

The Three Little Pigs **FMMLA, ADA, and WC**

And new PWFA Information



Attendance and Discipline

- General Rule - an employee is NOT entitled to time off and can be disciplined for absences or tardiness.
- Exceptions - unless the absence is protected by law (FMLA, ADA, or Worker's Comp.)



The Family Medical Leave Act FMLA

FMLA Overview

Twelve (12) weeks of unpaid, job protected leave.

During a 12-month period (Defined by policy)

For qualified employees (Must be employed for at least 12 months AND have worked 1250 hours in the previous 12 month period)

For a serious health condition (illness or injury) of the employee, minor child, spouse, or parent

Qualified Employees

- Employed by the County for 12 months

AND

- Worked at least 1250 hours (in the 12-month period immediately preceding the commencement of leave)

FMLA Qualifying Events

- Birth of son or daughter, and to care for the newborn child,
- Placement with the employee of a son or daughter for adoption or foster care,
- To care for the employee's spouse, son, daughter, or parent with a serious health condition,
- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job, or
- To care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.



Serious Health Condition

Illness, Injury, impairment, or physical or mental condition involving:

1. Inpatient Care, or
2. Continuing treatment by a health care provider

Serious Health Condition

Inpatient Care

- An overnight state in a hospital, hospice, or residential medical care facility
- Includes any period of incapacity or any subsequent treatment in connection with the overnight stay.

Continuing Treatment

- Incapacity + Treatment
- Pregnancy
- Chronic Conditions
 - Ex: asthma, diabetes, etc.
- Permanent/Long-term Conditions
 - Ex: Cancer or Alzheimer's Disease
- Conditions requiring multiple treatments

What Triggers FMLA?

An employee requests FMLA leave for a qualifying reason

An employer learns that an employee's need for leave may be for an FMLA-qualifying reason

Employee Requests FMLA Leave for a Qualifying Reason

EXAMPLE 1

“My mom needs medical treatment in Colorado, can I have a few weeks off because she needs me to travel with her and take her to appointments?”

EXAMPLE 2

“I broke my hip skateboarding this weekend, I’ll need emergency surgery and will be out for two weeks for recovery.”

EXAMPLE 3

On employee's 3rd day calling in sick: “I’m not feeling well. The doctor recommended yesterday that I stay home the rest of the week to rest. I was prescribed an antibiotic and I should feel better by next week.

EXAMPLE 4

“I’m pregnant and due to have the baby in December. I plan to take some time off afterwards to care for the baby.”

Employer learns the need for leave may be for a FMLA qualifying reason

- Employee's 3rd day calling in sick to care for minor child: "My daughter is still not feeling well. The doctor recommended she stay home from school the remainder of this week. I expect to be back to work on Monday next week."
- Employee goes out on **work comp** leave.
- Supervisor hears that employee had stroke, goes to hospital to bring flowers and check in on the employee's family.



Bobby: Can I take a few weeks off to help my mom recover from surgery?

Will (thinking): This could qualify for FMLA leave that I heard about in the managers' training last month.

Will: Please put in a leave request.

Will: I will talk to HR about the next steps.

Return to Work

After FMLA leave, the employer MUST return the employee to the same job, or one that is equivalent.

- Same shift or general work schedule, and be a geographically proximate worksite;
- Same or substantially similar duties, responsibilities, and status;
- Same general level of skill, effort, responsibility, and authority;
- Offer identical pay, including equivalent premium pay, overtime, and bonus opportunities; and
- Offer identical benefits.



EMPLOYEES
CANNOT
DENY FMLA!

Employees Cannot Deny FMLA!

""An employer is PROHIBITED from delaying the designation of FMLA-qualifying leave as FMLA leave. Once the eligible employee communicates a need to take leave for an FMLA qualifying reason, **NEITHER THE EMPLOYEE NOR THE EMPLOYER MAY DECLINE FMLA PROTECTION FOR THAT LEAVE.**"

Leave after FMLA Leave is Exhausted

- When an employee has exhausted FMLA leave and the need for leave persists, OR
- The employee is not FMLA eligible and needs leave due to disability

The County has a duty to engage in the “Interactive Process” under the ADA and must consider additional leave as a reasonable accommodation.



The Americans with Disabilities Act ADA

What is the ADA?

The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in several areas including employment

What is a Disability?

