



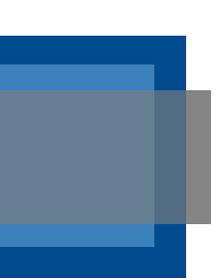
# *EMPLOYEE LEAVE ISSUES*

March 5, 2020  
Richmond, Virginia

VANDEVENTER BLACK LLP  

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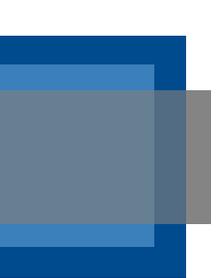
ATTORNEYS AT LAW



# Employee Leave Issues

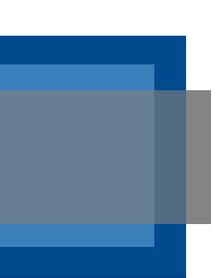
Employers Should:

- Review any applicable Laws (FMLA, ADA, WC, PSLA, State Laws)
- Review Internal Policies (and CBA)
- Review Past Practices



# Family and Medical Leave Act (FMLA)

- Covered Employers have 50 or more employees
- Joint and Successor Employers could be covered
  - “Joint Employers” – both must exercise some control over the working conditions of employees
  - “Joint Employers” – both must count the joint employees for determining FMLA coverage
  - Regulations provide further guidance

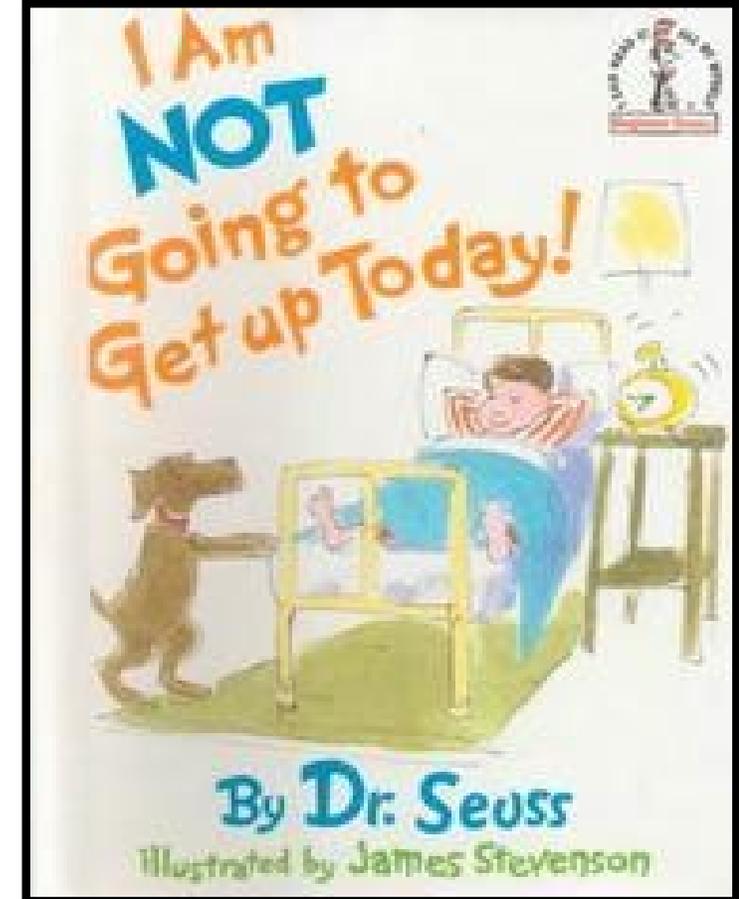


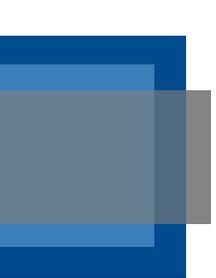
# FMLA Reasons for Leave

- Birth/Adoption/Placement of child
- Employee's own serious health condition
- Serious health condition of employee's spouse, parent or child
- Military exigency
- Military caregiver
  - 26 weeks
  - Next of kin included

# FMLA - Eligible Employees

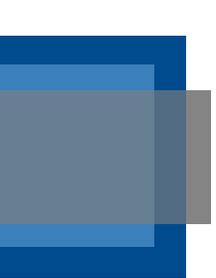
- 12 months employment
- 1,250 hours worked in past year
- 50 employees within 75 miles
- Voluntary Compliance
  - Intentional
  - Unintentional





