

Take It or Leave It: Episode 49: Digging Deeper into Maine PFML and What Employers Are Asking

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Josh Seidman: Hi, everyone, and welcome back for the 49th episode of Take It or Leave It, where we discuss the hottest topics in the world of workplace leaves, absence management, and accommodations. I'm your host, Josh Seidman. Well, folks, if you haven't heard, the New York Knicks are the NBA champions for the first time in 53 years. The weather forecast is predicting nothing but orange and blue skies over New York City for at least the next several months. Across all the celebrations, news articles, interviews, podcasts, parades, there is a wealth of fun facts and descriptors that have emerged from this title run. For example, the Knicks playoff record was 16 wins and 3 losses, one of the best playoff records of all time.

Their point differential in those games—the Knicks outscored their playoff opponents by a total of 258 points—that is the largest point differential ever in a playoff run. Their three losses, by the way, were by a mere six total points. Here's one of my favorites. The Knicks were a record of six wins and two losses in games where they trailed by double digits at some point in that game, and that includes NBA Finals Game 4 where they trailed by 29 points early in the second half and mounted an all-time great comeback that culminated in OG Anunoby's historic game-winning tip-in with 1.2 seconds remaining in the fourth quarter. OG's three-point shooting was steadfast and seemingly automatic all playoffs long. Jalen Brunson's 45-point barrage in closeout Game 5 in San Antonio was the maestro at his most magnificent. The two million fans who flocked to Lower Manhattan to participate in the championship parade was astounding, and on and on we go. What a two-month run it was.

Another journey that reached its peak over a similar two-month trajectory is the new Maine Paid Family and Medical Leave Program. Our last episode of Take It or Leave It kicked off our two-part discussion on Maine Paid Family Medical Leave, which, as some of you likely know, is the newest Paid Family Medical Leave program to go online. We covered a ton of ground during episode 48, including the program's history, claim administration overview, how things have been going with the initial batch of worker claims since the program started on May 1st, employee eligibility, employer coverage, covered reasons for use, amount of leave, public-facing resources, and so much more. And yet somehow, maybe even somewhat surprisingly to folks who are not super into the weeds on paid family medical leave mandates, we are back for another round because there are so many layers to these programs. To help us further explore Maine Paid Family and Medical Leave, I'm honored to once again welcome my friend, Sarah Brydon, Maine Paid Family Medical Leave Claims Administration Division Director, to Take It or Leave It. Sarah, welcome back to the podcast.

Sarah Brydon: Hi again, Josh. I'm so glad to be back. As you point out, there's so much to talk about Maine Paid Family Medical Leave, and I'm happy to be in this conversation with you.

Josh Seidman: Of course, of course. Well, thank you so much for joining us. To launch into the second episode, I do have one topic that I want to start us off with, which is very often top of mind for employers and their employees alike, and that is job protection. Sarah, can you explain for a few minutes to folks how job protection works within the Maine Paid Family and Medical Leave program?

Sarah Brydon: Yeah, thanks for bringing that up because it's a really important feature of the program for folks to be aware of. At a high level, the Maine Paid Family and Medical Leave

program is intended to be a portable benefit. So like we talked about last time, the eligibility threshold is to do with an earnings requirement—so six times the state average weekly wage during in-person space period. So that also means if somebody has, for example, been working in the state of Maine for years and years and years, but then switches jobs, they have the wage base, they've already earned that amount of money, so they're eligible and the benefit is portable. So if they then switch jobs and they're in week two with a new employer, they can, assuming other criteria is met, they can be approved for Maine Paid Family and Medical Leave benefits.

At the same time, our law has a job protection provision of 120 days of service with an employer. So if somebody has been employed by a particular employer for at least 120 days, then being approved for Maine Paid Family and Medical Leave does come with it job protection. One thing to be really clear about, though, is that, like we talked about last time, AFLAC is doing the claims administration work for reviewing eligibility, certification and benefit calculation, all of those things. AFLAC is not administering who is and is not subject to the job protection part of the law. They don't have dates of hire as part of the data that they are leveraging and using. So really it is the employer's responsibility to make sure that that 120-day job protection component is being cared for.

And so functionally, the other thing that that means is that—and again, to call back to, everybody should go back and listen to episode 48—but to call back to that, our program casts a really wide net in terms of which employees may potentially be approved for leave. We don't have a minimum employer size or anything like that. So there are a number of employers in the state of Maine who previously may not have needed to worry about federal or state FMLA, who now will need to pay attention to this 120-day window of time in terms of job protection.