There are three definitions of disability under the Americans with Disabilities Act:

- A physical or mental impairment that substantially limits one or more major life activities of an individual.
- A record of such an impairment
- Being regarded as having such impairment

Major Life Activities

- Seeing
- Hearing
- Standing
- Lifting
- Bending
- Performing Manual Tasks
- Speaking
- Caring for Oneself
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating

Record of Impairment

An individual who does not currently have a substantially limiting impairment,
but who has had one in the past. .

“Regarded As”

Individual establishes that he/she has been subjected to an action because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.

Individuals Covered under the ADA

Employees must still be qualified for the job, and be able to perform the essential functions, with or without an accommodation.

- This is usually met if an employee is out on FMLA leave or worker's comp, but not always.

Call for legal advice on each employee!

A reasonable
accommodation is a
measure that **enables an
employee to perform
his or her job functions.**

Requests for Accommodations

How can requests for a reasonable accommodation be made?



BY WHO?

The employee
Family member
Healthcare provider
Friend
Other representative

WRITING?

The request for an
accommodation DOES
NOT have to be made in
writing.

MAGIC WORDS?


There are none! A request
may be made doing "plain
language" and need not
mention the ADA or use the
phrase "reasonable
accommodation."

Situation

#1

AMY TELLS HER SUPERVISOR, "I AM HAVING TROUBLE GETTING TO WORK AT MY SCHEDULED START TIME BECAUSE OF MEDICAL TREATMENTS I AM UNDERGOING."

