

Compliance Webinar Series

# Looking For Leave In All The Wrong Places

When Your 15 Minutes of  
Fame Is A Bad Thing!

July 15, 2021



# Legal Disclaimer

## Not Legal Advice

This presentation is designed to provide accurate information in regard to the subject matter covered. It is provided with the understanding that ReedGroup is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent attorney or other professional person should be sought. Due to the numerous factual issues which arise in any human resource, leave of absence, or employment question, each specific matter should be discussed with your attorney.

# Today's Speakers



## Ashlee Brennan, Esq.

Senior Compliance Counsel

Ashlee has a strong background in leave of absence management compliance, conflict resolution, and cross-departmental problem solving. She has worked for several non-profit organizations assisting individuals with disabilities in a variety of roles prior to joining ReedGroup. Her work in the industry has specialized in statutory disability and paid family leave compliance while also providing solutions for FMLA, ADA, and ERISA concerns. Ms. Brennan graduated from Michigan State University College of Law in 2015, and is admitted to the Colorado Bar.



## Rachel Biederman - Moderator

Vice President of Marketing

Rachel rejoined ReedGroup in 2020 to lead the company's marketing department, where her team covers a broad range of responsibilities including internal and external communications. Her professional background includes B2B marketing leadership roles in a diverse range of industries including biotechnology, international business and aviation.



## Sheri Pullen

Senior Compliance Manager

Sheri provides compliance expertise, analysis, and direction regarding leave of absence, accommodation, and disability. Her areas of expertise include the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), state leave laws and disability programs, and ERISA as it relates to disability plans. Ms. Pullen has a strong compliance-focused background comprised of more than 20 years of experience in absence management and human resources outsourcing administration. In prior roles, Ms. Pullen provided best practice consultation, wrote and edited web and print content across a variety of platforms, and led software implementations.

# Agenda

A person in a military uniform is sitting at a desk, writing in a notebook with a blue pen. The background is blurred, showing other people in a similar setting.

1

FMLA

2

ADA

3

FFCRA

4

ERISA

5

Legislative  
Update



# FMLA

Family & Medical Leave Act

# FMLA

Job Protection for the Sandwich Generation...and so many more!



## Intent

Unpaid job protection to enable a work / life balance for employees who have met eligibility requirements



## Reasons

Medically necessary leave for an employee's own health, to care for a family member, bond with a new child, or due to military related leaves



## Amount

12 work-weeks (up to 26 work-weeks if the employee is caring for a family member due to military caregiver reasons)

<https://www.reedgroup.com/2020/07/30/telemedicine-visits-sufficient-for-fmla-certifications-until-december-31-2020/>

<https://www.reedgroup.com/2019/04/18/6-tips-for-minimizing-fmla-abuse/>

# Family and Medical Leave Act

## What is considered a violation?



### **Interference, denying the exercising or attempt to exercise FMLA rights**

- Refusal to authorize FMLA leave
- Discouragement from using FMLA
- Making negative comments about the employee's use of leave or disclosing employee's disability



### **Discriminating**

- Considering FMLA leave a negative during hiring, promotions, or disciplinary action
- Counting FMLA toward attendance policies
- Failing to provide benefits to employees taking unpaid FMLA



### **Retaliation**

- Treating employees differently for having filed charges against the employer
- Discharging employees for having given information in relation to any proceeding related to rights under the FMLA
- Action against an employee for testifying in an inquiry relating to rights under the FMLA





# What does it mean?

## Violation examples

- Request not recognized because the employee didn't use the word "FMLA"
- Leave is delayed or denied if not enough advanced notice is given when circumstances are not possible
- Asking an employee to work while on leave
- Making it hard to use intermittent leave
- Abuse for taking leave, such as verbal or withholding promotions
- Returning an employee to a less desirable position, like a different shift or in a role with less seniority





Pro tip: Employers should be on the lookout for employees whose behaviors don't coincide with what is known about the supposed medical condition. Remember to investigate thoroughly and take action where appropriate!

