

The Vorys logo consists of the word "VORYS" in a bold, white, sans-serif font. The letters are widely spaced, with significant gaps between them. The background of the slide features a dark blue color with a pattern of diagonal, hatched lines that create a sense of depth and texture.

VORYS

New thinking.
Since 1909.

ADA & FMLA Update

Emily St. Cyr
Erin French

Agenda

- Pump Act Guidance
- ADA Guidance on AI
- ADA Case Updates
- FMLA Case Updates
- FMLA Form Updates
- ADA & FMLA Interplay

PUMP Act: Recap

- Most nursing workers are entitled to **reasonable break time** and a **private space** to pump at work for up to one year after their child's birth.
- Most employers are required to provide covered employees with space that is functional for pumping milk, shielded from view, free from intrusion, available as needed, and not a bathroom.



PUMP Act: Guidance

Break Time Requirements

- Employers must provide nursing employees with reasonable break time each time they need to pump at work.
- There is no maximum number of breaks.
- The frequency, duration, and timing of breaks will vary depending on the need of the nursing employee and their child.
- Employee and employer may agree to a schedule based on individual need, but an employer cannot require an employee to adhere to a standard, fixed schedule.
- Telework employees are eligible for breaks on the same basis.

PUMP Act: Guidance

Space Requirements

- 1. Nursing employees must have access to a place to pump that is shielded from view, free from intrusion, available each time it is needed, and not a bathroom.
- 2. Employers must ensure privacy, regardless of location.
- 3. Location must be functional for pumping and must include a place to sit and a flat surface (other than the floor) to place the pump.
- 4. Employer must ensure employee is able to safely store milk.
- 5. Space may be permanent or temporarily created, converted, or made available.

PUMP Act: Guidance

Compensation Requirements

Exempt Employees	Nonexempt Employees
Entitled to their full weekly salaries even if absolutely no work is performed during their pump breaks.	Generally not entitled to compensation if completely relieved of duty during pumping breaks.
	Short breaks, usually 20 minutes or less, provided by the employer must be counted as hours worked.
	Employees must be compensated to for <u>any</u> work performed during pumping break.
	Employees must be compensated for pumping breaks in the same way as other breaks, if the employer provides paid break time.

PUMP Act: Guidance

EMPLOYEE RIGHTS
UNDER THE FAIR LABOR STANDARDS ACT

FEDERAL MINIMUM WAGE
\$7.25 PER HOUR
BEGINNING JULY 24, 2009

The law requires employers to display this poster where employees can readily see it.



Posting Requirements

PUMP AT WORK The FLSA requires employers to provide reasonable break time for a nursing employee to express breast milk for their nursing child for one year after the child's birth each time the employee needs to express breast milk. Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk.

ENFORCEMENT
In instances of minimum wage, overtime, and other violations. The Department may litigate and/or recommend criminal prosecution. Employers may be assessed civil money penalties for each willful or repeated violation of the minimum wage or overtime pay provisions of the law. Civil money penalties may also be assessed for violations of the FLSA's child labor provisions. Heightened civil money penalties may be assessed for each child labor violation that results in the death or serious injury of any minor employee, and such assessments may be doubled when the violations are determined to be willful or repeated. The law also prohibits retaliating against or discharging workers who file a complaint or participate in any proceeding under the FLSA.

ADDITIONAL INFORMATION

- Certain occupations and establishments are exempt from the minimum wage, and/or overtime pay provisions. Certain narrow exemptions also apply to the pump at work requirements.
- Special provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- Some state laws provide greater employee protections; employers must comply with both.
- Some employers incorrectly classify workers as "independent contractors" when they are actually employees under the FLSA. It is important to know the difference between the two because employees (unless exempt) are entitled to the FLSA's minimum wage and overtime pay protections and correctly classified independent contractors are not.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

 **WHD** WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR 1-866-487-9243
www.dol.gov/agencies/wHD 

WH0086 001 04/23

PUMP Act: Guidance

Exemption?



Employers with less than 50 employees nationwide may be exempt if they can demonstrate that compliance for a particular employee would cause an undue hardship within the framework of the ADA.