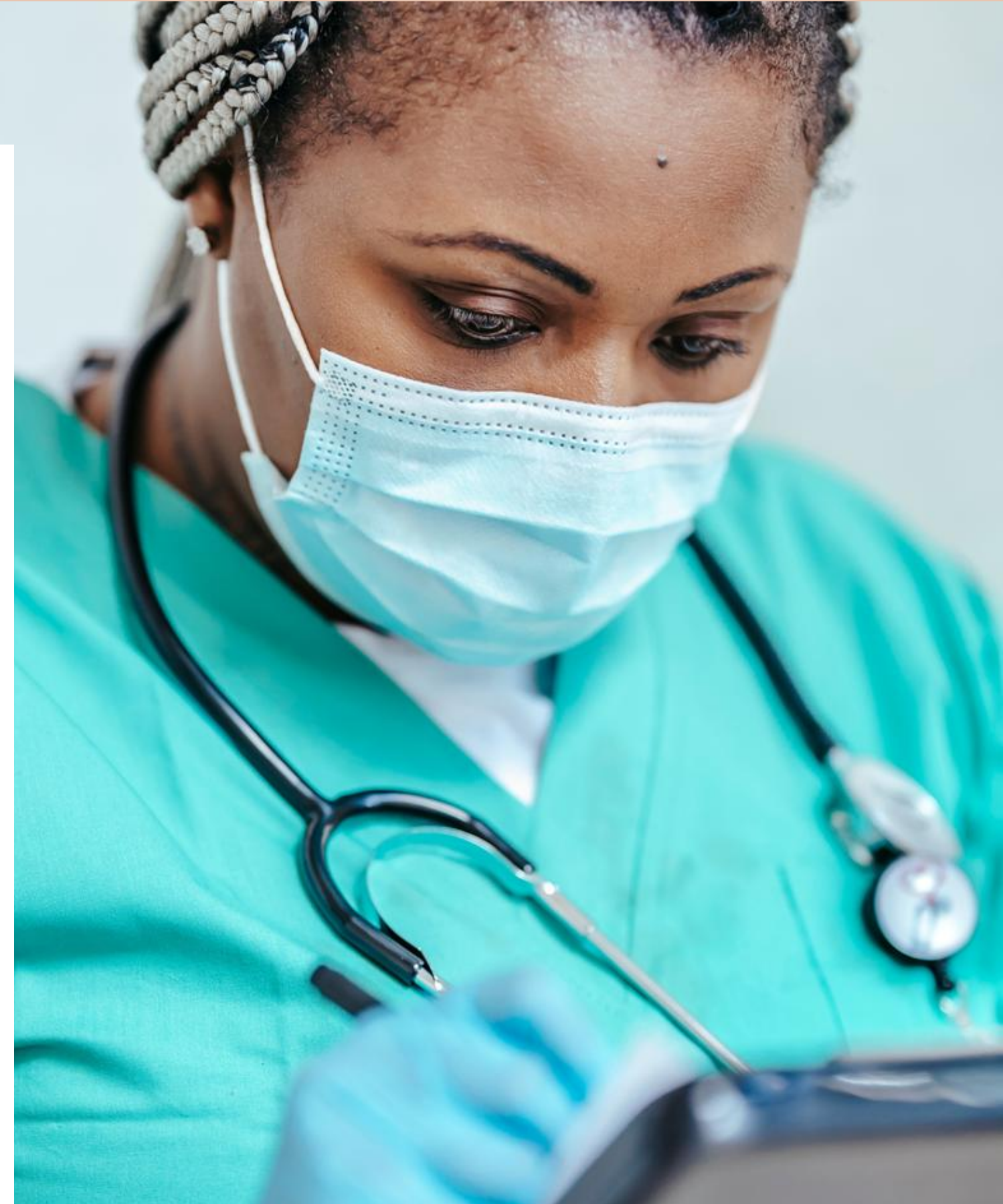




This is a request for
reasonable
accommodation.

SITUATION #2

Tom has been out of work for six (6) months with a WC injury. His doctor send you a letter stating that Tom can come back to work, but with certain work restrictions.



This is a request for reasonable accommodation.

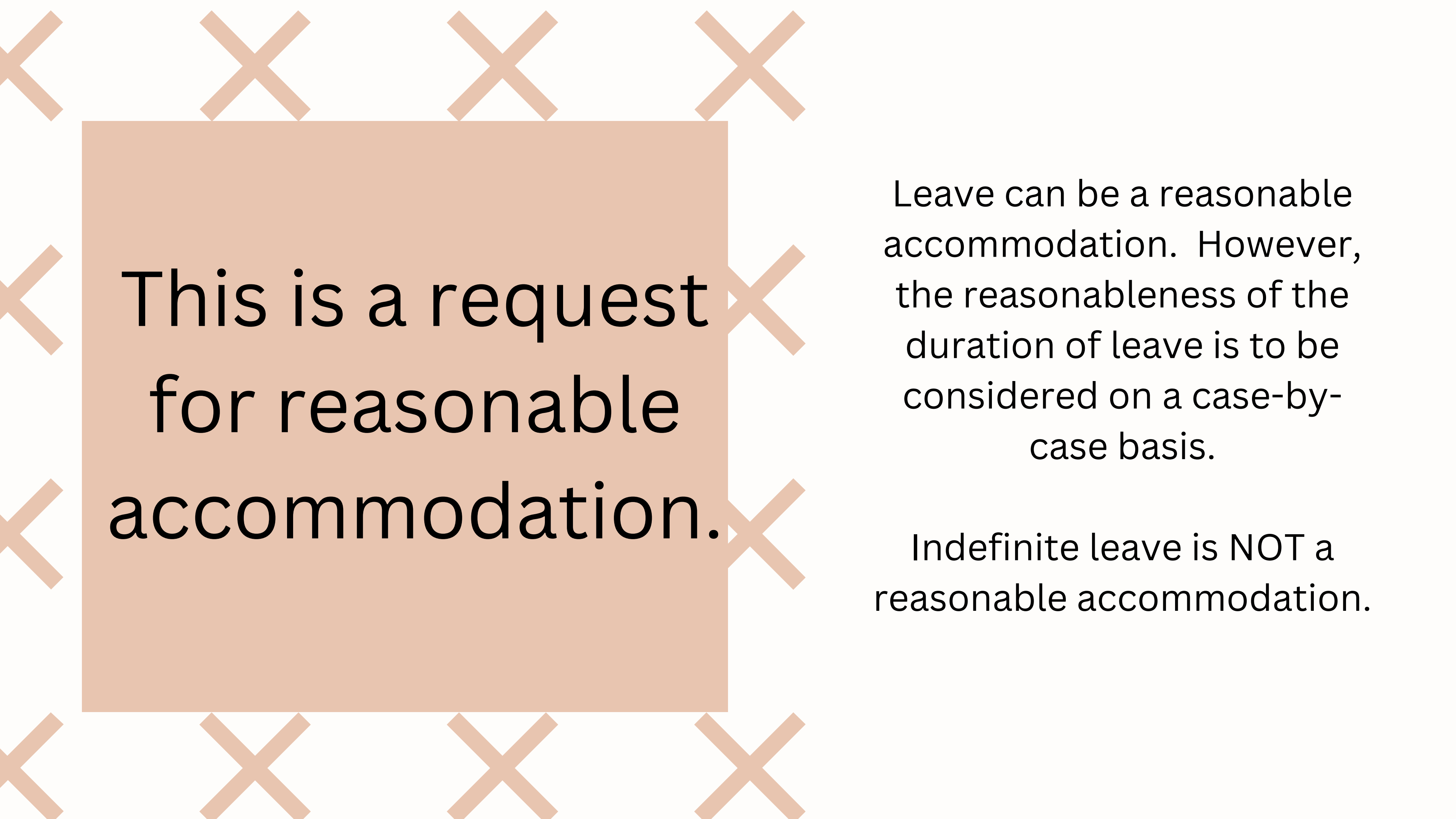
Work restrictions are a common accommodation request. However, the employee may be in a job where the restriction cannot be accommodated.