Josh Seidman: Thank you for pointing people back to episode 48. It was such a wonderful episode, and we covered so many important and distinct topics that are unique, but also are intertwined because of how these programs operate. So really good to point people back there as well. And speaking of key topics, and this one is a bit unique to Maine PFML and one that we teed up a bit during episode 48, in fact, is the employee notice process, in terms of letting their employer know about their PFML needs. What are the standards surrounding employee notice and undue hardship under the Maine PFML program, and what is the purpose of the undue hardship provision? And then also, how will Maine PFML or AFLAC evaluate an employer's decision on undue hardship in a particular instance?

Sarah Brydon: Yeah, undue hardship is unique to our program, very novel concept that has not, to my knowledge, been introduced in any other state's law or program. So Maine's employer community, I think, leading up to passage of our law was really expressing a lot of concern about folks being out of work and potentially significant operational impacts when that happens. So part of the policymaking, part of the legislative process, separate from bureau staff actually operationalizing all of this stuff—but, you know, leading into passage of the law, the undue hardship provision essentially creates this compromise approach where if there's a situation where an employer feels as though an employee's requested leave is going to cause a significant operational impact, what they can do is they can fill out an undue hardship form, send that into AFLAC, and explain the nature of, you know, basically explaining why the leave as requested and on the timeframe as requested would be so likely to cause a significant operational impact to that business.

So one of the components that AFLAC will then look at is how much notice did the employee give to the employer? Because that's a big part of being able to address those operational

impacts. If it's, "oh, I'm going out of work tomorrow" versus "I'm going out of work in several weeks," the ability to make adjustments and arrangements for that, it's a big part of it at the highest level. So the Maine Paid Family and Medical Leave program, the intent really is for employers and employees to be in communication. So the expectation for employees, if they are taking foreseeable leave, they know they're going to be out, is to let employers know—to let their employer know 30 days is generally sufficient. Obviously life throws curveballs all the time, so if an employee does not know that far in advance, then the expectation is to let their employer know when they know, and so to be in conversation about that.

I think it's also really important to point out and to make sure everybody understands that the undue hardship process is really intended to be, if anything, a rescheduling of leave. So it is not a mechanism for any employer in the state of Maine to say, "my employee cannot take leave." Like that's not the intent behind the undue hardship provision at all. The intent is to say—a lot of times we use the hypothetical example of the tax accountant, you know, tax day is April 15th and it's a small shop and you got three people and two of them are requesting leave for like the last week of March. That sort of scenario where the scheduling of the leave is really gonna cause a problem. If the undue hardship form comes into AFLAC and AFLAC takes a look at all the information provided and agrees, "yeah, that's gonna cause a significant operational impact," then the outcome from that is gonna be a rescheduling of that leave.

And I'm sure most people may already be thinking a few steps ahead—what if it's medical leave? Another part of the provision is that if it is a medical leave scenario, then the worker's healthcare provider needs to also be on board and say, "yeah, rescheduling this leave is okay from a medical perspective." So again, the undue hardship provision is intended to provide a mechanism for those really, really tricky situations where a person's leave might need to be rescheduled to avoid a really harsh, significant operational impact for the company.

I think it's also—it's interesting. I mean, the program is very, very new still, but I was actually in another—I was in a webinar recently, and one of the components of the webinar was a polling question to drive engagement. And the question was, "Do you think, as an employer, do you think that you're going to be using the undue hardship provision all the time, maybe occasionally, or never?" And a little bit more than half of respondents said, "never. We have mechanisms in place to address the fact that people need to take time off from work." And so this cohort of employers was of the mindset that undue hardship exists in this program, but they're not expecting to need to leverage that at all. Also within the AFLAC employer benefits portal, there's also a mechanism for an employer to go in and indicate "we're never going to use undue hardship" and just sort of blanket approach, waive the undue hardship assertion process. I don't know if that was helpful, I feel like I was talking for a number of minutes.

Josh Seidman: It was super helpful, as have been every one of your responses. And I think it was important to give the insights and the different contours of what the undue hardship concept is, right, under the guise of the program, under the umbrella of the program. Because one of the points that you mentioned, Sarah, that something that I've pointed out to several of our clients who we've been working with for Maine PFML purposes is that it is not something that allows you as an employer to just say, "no, sorry, hard stop, there is not going to be Maine Paid Family Medical Leave for you, this particular person." It is a rescheduling of the leave, as you put it. And I think getting that concept, wrapping your arms around that concept is a really important one when employers are thinking about whether to leverage the undue hardship provisions or not. So thank you for that.

As you know, and as others who have listened to our prior episodes know, we've spotlighted other state paid family medical leave programs, including episode 28 with Colorado, episode 31 with Oregon, episodes 38, 39 with Connecticut, and so on. One of the topics in the PFML realm that I am especially interested in, given its impact on the employers that I work with day-to-day, is how to coordinate the paid family medical leave program benefits with company-provided paid leave and company-provided paid time off and how they coordinate with potentially overlapping statutory leaves as well. So let's start with statutory coordination. Can you give our listeners some background on how Maine PFML handles coordination with other relevant leave laws, say the federal FMLA, state Maine FML, and so forth?

