

Employment Law Update 2020

Prepared for Human Resources Leadership Association

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One thing before we get started...

The materials contained in this presentation were prepared for the participants' reference in connection with education webinars. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.





Agenda

- Addressing Remote Work Challenges
- Addressing On-Site Work Challenges
- Leave Management – FMLA, FFCRA
- Connecticut’s COVID Response
- What Comes Next?
- CT SHPT
- CT PFMLI

Addressing Remote Work Challenges

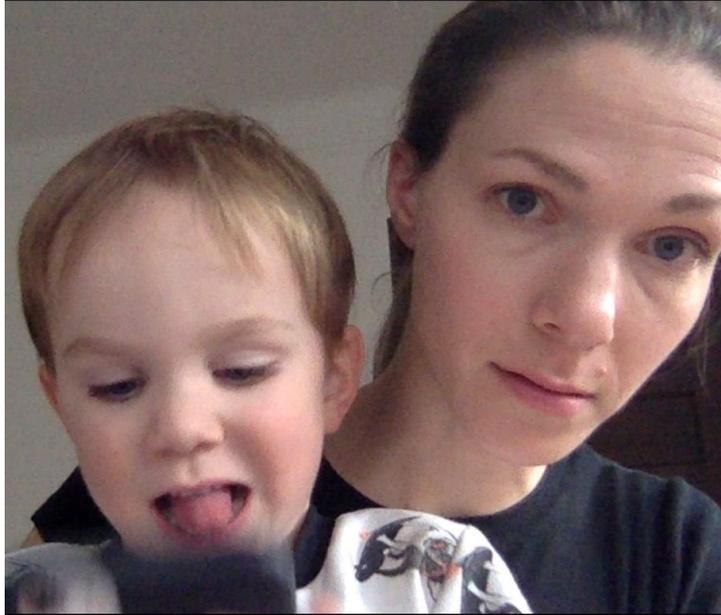




Addressing Remote Work Challenges

- Regularly discussing the plan that addresses each employee's circumstance on balance with the company's need to get the job done.
- Consider asking managers to re-set forth job expectations regularly.
- Ensure employees clearly understand goals, deadlines, and priorities.
- Talk to employees about performance issues that have arisen with any previous flexibility.
- Continue the same (or similar) performance management and evaluation processes.
- Consistent approach to managing the practical challenges of remote work life.

