

PRESENTATION FOR THE NONPROFIT FINANCIAL MANAGERS GROUP

GET READY FOR 2023!



PLEASE NOTE:

This training and any accompanying materials that were provided are for educational purposes only and do not constitute legal advice.

Employers should consult with their counsel with regards to the questions and issues discussed in this training. The answers to questions discussed during this webinar will ultimately turn on many factors, including, but not limited to, the size of the employer, the states of operation, the employer's policies and practices, contractual requirements, and others.

Pay Transparency

Key Points of Pay Transparency Laws

- Equal Pay for Equal Work
- Valid reasons for a pay difference can exist (e.g., experience level, location)
- Do not request pay history from a candidate
- Do not base offers on a candidate's pay history
- Employees can discuss wages without fear of retaliation



WHAT ARE PAY TRANSPARENCY LAWS?

States and municipalities are passing laws that require employers to list pay scales in their advertisements

Essentially, employers have to give the salary range, low and high on posted job listings or provide that info upon request (depending on the state). For any employer hiring for a position that can be performed remotely, you are affected by these laws.




For Example - NYC

- Anyone who advertises or posts a job, promotion, or transfer opportunity for a role that can or will be performed, at least in part, in NYC - they must disclose in such advertisement the minimum and maximum annual salary or hourly wage that the employer in good faith believes it would pay for the position.

Who is a Covered Employer?

Dependent on location and employer size

Generally, an employer is covered if work is being performed in the state.

-  How many employees do they employ?
-  How many employees do they employ within the applicable state?
-  Do they have a primary place of business in the state/municipality?

Some states/municipalities require as little as one employee, while others require as much as 15.

Who is a Covered Employee/ Candidate?

Dependent on location and employer size

Generally, an employee is covered if they work for a covered employer and work in the applicable state.



Do they work for a covered employer?



In what state is the work being performed?



Are they a remote worker?



Pay Scale Required

California

Colorado

Connecticut

Maryland

New York (9/17/23)

Nevada

Rhode Island

Washington

Jersey City, NJ

Ithaca, NY

New York City, NY

Westchester County, NY

Cincinnati, OH

Toledo, OH

Covers Current Employees?



Covered

- 📍 California (upon request and in internal postings)
- 📍 Colorado
- 📍 Connecticut (upon request or prior to offer)
- 📍 Nevada (upon request, or upon applying, interview, or offer for internal transfer/promotion)
- 📍 Jersey City, NJ
- 📍 New York (all locations—Ithaca, Westchester Co., NYC now, full state 9/17/23)
- 📍 Rhode Island (upon request or when moving to a new position)
- 📍 Washington (upon request and offer for new position)



Not Covered

- 📍 Maryland

Covers Candidates?



Covered

- 📍 California
- 📍 Colorado
- 📍 Connecticut (upon request or prior to offer)
- 📍 Maryland (upon request)
- 📍 Nevada (after interview)
- 📍 Jersey City, NJ
- 📍 New York (all locations—Ithaca, Westchester Co., NYC now; full state 9/17/23)
- 📍 Cincinnati, OH (upon request after offer)
- 📍 Toledo, OH (upon request after offer)
- 📍 Rhode Island (upon request or prior to discussing compensation)
- 📍 Washington



Not Covered

- 📍 N/A

Remote Workers?



Covered

- 📍 California
- 📍 Colorado (if work could be performed in CO and the employer has 1 employee in the state)
- 📍 Connecticut (only remote workers in CT)
- 📍 Maryland
- 📍 Jersey City, NJ (if employer is primarily in Jersey City)
- 📍 New York State (if work can/will be performed at least in part in NY)
- 📍 New York City, NY (if work “*could be performed*” in NYC)
- 📍 Ithaca, NY (worker must be in Ithaca)
- 📍 Westchester County, NY (worker must be in Westchester)
- 📍 Rhode Island
- 📍 Washington



Not Covered

- 📍 Cincinnati, OH
- 📍 Toledo, OH

Other Compensation or Benefits in Posting



Covered

- 📍 Colorado (bonuses, commissions, compensation, and benefits)
- 📍 Maryland (all compensation)
- 📍 Jersey City, NJ (benefits)
- 📍 Washington (all compensation and benefits)



Not Covered

- 📍 California
- 📍 Connecticut
- 📍 Nevada
- 📍 New York – but NY state will require a job description to be published
- 📍 Cincinnati, OH
- 📍 Toledo, OH
- 📍 Rhode Island

Out of State Employers Must Comply



Covered

- 📍 California
- 📍 Colorado
- 📍 Connecticut
- 📍 Maryland (if employer has business in MD)
- 📍 Nevada
- 📍 Ithaca, NY
- 📍 New York City, NY
- 📍 Westchester, NY (work must be in Westchester)
- 📍 Rhode Island
- 📍 Washington



Not Covered

- 📍 Jersey City, NJ
- 📍 Cincinnati, OH
- 📍 Toledo, OH

Follow that Employee! – Steps for Analysis

1

Where will or
can the work be
performed?

