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Employment Law Letter

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EMPLOYER LIABILITY

Providing housing to employees in Texas: What risks may affect you

by Jacob M. Monty, Monty & Ramirez, LLP

Providing housing to employees may seem like a practical solution, but it carries significant legal risks, especially for employers hiring undocumented workers. A recent case in South Texas demonstrates how offering housing to employees can result in federal harboring charges under 8 U.S. Code § 1324, even without the intent to conceal workers from immigration authorities. Additionally, employers acting as landlords face potential violations of Texas labor laws, which can lead to financial penalties and civil litigation.

Housing or harboring?

A federal judge ruled that the owners of a South Texas bakery could be charged with harboring after a worksite enforcement action led to the apprehension of eight undocumented employees on February 12, 2025. According to federal agents, the business owners knew their employees were undocumented and provided them with housing adjacent to the business. Defense attorneys argued that providing shelter doesn't necessarily mean the workers were concealed from detection, but the judge ruled there was probable cause to charge the bakery owners under 8 U.S. Code § 1324.

The case highlights one of the many potential problems created when employers overextend the general employer-employee relationship. In general, it isn't a good idea for employers to provide their employees with housing because it adds complexity to a relationship that should otherwise be simple. Not only are employers supposed to maintain a professional relationship within the workplace, but they now also tack on the role of landlord.

These complexities will be explored more in the article, but first we must learn about what constitutes harboring.

What is harboring?

Harboring, as defined by 8 U.S. Code § 1324, includes the following key elements:

- Knowledge of an individual's undocumented status—the person must know or recklessly disregard the fact that the individual is unlawfully present in the United States;
- Assisting in transportation or movement—moving or attempting to move the individual within the United States;
- Concealing or shielding the individual from detection—providing housing or other means of hiding an undocumented person; and
- Encouraging unlawful residence—taking actions that induce or help the individual remain in the United States illegally.

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Court interpretations of harboring in employment and housing

Federal courts have addressed what constitutes harboring in employer-employee and landlord-tenant relationships. The U.S. 7th Circuit Court of Appeals held that employers that provide their undocumented employees with housing may be charged under the harboring statute if their actions help shield their employees from immigration (by omitting their names from wage records and providing housing).

The 11th Circuit held that if an employer gains a financial advantage from the housing arrangement (for example, the undocumented workers are paid less and work longer hours because of the housing, benefiting the employer), it can be charged under the harboring statute.

Despite these rulings, there may be a way for employers that seek to provide their employees with housing without the risk of criminal penalties to continue to do so.

Additional legal risks of employer-provided housing

It's generally not advisable for employers to act as landlords to their employees because of the potential legal and financial risks involved. When housing and employment are intertwined, disputes over rent can easily become labor law violations.

For example, if an employer provides an employee with a small loan to cover overdue rent and later deducts unpaid amounts from the employee's wages, it may violate the Texas Payday Law, which prohibits unauthorized deductions from wages. This could subject the employer to penalties from the Texas Workforce Commission and potential civil litigation from the employee.

Employers that are adamant about providing housing should be clear on the possible risks when doing so.

Good practices and leases may limit employer risk of federal penalties

Compliance with federal law is the rule, especially now with increased enforcement. You should remember that the Immigration Reform and Control Act (IRCA) mandates that you have an I-9 for every employee, and you can't knowingly hire undocumented workers.

Of course, problems may arise when employees provide false documentation and the employer offers housing. Though it may be an honest mistake, federal law imposes a fine of up to $250,000 for an individual and up to $500,000 for an organization that's found to harbor an undocumented person in addition to a maximum of 5 years' imprisonment. These penalties are much stricter compared with the penalties for hiring undocumented workers.

Because the penalties for harboring are so harsh, employers may add a lease agreement when providing housing to employees to reduce their risk of federal penalties. A formal lease agreement may provide protection against harboring charges because it suggests a business transaction rather than an effort to encourage or induce someone to remain in the United States unlawfully.

The 4th Circuit has ruled that simply renting to undocumented individuals isn't harboring unless additional steps are taken to shield them from detection.

What should a lease include to reduce risk?

In addition to a robust status verification system, employers may include the following in a lease to mitigate the risk of harboring charges:

- A monthly rent amount and payment terms;
- A clearly defined lease term (a month-to-month or fixed-term contract); and
- A written record of all transactions related to the lease.

