

Be Reasonable!

Accommodation Obligations and Managing Tricky Leaves of Absence Situations

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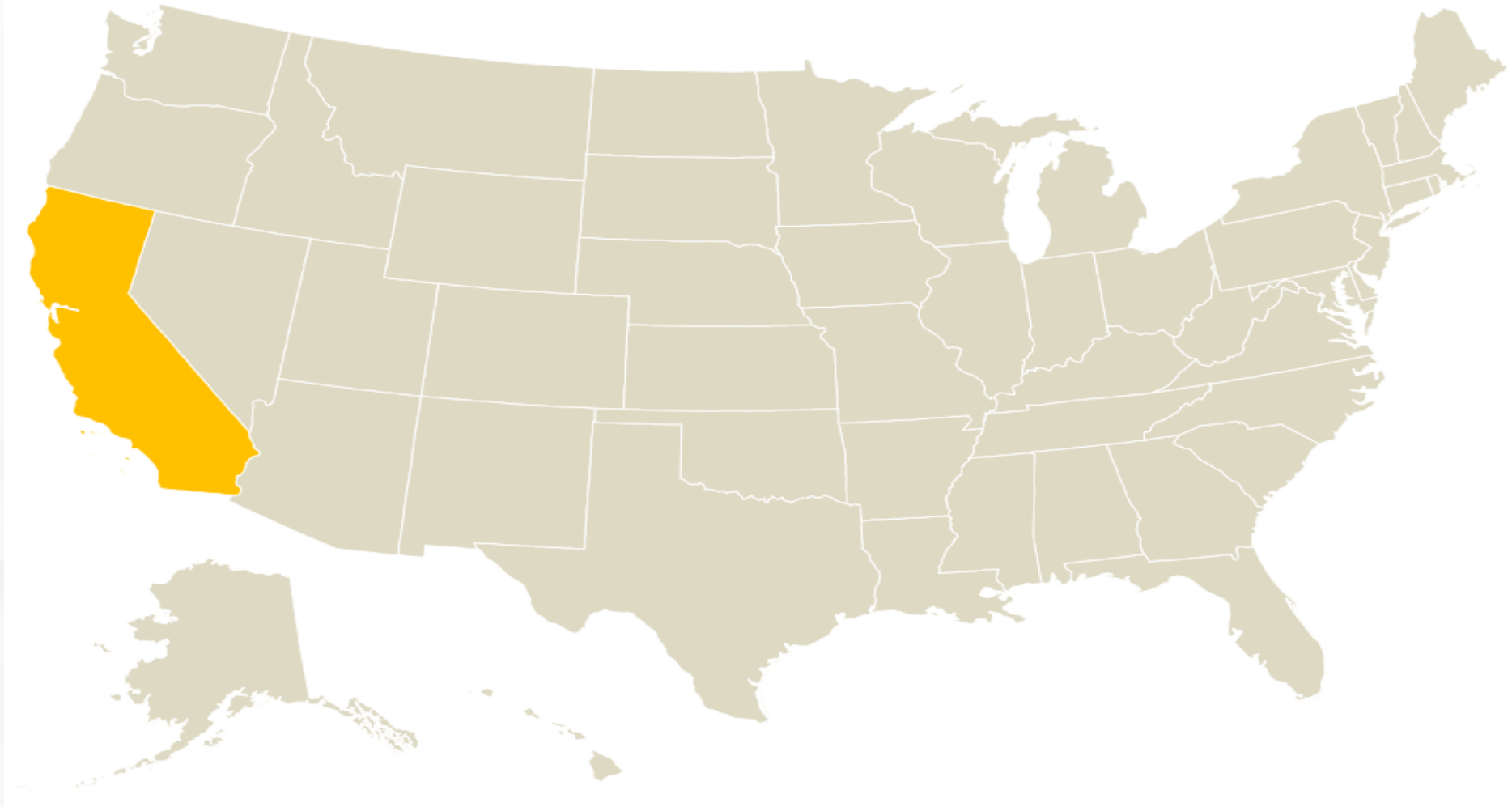
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Agenda