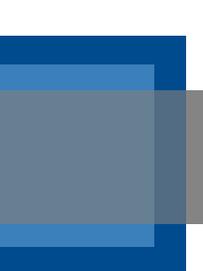
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# FMLA Requirements

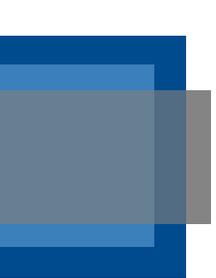
- 12 (or 26) weeks of unpaid leave within a 12 month period
- Reinstatement to same/substantially similar job
- Maintain benefits
- No interference with FMLA rights
- Notice of rights
- No retaliation
- Policy
  - Handbook inclusion
  - Options: FFD, “year,” concurrent leave



# ***DYER V. VENTRA SANDUSKY, LLC,*** **934 F.3d 472 (6th Cir. 2019)**

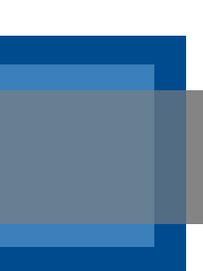
- **Facts:**

- Employer had No-Fault Attendance Policy with Point System.
- Employees accrued between 0.5 and 1.5 points per absence.
- 11 points or more resulted in automatic termination.
- Attendance Point Reduction Schedule: 30 days without an absence = -1 point.
- Unpaid absences, including FMLA, did not count in the Point Reduction Schedule.
- Dyer used intermittent FMLA for his migraine headaches.
- Employer fired Dyer after he accumulated 12 points.



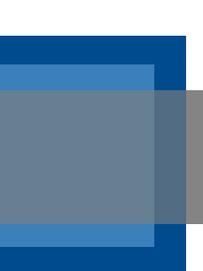
# ***DYER V. VENTRA SANDUSKY, (cont'd)***

- Employee sued for FMLA Wrongful Termination and his case was dismissed by the district court.
- On appeal, the issue was:
  - Did the Employer's no-fault point system interfere with the employee's right to take FMLA leave and be restored to equivalent employment conditions upon his return?
- Holding:
  - Restarting the 30-day period for point reduction each time intermittent FMLA leave was used punished the employee for exercising his FMLA rights. Thus, the employer failed to restore the employee's accrued employment benefits in violation of federal law.
- 6<sup>th</sup> Circuit reversed and sent the case back for a trial.



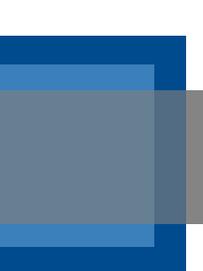
# ***SCHAAR V. U.S. STEEL CORP.*** **(E.D. Mich. Oct. 18, 2019)**

- **FACTS:**
  - Schaar was an engineering manager for U.S. Steel Corp. and lived in Michigan.
  - He managed engineers across different states for different USSC customers.
  - His spouse had a heart condition that required hospitalization at times.
  - Schaar traveled to a customer's Tennessee location to address an urgent issue.
  - While there, USSC directed him to immediately travel to Mississippi when he resolved the Tennessee issue.
  - Schaar refused, stating he had to return to Michigan to assess his wife's condition.
  - He returned to Michigan and assessed his spouse's condition.
  - The next day, he returned to USSC's Michigan office and was terminated.



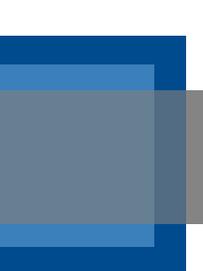
# ***SCHAAR V. U.S. STEEL CORP. (cont'd)***

- Schaar sued for FMLA Interference and FMLA Retaliation.
- FMLA Interference:
  - Employee did not demonstrate that he was “needed to care for” his spouse. Merely went home to “observe” or “evaluate” his spouse.
  - He failed to give the employer adequate notice of his FMLA leave request. A request for travel accommodations is not protected under the FMLA. Could be under the ADA.
- FMLA Retaliation:
  - Employee had no retaliation claim because he was not entitled to FMLA leave. He failed to convey information to the employer that was reasonably adequate to show that he was requesting leave for a serious health condition that rendered him unable to perform his job.
- District Court dismissed the case.



