

# Who's Taking Care of the Kids? Title VII, FMLA and Parental Leave

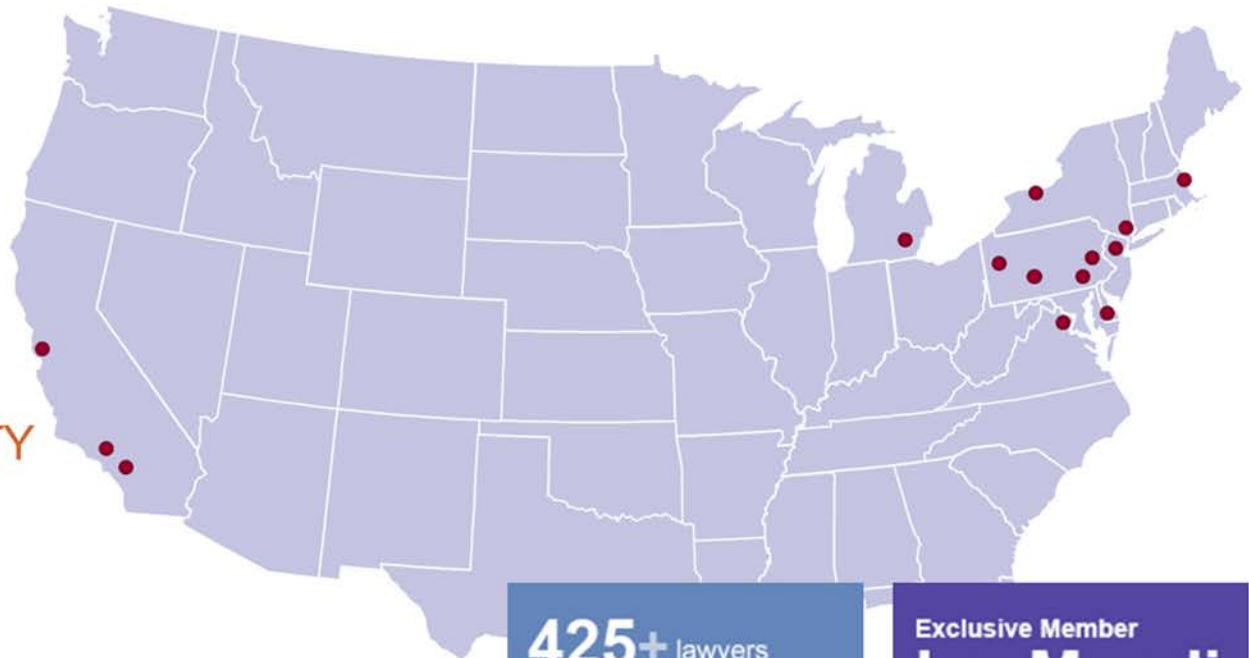
Hope A. Comisky  
Tracey E. Diamond  
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**Pepper Hamilton LLP**  
Attorneys at Law

Webinar - September 25, 2019

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Q&A

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Q&A



# Q&A

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- Attendee:
  - BD Brian Dolan (me)

Q&A

**The webinar will be starting at approx. 12:00pm ET.  
There is currently no audio until we start.**

**We are on mute and will be starting in a few minutes.**

Email [dolanb@pepperlaw.com](mailto:dolanb@pepperlaw.com) if interested in receiving a CLE form.

# Agenda

# Agenda

- ▶ Statutory framework and examples
- ▶ Recent cases/claims
- ▶ State-specific leave laws

# Title VII and ADA Basics

- ▶ Title VII: Prohibits discrimination based on gender
  - Applies to men and women
- ▶ ADA: Prohibits discrimination based on disability
  - Typical pregnancy is not considered a disability



# Pregnancy Discrimination Act

- ▶ Amendment to Title VII
- ▶ Prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions
- ▶ Employers must treat women affected by pregnancy the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work
- ▶ Considered to be a form of sex discrimination

# PDA and Maternity Leave



- ▶ Employer may not single out pregnancy-related condition for medical clearance procedures not required of other employees with medical conditions
- ▶ Pregnant employees must be permitted to work as long as they are able to perform their jobs
  - Employer may not insist that employee remain out of work until she gives birth
  - Employer may not make a rule prohibiting an employee from returning to work until a predetermined period of time after birth

# Family and Medical Leave Act

- ▶ Provides up to 12 weeks of unpaid leave in a 12-month period for any of the following reasons:
  - Employee's own serious health condition
  - The birth of a child or to care for a newborn child within one year of birth
  - The placement of a child with the employee for adoption or foster care and to care for the newly placed child within one year of placement
- ▶ Maintain employee benefits
- ▶ Restore employee to same or equivalent job after leave

