



Leaves, Accommodations and Compliance Challenges for 2018

**Presented by Laura Kerekes, SPHR, SHRM-SCP
ThinkHR**

March 2018

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TODAY'S PRESENTER



Laura Kerekes
Chief Knowledge Officer, ThinkHR

- Leads ThinkHR's content knowledge and human resources service delivery teams since 2007
- Before ThinkHR: Held executive human resources officer positions for large multinational companies in banking, manufacturing and high tech industries
- Credentials:
 - Education: B.S. Bus Admin, MBA, plus Stanford University Executive HR Management program certification
 - Senior Professional in HR certifications (SPHR,SHRM-SCP)

About ThinkHR: ThinkHR is the leader in integrated HR solutions that leverage trusted knowledge, human expertise and innovative technology designed to help companies rapidly achieve compliance and deploy best practices across their organizations. Our cloud-based platform is supported by a live team of experts who answer HR questions from employers to resolve people, workplace and compliance related issues quickly and efficiently. Serving 7 out of 10 of the largest insurance brokerage firms in the USA, ThinkHR also delivers expert HR content and training services to over 130,000 companies.

AGENDA

- Overview of the leave landscape
- Federal and state family leaves and paid sick time
- Time off as a reasonable accommodation
- Tax reform and FMLA
- Key takeaways and questions