Sarah Brydon: Yeah, yep. So the idea, again, at a high level, is for all of those programs to run concurrently, and the intent of Maine Paid Family Medical Leave to run concurrently with federal and state FMLA is so strong that we have a provision about this specifically. So our program has a provision that is intended to prevent employees from stacking these leaves one after another. So I mentioned that employers can use the employment verification form to provide information to AFLAC at the start of a new claim application. One of the things on that form is for the employer to let AFLAC know to what extent the employee has used Federal or Maine FMLA in the 12 months leading up to their PFML request. And that's because of this provision that says if a worker has used Federal or Maine FMLA by itself, like without Maine PFML, in the 12 months prior to the Maine PFML request, that amount of previously used time gets deducted from their available 12 weeks of Maine PFML.

So a worker cannot choose to, for example, say, "I'm going to use my federal FMLA. Once that time is burned down, I'm then going to file for Maine PFML and get another 12 weeks." The anti-stacking provision that we have, which I think is also another thing that's unique to the Maine program, is specifically intended to avoid that outcome. There's a handful of scenarios where stars could align and somebody could end up getting more than 12 weeks of leave in a year. For example, the Maine Paid Family and Medical Leave family member relationship list is a little bit more generous than federal FMLA. So for example, if somebody was taking leave to care for a sibling with a serious health condition, that would be a non-concurrent leave approval. But for the most part, this provision of our program is intended to avoid that and have all the leaves run concurrently.

Josh Seidman: I'm curious, so now that we've covered how the statutory coordination works, what about the interaction between employer-provided paid time off, such as PTO, vacation, sick time, and so forth, or employer-provided paid leaves, such as short-term disability, paid parental, bonding leave, and the like. How do those components and those benefits coordinate with Maine PFML? Do those benefits run concurrently? And how does the pay from the employer and the wage replacement from Maine interplay?

Sarah Brydon: Yeah, so again, to start at the highest level and then get further down in levels of specifics. So the overarching idea with Maine Paid Family Medical Leave is that the intent is not to have employees get more than they would earn if they were at work. So if, for example, to use your example of a paid company parental leave, if it's 100% fully paid company leave, then that is not going to run concurrently with Maine PFML. And the idea is that, so when AFLAC is taking in a new claim application, that's one of the questions they're going to ask. "Are you getting other income? Oh, your employer offers a six-week paid parental leave. Is that 100% pay? Great." So then the Maine PFML request would start after that 100% wage replacement period has ended.

In terms of other income that might come into the equation—PTO, other disability policies, things like that—Maine PFML is considered first payer. So there are a couple of statutorily required offsets that AFLAC on our behalf has to take into account. Workers' comp, unemployment are the most common examples. But beyond that, the benefit calculation is not going to reduce somebody's Maine PFML benefit to account for other partial wage replacement.

So one really common question that we've been getting is around the use of PTO to top people up because, as we talked about in the last episode, the Maine Paid Family Medical Leave benefits are not full wage replacement. And a lot of employees, of course, have a level of needs to get the amount of money that they're used to getting. People's lives are complicated and a lot of times folks need or want to use PTO to top up to what they're used to earning. So it is one path that I think some employees and employers are using is, for example, if you have an agreement between the employee and the employer in writing to essentially use PTO to get the person paid while they're waiting for their benefits from the Maine Paid Family and Medical Leave program. And then once the actual benefit amount paid out is available and known, then go back and readjust the PTO usage amount so that it reflects the top-up. So I think a lot of folks are choosing to go that route.

I have also been in a number of conversations around short-term disability policies that are remaining in place and the awareness that it might make sense for employers to check in about whether those policies have offsetting language as well, because Maine Paid Family Medical Leave will not be offsetting, for example, a short-term disability policy that might also be applying.

Josh Seidman: Thanks so much for that, Sarah. This is my last one on coordination of benefits, I promise. An area of Maine's program that is especially interesting to employers is the provision involving PTO accruals during an employee's PFML absence. What information can you provide to our listeners on this topic?

Sarah Brydon: Yeah, so I don't want to get too far into the weeds on employer practices. Oftentimes I will point people to legal counsel like you, but just to, at a high level, talk a little bit about the Bureau's position on this. So functionally, Maine Paid Family and Medical Leave approved time is treated as hours worked for the purposes of PTO accrual. So if an employer already has a system and policy that allows for an employee to accrue PTO time during other types of leave, then the expectation would be that that would be used as well for Maine Paid Family and Medical Leave. But if an employer does not already have a system and policy in place for that during other types of leave, then they don't necessarily have to create one just for Maine PFML. It's also worth noting that in Maine, we have the earned paid leave law, which requires accrual of, I believe it's 40 hours of time for PTO. So the category of situations where an employer does not have to already be doing this is quite small.