# FMLA – Covered Employers/Eligible Employees

- ▶ Covered employers:
  - Employs 50 or more employees in 20 or more workweeks in the current or previous calendar year
- ▶ Eligible employees:
  - Worked at least 12 months
  - Worked at least 1,250 hours in past 12 months (break in service of 7 years or more doesn't count)
  - Works at a location where the employer employs at least 50 employees within 75 miles of that worksite

# Married Spouses

- ▶ Employer may limit leave to married spouses who work for same company to 12 weeks to bond with baby
- ▶ Employer may not limit leave to married spouses to care for employee's own serious health condition or to care for son or daughter with serious health condition

# Example 1

- ▶ Mary and Jim are married and work for the same employer. Mary uses six (6) weeks of FMLA leave to recover from childbirth and two (2) weeks of FMLA leave to bond with the newborn baby. In the same 12-month period, Jim wishes to use FMLA to care for the baby.

*How many weeks of leave may Jim take?*

# Answer:

*Jim has ten (10) weeks of FMLA leave left to bond with the newborn baby or for other FMLA reasons*





## Example 2

- ▶ Lily and Bruce are married and work for the same company. Lily gives birth to a baby via C-section. The baby is a preemie and must remain in the hospital for two (2) weeks. Lily takes eight (8) weeks of leave to recover from childbirth and Bruce takes two (2) weeks of leave to care for the baby while he is in the hospital.

*How many weeks of FMLA leave does Lily have left?*

*How many weeks of FMLA leave does Bruce have left?*

# Answer:

- \*Lily has four (4) weeks left
- \*Bruce has ten (10) weeks left



How did we get here?

# Evolution of Policies

- ▶ Provided maternity leave
- ▶ Legislation required that pregnant women be treated the same as other employees with temporary disabilities (1978)
- ▶ Childbirth covered under disability leave policies

# Evolution of Policies

- ▶ Wanted to provide separate leave to care for/bond with a child
- ▶ FMLA (1993) allows for up to 12 weeks unpaid leave
- ▶ Started to provide pay for at least a portion of that time to mothers or other “primary caregivers”
- ▶ Paid for less time to fathers or those who were not the “primary caregivers”
- ▶ Merging concepts of disability with need to care for a new child

# Evolution of Policies

- ▶ Expanded coverage to those who adopt
- ▶ Issues become more apparent
  - Those who adopt do not have any disability by virtue of having a new baby

# Recent Cases/Claims



# ***Rotondo v. JPMorgan Chase Bank N.A., No. 2:19-cv-02328 (S.D. Ohio May 30, 2019)***

## Undisputed Facts of the Case

- ▶ Plaintiff worked in the Global Security and Investigations unit
- ▶ Took two parental leaves
- ▶ 2015 policy
  - 1 week of paid parental leave as a “non-primary” caregiver
  - 12 weeks of paid leave for primary caregivers

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Undisputed Facts of the Case

- ▶ 2017 policy
  - 2 weeks of paid parental leave as non-primary caregiver
    - 16 weeks of leave for primary caregivers
    - Fathers were non-primary caregivers unless:
      - primary caregiver had returned to work
      - mother was medically incapable of any care of the child
  - Plaintiff's wife was a teacher and had the summer off (birth date of child was 6/6/17)
  - Plaintiff's wife recovered quickly from childbirth

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Undisputed Facts of the Case

- ▶ 6/15/17 – filed charge of discrimination
- ▶ 12/18 – Chase changed its policy
  - Eliminated gender-specific language
  - Clarified that fathers as well as mothers could be primary caregivers
- ▶ 2/8/19 – received a right to sue letter
- ▶ 5/30/19 – complaint filed
- ▶ 5/30/19 (same day) – filed motion for preliminary approval of class action settlement

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Plaintiff's Legal Theories

Violation of Title VII of the Civil Rights Act and analogous state FEP laws

- ▶ Sex discrimination in the terms and conditions of employment
- ▶ A sex-based classification
  - But for their sex, birth fathers would have been treated differently
- ▶ And a sex-based stereotype
  - Women should be caretakers of children and should remain at home to care for a child following the child's birth

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Plaintiff's Legal Theories

- ▶ Engaged in a pattern or practice
- ▶ If Plaintiff was a birth mother, he would have been able to receive 16 weeks of paid leave as a primary caregiver, regardless of whether or not his spouse was working during the leave period