Situation

#3

JIMMY'S WIFE CALLS TO TELL YOU
THAT, DUE TO A MEDICAL
CONDITION, HE NEEDS TO BE
HOSPITALIZED, AND THUS REQUIRES
TIME OFF.



This is a request
for reasonable
accommodation.

Leave can be a reasonable accommodation. However, the reasonableness of the duration of leave is to be considered on a case-by-case basis.

Indefinite leave is NOT a reasonable accommodation.



Situation #4

Allen tells you that he would like a new chair because his current chair is uncomfortable.

This is NOT a request for reasonable accommodation.

Allen does not link his need for a new chair with a medical condition. There is not enough information to put the employer on notice that he is requesting a reasonable accommodation.

What is a Reasonable Accommodation?

Any change in the application, hiring process, job, or work environment that enables an individual with a disability to perform his or her “essential job functions.”

Examples:

- Modified work schedule
- Flexible leave policy
- Provide an aid or service to increase access
- Provide or adjust a product, equipment, or software
- Changing training methods/practices
- Medical leave **

Questions to Ask if the Reasonable Accommodation Requested is Leave

WHAT IS THE SPECIFIC REASON(S) THE EMPLOYEE NEEDS LEAVE

(for example: surgery and recuperation, adjustment to new medication(s), training of a new service animal, or doctor's visit/physical therapy.

WILL THE LEAVE BE FOR A BLOCK OF TIME OR INTERMITTENT

(for example: three weeks or four months or one day per week, occasionally throughout the year

WHEN WILL THE NEED FOR LEAVE END.

Leave as a Reasonable Accommodation and County or Department Policies

Maximum Leave Policy

The ADA may require leave beyond the employer's policy.


100% Healed Policy

This violates the duty to engage in the interactive process and may violate worker's comp laws. YOU CANNOT REQUIRE THIS.

Light Duty Policy

An employer **is not** required to create light duty positions, or to reassign job duties to another employee. However, if a position is open that meets the employee's restrictions, you may consider reassignment to the open position.

Unreasonable Accommodations

- Leave for an extended or indefinite period of time.
 - An accommodation that would require other employees to work harder, longer, or be deprived of opportunities.
 - Preventing stress-producing situations at work.
 - Allowing an employee to work only the daytime shift.
 - Allowing an employee to be exempt from attendance policies.
- 

The Interactive Process

An informal process designed to enable the employer to obtain relevant information to determine the feasibility of providing a reasonable accommodation without causing an undue hardship.

The Importance of Clear Communication & Documentation



It is important to create sufficient documentation from the moment a request for a reasonable accommodation has been made.

- This is the ONLY way to defend claims of discrimination, failure to accommodate, failure to engage in the interactive process, and retaliation

Important ADA Documentation

ABSENCES

Any absences taken for any reason other than the employee's disability ARE NOT PROTECTED!

How do you know the absence is related to your employee's disability? You need documentation.

- Phone Call? WRITE IT DOWN!
- Text Message/Email? SAVE IT!
- Doctor's Note? SAVE IT!

ACCOMMODATIONS

How did you accommodate your employee?

How long did the accommodation last? (Start date, End Date)

If you could not accommodate restrictions – What was the reason? What did you do?

LEAVE UNDER FMLA

FMLA leave and Workers Compensation leave can run concurrently.

You have an obligation to provide FMLA paperwork to your employees who need leave for a serious health condition.

When did you provide the paperwork? What days were designated as FMLA leave? How do you know?