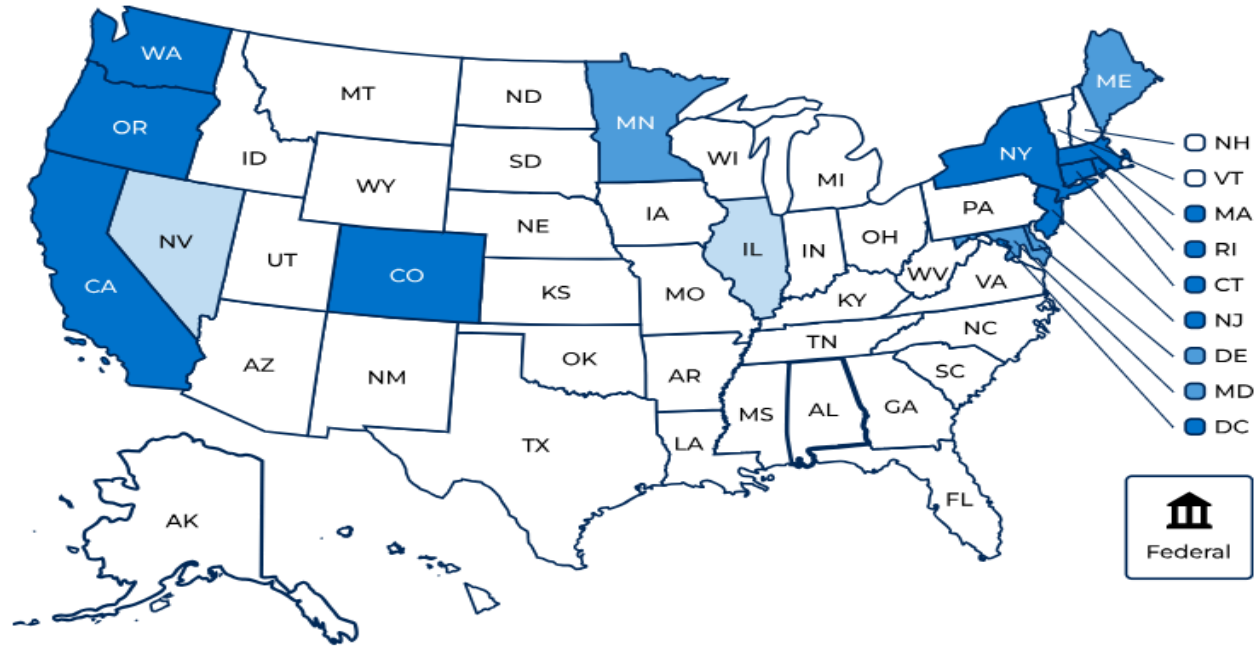
- Leave Expansion
- Leave Trends
- How Much Leave is Too Much?
- Coordinating Leaves, Wage Replacement, and Benefits
- Outsourcing Leaves and Accommodation
- Keeping Up