# Waag v. Sotera Def. Sol., Inc. (4<sup>th</sup> Cir. 2017)

- Defense contractor employee on FMLA for 3 months
- RTW in similar position, but with different supervisor and different projects
- After RTW, federal budget cuts led to employer eliminating several positions. Employee and his supervisor were among those fired.
- Employee claimed FMLA violation: failure to restore to equivalent position and retaliation for taking FMLA



# Waag v. Sotera Def. Sol., Inc. (4<sup>th</sup> Cir. 2017)

- Held:
  - FMLA does not require employer to hold open the employee's position or to return employee to the same position. Employer has option of restoring employee to either original position or equivalent position.
  - Post-FMLA position was equivalent because same salary, bonus structure, benefits, terms of employment, worksite, title, and substantially similar job responsibilities
  - No retaliation: employer missed its budget by \$110 million and layoffs affected a broad swath of employees (including the VP)

# FMLA: Military Exigency Leave

Up to 12 weeks of leave while the employee's spouse, son, daughter, or parent ("**covered military member**") is on "**covered active duty**," for one or more "**qualifying exigencies**."

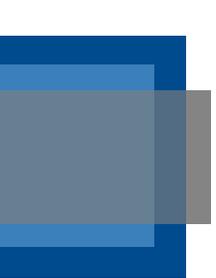


# Covered Active Duty

**Covered Active Duty** = deployment to a foreign country

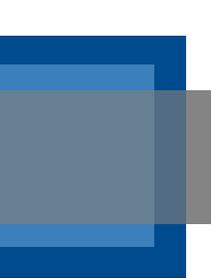
**Covered Military Member** = members of the Reserves *and* Regular Armed Forces





# FMLA: 9 Qualifying Military Exigencies

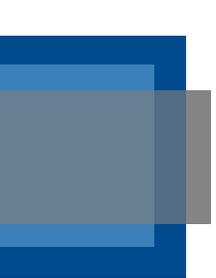
1. Short notice deployment (i.e., 7 days or less)
2. Military events and related activities (e.g., ceremonies)
3. Childcare and related activities
4. Care of military member's parent who is incapable of self-care
5. Financial and legal arrangements
6. Counseling
7. R & R
8. Post-deployment activities
9. Any other event that employee and employer agree is a qualifying exigency



# FMLA: Military Caregiver Leave

An eligible employee who is the spouse, son, daughter, parent, or ***next of kin*** of a ***covered servicemember***\* shall be entitled to a total of **26** workweeks of leave during a ***single 12-month period*** to care for the servicemember

\* Includes vets if: discharged under conditions other than dishonorable and discharged within 5 years of employee first taking the military caregiver leave to care for him/her.



# Serious Health Condition (“SHC”) (all FMLA Leave Reasons)

- **Incapacity plus treatment.** Incapacity of >3 consecutive days, plus either (a) 2 health care provider visits or (b) 1 health care provider visit and regimen of continuing care under his/her supervision
- **Chronic condition.** *E.g.*, asthma, diabetes, epilepsy
- **Permanent/long-term condition.** *E.g.*, Alzheimer’s, severe stroke, terminal stages of a disease

# Serious Health Condition (cont.)

- **Conditions requiring multiple treatments.** Restorative surgery after injury OR condition that would result in incapacity >3 consecutive days if not treated (e.g., chemo for cancer, P.T. for severe arthritis, dialysis for kidney disease)
- **Pregnancy or prenatal care**

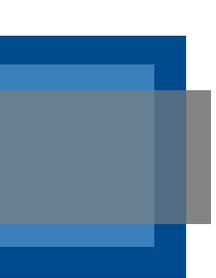


'Another sick note from your employer!'



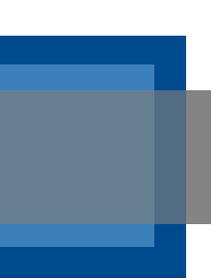
# FMLA: Intermittent/Reduced Schedule Leave

- Only required if medically necessary
- Not required for birth/placement of child
- Must be tracked in same increments as employer tracks other types of leave
- Other, complicated tracking rules



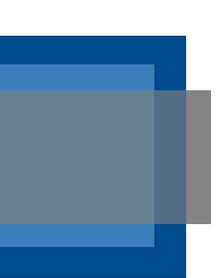
# FMLA: Paid Leave Substitution

- Employers must notify employees of any requirements for the use of paid leave during FMLA
- Some states' laws do not allow concurrent paid and FMLA leave unless employee agrees
- In Virginia, paid leave, workers' comp. leave, FMLA leave, and ADA leave may all run concurrently, if designated by employer