Conclusion

Providing housing to employees, even within a formal landlord-tenant arrangement, is generally not advisable because of the significant legal and financial risks involved. The recent South Texas case highlights how such arrangements can lead to harboring charges, even if you don't intend to shield employees from detection.

Additionally, employers that act as landlords may risk violating state labor laws if disputes over rent or deductions arise. If you choose to provide housing despite these risks, you must be mindful of potential federal and state penalties. At a minimum, you should ensure compliance with federal hiring laws and use formal lease agreements to clarify the nature of the arrangement. As enforcement efforts increase, seeking legal counsel and adopting best practices are essential to minimize liability.

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PERSONNEL POLICIES

5th Circuit ruling highlights pros, cons of employee attendance point systems

by Jacob M. Monty, Monty & Ramirez, LLP

A recent decision from the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) serves as a compelling example of how a well-implemented employee attendance point system can support an employer's nondiscriminatory decision to terminate an employee for attendance policy violations. However, employers must still be cautious to ensure compliance with applicable laws when implementing such attendance policies.

How employee attendance point systems can benefit your business

Employee attendance point systems are a common method employers use to manage and track employee attendance. The systems assign points for attendance infractions, such as tardiness, absences, or early departures. The employer keeps a record of each employee's attendance points over a specific period, typically a rolling year. When an employee accumulates a certain number of points, it triggers specific actions, ranging from a verbal warning to more severe consequences like suspension or termination.

Attendance point systems, when properly implemented, create a clear and consistent method for tracking attendance, encouraging employees to be more accountable for their punctuality and attendance. They can help reduce excessive absenteeism and unapproved leave, leading to a more reliable workforce. A well-implemented and structured point system treats all employees equally, reducing the risk of favoritism in attendance-based disciplinary actions. The systems are also helpful by providing a clear record of attendance issues, which can be useful for HR and management in making informed decisions.

Point system pays off for Valvoline

Valvoline's thorough recordkeeping of employee absences through its point system paid off greatly when Craig Price, II, a former employee at its La Porte plant in Texas, filed a lawsuit against the company, alleging his termination was racially motivated and that he had been subjected to a hostile work environment.

The court granted summary judgment (dismissal without a trial) in Valvoline's favor, affirming that Price's termination was based on his attendance record and not on race discrimination. The court noted that the company's attendance point system was applied consistently and fairly to all employees, demonstrating that Valvoline's decision was nondiscriminatory. Price's termination was the result of his repeated absenteeism, which

Cutting-Edge HR

Student loan debt called key factor in job offer decisions. A report from financial services provider MissionSquare Research Institute finds that student loan debt influences job acceptance decisions for 56% of public-sector employees and 62% of private-sector employees. The data, reported in February, also shows that student loan debt has a negative effect on retention. The report, "The Ripple Effect of Student Debt: Shaping Careers, Financial Choices, and Well-Being in Public and Private Sectors," shows how debt encourages an emphasis on short-term planning and investing or no investing at all. The research found that employees with student debt perceive the debt as a barrier to their career advancement, and it's associated with a higher likelihood of negative work morale. Also, employees who pursue professional development goals are more likely to have student loan debt compared with those who don't pursue those goals.

Research finds live training most popular for frontline workers. Research from the Association for Talent Development (ATD) reported in January shows that 75% of organizations use on-the-job coaching by managers to train frontline employees. On-the-job coaching was found to be the most popular form of on-the-job training, but job shadowing, employee knowledge-sharing, and coaching by peers were also popular training methods used to build employee technical and hard skills, retain and pass along institutional knowledge, and familiarize employees with the industry. ATD's research also found that nearly two-thirds of organizations measure the impact of their training efforts for frontline employees on business goals. Organizations that don't measure impact often report they don't have the right tools or lack resources like budget and time.