LEAVE EXPANSION

Paid Family Leave – 2004

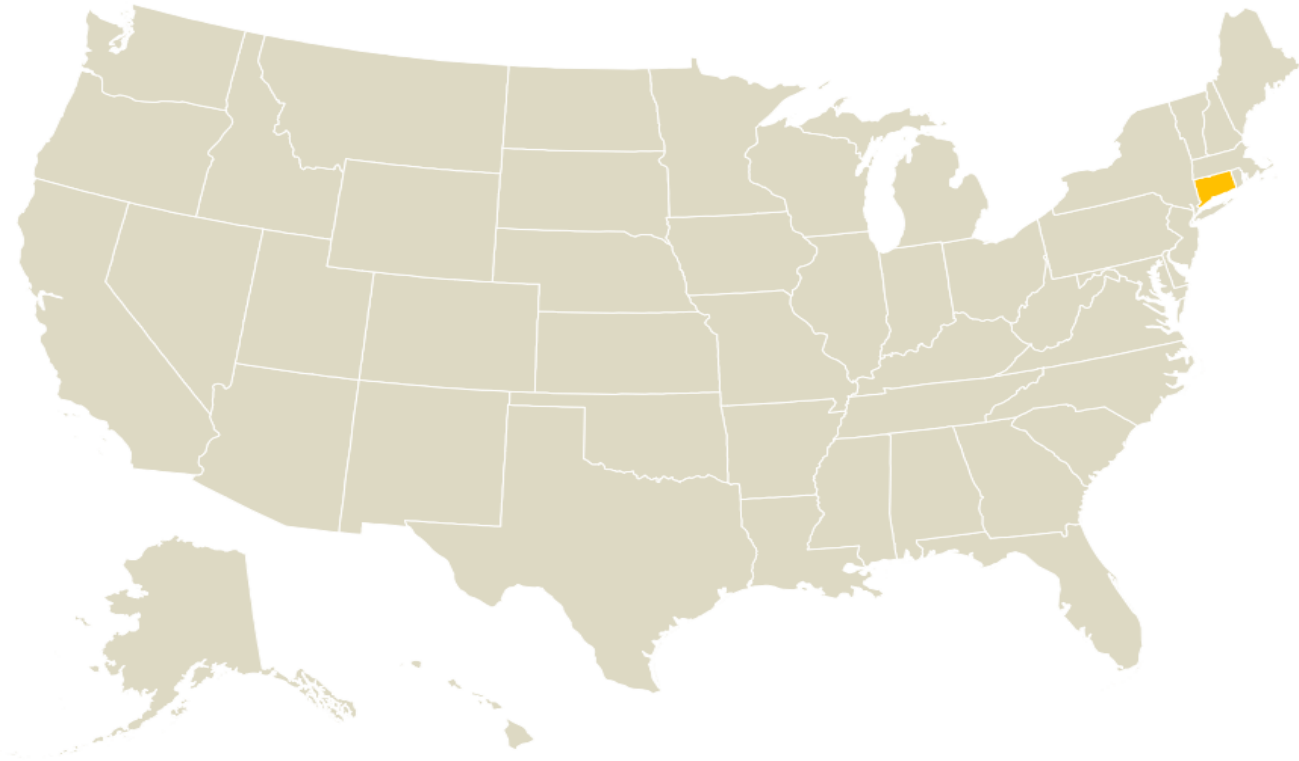


Family and Medical

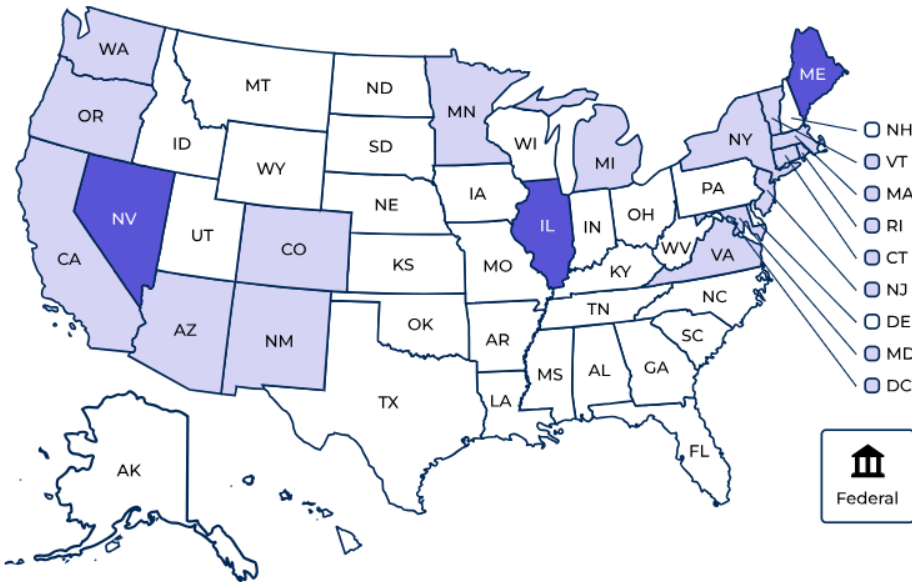


- State-mandated paid family and medical leave insurance program in effect
- State-mandated paid family and medical leave insurance program enacted but not yet active
- State law requires covered employers to provide paid leave that can be used for any reason
- No state-mandated paid family and medical leave insurance program