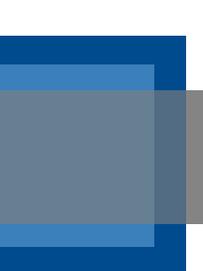
# FMLA: Interaction With Workers' Compensation Laws

- FMLA leave can and should run concurrently with workers' comp leave in Virginia
- Employee may decline offer of light duty and elect to remain on FMLA if unable to return to the same or an equivalent position
- Declining "light duty," will affect employee's workers' comp. case
- Neither ADA nor FMLA nor WC require employers to "create a position" to accommodate an employee's illness or injury



# FMLA - Fitness for Duty Certification

- Employer may contact health care provider directly to authenticate/clarify certification, but may not delay the employee's RTW while doing so
- Employer must notify employee at the beginning of FMLA leave of FFD requirement, whether FFD will address ability to perform essential job functions, and what those job functions are
- Employer may delay RTW until employee produces FFD certification, and may deny RTW if fails to do so



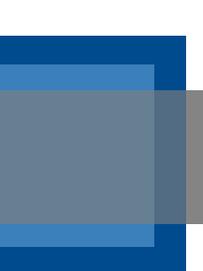
# Americans with Disabilities Act

- Applies to employers with 15 or more employees
- Prohibits employment decisions based on an employee's/applicant's disability, if the individual is qualified to perform the essential functions of the job, with or without reasonable accommodation
  - Exception: if disabled individual poses a direct threat (to self or others) that cannot be eliminated by reasonable accommodation
  - Exception: if accommodation creates an undue burden on the employer, not required



# ADA: Definition of Disability

- a physical or mental impairment that substantially limits one or more major life activities of such individual;
  - An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.”
- a record of such an impairment; or
- being regarded as having such an impairment.



# *Temporary Disability?*

- Under ADA, a condition lasting less than 6 months may be a disability if it meets the ADA disability definition.
- *Heatherly v. Portillo's Hot Dogs, Inc.* (N.D. Ill. July 19, 2013).
  - Temporary light-duty restrictions, including no heavy lifting, due to “high-risk” pregnancy could substantially limit plaintiff in the major life activity of lifting (citing to EEOC’s ADAAA regulations [“[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting”]).



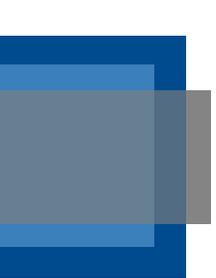
# Qualified Individual

- One who, with or without accommodation, can perform the essential job functions
- Employers should have written job descriptions



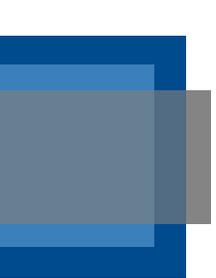
# ADA Interactive Process

- Employer should engage in an informal, interactive process with the disabled individual to identify the precise limitations and potential accommodations.
- The individual must request an accommodation, but does not have to mention ADA.
- The employer may ask for documentation about the disability, functional limitations, and what aspect of the workplace is a barrier. The employee does not have to specify a precise accommodation.
- Under ADA, employers have more flexibility in communicating with employees and their health care providers (compared to FMLA)



# ADA - Reasonable Accommodation Examples

- Making existing facilities accessible
- Acquiring or modifying equipment
- Providing qualified readers or interpreters
- Modifying workplace policies
- Job restructuring
  - Reassign nonessential or marginal job functions
  - Alter when or how a function is performed
  - **An employer does not have to eliminate an essential function of the position.**



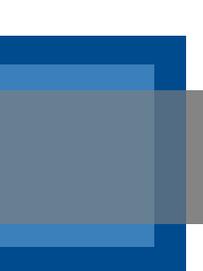
# More Reasonable Accommodation Examples

- Modified work schedule or location
- Reassignment to a vacant position: when an employee can no longer perform the essential functions of his/her current position, with or without reasonable accommodation. The employee must be qualified for the new position.
- Reasonable accommodation is required for WC injuries.