# Peggy Snyder v. E.I. DuPont de Nemours, Inc. & Co.

District Court of Delaware, February 2021

- Employee received STD payments and FLMA leave for a foot surgery and recovery
- While on leave, Snyder was seen walking around a pool party
- After returning to work, Snyder claimed her eight-hour shifts were "killing her" and she needed four-hour light duty shifts
- While receiving disability for light-duty shifts, Snyder was recorded performing supposed duties she 'could not perform'
- Snyder sued and sued for FMLA retaliation
- Delaware District Court granted DuPont's Motion for Summary Judgment

# Kalahar v. Priority

Eastern District of Wisconsin, February 2021

- Employee project manager with mental health disabilities, approved for WFH part time
- Part-time schedule became disruptive, and EE was asked to go out full time or RTW
- EE continued taking approved intermittent FMLA
- EE's performance declined and she was fired
- EE sued for interference under FMLA
- Judge found in favor of employee – direct correlation to decline in performance and protected missed work



Do not threaten a protected EE's FMLA time in order to RTW sooner.



# DaPrato v. Massachusetts Water Resources Authority

Massachusetts Supreme Court, June 2019

- IT manager needing a foot tumor removed, requiring 4-6 weeks leave and took a vacation at the end of his FMLA leave
- Reported that he needed future FMLA leave for knee surgery and employer obtained video footage that employee was 'lifting his luggage'
- Employer fired and assumed FMLA violations abound
- Court held the employee did not violate FMLA by going on vacation



Employers should tread lightly when taking action or penalizing an employee who has taken legitimate FMLA or similarly protected time. Do your research, note taking, and be prepared to explain yourself!



# Ramji v. Hospital Housekeeping

District Court of Delaware, February 2021

- Failure to provide FMLA rights
- Worker's Compensation process / requirements superseded FMLA
- Decision to force an employee to complete a physical Essential Functions Test beyond the point of discomfort
- Refusal to allow use of sick leave to continue to heal
- Retaliation by issuing written warnings for past incidents, including the one that caused the knee injury in the first place



[Ramji v. Hospital Housekeeping Systems, LLC](#)





# ADA

Americans with Disabilities Act



# ADA

Equal opportunity for those with a physical or mental impairment

- Protection from discrimination for employees with identified disabilities
- Guardrails for employers

The Signing of the ADA:

<https://www.youtube.com/watch?v=9gsGiszvyjQ>

RESOURCE: Ask JAN (Job Accommodation Network)

<https://askjan.org/info-by-role.cfm#for-employers>



<https://www.reedgroup.com/2021/01/06/can-employers-mandate-employees-get-vaccinated/>

<https://www.reedgroup.com/2018/12/21/safety-sensitive-positions-ada/>





# ADA Workplace Violations

How to get noticed by the Department of Labor (DOL), the Office of Federal Contract Compliance Programs (OFCCP), AND the Civil Rights Center (CRC)....and possibly a few local news stations



Have open communication with your employees so everybody understands the rules.  
Confirm state requirements, as they may differ from the federal direction.

# What not to do



**Exclude or Discourage**



**Not Accessible**



**Assumption Of Abilities**



**Reassignment**



**Refuse to Modify**



**Inadequate Training**



**Discriminate**



Review current policies. Utilize resources like JAN and those created by the EEOC.

<https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>

# Myth or Fact?



- Employers must hire unqualified individuals to accommodate their disabilities
- When there are several qualified applicants, the one with a disability must be given priority
- Accommodations are going to be expensive, so employers should budget for that substantial line item
- Courts can't handle all the current lawsuits
- Difficult or rude personalities are generally also covered under the ADA
- Employees with documented disabilities can't be terminated



# EEOC v. Opportunities and Resources, Inc.

They should know better! Back to the basics...

- Press Release: 06/25/2021
- Work placement agency for those with disabilities violated ADA by refusing to provide sign language interpreters for deaf employees
- Denial of the benefits and privileges of employment, including full participation in meetings and equal access to important information

<https://www.eeoc.gov/newsroom/eeoc-sues-opportunities-and-resources-inc-disability-discrimination>



# EEOC v. Ranrae, Inc. d/b/a Subway Sandwich

Southern District of Indiana, March 2021

- Subway Sandwich shops are ALL independently owned and operated
- Ranrae, Inc. rejected a hard-of-hearing applicant because of his hearing and speech impairments
- Disability-related discrimination
- Employer agreed to monetary settlement and two-year consent decree to train supervisors and managers, post a notice, and report to the EEOC

<https://www.eeoc.gov/newsroom/subway-franchisee-pay-28700-settle-eeoc-disability-discrimination-suit>



# Polling Question

How confident are you that you have been sufficiently informed to not make any of the possible errors we have discussed so far?