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Chase's Legal Theories

- ▶ Policies not facially discriminatory
- ▶ Proof required that Chase applied its policies in a biased way
  - But it applied the policies in a gender-neutral way
- ▶ Plaintiff could have qualified for primary caregiver leave
- ▶ Far more fathers who requested primary caregiver leave were allowed to take the leave than were denied permission
- ▶ No damages because fathers continued to receive pay for the time period worked

# *Rotondo v. JPMorgan Chase Bank N.A.*

## Chase's Legal Theories

- ▶ Analysis requires individual inquiry that may bar class certification
- ▶ Employees signed an arbitration clause with a class waiver

# *Rotondo v. JPMorgan Chase Bank N.A.*

## The Settlement

- ▶ \$5,000,000 settlement fund
- ▶ Certification of settlement class
  - Class comprised of all male employees who took the maximum amount of non-primary caregiver leave then in effect [in a specific time period] and would otherwise have qualified for primary caregiver leave
  - @ 5,000 class members
  - Estimated 500 valid claims



# *Rotondo v. JPMorgan Chase Bank N.A.*

## The Settlement

- ▶ Maintaining gender-neutral policy for at least four (4) years
- ▶ Training related to gender-neutral policy to HR personnel and third-party HR providers
- ▶ Monitoring for two (2) years of applicants for leave, approvals, etc.

# ***EEOC v. Estee Lauder Companies, Inc., No. 2:17-cv-03897 (E.D. Pa. Aug. 30, 2017)***

## Facts Alleged in the Complaint

- ▶ 4 paid leave benefits
- ▶ Maternity leave
- ▶ Parental leave/adoption leave
  - 6 weeks paid for primary caregiver
  - 2 weeks paid for secondary caregiver
  - Same purpose – to bond with new children
- ▶ Plus transition back-to-work benefits for primary caregiver
  - 4 week period of flexibility at end of leave period
  - Not offered to secondary caregivers
- ▶ Centrally administered

# *EEOC v. Estee Lauder Companies, Inc.*

## Facts Alleged in the Complaint

- ▶ Father notified Estee Lauder of birth of child and intent to take primary caregiver leave
- ▶ Estee Lauder advised father that he was eligible only for secondary caregiver leave
- ▶ Father filed timely charge with EEOC
- ▶ On 3/27/17, EEOC issued a finding of reasonable cause
- ▶ On 8/30/17, EEOC filed complaint

# *EEOC v. Estee Lauder Companies, Inc.*

## Plaintiff's Legal Theory

### Policy violates Title VII

- ▶ Estee Lauder adopted parental leave policies which discriminate based on sex
- ▶ Biological fathers entitled only to the secondary caregiver leave
- ▶ Leave benefit for biological fathers is inferior for purpose of child bonding to the benefit for biological mothers, based on sex
- ▶ Estee Lauder applied the leave policies in a discriminatory manner based on sex

# *EEOC v. Estee Lauder Companies, Inc.*

## Plaintiff's Legal Theory

Policy violates the Equal Pay Act

- ▶ Estee Lauder provided inferior parental leave benefits to fathers although fathers and mothers performed equal work involving equal skill, effort and responsibility and under similar working conditions for a host of jobs
- ▶ Provided less wages in the form of paid parental leave and transition benefits

## Defendant's Legal Theories?

# ***EEOC v. Estee Lauder Companies, Inc.***

## Consent Decree – filed 7/17/18

- ▶ Injunctive relief prohibiting discrimination
- ▶ Injunctive relief prohibiting retaliation
- ▶ Settlement fund of \$1.1 million (@ 211 class members)
- ▶ Revised policy adopted 5/1/18
  - 20 weeks paid to eligible employees who are new parents
  - 6 week flexible schedule upon return to work
  - Regardless of gender or caregiver status

# *EEOC v. Estee Lauder Companies, Inc.*

## Consent Decree

- ▶ At least two (2) hours of training for those administering the new policies
- ▶ At least one (1) hour of training for all managers (with direct reports) and HR employees on sex discrimination laws and the requirements of the new leave policies
- ▶ EEOC monitoring for one (1) year

# **Savignac v. Jones Day, No. 1:19-cv-02443-RDM (D.D.C. Aug. 13, 2019)**

## Facts Alleged in the Complaint

- ▶ Plaintiffs (Julia Sheketoff and Mark Savignac) are husband and wife
- ▶ Both are former Supreme Court clerks
- ▶ Both worked in the appellate practice group
- ▶ Julia became pregnant; resigned to work for an appellate public defender