Paid Sick Leave – 2011



Paid Sick Leave



- State law requires covered private employers to provide paid leave that can be used for any reason
- State law requires covered private employers to provide paid sick leave that can be used for illness and other statutorily-defined reasons
- State law does not require private employers to provide paid sick leave

Federal Laws

- FMLA – Mandatory leave. No undue hardship, only “key employee” exemption.
- ADA – Employee’s health condition causing impairment.
 - LOA can be a reasonable accommodation.
 - Undue hardship defense.
- PWFA – Pregnancy accommodation.
 - LOA can be a reasonable accommodation.
 - May have to remove essential job functions as a reasonable accommodation.

State Leave Laws and Employer Leave Policies

- Any Reason/No Reason Leave
- Reproductive Loss Leave
- Paid Sick Leave
- Bereavement Leave
- Crime Victim Leave

State Leave Laws and Employer Leave Policies

- Domestic/Sexual Violence Leave
- Organ Donor Leave
- Parental Leave
- Pregnancy/Childbirth Recovery Leave
- School Activities Leave
- Family/Caregiver Leave
- Workers' Compensation

LEAVE EXPANSION TRENDS

Any Reason/No Reason Leave

- Employees may use leave for any reason without disclosing it to the employer
- Maine; Nevada; Illinois; Bernalillo County, NM

Reproductive Loss Leave

- California
 - Leave after a reproductive loss
 - Miscarriage/stillbirth
 - Failed adoption or surrogacy
 - Unsuccessful assisted reproduction
 - 5 days for each event
 - Maximum 20, each 12 months

Reproductive Loss Leave

- Illinois Family Bereavement Leave
 - 10 workdays of unpaid leave
 - A stillbirth;
 - A miscarriage;
 - An unsuccessful reproductive procedure;
 - A failed adoption match or an adoption that is not finalized because it is contested;
 - A failed surrogacy agreement; or
 - A diagnosis that negatively impacts pregnancy or fertility

Reproductive Loss Leave

- “Any reason” leave also would cover reproductive loss
- Some employers adding reproductive loss to bereavement leave policies

Bereavement Leave

- California – 5 days unpaid leave
- Illinois – 10 days
- Maryland
- Oregon
- Bills introduced in New Jersey and Massachusetts

Expanded Paid Sick Leave

- California
 - 3 days to 5 days
 - “Designated person”
- New York
 - Another 20 hours for prenatal care for pregnant employees

Expanded Paid Sick Leave

- Connecticut
 - Expanded covered employers
 - Expanded reasons for leave
 - Revised accrual rate
- Alaska, Missouri, and Nebraska
 - November 2024 ballot measures approved
 - Earned paid sick leave for 2025

HOW MUCH IS TOO MUCH?

FMLA Is Not Enough

- Should engage in interactive process to determine if additional leave is a reasonable accommodation
- California
 - Regulations REQUIRE an interactive process at the end of FMLA/CFRA
 - Separate claim for failure to engage in interactive process

Inflexible Leave Policies

- One that calls for the employee's termination at the end of a specified period
- EEOC claims that inflexible leave policies violate the ADA because company must determine leave length on an individual basis

No Bright-Line Rule for Reasonableness

- Most courts hold no bright-line rule for leave length
- Look at
 - Length of leave
 - The employee's prognosis, treatment, and likelihood of recovery

Reasonableness May Depend on Jurisdiction

- LOA of more than six months per se unreasonable (10th Cir.)
- Six months could be reasonable for lupus (6th Cir.)
- 12 more months (for a total of 17) not reasonable in particular case (but could be in others) (1st Cir.)