Watch for Issues



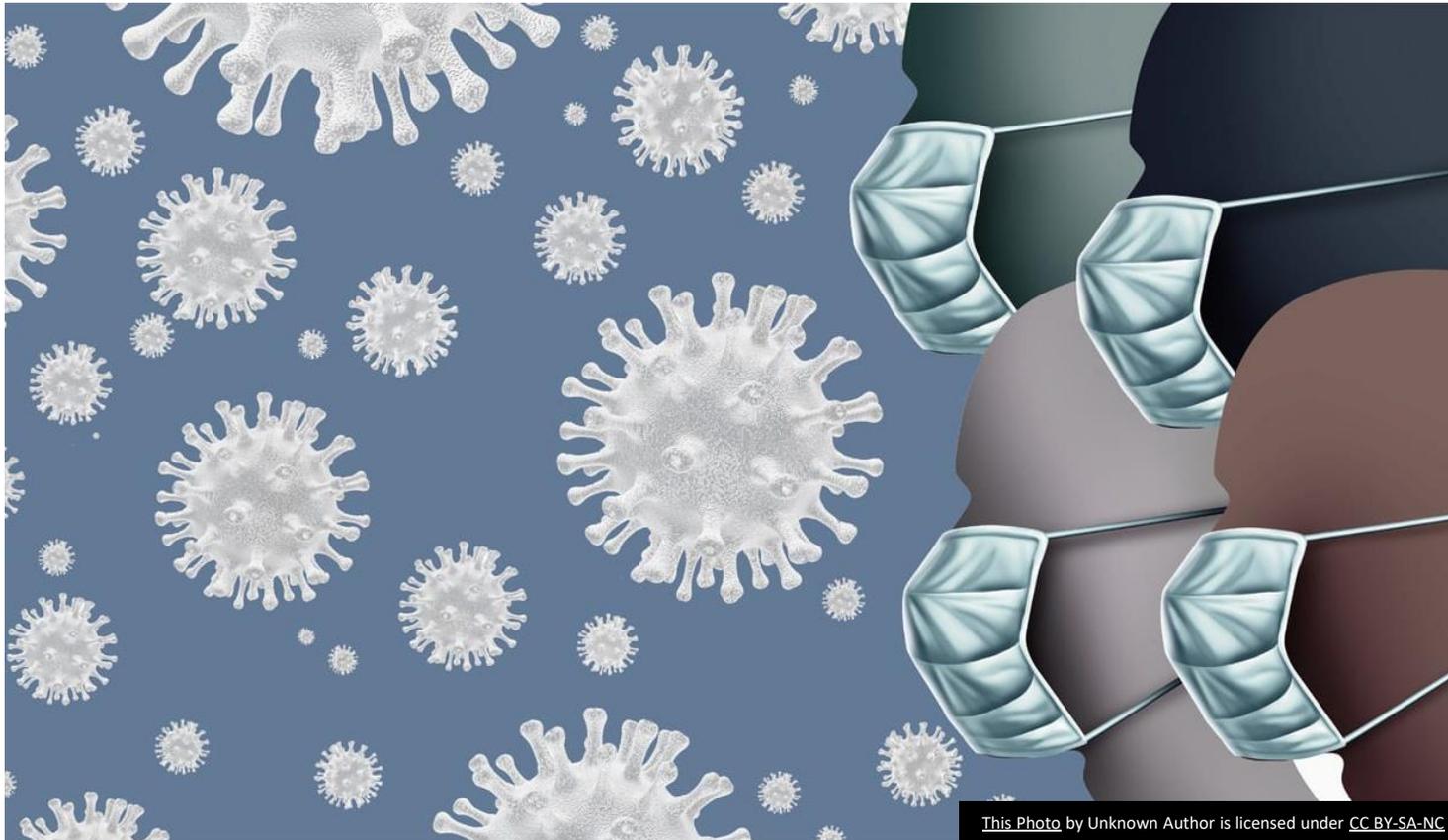
- Set expectations about the degree to which it is acceptable for parents to acknowledge family responsibilities, have a child on their lap during a call, or to reschedule meetings
- Pointing out a man is “such a great dad” when his child interrupts, but rolling eyes when the same thing happens to a woman
- Older employees adapting to technology

Can Employers Require Employee To Come Onsite?



As a general rule, if job duties cannot be performed at home – or even if they can - you can require on-site attendance.

Practical Considerations



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- Site Safety protocols
 - Protective coverings
 - Cleaning
 - Physical changes to worksite
 - Social distancing, staggered shifts
- Bar symptomatic employees from the workplace
- Taking employee temperatures
- Waivers?

Practical Considerations



Per EEOC Guidance A.8:

- *Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19 and ask if they have been tested for COVID-19.*

What about asking only certain employees questions about their exposure, other matters related to COVID-19?

- *If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease (EEOC Guidance A.9).*

Practical Considerations



Travel, quarantine policy

- Questions about where an employee is traveling or has traveled are not considered disability-related inquiries subject to ADA concerns. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are traveling to or returning from these locations, even if the travel was personal. (EEOC Guidance A.14)

Monitoring of “hot states” and plan for handling variations in employee travel reasons

Administering employee testing – current EEOC Guidance A.6:

Under the “direct threat” exception to the law, employers may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.

Note antibody testing prior to returning employees to work is not permitted per EEOC Guidance A.8.

Fall Leaves . . .