A

I'm an ADA  
and FMLA  
rockstar!

B

I have done OK,  
but glad I dialed  
in today.

C

No violations  
here, but it's  
really a miracle.

D

Uh-oh! I need  
all the  
resources you  
can send me!





# FFCRA

Families First Coronavirus Response Act

# FFCRA – What was that again?

Gone, but not forgotten!

- Paid leave for COVID related absences
- Employer size limitations
- Employees eligible with 30 days of employment
- Quarantine or isolation order
- 80 hours of leave unless due to childcare / school closure



[https://www.reedgroup.com/2020/08/04/dol\\_ffcra-invalidated/](https://www.reedgroup.com/2020/08/04/dol_ffcra-invalidated/)





# School may be out, but don't lose lessons learned

- Changes to laws can happen quickly
- When changing policies, consider flexibility to handle future, unforeseen situations
- Moving forward – sometimes 'outside the box' thinking is just what you needed all along
- Don't rely on the "but I didn't know" card
- By the end of the 1st quarter Employers paid close to \$4M for FFCRA violations, per Helen Applewhaite (DMEC March 2021 Compliance Conference)

<https://www.hrdive.com/news/dol-official-employers-paid-close-to-4m-for-ffcra-violations/596484/>

<https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html>





# Payne v. Wood Services

Eastern District of Pennsylvania, February 2021

- EE counselor at group home for children with disabilities, tested positive after being exposed to COVID-19 by residents
- EE quarantined for 14 days after medical advice and was terminated after requesting leave
- EE brought retaliation claims under FFCRA, FMLA, ADA, and PHRA (PA Human Rights Act)
- Stay tuned to see how BIG of a blunder this becomes...

# Constance v. Hollybrook Golf & Tennis Club

Southern District of Florida, July 2020

- You can't just sweep COVID under the rug...
- Maintenance supervisor tested positive for COVID after symptoms displayed, requested time off
- Supervisor instructed to not disclose, forced EE to utilize PTO (violation of FFCRA)
- After cleared RTW, employment was terminated
- Demanded jury trial, settled in mediation, could face negligence suits by residents



Don't hide COVID-19 outbreaks in the workplace. If eligible, offer employees time under FFCRA like sick leave policies and NEVER retaliate!