Reasonableness May Depend on Jurisdiction

- Generally not required to hold position open for more than a year (6th Cir.)
- Long-term LOA NOT a reasonable accommodation (7th Cir.)
 - 2-3 months post-FMLA to recover from disc compression surgery not reasonable
 - Employee needing FMLA + six months to recover from breast cancer not a qualified individual

Indefinite Leave: Reasonableness v. Undue Hardship

- BUT Ninth Circuit
 - 16 weeks, asked for another month, and doc wrote that employee would need monthly appointments and unclear how long healing process would take
 - Leave without an end date is NOT “per se unreasonable”
 - Recovery time of unspecified duration could be a reasonable accommodation unless the employer can show that it causes an undue hardship

Cost as Undue Hardship

- Courts not sympathetic
- Courts look at company resources, not cost when compared to employee's compensation
- May have to open financial books and justify to jury other costs (like retreats, club memberships, etc.)
- Courts look at NET costs (after tax credits/deductions)

Impact on Others as Undue Hardship

- EEOC: Undue hardship if accommodation “would be unduly disruptive to other employees’ ability to work.”
- So burden another employee(s) that they cannot do their own work
- Proportion of OT that is voluntary v. involuntary

Impact on Others as Undue Hardship

- Undue hardship if accommodation caused employees “to work more nights, more weekends, and more irregular hours”
- Look at whether other employees already on leave
- Impact on morale is not enough

11th Circuit Undue Hardship Case Example

- Bus driver with spinal stenosis recovering from surgery. FMLA + 9 weeks too much.
- Court looks at
 - Size of the workforce
 - Number of bus routes
 - Impact on other bus drivers
 - “The difficulty of scheduling operators to cover bus routes while holding position open”
 - Cost of overtime pay
 - Expected loss of trained and experienced personnel as a result of forced overtime

Best Practices

- Find out the jurisdiction standards
- Analyze each situation and do not rely solely on inflexible leave policies
- Look for operational impacts (and make operations provide specifics)
 - Employees
 - Customer service
 - Internal projects

**COORDINATING LEAVES,
WAGE REPLACEMENT,
AND BENEFIT PLANS**

Protected Leave v. Wage Replacement

- Protected Leaves = Permission to Not Work
- Wage Replacement = Payments When Not Working

Sources of Leave

- FMLA leave
- State/local leave laws
- ADA/PWFA leave/reduced hours as reasonable accommodations
- Employer policies that provide leave

Run Leaves Concurrently

- Run workers' comp concurrently with FMLA, if applicable
- Run FMLA concurrently with state/local/policy leaves, if applicable

Factors That Impact Which Leave Laws Apply to Each Employee

- **Does FMLA apply?**
 - Remote workers are part of site they report to or receive assignments from (i.e., they are counted to determine if 50 or more employees at the site).
- **Which state/local law applies?**
 - Where Employee resides?
 - Where remote work is performed?
 - The work site the employee reports to or receives assignments from?
 - Location traveling thru to perform work?

Leave Hypo

- Frank was hired on 8/1/23 and works in New York.
- Frank has a serious health condition and needs leave for 18 weeks starting 7/1/24.
- NY Paid FML provides 12 weeks job-protected leave after 26 weeks of employment.
- FMLA provides 12 weeks job-protected leave after 12 months of employment.

How should the Employer designate Frank's leave?

Leave Hypo

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How should the Employer designate Frank's leave?