Bob works in the Road Department. Bob selectively performs the tasks that require less manual labor causing other employees to work more. The Foreman talks to Bob several times, but does not document the conversation.

Later, Bob comes to work stating he has an aneurism, high blood pressure, and provides a doctor's note stating he needs two 15 minute breaks per day.

After going through the interactive process, Bob is released to return to work full duty. One week later, you fire Bob.

Bob files a charge with the EEOC for Failure to Accommodate and Retaliation.



Ken works in the Road Department. Ken performed all of his job duties without complaining of an injury until he showed up one day with a doctor note implementing a "left hand duty only" restriction. Ken also informed the County he had been prescribed pain medication. Ken was placed on Medical leave.

The County called Mallory at the AAC and they drafted some questions for Ken's doctor to help determine other reasonable accommodations. (Engaging in the interactive process)

After being cleared to return to work with a weight lifting restriction, the employee was terminated for poor job performance one week later.

There is no documentation supporting poor work performance.

Ken files a charge with the EEOC for Failure to Accommodate and Disability Discrimination





Worker's Compensation

What Triggers Worker's Comp?

A workplace injury
such as:

- Slip and fall
- Car accident
- Inmate fight
- Etc.

Off Work Due to a WC Injury

- If your employee is off work due to a worker's comp. injury, you should place them on concurrent FMLA leave.
- The doctor will tell the employee when they are released.
- The employee should call the county to say they are ready to come back to work, with or without restrictions, based on doctor's orders.

Return to Work

An employer cannot refuse to return an employee to work, without reasonable cause, if suitable employment is available within the limitations.

It does not matter if it is light duty or full duty.

- If they call you and tell you they want to come back, and
- You have a job that matches their release, you must give it to them.

Doctor's Releases:



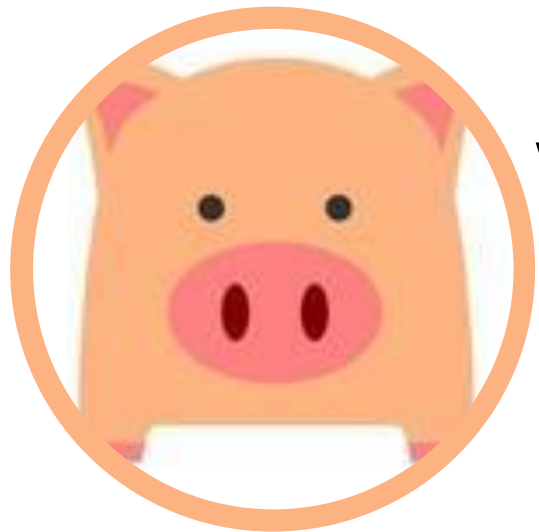
FMLA

- Only regarding the health condition that caused the employee's need for FMLA leave.
- Released to return to work – generally a one liner with no additional information



ADA

- Legitimate, nondiscriminatory reason to doubt the employee's capacity to perform their duties.
 - Ability to perform job duties or Direct threat to themselves or others.
- Request must be narrow and based on essential job functions.



Worker's Compensation

- Release to work with or without restrictions.

Job Duty Restrictions



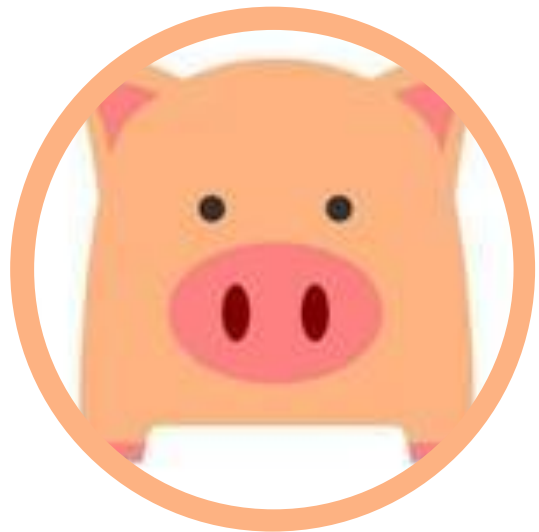
FMLA

- Does not accommodate restrictions in duties other than employee's attendance.



ADA

- Reasonable accommodations for essential job duties, including temporary leave.



Worker's Compensation

- Light duty restrictions, if available.
- NO REQUIREMENT TO CREATE LIGHT DUTY.

Length of Leave

FMLA



ADA



W.C.



