

# EMPLOYEES WHO DON'T WORK

**Hugh F. Murray, III**

**Louis B. Todisco**

**Genea O. Bell**

**Michael C. Markowicz**

**June 18, 2010**

# Federal Family Medical Leave Act

**Hugh F. Murray, III**

860-240-6077 | [hmurray@murthalaw.com](mailto:hmurray@murthalaw.com)

- An eligible employee who works for a covered employer is entitled to a leave of absence for certain qualifying events

# Covered Employer

- Public agency
- Primary or secondary school
- Business with 50 or more employees

# Eligible Employee

- 12 months
- 1250 hours
- 50 employees within 75 miles

# Qualifying Events

- Birth or placement of child
- Care for family member with serious health condition
- Employee's own serious health condition
- "Qualifying exigency" related to military service of family member
- To care for injured service member

# Leave Of Absence

- What is it?

# Leave Of Absence

- How much?
- 12 weeks in a 12 month period



- Husband and wife combined 12 weeks

- Intermittent Leave

- Care for covered service member
- 26 weeks in a 12 month period

- Post & Distribute General Notice of FMLA Rights

- Eligibility Notice

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- Rights & Responsibilities Notice

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- Designation Notice



- Employee Responsibilities

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- Medical Certification

- Return To Work

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- Record Keeping Requirement

# Connecticut FMLA

**Michael C. Markowicz**

860.240.6000 | [mmarkowicz@murthalaw.com](mailto:mmarkowicz@murthalaw.com)

# Key Differences from Federal FMLA

## Covered Employer

- Business with **75** or more employees
- No math – How many on Oct. 1?

# Covered Employer

- Does **not** include:
  - Municipalities
  - Private or parochial elementary or secondary school
  - Local or regional board of education

# Eligible Employee

- 12 months
- 1000 hours
- 75 employees total
  - Recent superior court decision: must include out-of-state employees when counting.

# Qualifying Events

- Birth or placement of a child
- Family member with serious health condition
- Employee's own serious health condition
- Care for injured service member
  - Note: **no** qualifying exigency leave



# Leave Of Absence

- How much?
  - 16 weeks in a 24 month period

# Key Differences Between CT & Federal FMLA

- CT FMLA includes same-sex couples
  - Bonding time following birth or adoption.
  - Care for spouse suffering from serious health condition.

# Key Differences

- CT FMLA includes “in-laws” in definition of parent.

# Key Differences

- CT FMLA does **not** guarantee an employee's right to continued insurance coverage

# Key Differences

## Intermittent Leave

- Same means of minimum duration of leave
- Look back average hours for past 16 weeks (federal: 12 months)

# Key Differences

## Equivalent Pay Requirements

- CT FMLA: Must provide bonus if not reached due to FMLA leave.
  - e.g., Perfect attendance, safety.
  - Does **not** include performance based goals, such as sales goals.

# Key Differences

## Notices

- General notice may be satisfied in same way
- Eligibility notice must be provided within 2 days of request for leave

# Key Differences

## Medical Certification

- May use federal form, but CT FMLA does not permit “diagnosis”
- Employer can not contact health care provider directly
- Employer must pay for recertifications not covered by insurance



# Key Differences

## Return to Work

- Must provide light duty work if needed and available
- Equivalent position only if original position “not available”

# Key Differences

## Fitness For Duty Certification

- Fitness for duty certification can not include essential job functions
- Not allowed for intermittent leave

- Employer is covered by both state and federal FMLA. Bill is a long term full time employee. In the early morning hours of January 1, 2008, Bill was struck by a drunk driver, sustained serious injuries and was unable to work for 8 weeks. He returned to work March 1, 2008.

Date*	Federal FMLA	Connecticut FMLA
1/1/08	1 year “rolling backward looking”  12 weeks available	24 months “rolling backward looking”  16 weeks available

\* Note – assuming 1 month is 4 weeks for simplicity

- Bill had surgery on December 1, 2008 to address issues related to the injuries in the car accident. He was out of work for 8 weeks, returning February 1, 2009.

Date*	Federal FMLA 1 year “rolling backward looking”	Connecticut FMLA 24 months “rolling backward looking”
12/1/08	1/1/08 – 3/1/08 – 8 weeks used  4 available	1/1/08 – 3/1/08 – 8 weeks used  8 available
1/1/09	Time becomes available 1 day at a time, uses 4 weeks federal FMLA	See above

\* Note – assuming 1 month is 4 weeks for simplicity

- In September, 2009, Bill needed more corrective surgery. He would be unable to do his job for another 8 weeks.