NY Paid FML: 7/1/24-9/30/24 (12 weeks)

Unpaid FMLA: 8/1/24-10/31/24 (12 weeks)

Unpaid Leave as ADA accommodation: 11/1/24-11/14/24
(2 weeks)

Wage Replacement Sources

- Employer Policies that provide payment when not working: PTO, vacation, sick time, Paid Parental Leave, etc.
- State Disability Insurance
- Temporary Disability benefits for work injuries
- Benefit Plans: STD and LTD benefits

Wage Replacement Hypo

- Sally was hired in 2021, works in Colorado, earns \$2,000/week.
- Employer offers 6 weeks childbirth recovery leave at 100% pay and 2 weeks bonding leave at 100% pay.
- Colorado provides Paid FML Insurance with 4 weeks for pregnancy complications and 12 weeks birth/bonding and Sally's benefit is \$1,100/week.
- Sally had pregnancy complications for 8 weeks and then requested 12 weeks off after childbirth.

How should the employer pay Sally during her leave?

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How should the employer pay Sally during her leave?

Paid FML for pregnancy complications: 4 weeks at \$1,100 per week

Unpaid leave as accommodation under PWFA: 4 weeks

Paid FML (\$1,100/wk) + Childbirth Recovery/Bonding (\$900/wk): 8 weeks

Paid FML (\$1,100/wk): 4 weeks

Benefit Plan Enforcement

- **Eligibility Terms**

- Eligibility usually based on being an “Active Employee” (e.g. working 32 hrs/wk).
- If not working required hours, need exception in the Plan to continue eligibility of coverage:
 - Health Plans include exception for approved FMLA leave;
 - Look for other exceptions in the Plan if not FMLA leave.

Benefit Plan Enforcement

- **Employer must give Employees notice when eligibility ends.**
 - If fails to provide notice, possible liability for breach of fiduciary duty.
- **Employer must give notice of continuation of coverage rights.**
 - If fails to provide timely notice, possible penalties and liability.

Benefit Plan Hypo

- David was enrolled in the Company Health Plan and Life Plan for \$100,000.
- Coverage under the Health Plan: If an employee worked 32 hours/week, or was on an approved medical leave but not longer than 6 months from first day of leave, unless the employee remained eligible for FMLA leave and then coverage ends when FMLA ends.
- Coverage under the Life Plan: If an employee worked 32 hours/week or was on an approved medical leave but not longer than 1 month.
- David got sick and took 12 weeks FMLA leave and then was approved for 8 months leave as an ADA accommodation. David paid all his premiums during his leave.
- David passed away right at the end of his leave.
- David's wife received notice his medical bills were denied for the last 2 months of his life. Her claim for the life benefit was also denied. Wife sued the Health insurer, Life insurer, and the Employer.

What happened?

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What happened?

Both Insurers were dismissed since they followed the Benefit Plan terms as written.

Employer found to have breached its fiduciary duty by failing to tell David his coverage ended and failing to provide COBRA rights to continue health coverage and conversion rights to allow an opportunity to convert to an individual life insurance policy.

OUTSOURCING LEAVES AND ACCOMMODATION

Potential TPA Issues

- Employer, not TPA, responsible for compliance.
- TPA isn't keeping up with the law, particularly state laws.
- TPA has difficulty with reasonable accommodation.
- TPA is not using compliant forms.

Potential TPA Issues

- TPA is not communicating clearly with employees.
- TPA is not keeping employer informed.
- TPA does not have the same sense of urgency.

Court Decisions

- TPAs that were merely performing administrative functions for an employer under the FMLA or ADA could not be held liable under those employment statutes because they were not the employer.
- In reviewing communications sent by the TPA to an employee to explain steps to take to seek FMLA leave, the Court found the TPA's letter was so confusing that even the HR department could not decipher what it was asking employees to do.

Best Practices With TPAs

- TPA should cc Employer on every form it sends the Employee.
- TPA Monthly Status Reports.
- Ensure Employer receives sufficient information to manage the employee and the work.

Best Practices With TPAs

- Verify the TPA forms/communications are clear and compliant.
- Work with TPA to customize forms, where needed.
- Employer should supplement information provided to its Employees with separate, more complete communications.

KEEPING UP

Steps to Remain Compliant

- Designate an SME.
- Partner with counsel.
- Tools that assist you – the Client Portal!