12 weeks of unpaid leave within a 12-month period

Unpaid leave time is unspecified and is based on medical provider's opinion, job duties, and whether the request is "reasonable."

Amount of leave injured worker receives will vary

Considered an absolute right; cannot deny with an eligible employee and sufficient medical certification.

Additional leave under the ADA should be closely analyzed after FMLA has expired or if employee is ineligible.

Leave may be used in a block period or intermittently

Block period leave and intermittent leave should be considered

Pregnant Workers Fairness Act (PWFA)

EFFECTIVE DATE: JUNE 27, 2023



What is the PWFA?


Requires employers to provide "reasonable accommodations" to an employee's known limitation(s) related to pregnancy, childbirth, or related medical conditions, unless the accommodation would be an undue hardship.

Applies to employees and applicants

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Known Limitations

The new rules define “known limitation” as “a physical or mental condition related to, affected by or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee’s representative has communicated to the covered entity, whether or not such condition meets the definition of disability under the Americans with Disabilities Act.”

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Pregnancy and Childbirth

Includes, but is not limited to:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
 - Which can include infertility, fertility treatment, and the use of contraception
- Labor
- Childbirth
 - Which includes vaginal and cesarean delivery

“Related Medical Conditions”

Defined in the rules as “medical conditions relating to the pregnancy or childbirth of the specific employee in question.”

Includes, but is not limited to....

- Termination of pregnancy
 - including via miscarriage, stillbirth, or abortion
- Ectopic pregnancy
- Preterm labor
- Pelvic Prolapse
- Nerve injuries
- Cesarean or perineal wound infection
- Maternal cardiometabolic disease
- Gestational diabetes
- Preeclampsia
- HELLP Syndrome
 - Hemolysis, elevated liver enzymes and low platelets
- Anemia
- Endometriosis
- Sciatica
- Chronic migraines
- Loss of balance
- Antenatal (during pregnancy) anxiety, depression, or psychosis
- Postpartum depression, anxiety, or psychosis
- Lumbar lordosis
- Carpal tunnel syndrome
- Dehydration
- Hemorrhoids
- Nausea or vomiting
- Edema of the legs, feet, angles, or fingers
- High blood pressure
- Incontinence
- Loss of balance
- Vaginal bleeding
- Menstruation
- Lactation and conditions related to lactation
 - Such as: low milk supply, engorgement, plugged ducts, mastitis, or fungal infections

**THIS IS NOT AN
EXHAUSTIVE LIST!**

Requests for an Accommodation under the PWFA

Similar to the ADA, the PWFA does not need to be in writing or use any specific words or phrases.

- If the request is made verbally, I HIGHLY recommend that you document in writing:
- When the request was made;
- What accommodation was requested; and
- Any information about why the employee states she needs the accommodation

Request can be made by the employee OR the employee's representative

- Family member
- Friend
- Health care provider
- Other representative of the employee

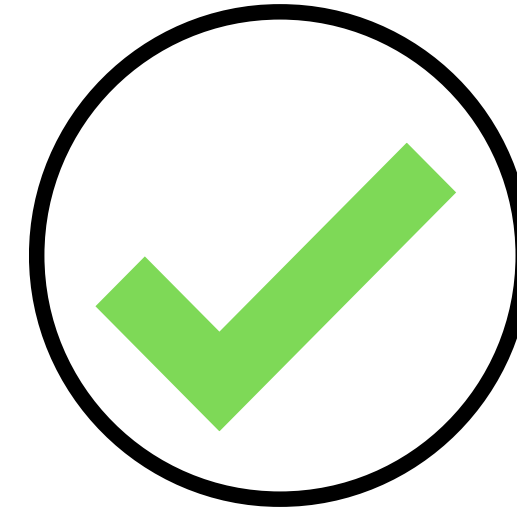
Requests for an Accommodation under the PWFA

Employee's must include two pieces of information in their request for a PWFA accommodation:

- 1** The employee/applicant (or their representative) must identify the limitation that is the physical/mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
- 2** The employee/applicant (or their representative) must indicate that they need an adjustment or change at work.

