process such complaints pursuant to any procedures that the employer has adopted.

If that's unsuccessful, then advise the employee to file a complaint with the local Human Rights Commission, the New York State Division of Human Rights or the Equal Employment Opportunity Commission.

Scenario # 5 (Title VII)

Angela, one of the most senior employees in your bargaining unit, sends you an email to ask for your guidance after being denied her preferred building assignment. She claims the building Principal is discriminating against her because the Principal thinks she is Jewish. As far as you can tell, Angela is not observant. There is no “non-discrimination” clause in your collective bargaining agreement.

What is the first thing we need to verify about Angela?

What, if anything, should we do to assist her?

Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, or sexual comments or conduct that:
 - Has the purpose or effect of unreasonably interfering with an employee's work performance
 - OR
 - Creates an intimidating, hostile, or offensive working environment
 - OR
 - When acquiescence to the conduct is made explicitly or implicitly a term or condition of employment.
- Is a form of discrimination on the basis of sex.
- Defined/interpreted more broadly under New York state law than federal law

Sexual Harassment

- Employers must adopt a sexual harassment prevention policy and training.
- This also applies to local union executive boards.
- Agreements requiring the arbitration of workplace sexual harassment claims are prohibited in NY State.

Americans with Disabilities Act

Prohibits discrimination against qualified individuals with disabilities in all terms and conditions of employment (hiring, benefits, promotions, layoff and termination).

The law requires an employer to make a reasonable accommodation to the known disability of a qualified applicant or employee, unless doing so would cause an undue hardship.

What is a disability?

1. A physical or mental impairment that substantially limits one or more major life activity. An episodic impairment or one in remission is a disability if it would substantially limit a major life activity when active;
2. A record of such impairment; or
3. Being regarded as having such impairment.

Who is a qualified individual?

Someone with a disability who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Reasonable Accommodations

What is an accommodation?

Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

What makes an accommodation reasonable?

An accommodation is generally “reasonable” if it is "feasible" or "plausible” and is effective in meeting the needs of the individual.

Types of "reasonable accommodations"

- Modifications to a job application process;
- Modifications to the work environment, or to the manner or circumstances under which the position is customarily performed; or
- Modifications that enable a disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated non-disabled employees.

Undue Hardship

Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business.

An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

Note however, that undue hardship means an actual hardship not an inconvenience.

What is required after an employee requests an accommodation?

- The employer and the disabled individual should engage in an informal interactive process to clarify what the individual needs and identify the appropriate reasonable accommodation.
- The employer may ask questions to enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

Essential Functions

The basic job duties that an employee must be able to perform.

Factors considered in determining if a function is essential include:

- whether the reason the position exists is to perform that function
- the number of other employees available to perform the function or among whom the performance of the function can be distributed
- whether it is contained in the job description

What is the Union's Role?

- Labor organizations that employ 15 or more employees are subject to the ADA.
- Labor organizations are also expected to help facilitate the interactive process between the employer and bargaining unit members regarding requests for reasonable accommodation.

ADA accommodations and seniority

Accommodations that conflict with an established seniority system are deemed to be unreasonable—absent special circumstances. However, a union may agree to modify the seniority system (where it is not governed by law) as a way of assisting an accommodation.

Speak to your LRS if it is ever necessary to evaluate whether such circumstances exist.

Scenario # 6 (ADA)

Gayle is a clerical employee who occasionally experiences fatigue, blurred vision, and cognitive problems as a result of multiple sclerosis.

While working remotely during COVID, her symptoms were well managed but when she returned to work, they worsened causing her to frequently leave work early and call out sick.

She asks you for advice after she received a counseling memo about her attendance issues. She shares that her supervisor, who controls the thermostat, prefers to keep the space warm but heat exacerbates her symptoms causing her to leave work early and stay out the following day. On days her supervisor works remotely, she has secretly been adjusting the thermostat to avoid flare ups. She is fine on those days.

She wants to work remotely and thinks it is unfair that her supervisor can do so but she is not allowed to.

What advice do you offer her?

Family and Medical Leave Act

Covered employers must provide covered employees with up to 12 work weeks of unpaid job-protected leave each year for specific family and medical events or up to 26 weeks for care of a familial service member.