2


Are they a covered
employer in that
state/ municipality?

3

Is the employee
covered?

Penalties and Remedies

Penalties

 \$100 - \$250,000



Remedies

 Compensatory

 Punitive

 Attorneys Fees and Costs

****Some states allow a private right of action.****

Recommendations for Employers

- ✓ Plan ahead; determine pay scales
- ✓ Identify and correct existing pay discrepancies
- ✓ Update job postings with pay scales, benefits, and compensation
- ✓ Update policies and procedures and existing job descriptions
- ✓ Train managers/HR

“The Gold Standard” – Sample Language

XYZ Company, in an effort to be transparent with applicants about salary and in compliance with various state pay disclosure requirements [insert any in particular that apply to this position], publishes the following information which is current as of [date]. Salary Minimum: \$85,571.20 Salary Maximum:\$182,956.80 The base salary range above represents the low and high end of the XYZ Company salary range for this position. Actual salaries will vary and may be above or below the range based on various factors including but not limited to location, experience, and performance.

The range listed is just one component of XYZ Company’s total compensation package for employees. Other rewards may include annual bonuses, short- and long-term incentives, and program-specific awards. In addition, XYZ Company provides a variety of benefits to employees, including health insurance coverage, an employee wellness program, life and disability insurance, a retirement savings plan, paid holidays and paid time off (PTO) [customize].

A woman with her hair in a bun is seen from behind, sitting at a desk in a home office. The room is decorated with framed pictures on the wall, a desk lamp, a potted plant, and a calendar showing the number 52. The entire scene is overlaid with a semi-transparent blue filter.