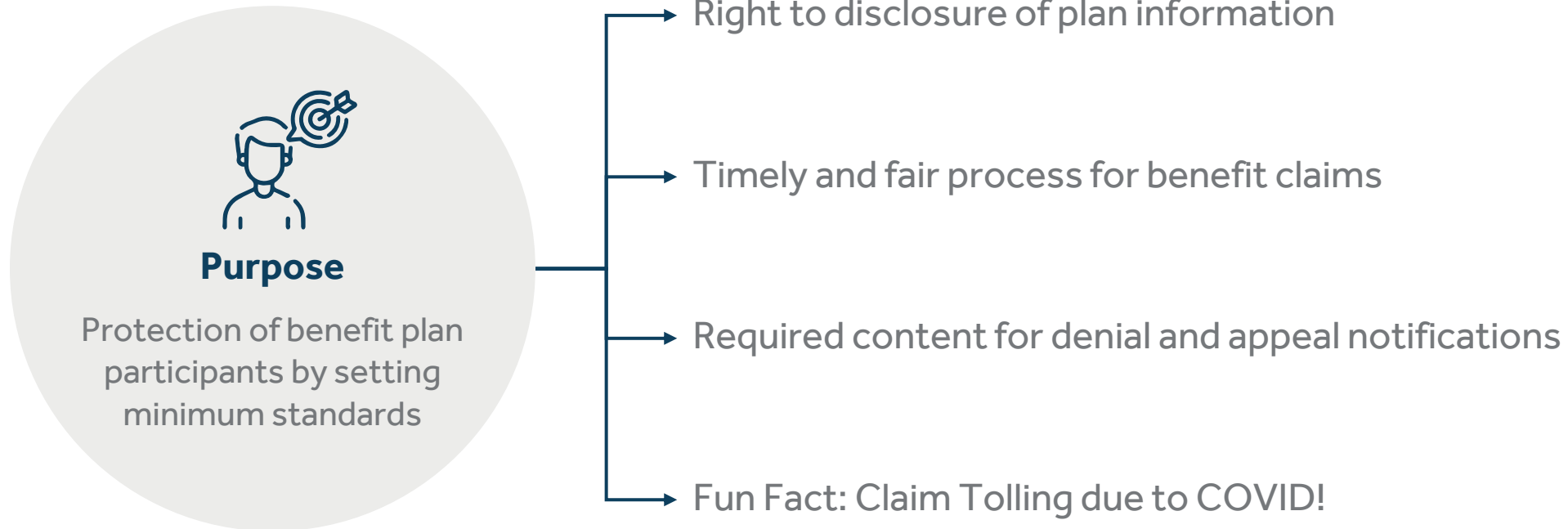


# ERISA

Employee Retirement Income Security Act



# What is ERISA anyway?



<https://www.reedgroup.com/2021/03/03/dols-ebsa-issues-update-on-emergency-erisa-deadline-extensions/>

# Stewart v. Hartford Life & Accident Ins. Co.

Northern District of Alabama, May 2021

- Benefit participant denied LTD after diagnosis of Parkinson's disease
- Denial due to 'prior plan' exclusion as employee was already receiving benefits from another insurer
- Court found in favor of Hartford as the LTD policy very clearly prohibited Stewart from 'double dipping'

# Hamid v. Metropolitan Life Ins. Co.

Northern District of California, February 2021

- Employee denied disability benefits for failure to provide 'objective medical' after seeking years of treatment
- Court found corroborating evidence to establish a disability by plan definition
- Court pointed out SSA determination and Met's failure to consider or discuss during its disability determination and found for employee awarding 24 months of disability



ERISA governed plans can be a blessing and a curse! If you have an ERISA-governed plan, ensure it meets minimum ERISA standards AND train your benefits team and administrators to understand and administer to the policy as written.



# Legislative Updates

# ENACTED Legislation

- [USERRA Amendment](#)
- [Colorado PFML Loan](#)
- [Connecticut Budget Act](#)
- [Indiana Pregnancy Accom](#)
- [Kentucky Adoption Leave Law](#)
- [Louisiana PFML Task Force](#)
- [Maine FML Expansion](#)
- [Maryland Essential Workers Protection Act](#) (Enacted 5/30)
- [Minnesota Pregnancy Accom](#)
- [NH Granite State Paid Family & Medical Leave](#)
- [Oregon OFLA Public Health Emergency Requirement](#)
- [Oregon BOLI permanent administrative order](#)
- [Pennsylvania Living Donor Protection Act](#)
- [Rhode Island Emergency Regulations](#)
- [Rhode Island TCI Increase](#)
- [Virginia Anti-Discrimination & Accom law](#)
- [VA PFML Study](#)
- [Washington PFML Updates \(WA H 1073 & WA S 5097\)](#)
- [WA Public Health Emergency Anti-Discrimination/Accommodation](#)
- [D.C. Coronavirus Support Emergency Amendment Act](#)
- [D.C. Public Emergency Act Amendment](#)
- [D.C. Coronavirus Support Congressional Review Emergency Amendment Act of 2021](#)
- [D.C. Coronavirus Support Temporary Amendment Act](#)
- [D.C. UPLAA Offset Prohibition](#)

# Pending Legislation: What We're Watching

## Federal

- [FMLA FAIR Leave Act](#)
- [Pregnant Workers Fairness Act](#)
- [Family Medical Leave Modernization Act](#)
- [FAMILY Act](#)

## State

- [North Carolina Paid Family Leave Insurance Act](#)
- [Oregon PFML Program Delay](#)
- [California TDI Increase](#)
- [CA A 1033](#) , [CA A 1578](#) , [CA A 1041](#) (CFRA Amendments)
- [D.C. Universal Paid Leave Program Amendments](#)
- [Healthy Delaware Families Act](#)
- [Illinois Victims' Economic Security and Safety Act Expansion](#)
- [Illinois House Bill 12](#)
- [Maine PFML Commission \(ME LD 1559/SP 501\)](#)
- [Nebraska Paid Family and Medical Leave Insurance Act](#)
- [NY A 6958](#) / [NY S 6198](#), [NY S 6032](#), [NY S 6032](#), [NY S 2928](#) (New York PFL Amendments)
- [Pennsylvania Family and Medical leave Insurance](#)
- [Rhode Island Parental and Family Medical Leave Act Amendment](#)



# Questions?



# Thank you.