Requests for PWFA Accommodations

A pregnant employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of my morning sickness.”



or



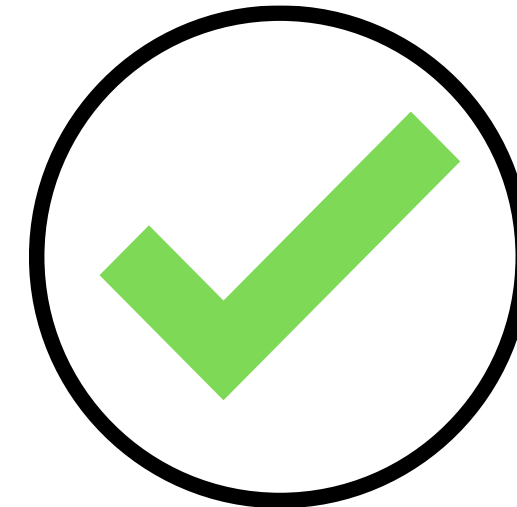
An employee who gave birth 3 months ago tells her supervisor, “I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.”



or



An employee tells a human resource specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

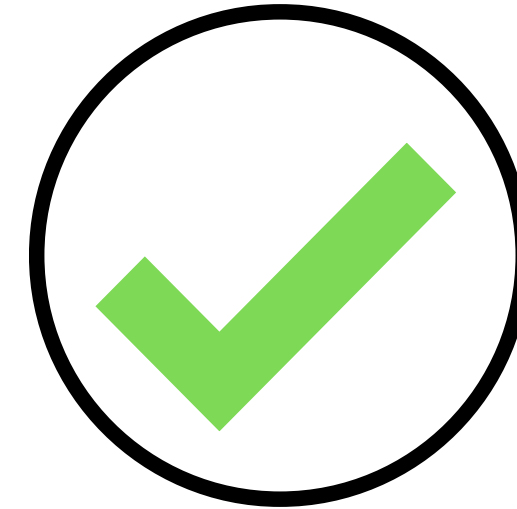


or



Requests for PWFA Accommodations

An employee's spouse, on the employee's behalf, requests light duty for the employee because the employee has lifting restrictions related to pregnancy.



or



An employee verbally informs her manager of her need for more frequent bathroom breaks, explains that the breaks are needed because of the employee's pregnancy, but does not fill out the employer's online form for requesting an accommodation.



or



An employee tells a supervisor that she needs time off to recover from childbirth.



or



Examples of Reasonable Accommodations for Pregnant Workers


- Ability to Sit and/or drink water
- Receive closer parking
- Have flexible hours
- Receive additional break time to use the bathroom, eat, and/or rest
- Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy
- Making existing facilities accessible or modifying the work environment
- Job restructuring
- Temporarily suspending one or more duties
- Adjusting or modifying examination policies
- Take leave or time off to recover from childbirth

Leave as an Accommodation

- The reasonable accommodation of leave includes, but is not limited to:
 - Leave during pregnancy;
 - To recover from childbirth, miscarriage, stillbirth, or related medical conditions; and
 - To attend health care appointment or receive health care treatments related to pregnancy, childbirth, or related medical conditions.
- Workers protected under the PWFA must be allowed to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employer benefit) or unpaid leave **to the same extent that the employer allows other employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to choose between these various types of leave.**
- Employers are not required to provide paid leave under the PWFA beyond the amount to which the employee is otherwise entitled.

Reasonable Accommodations for Lactation

Include, but is not limited to:

- Breaks, a space for lactation, and other related modifications as required under the Providing Urgent Protections for Nursing Mothers Act (PUMP Act).
 - Accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation:
 - Is in reasonable proximity to the employee's usual work area;
 - Is a place other than a bathroom;
 - Is shielded from view and free from intrusion;
 - Is regularly cleaned;
 - Has electricity;
 - Has appropriate seating;
 - Has a surface sufficient to place a breast pump (not the floor); and
 - Is in reasonable proximity to a sink, running water, and a refrigerator for storage.
- 
- A solid red, curved shape located in the bottom right corner of the slide, resembling a stylized wave or a decorative graphic element.

What does the PWFA Prohibit?

Requiring an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer.

Denying a job or other employment opportunities to a qualified employee or applicant based on a person's need for a reasonable accommodation.

Requiring an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working.

Retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation)

Interfering with any individual's rights under the PWFA



Undue Hardship

Significant difficulty or expense incurred by a covered entity when considered in light of factors set forth in the rules.

The rules provide five (5) factors that must be considered in determining whether or not an undue hardship exists under the PWFA.

Call me! Let's walk through those together to ensure that there is truly an undue hardship before denying an accommodation.

Contact Information

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