The Leave Pile

- **FMLA**
- **ADA**
- **FFCRA**
 - EPSL**
 - EFMLA**
- **CT PSL**
- **Etc., Etc., Etc.....**



ICYMI: New & “Improved” FMLA Forms Rolled Out

- All of the new forms have color-coded sections specific to the employee, the employer and the health care provider, and include additional headings, numbering and short explanations or instruction.
- Designed to be easier to understand and easier for doctors to complete.
- More “check the box” rather than open-ended questions.
- Easier to determine if leave qualifies as FMLA.
- Should result in less inconsistent or incomplete responses from medical providers.
- But also provides less opportunity to obtain medical information that could be used to challenge the need for leave, identify abuse or otherwise administer intermittent leave or leave when there are multiple serious health conditions.



Families First Coronavirus Relief Act (FFCRA)

- Effective April 1, 2020 through December 31, 2020
- Applies to private employers with fewer than 500 employees and most public employers
- Includes two leave provisions:
 - Emergency Paid Sick Leave Act (EPSL) – 80 hours
 - Emergency Family & Medical Leave Expansion Act (EFMLA) – 12 weeks (10 paid)
- Provides job protection and continued health benefits.
- Employers get a federal tax credit for paid leave provided under the FFCRA
- Covered employers must post the DOL's FFCRA notice

EFMLA/EPFL Comparison Chart

REASONS FOR LEAVE	EFMLA	EPFL	Rate	Cap
Employee is subject to quarantine or isolation order	No	Yes	Regular rate of pay or minimum wage, if greater	\$511 / day \$5,110 aggregate
Employee was told to self-quarantine by health care provider due to COVID-19	No	Yes	Regular rate of pay or minimum wage, if greater	\$511 / day \$5,110 aggregate
Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis	No	Yes	Regular rate of pay or minimum wage, if greater	\$511 / day \$5,110 aggregate
Employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine	No	Yes	2/3 regular rate of pay or minimum wage, if greater	\$200 / day \$2,000 aggregate
Son or daughter's school or place of child care is closed due to COVID-19	Yes	Yes	2/3 regular rate of pay or minimum wage, if greater	\$200 / day \$2,000 aggregate (PSL) \$10,000 aggregate (PFML)
Employee is experiencing other substantially similar condition specified by the Secretary of Health and Human Services	No	Yes	2/3 regular rate of pay or minimum wage, if greater	\$200 / day \$2,000 aggregate

COVID-19 Related Leave Requests

- “The government has advised that I stay home because I fall in a vulnerable population category.”
- “I’m caring for a parent who is old and could get sick” or “I live with someone who falls in a vulnerable population category.”
- “My spouse has been exposed to COVID-19.”
- “My spouse has COVID-19.”
- “I have a medical condition and need to work from home as an accommodation.”
- “I have COVID-19.”
- “I’m afraid and I think you are opening too soon.”
- “I’m receiving more money staying on unemployment than if I come to work.”
- “My child’s day care (or school) is closed and I need to take care of the child or help with schoolwork.”

Leave Management: 3 Questions To Determine How Much Time Off You Are Required To Provide Remain The Same

Is the employee “**entitled**” to be absent with job protection?

- FFCRA, FMLA, State Paid Sick Leave and Other State Entitlements

Has Company “**committed**” to providing additional job-protected leave?

- Collective Bargaining Agreement
- Your policies and past practices

Is additional leave required as a **reasonable accommodation** for employees with disabilities?

- ADAAA or state anti-discrimination laws
- PDA/state pregnancy accommodation laws

What about childcare?

Qualifying reason for EPSL or EFMLA:

Employee is unable to work (or telework) due to a need to care for the employee's son or daughter under 18 years of age if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency/COVID-19



Current CT DOL Guidance (as of 08/27/20)

Q: My child's school is operating on hybrid-attendance basis. The school is open each day, but students alternate between days attending school in person and days participating in remote learning. They are permitted to attend school only on their allotted in-person attendance days. May I take paid leave under the FFCRA in these circumstances?