# *Savignac v. Jones Day*

## Facts Alleged in the Complaint

- ▶ Parental paid leave policy
  - 18 weeks for primary caregivers (biological)
  - 10 weeks for biological fathers
  - 18 weeks for adoptive parents who are primary caregivers
- ▶ Shortly before Julia left, she sent an email to the practice group head asking the firm to provide 18 weeks paid leave to her husband
- ▶ Request was rejected

# *Savignac v. Jones Day*

## Facts Alleged in the Complaint

- ▶ Son was born in about January 2019
- ▶ Mark takes leave/running concurrently with FMLA leave
- ▶ On 1/16/19, Mark writes email asking for 18 weeks paid leave
- ▶ On 1/22/19, firm fires Mark by emailing a letter – and sending it by hand delivery

# *Savignac v. Jones Day*

## Plaintiff's Legal Theory

Policy violates Title VII and D.C. Human Rights Act

- ▶ Additional 8 weeks is not really for “disability leave” because it is given to all biological mothers without regard to how long they will be disabled
- ▶ Adoptive mothers are not disabled as a result of childbirth but receive the same 18 weeks
- ▶ Firm advertises its parental leave policy to prospective employees as providing 18 weeks of paid leave to mothers and 10 weeks to fathers

# *Savignac v. Jones Day*

## Plaintiff's Legal Theory

- ▶ Policy gives more time to mothers to care for and bond with their newborns than fathers receive
- ▶ Policy reinforces gender roles and sex-based stereotypes – men are breadwinners and women are caretakers
- ▶ Another reflection of sexism at the firm
  - Partner commented, “What would a man do on parental leave – watch his wife unload the dishwasher?”

# *Savignac v. Jones Day*

## Plaintiff's Legal Theory

Policy violates the Equal Pay Act

- ▶ Denied fathers the amount of paid leave provided to mothers in the same practice group, with the same level of seniority, in the same office, even though those associates perform work which requires equal skill, effort and responsibility, and which is performed under similar working conditions

# *Savignac v. Jones Day*

## Plaintiff's Legal Theory

Firm interfered with rights in violation of FMLA and D.C. FMLA

- ▶ Entitled to 12 weeks of job-protected family leave to care for a new child
- ▶ Firm interfered with father's taking of protected family leave by terminating his employment while he was on leave
- ▶ Interference was intentional

# Savignac v. Jones Day

## Defendant's Legal Theory

- ▶ The 8 week differential is due to the disability of the biological mother
- ▶ All primary caregivers are treated the same with ten (10) weeks paid leave
- ▶ All adoptive parents are treated the same
  - Unique demands on time (travel and administrative hurdles)
  - Unique demands on resources (costs of travel and adoption)

See, *Johnson v. University of Iowa*, 431 F.3d 325 (8th Cir. 2005)

# State-Specific Leave Laws



# New York Paid Family Leave

## Overview

- ▶ Began on January 1, 2018, phased in over four (4) year period
- ▶ Part of New York Workers' Compensation Law
- ▶ Funded by employees through payroll deductions
  - 2019 contribution: 0.153% of gross wages each pay period, up to \$107.97 annually
- ▶ Provides employees with paid leave for:
  - bonding with a new child
  - caring for a covered family member with a serious health condition
  - when a covered family member is on active military duty or has been notified of an impending call of duty

# New York Paid Family Leave

## Eligibility

- ▶ Employers
  - Applies to all New York employers that have employed one or more individuals for 30 consecutive days
  - Compare to FMLA – applies to employers with 50 or more employees within a 75 mile radius

# New York Paid Family Leave

## Eligibility

### ▶ Employees

- Applies to all employees who have worked for at least 26 consecutive weeks (for employees whose regular schedule is 20 or more hours per week) or 175 days (for employees whose regular schedule is less than 20 hours per week)
- Compare to FMLA – applies to employees who have worked for an employer for at least one (1) year, and for at least 1,250 hours in the previous 12 months

# New York Paid Family Leave

## Leave and Benefit Limits

- ▶ Phased over four (4) years

Year	Max. Leave	Max. Benefits (% of average weekly wage)
2018	8 weeks	50%
2019	10 weeks	55%
2020	10 weeks	60%
2021	12 weeks	67%

- ▶ Maximum pay during leave is a percentage of the employee's average weekly wage, which caps at the same percentage of the state average weekly wage
  - 2019 state average weekly wage is \$1,357.11, making maximum weekly benefit \$746.41