Work From Home

Overview: Managing a Remote Workforce

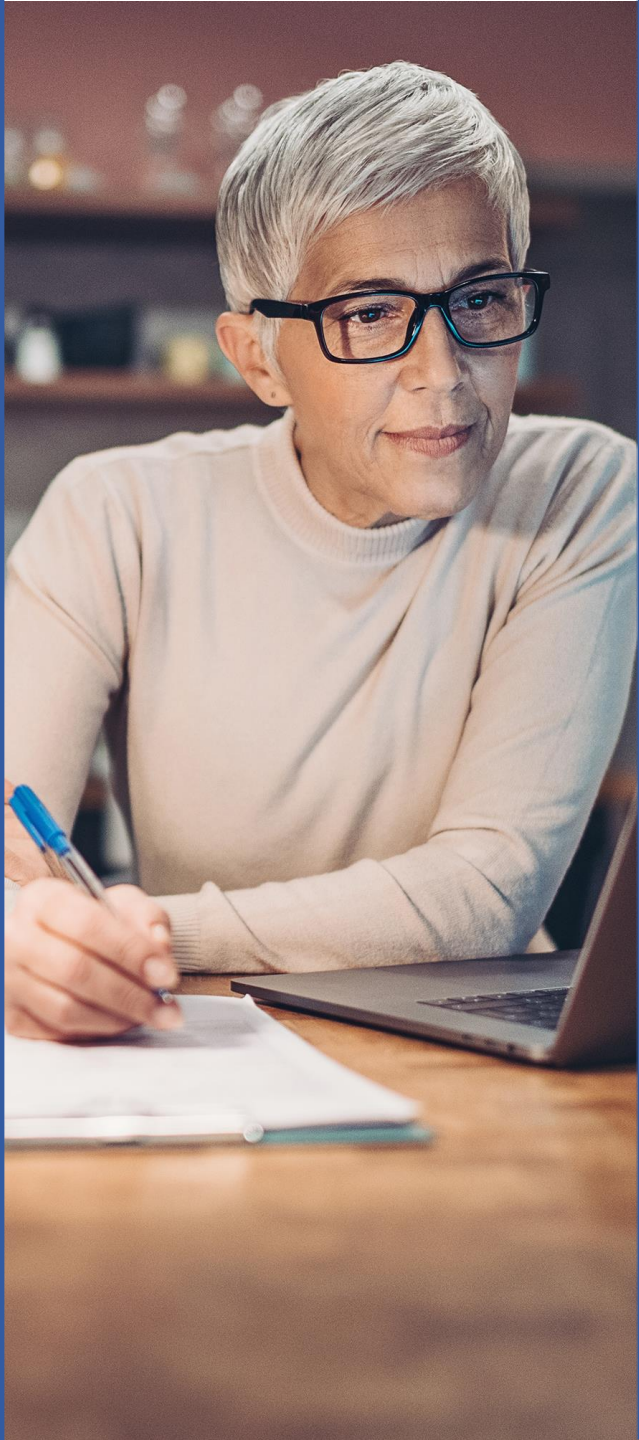


→ Policies & Other
Documentation

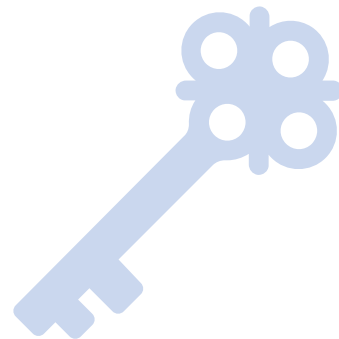
→ Compliance Issues

→ Best Practices









Setting Work From Home Expectations is Key!



Virtual Workforce – Practical Concerns

- 🖥️ Employee work performance: production and productivity? How will you monitor?
How will you know they are working?
- 🖥️ Communication and collaboration with co-workers?
- 🖥️ How do you manage people you never see in person?
 - 👤 Training and policies
- 🖥️ Policies regarding how they set up their workplace
 - 👤 Are you providing equipment, materials?
 - ➔ How will you get that back at the end?
 - ➔ Make sure your data can be removed from view at the click of a remote button
- 🖥️ You need to make sure you have policies that allow you to foster the right type of remote work environment.

The Virtual Workforce – Legal Issues

-  Work with payroll and accounting to make sure you are hiring people legally in each jurisdiction
-  Recognize there is no such thing as a one-size-fits-all employment form.
-  Are your advertisements compliant with new pay transparency laws?
-  Cybersecurity/data privacy concerns? Are you protecting your data and your customers'/clients' data?



Handbooks/Agreements/Hiring and Firing

You need to make sure your employees are informed of their legal rights where they live.

Think about how to structure your handbook to adapt to employees in other states.

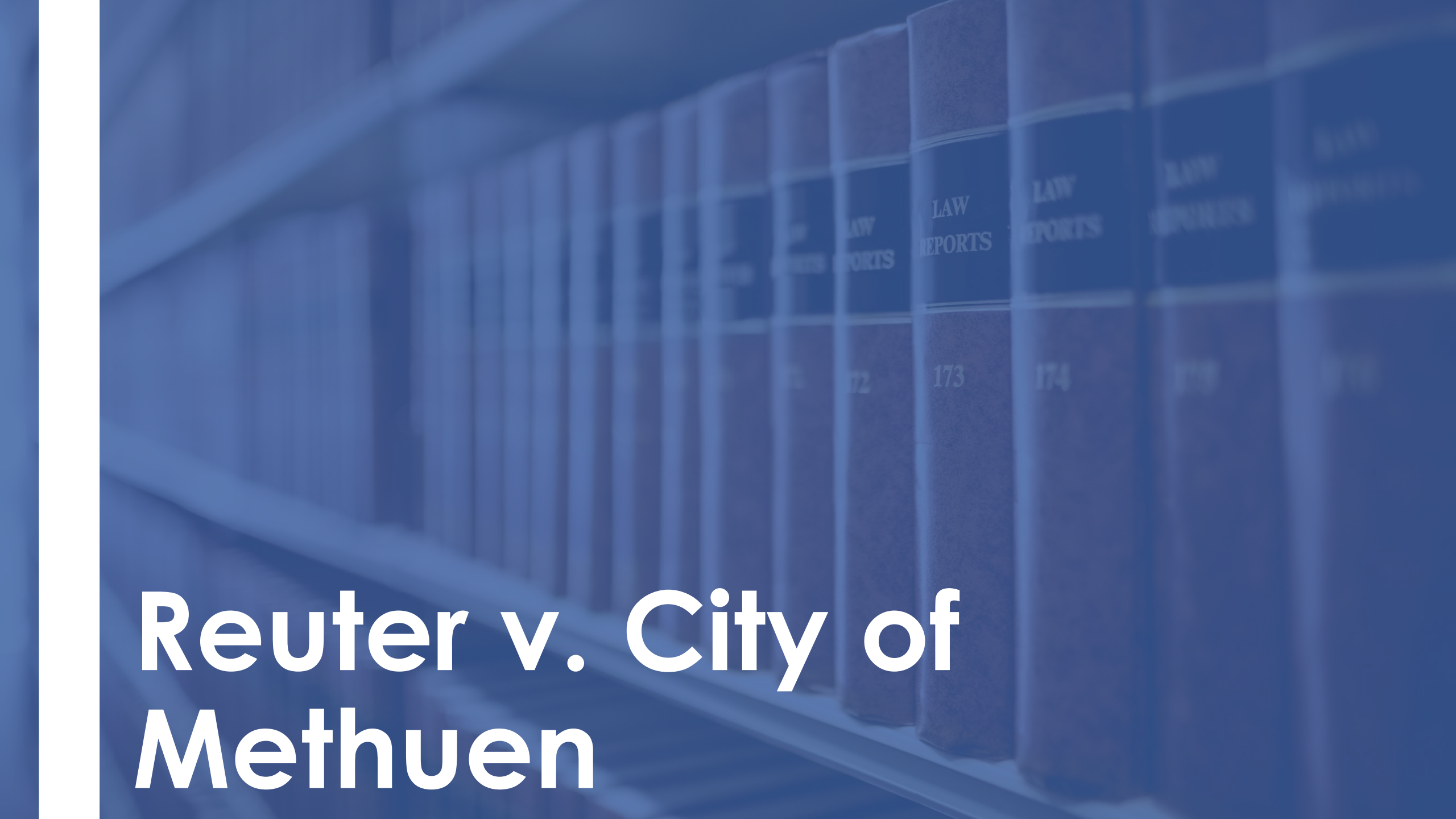
Agreements— you typically cannot have a NY Agreement on a CA or MA employee. You need to draft to comply with each state.