A: Yes, you are eligible to take paid leave under the FFCRA on days when your child is not permitted to attend school in person and must instead engage in remote learning, as long as you need the leave to actually care for your child during that time and only if no other suitable person is available to do so. For purposes of the FFCRA and its implementing regulations, the school is effectively "closed" to your child on days that he or she cannot attend in person. You may take paid leave under the FFCRA on each of your child's remote-learning days.

Current CT DOL Guidance (as of 08/27/20)

Q: My child's school is giving me a choice between having my child attend in person or participate in a remote learning program for the fall. I signed up for the remote learning alternative because, for example, I worry that my child might contract COVID-19 and bring it home to the family. Since my child will be at home, may I take paid leave under the FFCRA in these circumstances?

A: No, you are not eligible to take paid leave under the FFCRA because your child's school is not "closed" due to COVID-19 related reasons; it is open for your child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. If your child is home not because his or her school is closed, but because you have chosen for the child to remain home, you are not entitled to FFCRA paid leave. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, you may be eligible to take paid leave to care for him or her.

Current CT DOL Guidance (as of 08/27/20)

- Also, if your child's school is operating on an alternate day (or other hybrid-attendance) basis, you may be eligible to take paid leave under the FFCRA on each of your child's remote-learning days because the school is effectively "closed" to your child on those days.

Q: My child's school is beginning the school year under a remote learning program out of concern for COVID-19, but has announced it will continue to evaluate local circumstances and make a decision about reopening for in-person attendance later in the school year. May I take paid leave under the FFCRA in these circumstances?

A: Yes, you are eligible to take paid leave under the FFCRA while your child's school remains closed. If your child's school reopens, the availability of paid leave under the FFCRA will depend on the particulars of the school's operations.

Do you have to provide leave because of school or childcare issues?

Outside of the FFCRA (and assuming the child is healthy), generally no,
but...



Practical Challenges

- Economic struggles for employers
- Productivity still important
- Limited in ability to pay for no work
- Not the only reason employees are requesting leave
- Is there a qualified market to fill the roles?
- Will you lose talent (that you have already invested in)?
- Morale
- Retention
- Reputation: Female/Family Friendly?
- Future Recruitment Concerns