# ***EEOC v. United Airlines:*** **Reassignment Under the ADA**

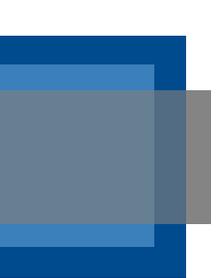
- United Airlines' policy allowed transfer to an equivalent or lower-level vacant position as a reasonable accommodation, but the transfer process was competitive. Although the disabled employee received preferential treatment when compared with equally qualified candidates, he or she lost out to better qualified candidates.





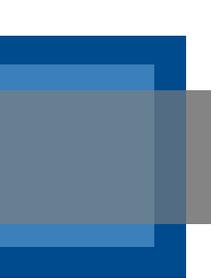
# ***United Airlines (Cont'd)***

- EEOC filed suit, challenging United's policy as a violation of the ADA.
- The Seventh Circuit held that the ADA ***does mandate*** that an employer appoint disabled employees to vacant positions for which they are qualified, if such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer.
- Employer violates the ADA by refusing to transfer a disabled employee to a vacant position for which he is qualified, even if there is a better qualified candidate.



# Leave as a Reasonable Accommodation

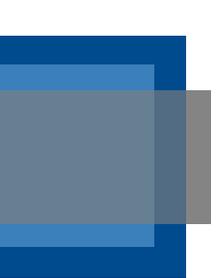
- An employer may be required to grant an employee leave as a reasonable accommodation for a disability, even though the employer's leave policies would otherwise require that the leave request be denied.



# Undue Hardship under the ADA

An action requiring significant difficulty or expense, based on:

- nature and cost of the accommodation needed;
- overall financial resources of the facility involved;
- overall financial resources of the covered entity; and
- the type of operations of the covered entity, including the composition, structure, and functions of the workforce of such entity



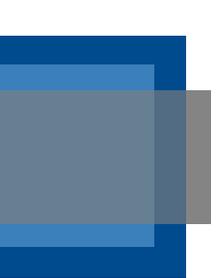
# Capps v. Mondelez Global, LLC (3d Cir. 2017)

- Employee suffered from arthritis, resulting in severe pain on an intermittent basis. He requested and was granted intermittent FMLA when the flare-ups occurred.
- Employee used intermittent FMLA on Feb. 11, 12, 14, and 15, 2013. (He worked a full shift on Feb. 13.) He RTW on Feb. 18, 2013.
- In early 2014, employer learned that employee had been arrested for DUI (4x the legal limit) on Feb. 14, 2013 and had been incarcerated on Feb. 15, 2013.
- Employer confronted employee with this information and demanded documentation for the Feb. 14 and 15, 2013 absences. Because the documentation he produced was insufficient, the employer terminated employee for dishonesty.



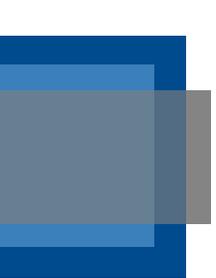
# Capps v. Mondelez Global, LLC (3d Cir. 2017)

- Employee sued for retaliation under FMLA and failure to accommodate his disability under the ADA.
- Held:
  - Employer demonstrated legitimate, nondiscriminatory reason for termination: good faith belief that employee abused FMLA leave. It doesn't matter whether the employer was correct that the employee abused FMLA; the question is whether the employer's description of its reasons is honest.
  - Employer did not interfere with employee's FMLA rights. Employee was granted all FMLA requested.
  - Employer also accommodated employee's disability by granting him intermittent leave.



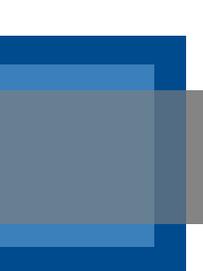
## ***EEOC v. Interstate Distributor Co. (D. Colo. 2012)***

- Company's policy required employees returning from medical leave to present documentation of no restrictions, 100% fit for duty.
- Company had leave cap of 12 weeks – no exceptions.
- Settlement: \$4.85 million
  - required to revise its policies; mandatory periodic training on the ADA to employees; report all employee complaints of disability discrimination to the EEOC; post a notice about the settlement; appoint an internal consent decree monitor



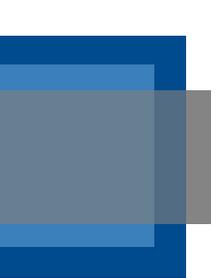
# Vanyan v. Hagel (E.D. Va. April 1, 2014)

- Employee was Russian instructor for DOD in a position that required travel.
- Employee knew of travel requirement when hired. 4 years later, employee complained that she could no longer fly due to phobia.



