



XpertHR Podcast

February 27, 2018

Paid Leave Trend Continues To Affect HR

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David Weisenfeld: I'm David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast our focus turns to paid leave and other notable leave law issues. The Family and Medical Leave Act is celebrating its 25th anniversary this year, but federal action regarding paid leave for qualifying employees has thus far remained elusive.

However, states and municipalities are increasingly taking matters into their own hands and going beyond the FMLA, including California, New Jersey, Rhode Island and others.

To get to the bottom of this growing trend we're joined by Casey Kurtz, co-chair of the Leaves of Absence and Disability Accommodation Practice Group at Littler Mendelson, the nation's largest employment law firm exclusively representing employers. Casey speaks frequently to HR professionals on these issues and he joins us by phone from his office in Pittsburgh. Casey, welcome. [0:01:22.1]

Casey Kurtz: Thanks David. It's a pleasure to be back on the podcast. Thanks for inviting me.

David Weisenfeld: Well it's great to have you back and Casey, I'll start with this. How is this trend of paid family leave at the state and city level affecting employers from your perspective? [0:01:36.7]

Casey Kurtz: That's a good question, David. I mean, it's affecting them quite significantly if they're in any of the jurisdictions that have enacted these laws, and there are quite a few and they're growing really seemingly by the month.

And the issues that they raise are really that there's no uniform approach. I mean, there are some trends across these various laws that make it at least palatable to have a policy that deals with multiple jurisdictions, but there are deviations across them as well that make it challenging. So the big concern is just how do you comply with multiple jurisdictions and one option is to go to the most generous approach, but a lot of employers aren't prepared to do that because

it's a significant extension of resources that they're extending towards sick pay. And what they're left with is the option of making different entitlements available to different employees in different locations, and that creates a lot of challenges as far as compliance.

David Weisenfeld:

Casey, New York state is the latest one to offer paid family time off and Maryland passed a paid sick leave law recently. And we've even seen Austin, Texas become the first Southern city to join the fray. Anything special that HR folks need to know about with these developments? [0:02:59.6]

Casey Kurtz:

Yeah, this is continuing a trend, David, that we've seen over the last several years. With the New York state law there's a little bit of a difference in that from most laws, that it's funded by employee deductions, actually through the workers' compensation system. So that's something we might start to see more frequently in these types of laws.

The Maryland law, there was really a persistent effort to get sick pay, sick leave in Maryland and it finally was successful this year. There were efforts to delay that bill that were unsuccessful as far as the effective date, but it did go into effect in February.

With Austin, the first Southern city, as you say, to get into sick pay. The state legislators all already came out and vowed to pass a law striking it down whenever they get the opportunity, so we'll see if that happens. I know it hasn't taken effect yet and we'll see if state action will dampen down that effort in Austin to add to employers' obligations across the country.

David Weisenfeld:

Well speaking of these state law developments, do you anticipate more in the coming year, and will they likely be geared towards new parents exclusively or perhaps for any sort of leave? [0:04:17.1]

Casey Kurtz:

There continue to be many, many bills that are pending in legislatures across the country, and it's very difficult to predict when those will actually make it – if and when they will make it – through the various committees and bodies of the government. It is hard to predict that. I mean, Hawaii is a state where there have been pretty consistent and persistent efforts similar to Maryland to get a sick leave bill passed, so that's a possibility, but it's certainly not able to predict where it will happen next.

David Weisenfeld:

Well Casey, with so much focus on work and family issues these days, do you anticipate federal action on paid leave or does that remain unlikely in your eyes? [0:05:00.0]

Casey Kurtz:

David, there is a groundswell in the employer community to address this challenge of how do you comply with these various variety of restrictions, and there's a pending bill in congress in the House to essentially create a federal solution that would amend ERISA and preempt the application of state and local law. It's also difficult to judge how much success that will have. I mean, there have been efforts in the past as well, where we haven't seen a successful effort, but that's the one that's pending now and we'll see if it does get some momentum.

David Weisenfeld: You mentioned earlier the New York law that was funded by employee deductions. There's been talk of a measure where there would be borrowing from social security to pay for paid leave. I would imagine there'd be a lot of opposition to that, though. [0:05:57.5]

Casey Kurtz: There are some challenges on the federal level, and certainly just the mechanism for creating an exemption or preemption of state and local law is a question of how that's going to actually be accomplished. So we're waiting and watching those things but I'm not particularly confident that something will be done on a federal level any time soon.

David Weisenfeld: Well shifting gears, Casey, some employers – most notably Netflix, who offers up to a year of paid time off – go well beyond what's legally required with family leave. Are there any risks, though, employers should be aware of when they take those steps? [0:06:36.4]

Casey Kurtz: Some of the risks are practical, as far as competition for employees, and that's what we're seeing mainly in the tech space, as far as offering additional enhanced benefits to compete for those hard-to-get employees. So that's something employers need to consider if they're in the mix or competing against the employers that are tending to offer these enhanced benefits.

The other things as far as compliance is concerned with those kinds of benefits can relate to the eligibility differences. So someone may be eligible for the company-provided paid time off, when they might not be also eligible for a federal- or state-provided leave or paid time off. And relating those to each other as far as making sure that you're not running them concurrently if they shouldn't be run concurrently, and then the issue of addressing employees who use up the company-provided benefit but then suddenly are eligible for the state-mandated or the federal-mandated leave, and they can tag that onto the end of what the company provided as an enhanced benefit.