Your offer letters, separation/severance agreements, and termination forms all have to be adapted to the requirements of the state where the employee lives.



Examples of Issues We Have Seen

- ✓ Misclassified employees – not keeping track of time
- ✓ People working odd hours without authorization.
- ✓ People with no child/elder care, saying they are working full-time
- ✓ People working at more than one job
- ✓ Difficulty coaching, managing, terminating, because of inability to connect in person.
- ✓ There are employment law tricks in every state – consult with an expert



Reuter v. City of Methuen

Reuter v. City of Methuen

Must pay on the day of termination or face treble damages on wage total

Miscalculation of wages can result in treble damages

Strict liability statute, no good faith defense



Considerations in Light of Reuter

- ✓ Have everything ready in advance of termination date
- ✓ Suspension with pay pre-termination date
- ✓ Review payroll process and capabilities



No More Mistakes!

- ✘ Mistakes now equal automatic treble damages
- ✘ If you find a mistake, should you fix it?
- ✘ What about commissions? We need to be very careful how we draft these plans.



Common Problems

- ❌ Inside Sales or Outside Sales that no longer travel
- ❌ Administrative employees who do not exercise judgment and discretion
- ❌ Making your life easier by just paying a set salary
- ❌ Allowing hourly employees to work after hours without keeping track of time, e-mails, travel, weekend calls, it adds up.
- ❌ Failing to account for incentive, bonus, other supplemental pay in overtime.

A photograph of a man with glasses and a beard, wearing a light-colored shirt, sitting at a table and feeding a baby. The baby is sitting in a high chair, wearing a white long-sleeved shirt and pants. The man is holding a spoon and feeding the baby. The background shows a kitchen setting with a window and a brick wall. The entire image is overlaid with a blue tint.

Leave Requests FMLA / PFML

Difference Between Federal and State Leave Law

Federal

Work at a site with 50 or more employees within a 75-mile radius

Job protected leave for employees that have been employed for one full year and worked 1,250 hours

Unpaid

Maxes out at 12 weeks

→ *Except for leaves related to military service*

Massachusetts

No minimum number of employees

No minimum employment requirement

Covers former employees, temps, etc.

Paid – but with a cap

Job protected family leave is 12 weeks, medical leave is 20 weeks, together annual cap is 26 weeks.