Leaves Are On the Agenda

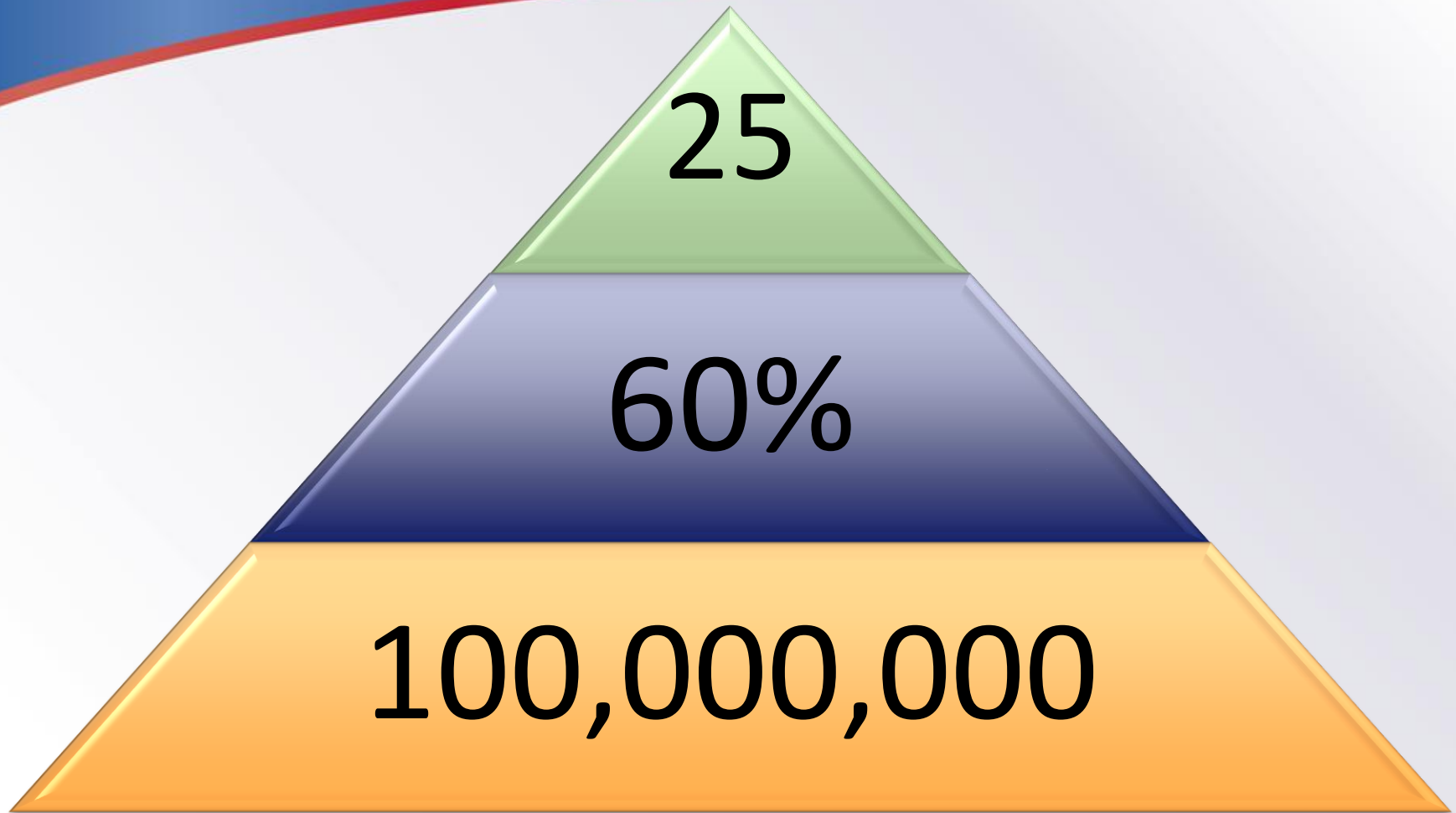


Building Momentum for Paid Sick Leaves

- 9 States + District of Columbia
- 30 Counties and Cities
- Laws vary considerably
 - Employers covered
 - Employees eligible
 - Amount of time
 - Unpaid or paid



Facts About FMLA



Federal Family and Medical Leave Act

Coverage

- 50+ employees within a 75-mile radius
- Employee must work at least 1,250 hours in preceding year, with 12 months of service

Leave

- 12 weeks unpaid leave for self or to care for family members

Benefits Continuation

- Same cost sharing prior to the leave for up to 12 weeks

Reinstatement

- Same or equivalent position
- Key employee exception
- Light duty can be refused

State Family and Medical Leave Laws

- California
 - CA Family Rights Act – 50 ees
 - New Parent Leave Act – 20 ees
 - Paid Family Leave – 50 ees
- Connecticut Family and Medical Leave Act – 75 ees
- District of Columbia Family and Medical Leave Act – 20 ees
- Hawaii Family Leave Act – 100 ees



State Family and Medical Leave Laws

- Maine Family and Medical Leave Act – 15 or more ees at one location, city/town/municipal agency with 25 ees
- Massachusetts Small Necessities Leave – 50 ees
- Minnesota Pregnancy and Parental Leave Act – 21 ees at a worksite
- New Jersey
 - New Jersey Family Leave Act – 50 ees
 - New Jersey Family Leave Insurance – all
- New York Paid Family Leave – all
- Oregon Family Leave Act – 25 ees

State Family and Medical Leave Laws

- Rhode Island
 - Parental and Family Medical Leave Act – 50 ees
 - Temporary Caregiver Insurance Program – all
- Vermont
 - Parental and Family Leave – 10 ees
 - Short-Term Family Leave – 15 ees
- Washington State
 - Family Leave Act – 50 ees
 - Family Care Act – all
- Wisconsin Family and Medical Leave Act – 50 ees

Consolidated Omnibus Budget Reconciliation Act (COBRA)

Coverage

- 20 or more employees for more than 50% of the preceding calendar year
- Covered employees, spouses, former spouses and dependent children

Qualifying Events

- Termination of employment, reduction of hours, death, divorce or legal separation, entitlement to Medicare, loss of dependent child status

Period of Coverage

- 18 months
- 29 months in case of disability
- 36 months if there is a second qualifying event

Premium Payment

- 102% of premium
- 150% after 18 months in case of disability

States Have Their Own COBRA



- Mini-COBRA laws are insurance laws
- Applicable provisions for continuation are set forth in the group policy
- Most states have provisions, except:
 - AL, AK, AZ, HI, ID, IN, MI, MT, WA

Americans with Disabilities Act

Coverage

- 15 or more employees
- Employees covered at date of hire.