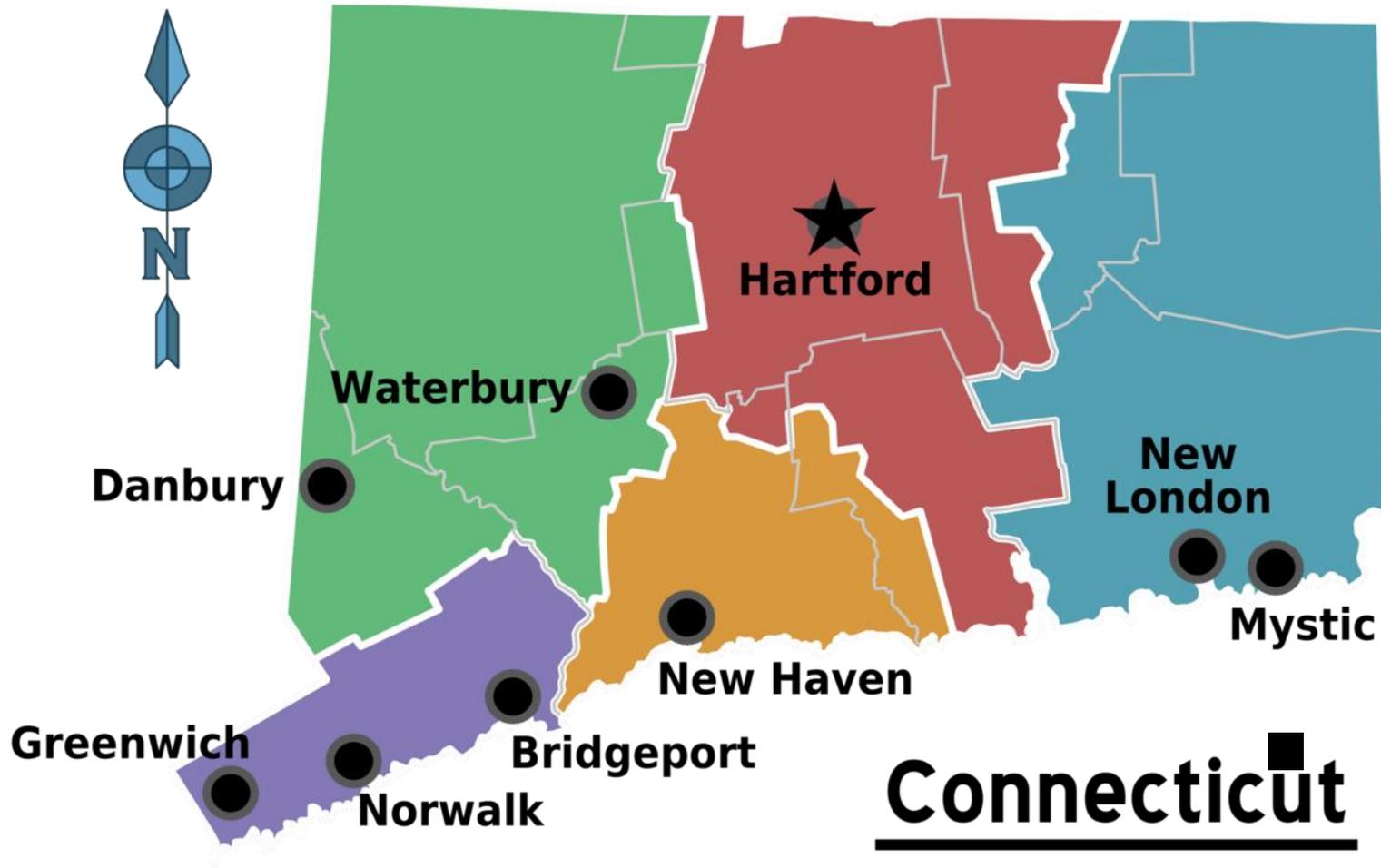
FFCRA – Small Business Exemption

Fewer than 50 employees

Only applies to close of care/school leave

High standard to meet

Has to be assessed for each leave



Connecticut: COVID Response

What Happens if an Employee Tests Positive?

- CDC protocols for cleaning workplace (check website)
- Employee self isolate
- Contact tracing for work – inform employees (and non-employees) in close contact
 - Self quarantine for 14 days, monitor for symptoms
- Consider organization-wide communication
- Do not share employee's name
- Return to work
 - If symptoms: symptom based OR test based
 - If positive test but no symptoms, time based OR test based

State and Local Executive Orders to Consider

- Business Opening Orders
- Mass Gathering Restrictions
- Social Distancing/Sanitation Protocols
- Mask Requirements
- Vulnerable Population Obligations
- Health Screening And Temperature Check Requirements
- Travel Orders And Recommendations
- Protocols When Employees Are Exposed To COVID-19, Test Positive, or Exhibit Symptoms
- Contact Tracing; Obligation To Notify Local Health Department
- Posting Requirements

Issues to Anticipate



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Discrimination Claims

- Discrimination in layoff/rehire/recall decisions
- Harassment based on pandemic-related health concerns
- Retaliation for engaging in protected activity
- Disparate treatment claims arising out of the provision of severance or other benefits for certain employees, and not others
- Disparate impact of employment policy to members of protected class



Health and Safety



- OSHA claims
- Negligence for failing to protect employees from COVID-19 exposure by prohibiting persons from workplace/requiring contact with others without implementing some form of screening
- Negligence/Wrongful death: failure to implement policies/training, sanitize, follow social distancing, provide protective equipment, follow CDC guidance
- Other claims that employee was forced to work in unsafe environment