Date*	Federal FMLA 1 year “rolling backward looking”	Connecticut FMLA 24 months “rolling backward looking”
9/1/09	12/1/08 – 2/1/09 – 8 weeks used  4 available	1/1/08 – 3/1/08 – 8 weeks  12/1/08 – 2/1/09 – 8 weeks  0 available
10/1/09	None Available	None Available

\* Note – assuming 1 month is 4 weeks for simplicity



- January 1, 2010, Bill checks into a clinic to address his addiction to painkillers. The program is an 8 week in-patient program. He returns March 1, 2010.

Date*	Federal FMLA 1 year “rolling backward looking”	Connecticut FMLA 24 months “rolling backward looking”
1/1/10	10/1/09 – 11/1/09 – 0 weeks 9/1/09 – 10/1/09 – 4 weeks 1/1/09 – 2/1/09 – 4 weeks Therefore 8 weeks used, 4 left, but 1 day regenerates each day for the Jan 09 LOA, so 8 weeks	9/1/09 – 11/1/09 – 0 weeks (did not count against State FMLA) 12/1/08 – 2/1/09 – 8 weeks 1/1/08 – 3/1/08 – 8 weeks One day regenerated each day, so 8 weeks effectively available

\* Note – assuming 1 month is 4 weeks for simplicity

- In September, Bill approaches you and says that his wife is expecting a baby and he wants to take as much time off as he can to bond with the child. The baby is due November 1, 2010.

Date*	Federal FMLA 1 year “rolling backward looking”	Connecticut FMLA 24 months “rolling backward looking”
11/1/10	1/1/10 – 3/1/10 – 8 weeks 4 available	1/1/10-3/1/10 – 8 weeks 9/1/09 – 11/1/09 – 0 weeks 12/1/08 – 2/1/09 – 8 weeks So none as of 11/1/10
12/1/10	1/1/10 – 3/1/10 – 8 weeks 11/1/10 – 12/1/10 – 4 weeks 0 available	As of 12/1/10, the leave that commenced 12/1/08 drops off 1 day at a time so he has 8 weeks he can use
1/1/11	The leave commenced 1/1/10 drops off one day at a time, so 8 weeks available	4 more weeks available
2/1/11	4 more weeks left	0 weeks available

\* Note – assuming 1 month is 4 weeks for simplicity

# Leave As a Reasonable Accommodation for Disability

**Louis B. Todisco**

203.772.7718 | [ltodisco@murthalaw.com](mailto:ltodisco@murthalaw.com)

# Leave As a Reasonable Accommodation for Disability

- The Connecticut and Federal FMLAs provide for a set amount of leave for a “serious health condition” to “eligible employees” of a covered employer.

# Leave As a Reasonable Accommodation for Disability

- However, an employee may also be entitled to a leave of absence under the:
  - Americans with Disabilities Act (ADA)
  - Connecticut Fair Employment Practices Act (CFEPA)

# Leave As a Reasonable Accommodation for Disability

- The ADA and the CFEPFA may apply when:
  - The employer is not covered by an FMLA
  - An employee is not eligible under an FMLA
  - An employee has exhausted his/her FMLA leave



# Leave As a Reasonable Accommodation for Disability

- The ADA and the CFEPA do not specifically address leave:
  - However, both require a “reasonable accommodation” to enable an employee to fulfill the essential functions of the employee’s job.
  - A leave of absence may be a reasonable accommodation

# Leave As a Reasonable Accommodation for Disability – Employer Coverage

- The ADA and the CFEPA cover more employers than the FMLAs.
  - ADA - 15 or more employees
  - CFEPA - 3 or more employees

# Leave As a Reasonable Accommodation for Disability – Employee Eligibility

- More employees are potentially “eligible employees” under the ADA and the CFEPAA
  - No hours requirement for employee eligibility
  - No length of service requirement for employee eligibility

# Leave As a Reasonable Accommodation for Disability – the Legal Standard

- To be able to claim an entitlement to leave under the ADA or CFREPA an employee must suffer from a “disability.”
- A “serious health condition” may or may not also be a disability.

# ADA Definition of “Disability”

- For “reasonable accommodation” purposes the ADA defines disability as:
  - A physical or mental impairment that substantially limits one or more major life activities
  - Physical impairment, mental impairment, major life activity and substantially limits are defined terms

# CFEPA Definitions of Disability

- Three pertinent definitions:
  - Physically disabled
  - Mental disability
  - Learning disability

# CFEPA Definitions of Disability

- "Physically disabled" refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device.