# New York Paid Family Leave

## Leave and Benefit Limits

- ▶ In 2019, an employee who makes \$1,000/week would receive a benefit of \$550/week. Employee who makes \$2,000/week would receive a benefit of \$746.41/week
- ▶ NY PFL allows for intermittent leave
- ▶ For leave taken in weekly increments, employees are eligible for the maximum number of weeks of leave
- ▶ For leave taken in daily increments, maximum amount of leave is based on the average number of days worked per week
  - In 2019, an employee who works three (3) days a week gets the equivalent of three (3) days a week of paid leave for ten (10) weeks, or 30 days

# New York Paid Family Leave

## Baby Bonding Leave

- ▶ Employees can take PFL for bonding with a new child anytime within the first 12 months of the birth, adoption or foster care placement
- ▶ NY PFL does not cover employee's own serious health condition
  - Example of birth of a child
    - Pregnant employee can take up to 12 weeks of FMLA leave, and then take additional leave under NY PFL to bond with her child
    - NY PFL begins only after birth

# New York Paid Family Leave

## Use of Paid Time Off

- ▶ Employers may allow employees to use sick or vacation time so employees are fully compensated for time off, but cannot require the use of such leave
- ▶ If employer pays full salary during a period of PFL, employer may request reimbursement from the carrier for advance payment of benefits

# New York Paid Family Leave

## Benefits and Reinstatement

- ▶ Employers must maintain employees' existing health insurance benefits for the duration of the leave
- ▶ Employees are entitled to reinstatement upon their return to work
- ▶ Statute prohibits retaliation for requesting or receiving leave benefits



# New Jersey Family Leave Act

- ▶ New Jersey Family Leave Act
  - Take up to 12 weeks of family leave in a 24-month period
    - Purpose:
      - Care for family member with a serious health condition
      - To care for or bond with a child within one year of child's birth or placement for adoption or foster care
      - NOT FOR OWN SERIOUS HEALTH CONDITION!
  - Employer must have at least 30 employees
  - Employee must have worked for employer for at least one (1) year and at least 1,000 hours during the last 12 months
  - Leave may be taken intermittently

# New Jersey Temporary Disability Benefits Law

- ▶ Provides for partial salary reimbursement for period of time doctor determines employee is disabled due to pregnancy and/or childbirth
- ▶ Need doctor to certify that employee cannot do job because of pregnancy or medical complications
- ▶ 66 percent of weekly wages up to \$650 per week
- ▶ TDI benefits do not count towards NJFLA leave

# New Jersey Family Leave Insurance

- ▶ Eligible employee (both moms and dads) may receive up to six (6) weeks of cash benefits while taking leave to care for/bond with a newborn or newly-adopted child
  - May be used for foster care placement as of July 1, 2020
  - Increasing to 12 weeks as of July 1, 2020
- ▶ May be taken intermittently (42 days in a 12-month period, increasing to 56 days as of July 1, 2020)
- ▶ 66 percent of weekly wages up to \$633 per week (increasing to 85 percent to a maximum of \$859 per week in 2020)
- ▶ Employer may not refuse to restore an employee after a period of leave

# New Jersey Law Against Discrimination

- ▶ Bans discrimination based on pregnancy
- ▶ Requires employers to provide a reasonable accommodation because of pregnancy/childbirth
  - Examples:
    - Bathroom breaks
    - Breaks for increased water intake
    - Periodic rest
    - Assistance with manual labor
    - Job restructuring or modified work schedules
    - Temporary transfers to less strenuous or hazardous work

# NJFLA and Federal FMLA Run Concurrently

...but only if the leave is for a reason covered by both Acts.

# FMLA/NJ FLA Interplay – Example 1

- ▶ Nancy has gestational diabetes and goes on leave four (4) weeks prior to giving birth. She has a normal delivery and the doctor certifies her as “disabled” for six (6) weeks following the delivery. How much leave can Nancy take?
  - 22 weeks
    - 4 weeks of leave for her own serious health condition prior to delivery under the FMLA
    - 6 weeks of leave for her own serious health condition after delivery under the FMLA
    - 12 weeks of leave to care for the newborn child under the NJFLA

# FMLA/NJFLA Interplay – Example 2

- ▶ Jaime takes FMLA leave for six (6) weeks because of complications related to her pregnancy. While she is out on leave, her father becomes seriously ill. How much NJFLA leave does she have at the end of the 6-week period?
  - 12 weeks
    - *The six (6) weeks count against FMLA but not against NJFLA, even though Jaime's father's illness could be for a NJFLA-qualifying reason*

# Questions & Answers



# Q&A

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