Wage & Hour

- Failure to pay wages/vacation/PTO on termination
- Employee misclassification
- FLSA and other wage/hour claims for reducing exempt employees' wages improperly
- Off the clock, work from home claims by non-exempts
- Reimbursement of expenses
- Furloughing salaried employees
- Compensability issues for time spent cleaning masks, donning and doffing other PPE



Non-Pandemic-Related Issues Facing Employers in 2020

- Responding to Allegations of Racism
 - From the public, including customers, clients, and the media
 - From current employees
- Employee Activity
 - Off-duty conduct
 - Social media activity
 - Masks, t-shirts, and buttons
- Disciplining Employees
 - “Free speech” at work
 - Legal constraints on employee discipline
 - Protected concerted activity



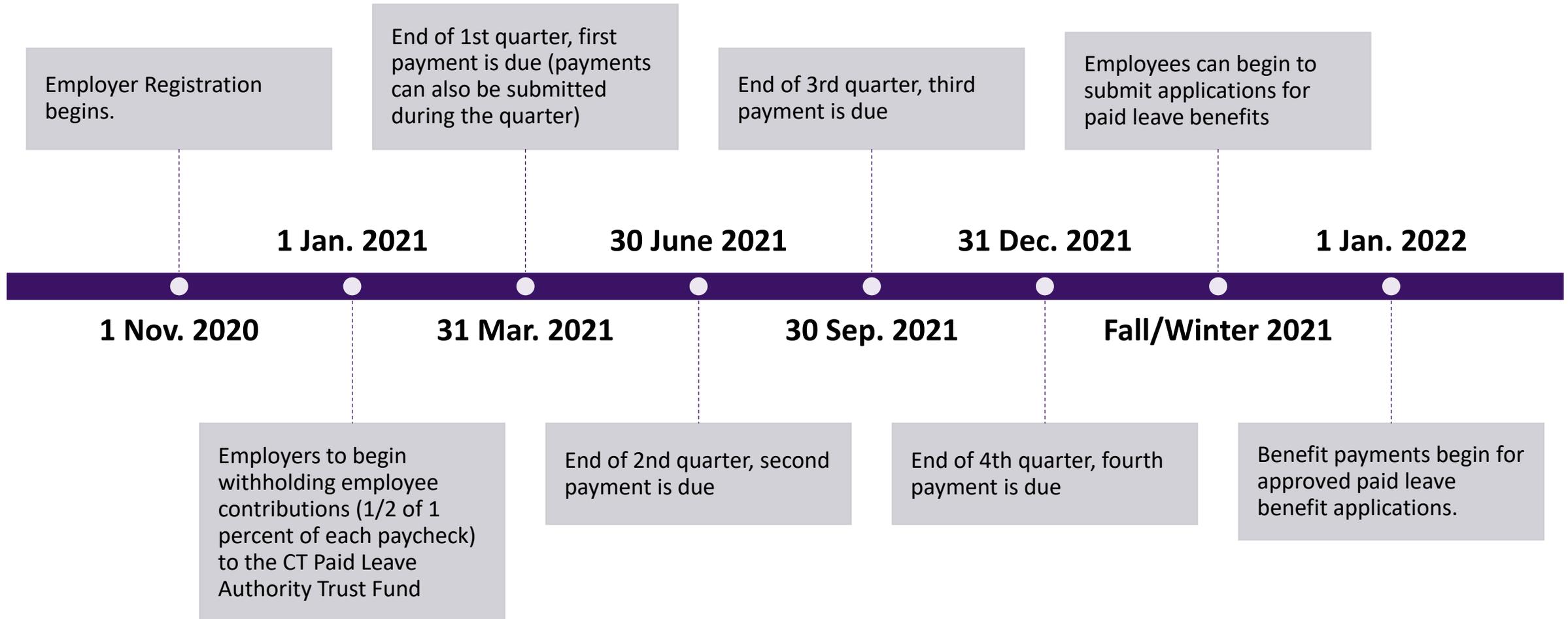
CT SHPT Law Regarding Training and Options