Leave

- Unpaid leave as a reasonable accommodation for disability

Benefits Continuation

- Not specified -- per company policy and practice

Reinstatement

- Suggested but not absolute.
- Undue hardship defense.

Denying Accommodation Can Cost \$\$



- *McClain v. Tenax Corporation*
– employer's summary judgement denied 1/18
- *Hill v. Asian American Drug Abuse Program Inc.* --
Judgment entered 1/18 --
\$4.5 million

Undue Hardship Relies on Facts

Consider the following criteria:

- Nature and cost of accommodation
- Overall financials of the company; impact on expenses and resources
- Nature of the company operations
- Impact of the accommodation on the company's operations



How Much Time Off is Reasonable?

- Depends upon facts and circumstances including size of employer and impact on business operations
- Other factors:
 - Length of additional leave required
 - Flexibility to allow intermittent or reduced work
 - Additional leave will return worker to capability to perform essential functions of the job
 - EEOC and courts do not require indefinite leaves

Interactive Process Checklist

- ☐ Don't put off the tough conversations.
- ☐ Make sure your employee knows you want to work with him or her. Ask: What do you need to successfully perform your job?
- ☐ Ask the employee to get information from the medical provider about the ability to do the job if needed.
- ☐ Provide job description, outlining essential functions of the job. Focus on job functions, not medical facts.
- ☐ Discuss accommodation options with key company decision makers (and legal counsel if necessary).
- ☐ Consider all options and accommodate when feasible.
- ☐ Document all discussions, options and resolutions.

Managing Leaves with ADA

Avoid 100% healed policies

- Can be seen as avoiding accommodation rights
- Don't automatically terminate employees for exceeding set FMLA/state leave amounts

Limit requests for medical information

- DO obtain medical certification of need for time off or accommodation
- DO require information regarding return to work
- DON'T request or collect overly detailed medical info

Engage in interactive discussions for accommodations

- Keep conversation flowing with employee
- Examine all possibilities
- Document every interactive discussion relating to the accommodations

Accommodation Tools

West Virginia University Research Corporation [US] | <https://prod.askjan.org/toolkit/>

JAN Workplace Accommodation Toolkit

Building Your Inclusive Workplace



FMLA Tax Credit

- Eligible for employers who pay employees while they are on FMLA
- Tax credit, not deduction
- If 100% of normal wages paid up to \$72,000, credit is 25% of pay
- Credit reduces pro rata to 12.5% for 50% of regular pay.
- Must offer 2 weeks of paid FMLA leave, maximum of 12 weeks
- Other provisions apply



2018 Estimated Tax Credit Calculation

- **Estimate wages paid per company paid family medical leave policy.** Includes annual wages up to \$72,000 per employee paid for FMLA up to 12 weeks per absence and excludes vacation, sick leave, PTO or short-term/statutory disability benefits from the number above.

- **Multiply by:**
 - 25% if the policy pays 100%
 - 22.5% if the policy pays 90%
 - 20% if the policy pays 80%
 - 17.5% if the policy pays 70%
 - 15% if the policy pays 60%
 - 12.5% if the policy pays 50%

** Company must provide a qualifying paid family and medical leave for at least 2 weeks and should consult with professional counsel to determine tax liability.*

Key Takeaways

- Watch for more state/local paid sick leave and parental leave laws until Washington acts.
- Be sure to align federal FMLA and COBRA with mini-state plans.
 - FMLA – most advantageous to employees
 - COBRA – check state insurance rules
- Comply with ADA and enter into the interactive discussions to accommodate returns to work

Resources

ThinkHR Resources

- Paid Sick Leave by State and Locality
- Federal Leave Law Chart
- State Family and Medical Leave Chart

Job Accommodation Network (JAN) Resources

- Workplace Accommodation Toolkit
<https://prod.askjan.org/toolkit/#>



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