# CFEPA Definitions of Disability

- "Mental disability" refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders."



# CFEPA Definitions of Disability

- "Learning disability" refers to an individual who exhibits a severe discrepancy between educational performance and measured intellectual ability and who exhibits a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in a diminished ability to listen, speak, read, write, spell or to do mathematical calculations.

# Leave As Reasonable Accommodation

- Leave may be a reasonable accommodation to allow an employee to:
  - Obtain medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
  - Recuperate from an illness or an episodic manifestation of the disability;
  - Obtain repairs on a wheelchair, accessible van, or prosthetic device;

# Leave As Reasonable Accommodation

- Avoid temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- Train a service animal (e.g., a guide dog); or
- Receive training in the use of braille or to learn sign language

# Leave As Reasonable Accommodation

- Interactive process to determine the accommodation
- Employee not necessarily entitled to the accommodation the employee prefers
- Employee is entitled to a reasonable accommodation

# Leave As Reasonable Accommodation – Undue Hardship Limitation

- Employer is not required to provide an accommodation that would impose an “undue hardship” on the operation of the business
- An undue hardship means an action requiring significant difficulty or expense in light of: the nature and cost of the accommodation, the financial resources of the facility involved or the employer generally, the operations of the employer and the impact of the accommodation of the operation of the facility, the overall size of the business and other factors.

# Pregnancy and Adoption Leave

**Genea O. Bell**

860.240.6042 | [gbell@murthalaw.com](mailto:gbell@murthalaw.com)

# Pregnancy Leave

## Follow all the other laws

- Federal FMLA
- Connecticut FMLA
- ADA
- Title VII/Pregnancy Discrimination Act
- Follow Connecticut Fair Employment Practices Act §46a-60

# Pregnancy and Adoption Leave

## Federal and Connecticut FMLA

- 12 weeks/16 weeks
- Prenatal appointments
- Prior to birth
  - If unable to work
  - To care for an incapacitated spouse
- Upon the birth or adoption of a child



# Pregnancy and Adoption Leave

## Connecticut FMLA

- For same sex parents, might not run concurrently with federal FMLA

# Pregnancy and Adoption Leave

## Example

- Female employee takes 16 weeks off to care for her pregnant spouse incapacitated by gestational diabetes.
- She then develops her own serious health condition and requests 12 more weeks off. Must you grant her the 12 weeks of leave?
- YES! She gets 28 total weeks of leave
- (16 CT + 12 federal).

# Pregnancy and Adoption Leave

## Things that make you go “hmmm”...

- Unlike federal law, Connecticut’s statute does not expressly state that the leave must be necessary to care for the newborn.

# Pregnancy (but not adoption) Leave

## ADA

- Normal pregnancies are not disabilities
- In very limited circumstances, a pregnant woman may have a serious complication that limits a major life activity and will qualify as a covered disability.

# Pregnancy (but not adoption) Leave

## Title VII and Pregnancy Discrimination Act

- Applies to employers with 15 or more employees
- Discrimination on the basis of pregnancy is “sex discrimination”
  - Overturned Geduldig v. Aiello, General Electric v. Gilbert
- What’s good for the gander is good for the (pregnant) goose.

# Pregnancy (but not adoption) Leave

## **Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60**

- Applies to employers with 3 or more employees
- No minimum period of employment to be eligible
- Does not apply to adoption

# Pregnancy (but not adoption) Leave

## Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60

- It shall be a discriminatory practice in violation of this section:
  - (A) to terminate a woman's employment because of her pregnancy;
  - (B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy;
  - (C) to deny to that employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer;
  - (D) to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and...benefits...unless...the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

# Pregnancy (but not adoption) Leave

## Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60 *(continued)*

- (E) to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available [where] an employee gives written notice of her pregnancy...and the employer or pregnant employee reasonably believes that continued employment in the position...may cause injury to the employee or fetus;
- (F) to fail or refuse to inform the pregnant employee that a transfer pursuant to subparagraph (E) of this subdivision may be appealed under the provisions of this chapter; or
- (G) to fail or refuse to inform employees of the employer, by any reasonable means, that they must give written notice of their pregnancy in order to be eligible for transfer to a temporary position;