- Connecticut law requires most employers (those with 50 or more employees) to provide sexual harassment prevention training to all employees by October 1, 2020. However, this was just extended by executive order to January 1, 2021, without the need to request an extension.
 - This deadline is for employees who have been employed as of October 1, 2019. Any employee hired on or after that date must be provided training within six months of hire.
 - The training must run for at least two hours.
- The CHRO offers a free training program, available at:
https://forms.office.com/Pages/ResponsePage.aspx?id=-nyLEd2juUiwJjH_abtzi1ho4uKVVftOpzDtEVu7P7IUMk5JTTY2WIZSWDFOTEIXMk9OUjYwRFFNOS4u

Connecticut Paid Family Medical Leave Insurance Program (PFMLI) Updates

- Passed in June 2019 but not set to be implemented until 2021-2022.
- CT set up the Paid Family and Medical Leave Insurance Authority to administer paid family leave benefits and to guide employees and employers through the program.
- No regulations have been issued yet but the state recently launched a website with additional information:
www.ctpaidleave.org.

Key Dates for Employers (From Connecticut Paid Family Medical Leave Insurance Program Website)



Qualifying Events for PFMLI Coverage

- Qualifying Events:
 - Upon the birth of a son or daughter of the employee
 - Upon the placement of a son or daughter with the employee for adoption or foster care
 - To care for a family member of the employee, if such family member has a serious health condition
 - Because of a serious health condition of the employee
 - In order to serve as an organ or bone marrow donor
 - If an employee is experiencing family violence, they can apply to take up to 12 days of leave

Eligibility for PFMLI



Requirements to be a “covered” employee:

Must work for a CT-based company (do not need to be resident of CT)

Earned \$2,345 in wages in the first 4 of the past 5 quarters AND fit in one of the following categories:

- Currently employed by a CT employer
- Had been employed by a CT employer in the past 12 weeks



The paid leave authority only offers payment for qualifying events but *does not offer job protection* to employees taking leave.

Thank you!

About Jackson Lewis P.C.

As legal professionals **focused on the workplace**, we have a unique vantage point into the human condition.

It is our **privilege** to do work that affects real people.

It is our **calling** to craft policies that achieve the delicate balance between supporting diverse workers and the **businesses that employ them**.

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- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

National recognition



Recognized for excellence and ranked as a Tier 1 National “Best Law Firm” by *U.S. News — Best Lawyers*® for:

- Employment Law – Management;
- Labor Law – Management; and
- Litigation – Labor & Employment.

More than 70% of Jackson Lewis’ firm locations also received a Tier 1 Metropolitan designation in various labor and employment categories.



Recommended in *The Legal 500 United States 2019* for:

- Employee Benefits, Executive Compensation and Retirement Plans: Design;
- Immigration; Labor and Employment Disputes (including collective actions): Defense;
- Labor-Management Relations; and
- Workplace and Employment Counseling.



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Designated as a “**Powerhouse**” in Everyday Employment Litigation in Complex Employment Litigation in *BTI Litigation Outlook 2019: Changes, Trends and Opportunities for Law Firms*.