Retaliation Provisions Under PFMLL

An employer may not interfere with the exercise of any right to which an employee is entitled under PFMLL

There is a 6-month presumption following leave that negative job action constitutes retaliation UNLESS the employer can show by “clear and convincing evidence” that the action was not retaliation

Burden on employer to prove that employer’s actions were not retaliatory

Application of “preexisting employment rule or policy shall be deemed to be clear and convincing evidence”



Protecting Against Claims of Retaliation

Any negative employment action (demotion, layoff, etc.) taken while employee is on leave or in the six months following leave is presumed to be retaliatory

→ Negative change shall not include trivial, or subjectively perceived inconveniences that affect de minimis aspects of an employee's work


What that means in practice:

→ Employee can take four weeks of leave, have a six-month anti-retaliation period, then take four more weeks of leave

Need to rebut this presumption with clear and convincing evidence.
What does this mean?

→ Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.

The Paper Trail

-  **Request for Leave**
-  **Letter designating leave**
 - designating leave triggers applicable period
-  **Certification of health care provider**
-  **Fitness-for-duty certificate**



FMLA/PFML Types of Leaves

- The Company must put eligible employees on leave. It is not voluntary.
- You must learn to recognize when an employee is taking time off that would qualify under these statutes.
- You must notify HR.
 - you must tell HR once you see someone out for a few days, if there is any chance it could last longer.
Let HR take over the process.
- Do not self-administer. These laws are very rigid with lots of required forms and notices.



Leaves of Absence

- ▶ Leaves are a reasonable accommodation
- ▶ Interplay between state leave laws and disability discrimination accommodation law
- ▶ Must hold open employee's job unless undue hardship
- ▶ Indefinite leave may be requested, but few cases require it

Intermittent Leave

- ➔ It may look like just sick leave for the same issue, but you should contact HR if there is any question that a condition may continue to require absences.
 - ◆ *For example, the employee is out once a week with migraines.*
- ➔ We need to get the leave paperwork completed, get the doctor's certification, and make sure the employee understands the nature of their intermittent leave.
- ➔ They cannot just call out when they feel like it, it must be tied to the underlying certified medical condition.
- ➔ If employee is on an intermittent leave, you must track approved leave time vs. non-approved leave time.
- ➔ For example, if employee is allowed to take time off every week for PT, but then calls out sick for her daughter's flu, the flu is not an "approved leave of absence" absence.

Coordination With Existing Employer Policies

- PFMLL runs concurrent with FMLA leave and the MA Parental Leave Act
- Policies requiring employees to first exhaust available PTO before taking PFMLL are not permissible
- If using a private plan, employers may allow employees to supplement PFMLL with accrued paid leave
Otherwise, on state plan they cannot
- Determine if you want to provide supplemental pay voluntarily



Disability Discrimination



It is very hard to know whether a medical condition is a disability.

→ Mental and physical impairments



Disability Discrimination:

→ Treating someone less favorably because of his/her disability (if the person can perform the job with or without a reasonable accommodation); and/or

→ Failing to provide a reasonable accommodation.

→ Even if the condition has been corrected or is managed, employee is still disabled.

Who Cares About Documentation?



Me (Your Attorney)



The MCAD



The Courts/the Juries

What Kind of Documents Do I Care About?