Artificial Intelligence in Employment



RECRUITMENT



HIRING



PAY



PERFORMANCE



PROMOTION

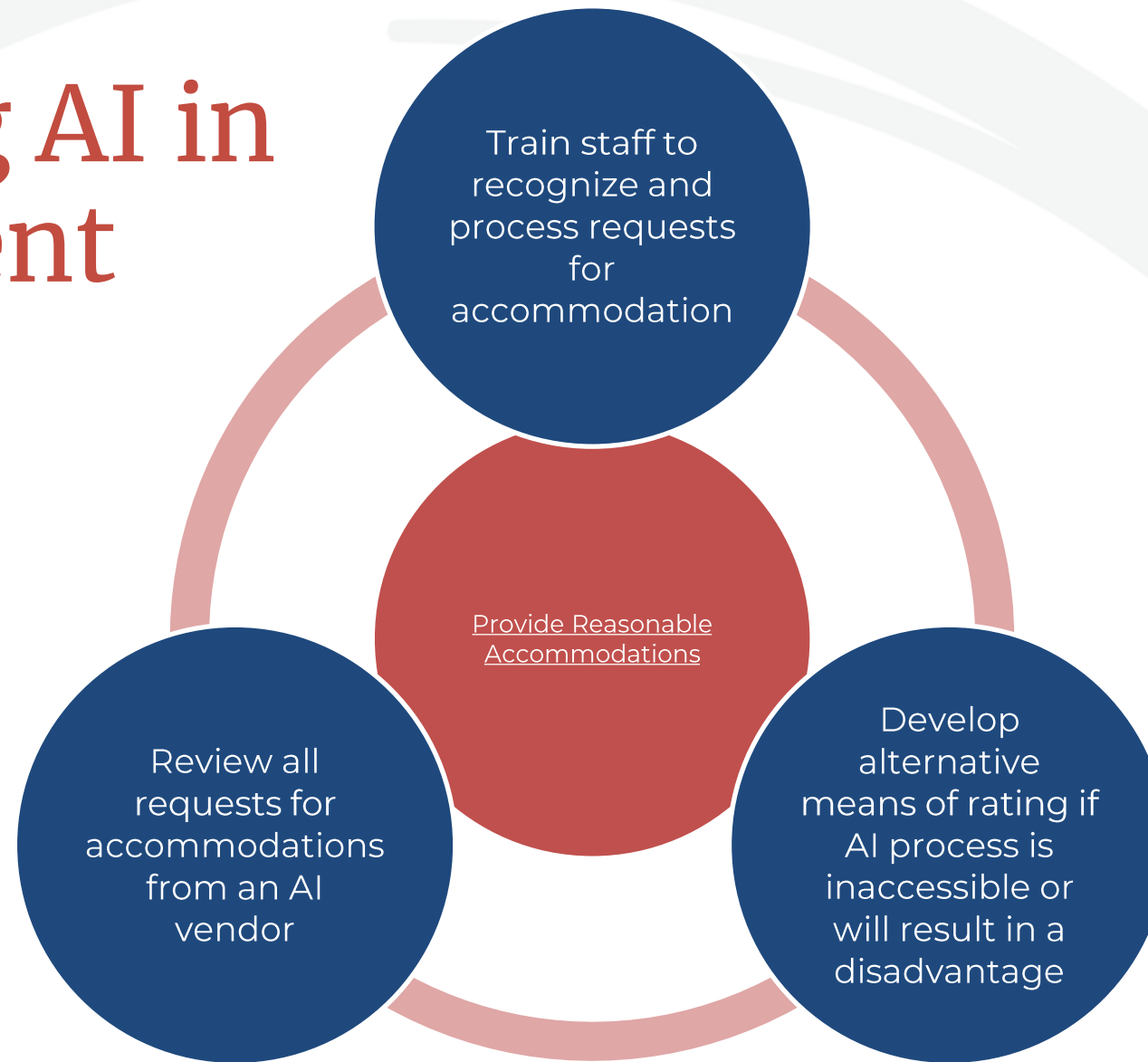
AI Concerns in Employment Decisions



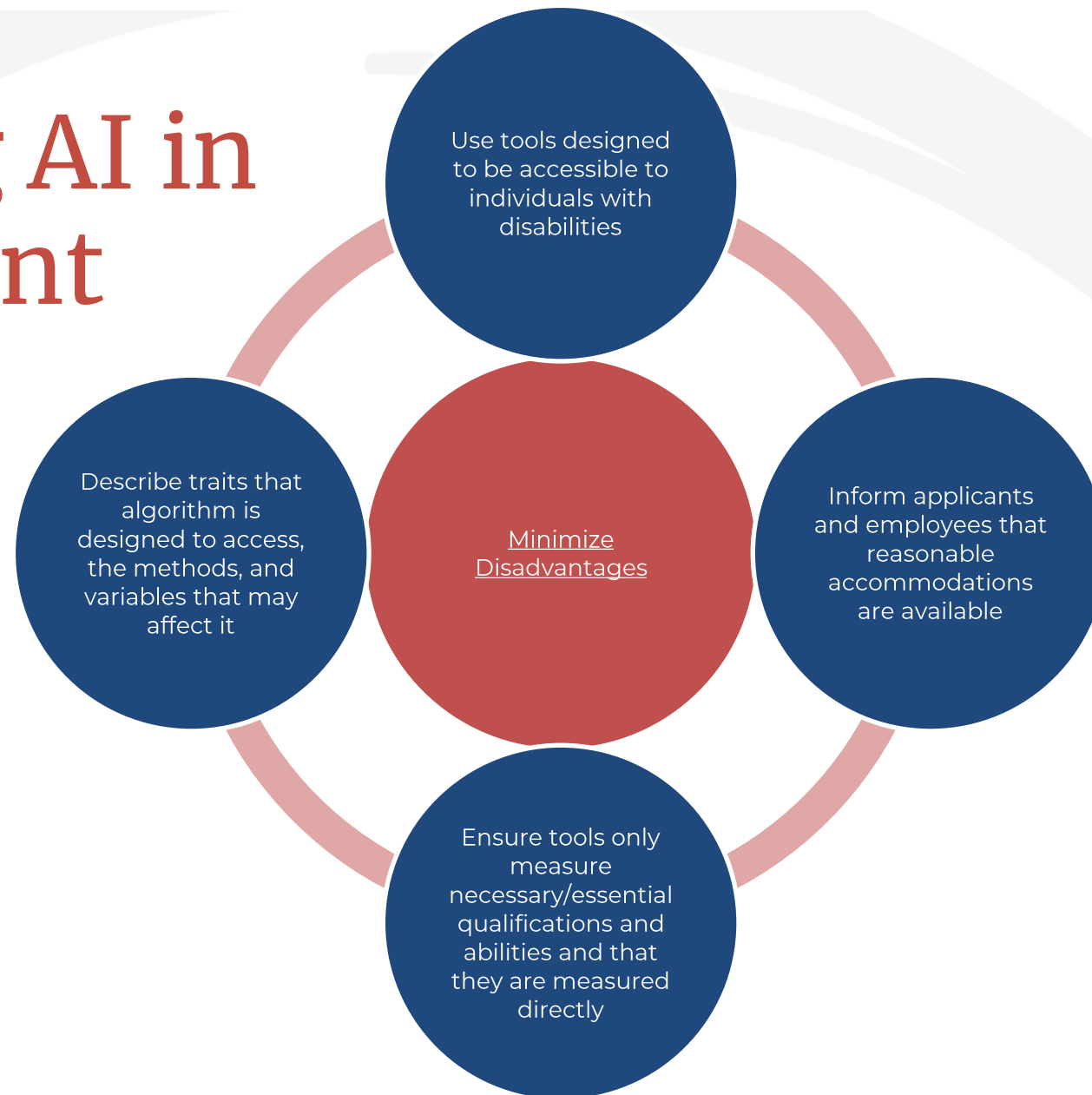
AI Concerns in Employment Decisions

- The employer does not provide or account for a **reasonable accommodation** that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm.
- Algorithmic decision-making tool intentionally or unintentionally **screens out** or otherwise **penalizes** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation.