Self, Spouse, Child, or Parent

Covered Employer

- Public agency regardless of the # of employees
- Public or private elementary or secondary school regardless of the # of employees
- Private employer with at least 50 employees within 75-mile radius

Covered Employee

- Works for covered employer
- Employed by same employer for at least 12 months
 - Months need not be consecutive but time worked before a break of seven or more years need not be counted
- 1250 hours during that 12-month period
 - If the employer failed to track hours worked for an employee who has worked at least 12 months, the employee is deemed qualified

Job-protection

- Restoration to original or equivalent position
 - Same pay, benefits, working conditions, schedule, shift, privileges, authority, and status.
- Exceptions:
 - Layoff
 - Key employee
 - Unable to perform an essential duty

Leave Year

- Calendar year
- Another fixed 12-month period (often fiscal year)
- 12-month measured forward from the date an employee first uses FMLA
- 12 months measured backward from each date an employee uses FMLA

Family and Medical Events

- Serious health condition of self or family (Child, spouse, parent)
- Birth, adoption, or foster placement of child
- Qualifying exigency arising out of the fact that a covered military member is on active duty or called to active duty.

Familial Service Member

- Spouse, parent, and child
- Next of kin
 - Nearest blood relative other than the covered service member's spouse, parent, or child; or
 - Blood relative specifically designated by the service member for purposes of military caregiver leave under FMLA

Leave Entitlement

12 work weeks for the following reasons:

- The birth or placement of a child;
- To care for a spouse, child, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active-duty status.

Serious Health Condition

Includes physical and mental conditions that involve either inpatient care or continuing treatment by a healthcare provider.

- Inpatient is an overnight stay in a hospital or similar facility
- Continuing treatment period of incapacity that requires absence from work, school or other normal daily activities of more than 3 consecutive days and related continuing treatment by a healthcare provider.

Intermittent Leave and Reduced-Leave Schedule

- FMLA Leave may be taken intermittently or on a reduced-leave schedule when medically necessary.
- When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations.
- If FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer's approval.

Temporary Transfers

An employer may temporarily transfer an employee who needs intermittent or a reduced-leave schedule to an alternative position for the period the leave is required.

Must be equivalent which means same pay and benefits but not necessarily same duties.

Temporary Transfers

- Transfer cannot be done for purpose of discouraging use of leave.
- If the employee is on a reduced-leave schedule and is therefore part-time, the employer does not have the right to eliminate benefits that regular part-time employees do not receive.
 - But the employer may prorate benefits that are based on hours worked.
 - Transfer must comply with CBA

Scenario #7 (FMLA)

A teacher works full time for a school district that provides health insurance for full-time employees but not for part-time employees. Additionally, the employer's policy regarding sick leave accumulation is that full time employees accumulate one day of sick leave for every month of service. Part-time employees accumulate a half day of sick leave for every month of service.

If a full-time teacher requests a reduced-leave schedule for two months, what benefits are they entitled to (Sick/Health Insurance)?

Medical Certification

- Employers may require medical certification from a healthcare provider.
- HIPAA overlap:
 - 2 ways to obtain certification:
 - Indirectly: employee gets form completed by their provider (recommended)
 - Directly: employee authorizes employer to directly contact the provider.
 - Employer's contact must be done by a health care provider, HR, leave administrator or management official. Not the employee's direct supervisor.

Medical Certification

- If the employer finds the certification to be incomplete/insufficient, the employer must specify in writing what info is lacking and give time to cure the deficiency.
- Employer who doubts accuracy, may require employee to get second opinion.
- If second opinion differs, the employer may require a third opinion. This opinion is binding.

Spouses employed by the same employer

Total amount of leave may be limited to 12 work weeks to be divided among the spouses when taken for 3 FMLA approved reasons:

- Childbirth;
- Adoption; or
- Caring for a sick parent

Scenario # 8 (FMLA – spouses)

Pete and Chasten are married and work for the same district. When they first adopted baby Dylan, Pete used 3 weeks of FMLA leave beginning on April 15, 2021 and Chasten used 9 weeks after Pete's leave finished. In January 2022, Pete was diagnosed with a serious health condition that required him to be absent from work for an extended period of time.

How much FMLA time may Pete use for this condition?