Study finds most workers with chronic conditions haven't told employer. A national poll has found that 76% of employees with chronic conditions like hypertension, heart disease, diabetes, and asthma need to manage their conditions during work hours, but 60% haven't formally disclosed their conditions to their employer. The poll, conducted by the Harvard T.H. Chan School of Public Health and the de Beaumont Foundation, also found that a significant share of the U.S. workforce faces additional challenges caring for family members with chronic conditions. The survey also found that one in four employees who have chronic conditions themselves or help family members with theirs say they don't have any paid leave or have run out of paid leave in the past year because they were trying to take care of their or their family's chronic conditions. ■

Federal Watch

NLRB counsel rescinds memos to reduce caseload. In February, William B. Cowen, acting general counsel of the National Labor Relations Board (NLRB), rescinded a series of memoranda issued by the former general counsel. In his memo to the NLRB regions, Cowen said the backlog of cases has grown "to the point where it is no longer sustainable." Among the rescinded memos are those addressing remedies to be sought, student-athletes' rights under the National Labor Relations Act, electronic monitoring, severance agreements, and noncompete agreements, as well as those concerning the Board's decision in *Cemex Construction Materials Pacific, LLC,* which deals with determining when employers are required to bargain with unions without a representation election.

DOL ends enforcement activity under rescinded EO 11246. The U.S. Department of Labor (DOL) announced in January that it would end all investigative and enforcement activity under the rescinded Executive Order (EO) 11246, which related to nondiscrimination in government employment and by government contractors and subcontractors. It also set out affirmative action obligations for federal contractors. The order was signed by President Lyndon B. Johnson on September 24, 1965, prohibiting employment discrimination by contractors and requiring them to take certain affirmative actions to prevent racial discrimination. On January 24, 2025, Acting Secretary of Labor Vince Micone transmitted Secretary's Order 03-2025 to all department employees, including the Office of Federal Contract Compliance Programs, the Office of Administrative Law Judges, and the Administrative Review Board.

EEOC head speaks out against 'immigration crisis.' Andrea Lucas, acting chair of the Equal Employment Opportunity Commission (EEOC), announced on February 19 that her agency was "putting employers and other covered entities on notice" about illegal preferences against American workers. "The EEOC will help deter illegal migration and reduce the abuse of legal immigration programs by increasing enforcement of employment antidiscrimination laws against employers that illegally prefer non-American workers, as well as against staffing agencies and other agents that unlawfully comply with client companies' illegal preferences against American workers," a statement from the EEOC said. Lucas called unlawful bias against American workers "a large-scale problem in multiple industries nationwide." The agency said it has a track record of investigating and prosecuting unlawful discrimination, but Lucas said, "There is room for enhanced investigation and enforcement by the EEOC and in collaboration with other federal agencies." ■

was well-documented and managed through the company's attendance point system. *Price v. Valvoline, L.L.C.*, 88 F.4th 1062 (5th Cir., 2023).

Why employers should be cautious

While attendance point systems can be effective in promoting punctuality and reducing absenteeism, they also come with potential drawbacks and legal considerations.

Attendance point systems can sometimes be too rigid, not accounting for legitimate reasons for absences, such as medical emergencies or family issues. This can have a negative impact on employee morale. Using these systems also runs the risk of overstepping employees' legal protections.

Legal considerations

You should consider several legal factors to implement an effective attendance point system:

- **Compliance with the Family and Medical Leave Act (FMLA).** You must ensure absences covered under the FMLA aren't counted toward disciplinary points. FMLA-covered absences must be excluded from the point system to avoid legal repercussions.
- **Protected absences.** You need to exclude absences for legally protected reasons, such as medical leave, disability leave, and other state or federal protections, from the point system.
- **Americans with Disabilities Act (ADA) compliance.** You must consider reasonable accommodations for employees with disabilities, which may include a flexible attendance policy.
- **Avoiding discrimination.** You must apply your attendance policies consistently to mitigate the risk of discrimination claims. You should ensure the point system doesn't disproportionately affect certain groups of employees. The *Price* case underscores the importance of a structured attendance point system in managing employee attendance and defending against claims of discriminatory termination.

Actions you should take when using point systems

As shown in *Price*, if you adopt a well-implemented point system, you can foster a fair and productive work environment while protecting yourself from potential legal challenges. You should consult with employment law attorneys to carefully design your attendance policies to ensure compliance with all applicable laws.

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LITIGATION

Texas Tech lawsuit teaches multiple lessons

by Michael P. Maslanka, UNT-Dallas College of Law

Sometimes one lawsuit serves as a valuable teaching tool on several fronts. A recent case from the U.S. 5th Circuit Court of Appeals (the federal appeals court covering Texas) fits the bill! I'll tell you about the facts first, then the lesson.