Josh Seidman: Great, thanks for that. Now to the topic of private plans. Can you tell our listeners a little bit about how the private plan option under Maine PFML works? Do you have a sense about what percentage of employers are following the public program versus going the private plan route, and what are some of the criteria that employers' plans must meet to be approved for a private plan for Maine PFML?

Sarah Brydon: Yeah, so our law has—it's again, another example of where Maine is a little different. I know there are a number of states that have a requirement for a private plan to be at least as generous as the public plan. Maine's statute says substantially equivalent, which is not the same as at least as generous. So that's an interesting nuance. So in order to get an

approved private plan exemption, an employer has to be offering a plan that is substantially equivalent.

I think in my experience, employers generally speaking go with private plans for a variety of reasons, whether that is cost premiums, making sure that the services that they're offering to their employees are sort of packaged up in a cohesive way. You know, make one phone call for your short-term disability and your state paid family medical leave and everything that's involved in this life event that you're facing. And then also, I think sometimes I've heard a few employers talking about this perception of what service level you're gonna get from a public plan versus a private plan. And I will say in terms of my role, that includes managing the vendor relationship with AFLAC to administer our public plan claims on behalf of the Maine Paid Family and Medical Leave Bureau, one of my big goals is essentially to make sure that public plan service is delivered at an equally stellar level as any employer is going to find with a private plan.

I will also say this is another great example of a reason to plug our website, maine.gov/paidleave. There's a lot of resources there about the private plan process, the application process, all of that lives on our website, and I encourage folks to go check it out.

Josh Seidman: Perfect, thank you, Sarah. Just a couple more questions, and I think we'll be wrapping up for the day, but I love asking this next one to my guests from state PFML agencies. So please humor me for this one. Given your unique position with Maine PFML, and you previewed this a little bit during our first episode together, are you in contact with any of your counterparts in other state paid family and medical leave programs? And if so, did any of these individuals connect with you while Maine PFML was coming online? And have you been in contact with them since it started, as well as have you been in contact with any of the folks in charge of other PFML programs that are coming online in the coming couple of years?

Sarah Brydon: Yeah, to sort of continue the same theme that we've been talking about, absence nerds—leave of absence is such an important area of specificity. And I think that not just folks who have chosen to do this work across various sectors, but specifically in the public sector, it's just a really great group of people, really collaborative. And so there are people from various states that have been really, really helpful. Again, some states have had programs like this for a number of years and have a completely different type of expertise and history and all of that. And then you have your slightly more recent, but still established state programs and all the way up to Maine just recently going live and Virginia just starting to do their important work as well. It's really a great group of people, very, very helpful, very collaborative.

Josh Seidman: Lovely. Lovely to hear, Sarah. And consistent with what I've heard from other folks, really hitting on that community aspect in the leave of absence world. Final question, and I have asked this to a few other guests on this podcast, but I'm very curious for your thoughts on it as well. I often get asked by my employer clients something to the effect of, "why are state paid family medical leave programs so different? Why is the patchwork of laws so varied?" Do you have any thoughts on why state paid family leave and paid family medical leave programs across the country tend to have differences, sometimes broad differences, within the substantive contours of their different paid family medical leave programs? This can be on topics such as employee eligibility, the scope of covered absences or covered family members, the amount of leave that's permitted over a 12-month period, the percentage of wage replacement and amount of weekly pay, and so forth.

Sarah Brydon: Yeah, I did a presentation a few months back about how Maine fits into the overall context and trying to illuminate some of the commonalities and differences across all the

states. And essentially one of the talking points across the entire presentation was nothing is apples to apples. It's all so different and it's really difficult to find data points that are consistent across even like a portion of state programs, because, to your point, each state, each community is different and all policy work is about compromise. So I think each state as a community and as legislative bodies and voters—in Colorado, it's really community specific in terms of what folks can agree on and pass and move forward through the process of doing this important work to benefit the public. I think that it's really interesting also to see how that has played out as specifically as you've sort of watched the arc of various states passing laws and taking ideas from previous states and finding new things that various constituencies want to include or jettison or iterate on. I think it's really interesting to see.

Josh Seidman: Love it. That is great, Sarah. Thank you. I agree. I think the details based on the specific community, the specific jurisdiction and state, the needs of the constituents, that certainly is part of the equation that leads to the patchwork of these laws. So thank you for pointing that out to folks. And thank you so much for spending time with us today and in our prior episode and diving further into the details of Maine PFML with us. So informative, so useful, thank you, thank you, thank you.

Sarah Brydon: You're most welcome. This is a pleasure. Thanks so much.

Josh Seidman: Absolutely. And thank you to our listeners for tuning in for today's episode. We will see you next time.