Benefit Entitlement While on FMLA Leave

- Able to substitute use of accrued paid leave for unpaid leave on the same terms as it would otherwise be available
- Employer may require substitution of leave
- Health insurance must be maintained on same terms during leave
- Other accrued benefits must be protected while on leave

Scenario # 9 (FMLA and sick time)

As the longest serving employee in the District, Joe has accrued months of sick leave.

If he takes FMLA leave to care for his son who is going through chemotherapy, may he substitute his accrued sick leave for unpaid FMLA leave?

Specific Rules for Certain Educational Employees

Exempt employees:

- Presumed to meet the 1250-hour requirement
- Examples: teachers, guidance counselors, school psychologists, and school registered nurses who work full-time.

Nonexempt employees:

- Eligibility depends on how many hours they are compensated for

Scenario #10 (FMLA – eligibility)

Two teacher aides approach you to find out if they are eligible for FMLA leave.

Cory works at the high school 7 hours a day for 180 days during a 12-month period.

Julian works at the elementary school 6.5 hours a day for 180 days during a 12-month period.

How do you respond to each of them?

Special Rules for Instructional Employees

- Instructional employees are those whose principal function is to teach and instruct students in a class or individual setting.
- Generally, these rules exclude teaching assistants and aides.

“Return-to-Work” Rules for Instructional Employees

Generally, an employee on leave who is able to return sooner than anticipated is only required to give 2 work- days notice of their desire to return in order to be reinstated.

However, instructional employees can be forced to delay their return to the start of a new semester.

Rule #1

An instructional employee (IE) who commences FMLA leave MORE THAN 5 weeks before the end of an academic term can be required to remain on leave until the term ends if:

1. The duration of the leave is 3 weeks or more; and
2. The IE would otherwise return during the last 3 weeks of the term.

Rule #2:

An IE who commences leave between 5 and 3 weeks from the end of a term can be required to remain on leave until the term ends if:

1. The IE takes the leave for a reason other than their own serious health condition;
2. The leave is for more than 2 weeks; and
3. The leave would end during the last two weeks of the term.

Rule #3

An IE who commences leave within 3 weeks from the end of a term can be required to remain on leave until the term ends if:

1. The IE takes the leave for reasons other than her own serious health condition;
and
2. The leave is for more than 5 working days.

“Return-to-Work” Rules for Instructional Employees

Things to keep in mind when an employee is required to take extra leave:

- The additional time will not be charged against the employee’s FMLA leave entitlement
- Employer must maintain the employee’s group health insurance on same terms
- Employer must restore the employee to the same or equivalent position at the start of the new academic term

Scenario # 11

(FMLA and Instructional Employees)

Elizabeth, a third-grade teacher, began a 4 week FMLA medical leave on May 22, 2023. Elizabeth complained to you that the District denied her request to return on June 19th and instead required her to stay out for the remainder of the term which ended on June 30th. She was especially concerned about using extra FMLA leave because she is pregnant.

How could you have advised Elizabeth?

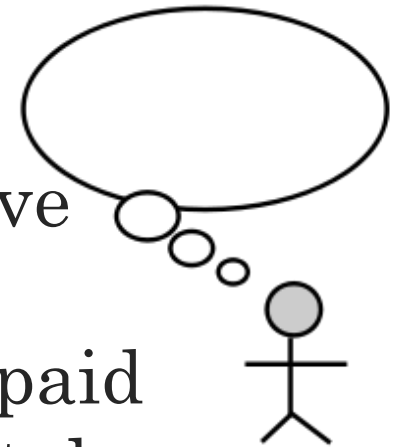
Intermittent /Reduced -Leave Rules for Instructional Employees

If the requested leave would be *more than 20%* of the total number of working days over the entire period of the leave, the employer may require the employee to choose either:

1. To take leave for the entire period of the planned treatment, or
2. Transfer temporarily to an available alternative position for which the employee is qualified, has equivalent pay, benefits, and working conditions.

Thoughts for collective bargaining

- Ensure that the substitution of paid leave is the employee's option
- Expand the definition of family
- Expand the reasons for taking leave
- Increase length of allowable leave
- Make FMLA leave paid versus unpaid
- Guarantee that new parents may take intermittent leave rather than leaving that decision up to the employer



New York's Paid Family Leave Law

NYS PFL Law implements a system of paid family leave benefits for eligible employees of covered employers.