Staying Up to Date With Monthly Client Portal Update



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Updates in August 2024

Alaska

- [Drug And Alcohol Testing](#)
August 01, 2024

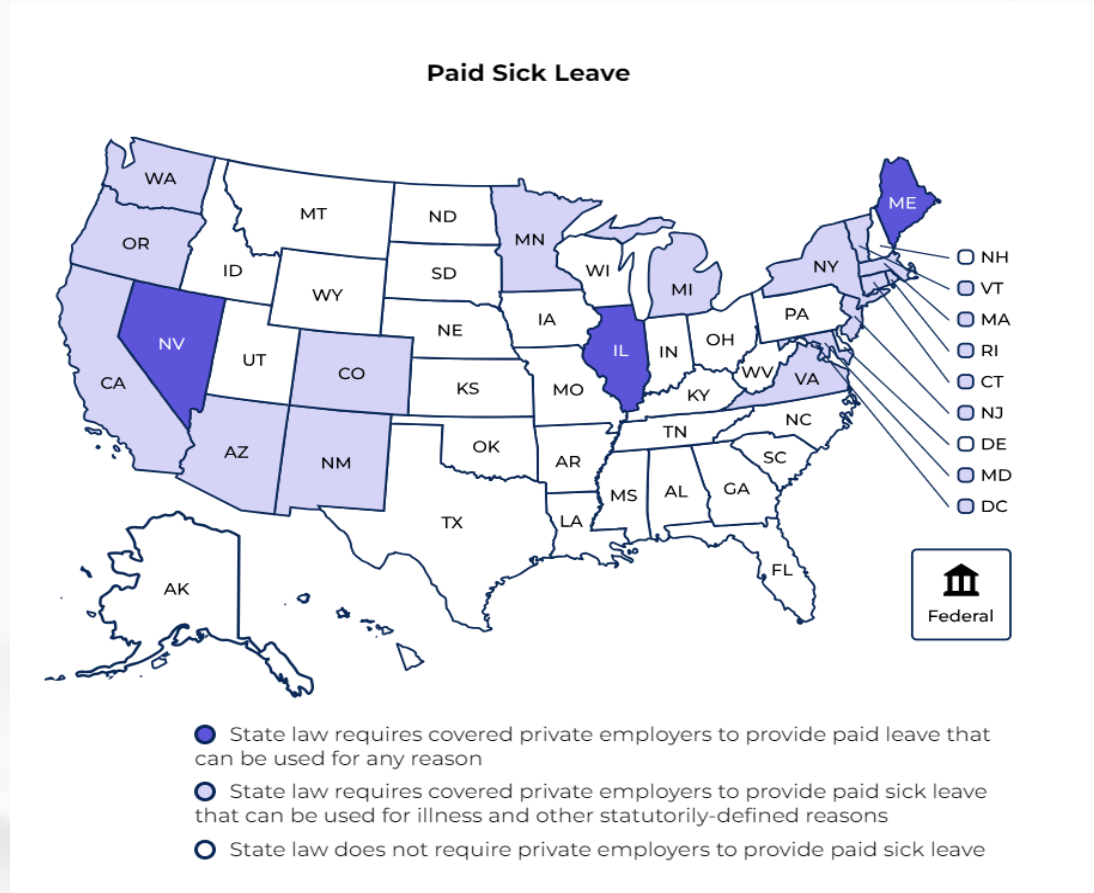
California

- [Minimum Wage](#)
August 15, 2024

Colorado

- [Minimum Wage](#)
August 01, 2024

View Client Portal State Leave Law Maps



Create Summary Table of State/Local Leave Laws in Client Portal

Law Summary Build a Table

Change your selections to build a new table, and use the link on the right side of the table to download to an Excel file.