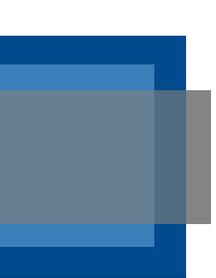
# Vanyan, cont'd

- Employee presented documentation that she had a panic disorder with agoraphobia, and requested as an accommodation that she not be required to fly.
- DOD denied request because air travel was an essential function of position. DOD considered reassignment, but there was no vacant position for which employee was qualified.
- Apart from refusal to fly, employee had poor attendance and was frequently tardy. She responded to reprimands by stating that “15 minutes late is no big deal for government work.”
- Employee took 4 weeks of annual, sick, and donated leave, followed by 12 weeks of FMLA.



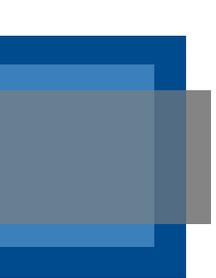
# Vanyan, cont'd

- DOD requested that employee RTW at end of FMLA.
- Employee requested and was granted another 4 weeks of leave.
- Employee continued to send in requests, with medical documentation, that she be relieved of air travel duties.
- DOD allowed employee additional leave, then put her in an AWOL status.



# Vanyan, cont'd

- Finally, ten months after employee stopped coming to work, DOD fired employee.
- Employee filed suit claiming that DOD failed to accommodate her disability under the Rehabilitation Act (equivalent of ADA) and retaliated against her for filing EEOC charges about the failure to accommodate.
- Court: Employer Won on Summary Judgment.



# ***What if Vanyan developed phobia on the job?***

- Are mental illnesses covered by WC?
- Should the employer create a “light duty” position for Vanyan?
- How would WC treat Vanyan’s discharge?



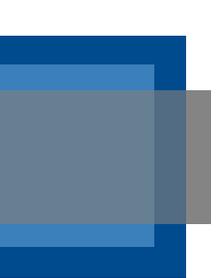
# ***Is Pregnancy A Disability?***

- Pregnancy Discrimination Act = Title VII
- Treat as Temporary Disability if Routine Pregnancy – FMLA, PDA
- Pregnancy Complications – ADA, FMLA, PDA
- Any WC implications?



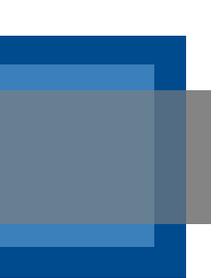
# ***Frequent Workers' Comp Leave Issues***

- Employees who are out of work for compensable work injuries are generally compensated under the applicable workers' compensation laws and usually receive 2/3 of their pre-injury wages in workers compensation benefits.
- BUT – some employees will also file for disability benefits under a disability policy. Is that allowed?
  - If the disability is one the employee pays for, usually YES (unless the policy forbids benefits for WC injuries).
  - If the disability policy is a benefit that is solely paid for by the employer, the employer could be entitled to a credit for those benefits against the workers compensation benefits that are due. This can depend on how the policy is written.



## ***WC – What should Employer do if it Questions Validity of Reported Work-Related Injury or Illness?***

- Investigating and Documenting Circumstances Surrounding Reported Injury is Legal
- Retaliatory Discharge is Prohibited – Be Careful!!!
- Virginia Code Section 65.2-308 Provides That:
  - No employer or person shall discharge an employee solely because the employee intends to file or has filed a claim under this title or has testified or is about to testify in any proceeding under this title.
  - The discharge of a person who has filed a fraudulent claim is not a violation of this section.
  - These cases are under the jurisdiction of the Virginia state courts, not the Virginia Workers' Compensation Commission.



# Final Leave Issue – Paid Sick Leave Act

- Only applies to certain federal government contractors
- Requires paid time off for all employees working on the covered contract
- Accrues at 1 hour PSL for every 30 hours worked
- Carry over of PSL required up to 56 hours
- May run concurrently with employer's voluntary paid leave program, but not with Wage Determination benefits requirements under Davis-Bacon Act or Service Contract Act

A wooden gavel with a dark handle and a light-colored head rests on a wooden surface. In the background, a pair of brass scales of justice is visible, symbolizing law and justice. The scene is set in a library with bookshelves filled with books.

**QUESTIONS?**