Choppy academic career

Cara Wessels Wells attended Texas Tech University in Lubbock. In 2009, she became the paid research assistant to Professor Samuel Prien in the Department of Animal and Food Sciences.

It wasn't all smooth sailing in academia, and Wells alleged that Prien and another professor forced her to share a hotel room with them during an academic conference. Also, she claimed the professors consistently harassed and bullied her. After her graduation, she continued working in Prien's lab as a PhD student.

Wells graduated from the PhD program in 2017 and struggled to find work. Allegedly, Prien told her he couldn't recommend her for a job, so she would have no choice but to return to work in his lab. She finally ended up in the Tech Accelerator Hub program, which helped fund her in a tech start-up in products dealing with animal embryos. In May 2022, she was accepted as a mentor in the Hub program, which she hoped would turn into a paying position at the university.

But 2017 to 2022 wasn't a peaceful time for Wells and Prien, who she claimed misappropriated her research on embryos. (In fall 2020, she finally complained to the university about his conduct, including the hotel room incident back when she was his research assistant.) But it wasn't until a month after starting as a mentor in May 2022, however, that she claimed retaliation that included her being yanked from the program by the university, her being removed from the school's website, and other Hub mentors being told to have nothing to do with her in the future.

On November 11, 2022, Wells filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the university, alleging discrimination, harassment, and retaliation for complaining about the hotel room incident when the university removed her as a mentor and instructed others not to deal with her. Her lawsuit followed.

Lesson plan

The appeals court said the trial court was correct in tossing all of Wells's claims.

Lesson No. 1: Volunteers not protected by Title VII of the Civil Rights Act of 1964. Is an unpaid person an employee within the meaning of Title VII? If yes, there's protection from discrimination/retaliation, but if not, there's none.

To be an "employee," there must be "direct remuneration," such as a salary or wages. Incidental benefits like the hope of becoming paid after serving as a mentor or prestige from being a mentor are insufficient to elevate a volunteer to employee status. No employee status means no claim. Indeed, the last time Wells was actually employed as defined by the law was back when the hotel issue popped up and she was a paid research assistant. But that was well over 300 days before she filed her EEOC charge and so untimely.

Lesson No. 2: Retaliation doesn't have only whiskers but also a full-grown beard. Wells complained about her professor's conduct in fall 2020, and she claimed retaliation in May 2022. The word for the day, then, is "attenuated." Put differently, the time lapse between the complaint and the complained-of retaliation is too long to support an inference of a retaliatory motive. Retaliation claim tossed!

Lesson No. 3: No violation of Texas Uniform Trade Secrets Act (TUTSA). Wells claimed Prien violated the TUTSA when he misappropriated the embryo research she gave him. Texas courts use six factors in deciding whether such research (or any information a company believes is confidential or proprietary) is a trade secret under the Act:

- The extent to which the information is known outside the business;
- The extent to which it's known by employees;
- The extent of measures taken to guard the secrecy of the information;
- The value of the information to the business and its competitors;
- The amount of effort or money expended in developing the information; and
- The ease or difficulty with which the information could be properly acquired or duplicated by others.

So, Wells needed to allege facts to support these criteria. The appeals court cut to the heart of the matter: "Wells alleges [only] that the data from her [research] is a trade secret because she says it is." And that's, well, never enough. As I tell my classes, conclusions are like doughnuts: They look pretty and are super tasty but have zero nutritional value. As with doughnuts, so, too, with the law. *Wells v. Texas Tech University* (5th Cir., March 3, 2025).

Bottom line

Keep these lessons in mind. Press employees early on in a lawsuit, through a request to dismiss, to allege the facts supporting their lawsuit. Demand facts—don't settle for doughnuts.

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REASONABLE ACCOMMODATION

Texas Supreme Court limits disability definition

by Michael P. Maslanka, UNT-Dallas College of Law

A recent case from the Texas Supreme Court circumscribed the definition of "disability" in Texas Labor Code Section 21.002(6). Read on.

Argument

Sheri Kowalski worked as the director of finance at a hospital in Dallas. She was terminated in a reduction in force (RIF) but claimed the true reason for her termination was her disability.