Jurisdictions: Select jurisdictions (3 selected) X

Law Summaries: Select Law Summaries (3 selected) X

View: All Snapshots Updates

LAW SUMMARY TABLE (9 ITEMS) Download to Excel

	Minimum Wage	Minimum Wage Tip Credit	Overtime Rules
Federal	<p>Update</p> <p>No recent updates.</p> <p>Go to Law Summary</p>	<p>Update</p> <p>No recent updates.</p> <p>Go to Law Summary</p>	<p>Update</p> <p>On April 23, 2024, the US Department of Labor unveiled a final rule increasing the minimum salary thresholds to qualify for certain overtime exemptions under the Fair Labor Standards Act from \$684 per week (\$35,568 per year) to (a) \$844 per week (\$43,888 per year) effective July 1, 2024, and (b) \$1,128 per week (\$58,656 per year) effective January 1, 2025, among other updates.</p> <p>Updated 4/23/2024 Effective 7/01/2024</p> <p>Go to Law Summary</p>
Colorado	<p>Update</p> <p>On August 1, 2024, Denver's Department of Finance announced that the local minimum wage will increase from \$18.28 to \$18.61 on January 1, 2025.</p> <p>Updated 8/01/2024 Effective 10/01/2025</p> <p>Go to Law Summary</p>	<p>Update</p> <p>On August 1, 2024, Denver's Department of Finance announced that the local minimum cash wage for tipped workers will increase from \$15.27 to \$15.79 on January 1, 2025. The corresponding maximum tip credit amount remains \$3.02.</p> <p>Updated 8/01/2024 Effective 10/01/2025</p> <p>Go to Law Summary</p>	<p>Update</p> <p>No recent updates.</p> <p>Go to Law Summary</p>
Connecticut	<p>Update</p> <p>Connecticut's statewide minimum wage increased to \$15.69 from \$15.00 on January 1, 2024.</p> <p>Updated 9/18/2023 Effective 10/01/2024</p> <p>Go to Law Summary</p>	<p>Update</p> <p>On January 1, 2024, Connecticut's maximum tip credit amount increased to \$9.31 from \$8.62 (and to \$7.66 from \$6.77 for bartenders) due to the state's minimum wage increase.</p> <p>Updated 9/18/2023 Effective 10/01/2024</p> <p>Go to Law Summary</p>	<p>Update</p> <p>No recent updates.</p> <p>Go to Law Summary</p>

Generate Detailed Leave Law Report with Recent Changes in Red

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Table of Contents

- LEAVES.....
- FEDERAL.....
- Voting / Election.....
- Voter Leave.....
- Election/Polling Officials' Duties.....
- ALABAMA.....
- Voting / Election.....
- Voter Leave.....
- Election/Polling Officials' Duties.....
- ARIZONA.....
- Voting / Election.....
- Voter Leave.....
- Election/Polling Officials' Duties.....
- CALIFORNIA.....
- Voting / Election.....
- Voter Leave.....
- Election/Polling Officials' Duties.....

California

Voting / Election

SNAPSHOTS

California law requires employers to provide employees with paid time off to vote and unpaid time off to serve as an election officer.

UPDATES

Effective Date: October 26, 2024

California employers must post the "Time off to Vote" notice by October 26, 2024 - ten days before the statewide general election.

Voter Leave

Employers must provide employees sufficient time to vote outside regular working hours. Employers must provide up to **2 hours of paid time off** to an employee to vote in a statewide election (if they do not have sufficient time outside of working hours to vote). Employers may require that the voting leave be taken at the beginning or end of the employee's shift. Employees may take as much time as they need to vote, but only 2 hours must be paid.

Employers may not not require or request that an employee bring the employee's mail ballot to work or vote the employee's mail ballot at work.

Employee Notice. Employers may require employees to request voting leave at least 2 work days in advance

Employer Notice. Employers must post a notice of the right to time off to vote no less than 10 days before every statewide election—or by **October 26, 2024, for the November 5, 2024 General Election.** The required "Time Off to Vote" poster can be found on the California Secretary of State's [website](#).

[Cal. Elec. Code §§ 14000, 14002, 14004.](#)

Thank you!

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