David Weisenfeld: Again we're speaking with Casey Kurtz, who practices with Littler Mendelson's Pittsburgh office, where he co-chairs the firm's Leaves of Absence and Disability Accommodation Practice Group. Casey, what's the number one question that clients are asking you when it comes to employee leave? [0:08:06.8]

Casey Kurtz: One is the difficulty with intermittent leave and the pressure that puts on operations. Under the FMLA and state leave laws that are similar to the FMLA, there is no operational difficulty or undue hardship defense to someone who might need intermittent leave on a regular but unpredictable basis that someone can potentially use for a full twelve months and never exhaust the entitlement, and yet that has a significant pressure on the business. So dealing with those issues, trying to root out fraud in those types of situations, and dealing with when the employee *does* exhaust those entitlements addressing intermittent leave use under the ADA is a very common issue and increasing issue.

David Weisenfeld: Now Casey, this one might be right up your alley as someone who practices at the edge of both the FMLA and the ADA. If an employee

with a serious health condition exhausts all of their FMLA leave time, the employer can't necessarily just cut them loose because ADA protections might apply. Is that any area that you find yourself having to educate employers about? [0:09:22.4]

Casey Kurtz:

Definitely, David. I mean, this is something that employers have become much more savvy and aware of because the EEOC had a very focused effort to address what I would call 'bright line leave cut-offs' and things like that, where in the past employers might have had policies that said, "If you're out beyond FMLA or beyond six months or beyond twelve months you're terminated," and the ADA really steps in there to say, "Well let's look at it individually. If a person needs a finite period of time beyond that..." whatever deadline or cut-off had been normally applied the ADA says you've got to look at that on a case-by-case basis.

There have been trends recently in this area in the Seventh Circuit, for example, that court held that, in fact, leave beyond FMLA entitlement of any length of time is not a reasonable accommodation, even if it's finite. So it does depend on your jurisdiction. Most jurisdictions still hold that a finite leave that goes beyond other leave entitlements can be a reasonable accommodation, but now with the Seventh Circuit it's a little more employer-friendly in that they basically have said that not working is not an accommodation that enables someone to do their essential functions. It's kind of counterintuitive. They haven't specified how much time would be permitted, but with that case it gave employers in that jurisdiction a little more ammunition to push back on extended leave.

David Weisenfeld:

Casey, I read an article recently that noted frontline managers are the ones who are kind of at the center of FMLA violations. Is there anything employers can do better in terms of training their managers? [0:11:13.9]

Casey Kurtz:

Yeah, I think there's always an opportunity to train managers better. They're in the center of these issues of FMLA because they do interface with the employees most directly. They need to know what are the FMLA triggers, what words does the employee need to say in order to prompt the FMLA process, because the notice obligations that an employer has are set off by statements not necessarily, "I need FMLA leave." So knowing what types of leave are available and what level of disclosure the employee has to make to trigger that process is important for them to know.

And just having managers understand the nature of FMLA and what limits there are to pushing back against someone who needs time off. Often – I encounter this a lot – there's frustration, understandably, because the manager can't get work done. But then you see they email someone about this and they really don't have an understanding of the limits that the FMLA provides on, for instance, we were talking about intermittent leave. But now we have an email that exists that shows how frustrated and wanting to take adverse action they are, and that can come back and be a concern in litigation obviously.

So a key training point also is just not to make statements in emails that indicate those kinds of things, and just understand what the process is, and that everyone should go through that process when they've made a request for leave.

David Weisenfeld:

Is there any other significant risk employers are facing when it comes not just to the FMLA but to leave law generally? [0:13:01.7]

Casey Kurtz:

Well I think the one thing I've been seeing increasingly is just a huge number of third-party administrators out there who will administer FMLA on an employer's behalf. And that's certainly something understandable. They're meeting a need in the marketplace that they can take a lot of administrative burden off of employers.

But the challenge that sometimes that can raise is that employers think they can outsource and forget it, think that all the obligations are gone. But that's really not the case. They really need to make sure number one that the TPA is doing things correctly and consistent with the employer's policies. They still have an obligation (back to the manager situation) to recognize requests for leave and make sure they're funnelled to the TPA. So there's still a lot of obligations that remain when an employer outsources.

The other issue that is raised by outsourcing is the interplay between short-term disability benefits, which are often administered by the same types of companies. That can create some conflicts between what can be asked for FMLA purposes and what can be asked for purposes of seeking a benefit voluntarily. So those are some of the things that I've seen, especially in Department of Labor investigations. The Department of Labor, if they investigate, or auditing or addressing a complaint, they're going to ask for all the documents your TPA uses, and potentially will start looking in a broad swath of employees and how you've treated them with regard to their FMLA requests.

David Weisenfeld:

In our final minute, Casey, do you have a final piece of advice for HR professionals? [0:14:50.0]

Casey Kurtz:

You know, David, I would say that these areas are complex. The laws can be contradictory. They can intersect with each other, but also have to take a back seat to another law that takes precedence, for instance when the FMLA is in place the ADA often takes a back seat, but may become relevant during even an FMLA leave. So the challenge with negotiating all this is not easy, and I see this every day in my role as co-chair of our practice group.

And I think what that means for employers is that you're going to be at risk if you kind of take a haphazard approach to compliance. You really need to develop a strategy for staying on top of these ongoing changes from paid sick leave to other state family leave obligations, and making sure that your team communicates and ensures compliance.

David Weisenfeld:

Casey Kurtz of Littler Mendelson's Pittsburgh office, and the co-chair of the firm's Leaves of Absence and Disability Accommodation Practice Group, has been our guest. Casey, thanks so much for your insights. [0:15:58.9]

Casey Kurtz:

Thank you David. It was a pleasure to join you.

David Weisenfeld:

I'm David Weisenfeld. We hope you've enjoyed this podcast. Continue listening regularly for more podcasts on key employment-related issues, including *Sexual Harrassment Run Amok – A View From the EEOC* and *What 2018 California Employment Laws Mean For HR*.

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