# Pregnancy Leave

## The big points:

- Reasonable period of leave for disability due to pregnancy (even if FMLA is exhausted); “reasonable” is undefined
- After leave, reinstatement to original or equivalent job and benefits
- With written notice, temporary transfer to an alternate position if employer or employee believes mother or fetus may be harmed

# Pregnancy and Adoption Leave

**Questions?**

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# Military Service

**Michael C. Markowicz**

860.240.6000 | [mmarkowicz@murthlaw.com](mailto:mmarkowicz@murthlaw.com)

# Three Primary Laws

- USERRA (Uniformed Services Employment & Reemployment Rights Act)
- Federal FMLA
- CT FMLA

# USERRA

- Protects service member's reemployments rights when returning from military duty
- Prohibits discrimination on basis of military service

# USERRA Protects

- Army, Navy, Marine Corps, Air Force, Coast Guard & Public Health Service Corps
- Active duty and National Guard/Reserves

# USERRA Includes

- Active service
- Training (including Reserves drills)
- Funeral services
- Disaster response

# USERRA Applies To

- Nearly all employers
  - Regardless of size
- Nearly all employees
  - Including part-time & probationary employees



# USERRA Requirements

- May not deny initial employment, reemployment, continued employment, promotion or any benefit on the basis of past, present or future military service.

# USERRA Reemployment

USERRA guarantees reinstatement to employees who meet five criteria:

1. Absent from work due to uniformed service
2. Advanced notice that leaving work for service
3. Military service did not last longer than 5 years
4. Not released from service dishonorably
5. Reported back to the employer in a timely fashion

# USERRA

- Notice requirements

# USERRA Reinstatement

## The “Escalator Principle”

- Reemployed to same job would have had if not called away to service
  - Includes seniority and pay
- If not qualified, must be reinstated to other position.

# USERRA Reinstatement

- Must provide training / re-training if necessary & reasonable

# USERRA Reinstatement

- Time limits to return based on time of service are next regularly schedule work period following:
  - < 31 days = time to travel + 8 hours
  - 31 to 180 days = 14 days
  - > 181 days = 90 days
  - All deadlines may be extended up to 2 years as a result of a service injury or illness

# USERRA Health & Pension Coverage

- If service < 31 days, same as if remained employed
- If greater, may elect to maintain coverage up to 24 months
  - Employer may charge up to 102%
- Service time counts for vesting, participation & benefit accrual

# FMLA Military Leave

- Military caregiver (covered service member) leave
- Qualifying exigency leave



# Military Caregiver Leave

- Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave.
- Extends service member family leave to eligible employee who is:
  - Spouse
  - Son or daughter
  - Parent, or
  - Next of kin of a covered service member (“next of kin” = nearest blood relative)

# Military Caregiver Leave

- Applies to serious illness or injury incurred in line of duty rendering unable to perform duties
- Including preexisting illness or injury aggravated in service

# Military Caregiver Leave

- 12 month period (CT & federal) calculated from first day of leave
- Combined limitation for spouses applies

# Military Caregiver Leave

- Counts against normal FMLA, but must count excess first
  - ex. 17 weeks of caregiver leave would 9 weeks of regular federal and/or CT leave

# CT vs. Federal

- 2009 federal amendment to include:
  - Reserves / National Guard
  - Veterans serving anytime in 5 years preceding treatment, recuperation or therapy.

# Qualifying Exigency Leave

- Help families of members of Armed Services & National Guard / Reserves manage affairs while member is on active duty in support of a contingency operation.

# Qualifying Exigency Leave

1. Short-notice deployment
2. Military events and related activities
3. Childcare and school activities
4. Financial and legal arrangements

# Qualifying Exigency Leave

*(continued)*

5. Counseling
6. Rest and recuperation
7. Post-deployment activities
8. Additional activities not encompassed above, but agreed to by employer and employee



# Workplace Injuries

**Genea O. Bell**

860.240.6042 | [gbell@murthalaw.com](mailto:gbell@murthalaw.com)

# FMLA

- Serious Health Condition

# Workers' Compensation

- Income Replacement

# Light Duty Work

- Employer shall transfer employee to full-time work suitable to his physical condition where such work is available

# Non-Discrimination

- No employer shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter.

# Pepperidge Farm Case - 1 Year



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# Other Mandatory Leaves of Absence

**Hugh F. Murray, III**

860-240-6077 | [hmurray@murthalaw.com](mailto:hmurray@murthalaw.com)

- Full Time Elective Municipal or State Office



- Jury Duty

- Family Violence

- Policies/Agreements