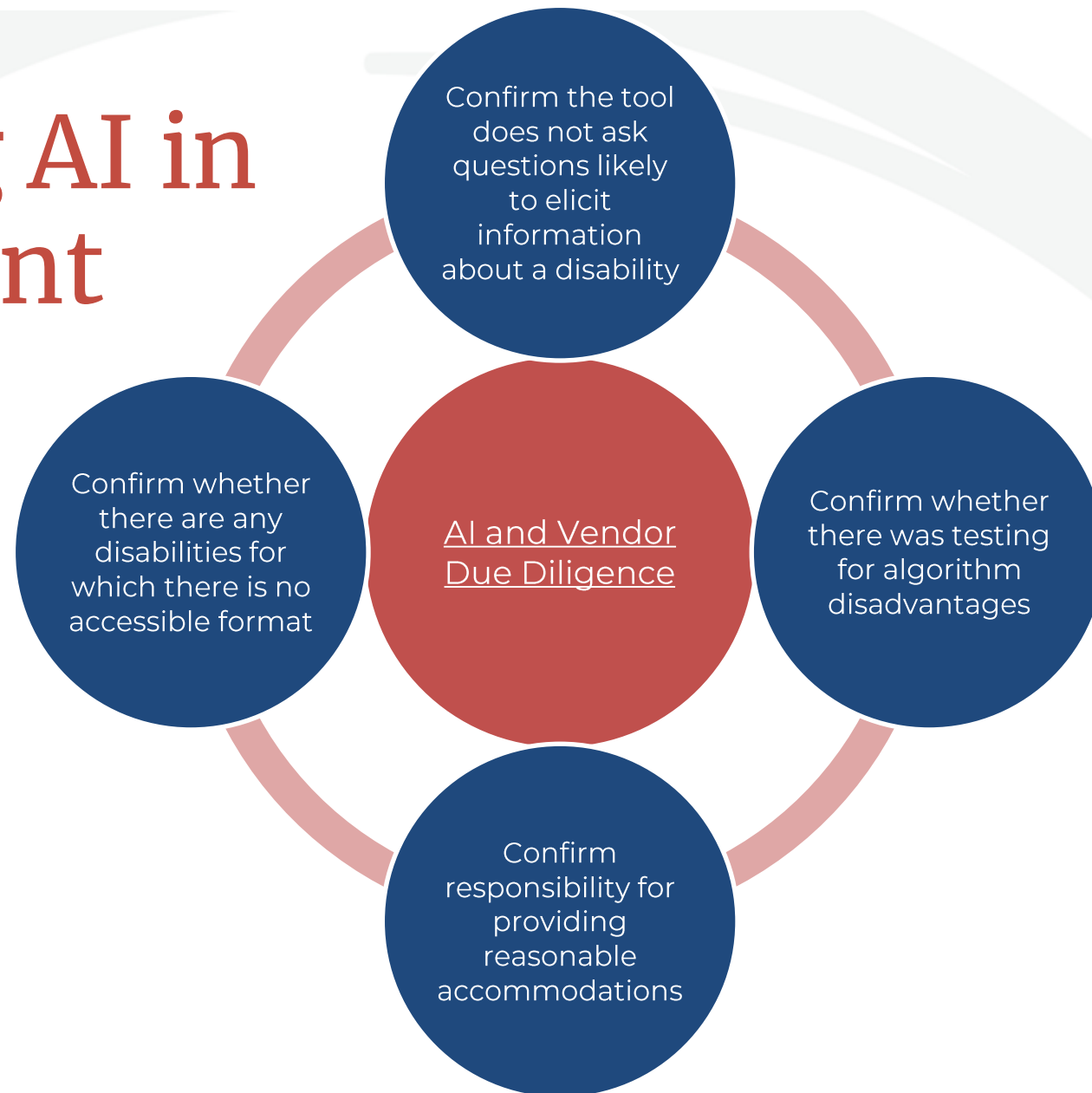
Navigating AI in Employment Decisions



Navigating AI in Employment Decisions



Navigating AI in Employment Decisions



ADA Case Update

While plaintiff's tester ADA case regarding website accessibility was moot, "the issue [as to whether a plaintiff has Article III standing to sue hotels whose websites failed to state whether they have accessible rooms, even if the plaintiff has no intention of staying at the hotels] in this Court is very much alive."