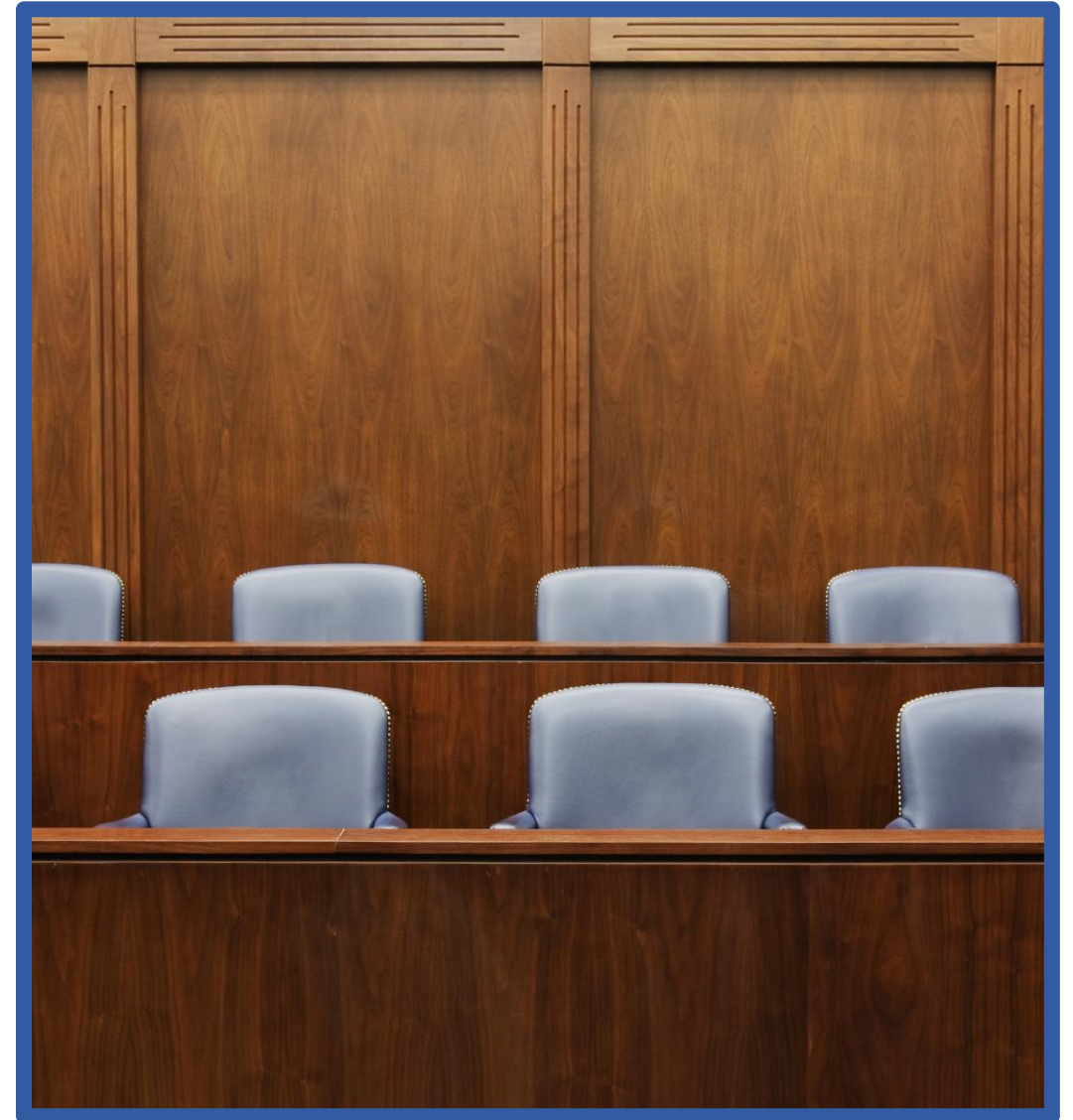
- ✓ Hiring Documents
- ✓ Performance Documents
- ✓ Investigation Documents
- ✓ Documents re: Terms and Conditions of Employment
- ✓ Communications

If You Don't Write it Down... It Never Happened

Documents do not:


- ↳ Lose their memory
- ↳ Change jobs
- ↳ Retire to Florida
- ↳ Fall apart on the witness stand

Juries tend to believe what they read if
it was written *at the time of the
incident*



Problems with Poor Performance Management

- ➔ Problematic employee with no record in their file
- ➔ Employee who doesn't know that they are not performing well
- ➔ Inconsistently applied standards feel unfair
- ➔ Lax standards create problems when managers try to enforce them
- ➔ Not fair to the rest of the team, to allow poor performance to go unaddressed



Document Problems As They Arise

- Continue to document, rewarding improvement, documenting continued struggles.
- There is no requirement for progressive discipline, but often taking discipline in steps is helpful
- Consider verbal warnings (that you document), written warnings, final warnings, and performance improvement plans, also, honest feedback on reviews, periodic check-ins.
- Private notes to yourself are not enough (and are legally problematic)
- Seek guidance on write-ups

The Best Way to Get Sued is to Fail to Document Problem Behavior

- Issue written warning. Put people on Performance Improvement Plans.
- Do annual (at least) performance reviews.
- If someone makes a mistake, tell them and document that you did.
- Employees rarely agree that they deserve to be fired.
- Make sure you have revised old-fashioned progressive discipline policies to give you leeway.
- Discipline managers who fail to discipline.

Train Managers

- Managers must be trained to give feedback – good and bad.
- When employees see an attorney after they are fired and there is a stack of warnings, the case isn't as desirable.
- They must be trained to go to HR or whoever covers that function when they learn of a complaint
 - Plaintiff's lawyers love to tell us that the employee repeatedly complained and nothing was done.
 - They need to know when a request should be run by someone else and documented in the file
 - ▶ Can I leave early today – my son has a doctor's appointment?
 - ▶ I have a medical issue that requires I be late regularly.
 - ▶ I can't lift more than 20 pounds, so can another employee do that part of my job?



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