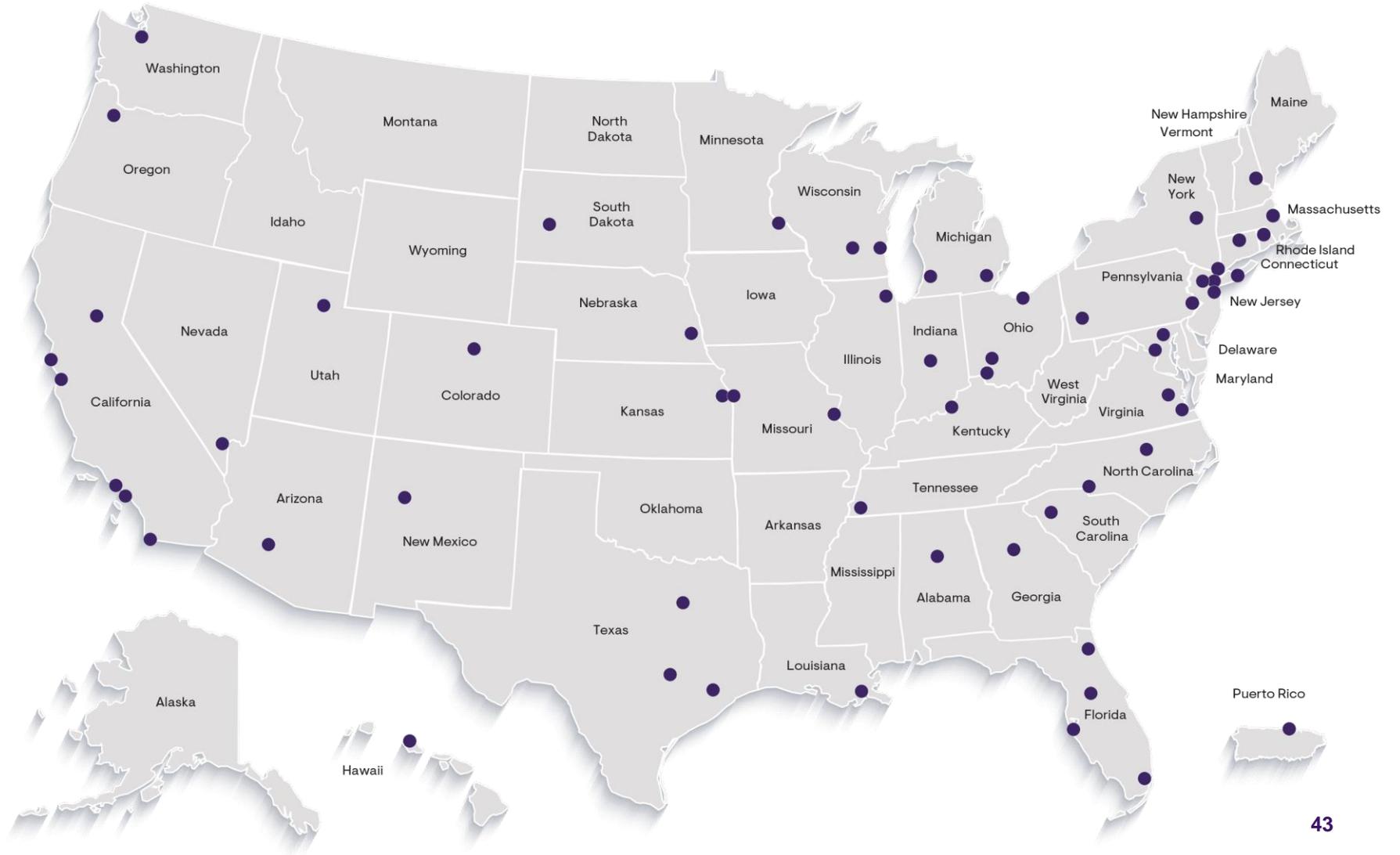
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- Health Law and Transactions
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- International Employment Issues
- Labor and Preventive Practices
- Non-Competes and Protection Against Unfair Competition
- Privacy, Data and Cybersecurity
- Wage and Hour
- White Collar and Government Enforcement
- Workplace Safety and Health
- Workplace Training



Industries

- Automotive
- Chemicals
- Construction
- Energy and Utilities
- Financial Services
- Government Contractors
- Healthcare
- Higher Education
- Hospitality
- Insurance
- Life Sciences
- Manufacturing
- Media
- Professional Services
- Real Estate
- Retail and Consumer Goods
- Staffing and Independent Workforce
- Technology
- Transportation