She asserted she suffered from "severe" neck pain, "causing her difficulty when driving, typing at a computer for long periods of time, turning her head or turning around, sleeping, and focusing and concentrating."

Supreme court's response

The court was direct: "Mere difficulty" with everyday tasks is a far cry from what Section 21.002(6) requires, which is evidence of a significant limitation of a major life activity. (Lawyers love using the word "mere" as a modifier in advocating for their position.)

Here's the court expounding:

> Kowalski does not allege now, and no evidence from her time at [the hospital] indicates, that she was actually unable to complete (that is, that she was in any way limited as to) any of the tasks or activities that she describes.

There's more! The court said there was no evidence that the hospital was aware of the alleged severity of Kowalski's condition before letting her go.

From the top rope

Also, the court gave a judicial smackdown to the Dallas appeals court for siding with Kowalski. According to the Dallas court, there was a disability under Section 21.002(6) because there was evidence she needed a job accommodation so she could work more "comfortably." The smackdown from the high court:

> We disagree [with the Dallas appeals court]. The crucial point is whether Kowalski suffered an impairment that substantially limited at least one major life activity; no fact issue arises as to that point on account of the potential for her to be more comfortable at work. Allowing claims of mild discomfort to qualify as disabilities would substantially lower [an employee's] burden below the Labor Code's requirements. Everyone could claim a disability if that were true because everyone can be made more comfortable.

Ouch! *Dallas County Hospital System v. Kowalski* (Tex., Dec. 31, 2024).

Bottom line

Hold employees to their burden of proof—here, that they have a disability as that word is defined in the Texas Labor Code. Give careful consideration to whether you can turn the litigation tide at this key threshold issue.

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LITIGATION

No harm, no foul means no FMLA violation in Texas appeals court

by Michael P. Maslanka, UNT-Dallas College of Law

The Family and Medical Leave Act (FMLA) empowers employees to file an interference claim—that is, a claim based on actions taken by an employer to discourage or dissuade employees from seeking FMLA benefits. But in Texas, mere interference is insufficient to state a claim.

In addition, there must be an allegation that the employee was somehow harmed by the interference. No harm, no claim. For a recent case from Houston, read on.

Discouragement galore!

Duy Dihn Do worked as a manager for Comcast Cable Company. He claimed his managers told him to actively discourage employees from taking FMLA leave. Specifically, management directed their purported animus toward Jessica Edge, one of his direct reports. This included telling Do that she "is lucky to have a job to return to [after FMLA leave] . . . we want to hold her accountable." And on another occasion, he claimed management described Edge as "a disruptive employee" based on "her long [leave of absence]" and that the company would like "to fire her."

All this got to be a bit much for Do, who took FMLA leave for his own mental health issues related to these threats. While he was on leave, Comcast fired him because of alleged poor performance. He sued for FMLA interference, and in his lawsuit, he recited the various comments about Edge.

What's missing?

Although the company's comments were about another employee, they could be viewed by Do as discouraging him from taking his own FMLA leave. But under the case law of the Texas appeals court, an FMLA interference claim must also allege that the discouragement resulted in the employee's taking no FMLA leave or less FMLA leave than the employee was entitled to take. The lack of alleged harm means no claim. As the trial the court pointed out:

> [Do] has adequately alleged that [Comcast] discouraged him from taking FMLA leave. However, he has not alleged that he took less leave because of [Comcast's] various statements and actions.

So, the court dismissed the lawsuit but gave Do an opportunity to make such allegations in an amended lawsuit. *Do v. Comcast Corporation*, Civil Action No. 4:24 -cv-1358, S.D. (Tex. Houston, 2024).

Bottom line

Always hold employees to their burden of proof. Even if they amend their lawsuit and replead, you're still better off because now you know more about their lawsuit. One side note: Do could have alleged he was terminated in retaliation for refusing to violate the FMLA by disciplining Edge.