Benefits:

- Cash benefit
- Job protection
- Health insurance

Effective Date	Maximum weeks of Paid Leave	Amount of Benefits
1/1/21 and beyond	<u>12 weeks</u> in any 52-week period	67% of an employee's average weekly wage but not to exceed 67% of the New York State Average Weekly Wage

New York's Paid Family Leave

Benefits Examples

Worker's Average Weekly Wage

\$600

\$1,000

\$2,000

Weekly PFL Benefit*

\$402

\$670

\$1,131.08*

2023 New York Paid Family Leave

For 2023, the State Average Weekly Wage is **\$1688.19**, which means the **maximum weekly benefit is \$1,131.08**.

How are the benefits funded?

- Employee-funded (unless negotiated employer contribution)
- Employer may collect through payroll deduction

Job-protection

- Employee must be returned to the same job, or a comparable one, after returning from PFL.
- A comparable job is one with comparable employment benefits, pay and other terms and conditions of employment.

Continued health insurance

Just like FMLA, the employer is obligated to maintain an employee's health insurance while on PFL on the same terms as if you continued to work.

Eligible Employees:

Employees of a covered employer who satisfy the minimum time-worked requirements:

- **Full-time employees:** Employees who work a regular schedule of 20 or more hours per week are eligible after 26 consecutive weeks of employment.
- **Part-time employees:** Employees who work a regular schedule of less than 20 hours per week are eligible after working 175 days, which do not need to be consecutive.
- **Employees with irregular schedules** should look at their average schedule to determine if they work, on average, fewer than 20 hours per week.

When can PFL be used?

Almost identical to FMLA except:

The definition of family is broader and it cannot be used for the employee's own serious health condition.

Family = Domestic Partner, Spouse, Child, Parent, Grandparent, or Grandchild

(NOT THE EMPLOYEE!)



PFL cannot be used when the employee:

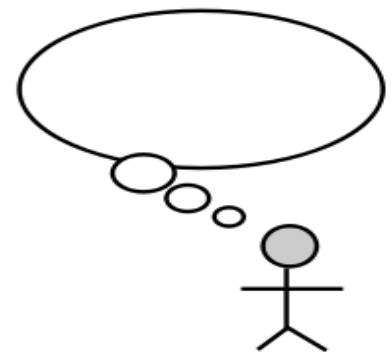
1. Is receiving total disability benefits pursuant to a claim for Workers' Compensation, volunteer firefighters or volunteer ambulance workers' benefits
2. Is not employed or is on suspension or administrative leave
3. Is collecting sick pay or paid time off from the employer; or
4. Has worked at least part of the day during the same working hours as those for which PFL benefits are claimed.

PFL and FMLA

- If an event qualifies for leave under both FMLA and PFL, & the employer is covered under both laws, the employer may require employees to run the benefits concurrently.
- In order for the two types of leaves to run together, the employer must notify the employee that the leave qualifies for both FMLA and Paid Family Leave, and that it will be designated as such.
- Both require completion of a notice to the employer and a medical certification.

Thoughts for collective bargaining

- Public sector locals should consider negotiating PFL benefits into their CBA;
- Limit amount of employee contribution by requiring the employer to contribute a portion;
- Districts with PFL can negotiate whether to run FMLA and PFL consecutively.



Take-Aways

- You must fairly (and consistently) represent all members of your bargaining unit—regardless of their status as union members.
- You are not obligated to represent non-members with respect to alleged violations of law that are not incorporated into your CBA.
- With respect to claims of discrimination, it is not your job to reach a conclusion about whether the alleged discrimination occurred but you should help union members identify and navigate the process for filing a complaint.
- Union leaders should help union members navigate the interactive process under the ADA.

Take-Aways

- You must fairly (and consistently) represent all members of your bargaining unit—regardless of their status as union members.
- You are not obligated to represent non-members with respect to alleged violations of law that are not incorporated into your CBA.
- With respect to FMLA eligibility, it is not your job to reach a conclusion about whether an employee is eligible but you should help union members complete the necessary paperwork.
- Union leaders should help union members when their FMLA request is denied.