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HR Technology

Survey shows most organizations feel impact of IT skills gap. In January, technology talent developer Revature announced the results of its State of IT Skills Survey, showing that 77% of organizations have felt the impact of an IT skills gap. Also, 56% of the survey respondents reported that upskilling and reskilling are the top strategies for closing the IT skills gap in 2025. Revature's survey also found that 84% of decision-makers are concerned about finding tech talent this year. When asked about specific challenges relating to the skills gap, respondents named their top three as finding qualified talent with the necessary skills (71%), IT staffing companies that don't deliver talent quickly (57%), and upskilling/reskilling in-house talent (53%). While 56% of respondents reported upskilling/reskilling as their main strategies for closing the gap, 53% reported still struggling with training. The survey also found that 64% of the decision-makers surveyed believe generative artificial intelligence (GenAI) will positively affect training, and 56% believe it will help with hiring and retention this year.

Tech employment high at beginning of year. Technology companies and employers throughout the economy added tech workers in January, indicating strong hiring momentum as the year opened, according to data from CompTIA, a provider of vendor-neutral information technology training and certification products. In addition, new employer job listings for tech positions increased in January, with the total number of active job postings for the month being more than 476,000. CompTIA's analysis shows 49 states, plus Washington, D.C., saw increases in tech job postings in January. California, Texas, Illinois, Virginia, New York, and Florida recorded the largest month-over-month increases. Metropolitan areas that experienced big jumps in tech job postings included San Jose and San Francisco in California, New York City, Chicago, and Dallas.

Cross-border misuse predicted to cause AI data breaches. Technology research and consulting firm Gartner Inc. predicts that by 2027, more than 40% of artificial intelligence (AI)-related data breaches will be caused by the improper use of generative AI (GenAI) across borders. The speed of adoption of GenAI technologies by end users has outpaced the development of data governance and security measures, Gartner says. The lack of consistent global best practices and standards for AI and data governance exacerbates challenges by causing market fragmentation and forcing enterprises to develop region-specific strategies, Gartner says, which can limit organizations' ability to scale operations globally and benefit from AI products and services. ■

EMPLOYEE LEAVE

Employer do's and don'ts for applying accrued PTO to FMLA leave

by Charlie Plumb, McAfee & Taft

The Family and Medical Leave Act (FMLA) allows eligible employees working for covered employers to take up to 12 weeks of unpaid, protected leave during a 12-month period for absences resulting from covered family or medical reasons. A recent U.S. Department of Labor (DOL) opinion letter reminds us how unpaid FMLA leave and employees' accrued paid time off (PTO) may interact.

Policies requiring the application of accrued PTO

According to FMLA regulations, an employer may require its employees to apply or "substitute" their accrued PTO for any time missed on FMLA leave. In that way, employees would receive compensation while on unpaid FMLA leave by virtue of their PTO application.

To require PTO substitution for FMLA absences, however, the employer's FMLA policy must spell out that requirement. If the policy is silent on the issue, employees may choose whether they want to apply their accrued PTO to any FMLA absences.

Supplementing workers' comp and disability benefits with PTO

A workers' compensation injury can qualify as an FMLA-covered absence. Likewise, while on an FMLA-covered absence, an employee may be receiving short-term and/or long-term disability benefits. During an approved FMLA absence during which an employee is receiving workers' comp or disability benefits, the employer may not require the employee to apply accrued PTO to the absence.

However, the employer and the employee can mutually agree that the employee may use accrued PTO to supplement workers' comp or disability benefits to bring the employee's total compensation during the absence up to their regular, full-pay amount.

Supplementing state-based benefits with PTO

A number of states have enacted laws that provide paid leave to employees for family and medical absences, and it looks like other states may soon follow.

In a January 14 opinion letter, the DOL's Wage and Hour Division (WHD) addressed what should happen if an employee on FMLA leave is receiving some form of paid family or medical leave under state-based law. Under those circumstances, the rule for receipt of workers' comp or disability benefits would likewise apply to receiving state-based paid leave.

If an employee on FMLA-covered leave is receiving state-based family and medical benefits, the employer may not require the employee to apply accrued PTO to the absence. However, the employer and the employee can mutually agree that the employee may use accrued PTO to supplement their state-based family and medical benefits to bring the employee's total compensation during the absence up to their regular, full-pay amount. "U.S. Dept. of Labor Wage and Hour Division Opinion Letter" FMLA2025-01-A (1/14/25).

Next steps for employers

Now is a good time to review your FMLA policy to make sure it follows current legal requirements. Pay attention to whether and how your policy addresses the interplay between FMLA absences and accrued PTO. ■

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