Acheson Hotels. LLC v. Laufer, 144 S. Ct. 18 (2023).

ADA Case Update

“[I]f a plaintiff’s retaliation claim is based on a predicate violation of Title I regarding employment discrimination, then her Title V retaliation claim will be barred by sovereign immunity.”

Sherman v. Pub. Emps. Ret. Sys., 2023 U.S. Dist. LEXIS 174092, 2023 WL 6307632 (S.D. Ohio Sept. 28, 2023).

ADA Case Update

An employee does not put an employer on notice of a disability by stating that she feels “depressed” about her work environment without more (e.g., corroborating medical evidence).

Hrdlicka v. General Motors, LLC, 63 F.4th 555 (6th Cir. 2023).

FMLA Case Update

An employee's notice of intention to take FMLA leave must be reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered her unable to perform her job. General references to her head "really hurting", feeling "sick," or having "fever and other symptoms" are "simply generalized descriptions of ailments that do not rise to the level of 'serious health conditions' within the meaning of the FMLA."

Hrdlicka v. General Motors, LLC, 63 F.4th 555 (6th Cir. 2023).

FMLA Case Update

FMLA claim for violations of the “self-care” provision of the FMLA is barred by the doctrine of sovereign immunity.

Sherman v. Pub. Emps. Ret. Sys., 2023 U.S. Dist. LEXIS 174092, 2023 WL 6307632 (S.D. Ohio Sept. 28, 2023).

FMLA Case Update

An employee can maintain an FMLA retaliation claim even when the employee is not entitled to FMLA leave because “the FMLA protects the right of an employee to inquire about and request leave.”

Millman v. Fieger and Fieger, PC, 58 F.4th 860 (6th Cir. 2023).

FMLA Case Update

Intermittent leave falls within the foreseeability leave provision for providing notice under the FMLA. “Foreseeability turns on whether the *qualifying reason, i.e.,* the illness or medical condition, was foreseeable. In intermittent leave cases, the qualifying reason is known in advance, even if it is unclear when the condition will flare up and require time off.”

Render v. FCA US LLC, 53 F.4th 905 (6th Cir. 2022).

FMLA Case Update

“[T]he required casual connection between the protected activity and the adverse action can be established solely by temporal proximity.”

Maxwell v. FCA US, LLC, 2023, U.S. App. LEXIS 6775, 2023 WL 2636586 (6th Cir. Mar. 21, 2023).

FMLA Case Update

Alterations of job responsibilities, changing of supervisors, requirement to work in person at a relocated desk were not adverse employment actions. “Employment shifts . . . ‘without changes in salary, benefits, title, or work hours usually do not constitute adverse employment decisions.’”

Erwin v. Honda North Am., Inc., 2023 U.S. App. LEXIS 9618, 2023 WL 3035355 (6th Cir. Apr. 21, 2023).

FMLA Case Update

Plan administration for short-term disability leave—rather than the employer—took adverse action against employee by denying STD leave while employee was on approved FMLA leave for her pregnancy. Employer could not be liable for FMLA retaliation for plan administrator's action related to STD leave.

Harmon v. Honeywell Intelligrated, 2023 U.S. Dist. LEXIS 115597, 2023 WL 4348834 (S.D. Ohio July 5, 2023).

FMLA Poster Update

In April 2023, the Department of Labor released a redesigned employee rights poster, which includes updated language on how covered employers are defined.

Your Employee Rights Under the Family and Medical Leave Act

What is FMLA leave?

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees with **job-protected leave** for qualifying family and medical reasons. The U.S. Department of Labor's Wage and Hour Division (WHD) enforces the FMLA for most employees.

Eligible employees can take up to **12 workweeks** of FMLA leave in a 12-month period for:

- The birth, adoption or foster placement of a child with you.
- Your serious mental or physical health condition that makes you unable to work.
- To care for your spouse, child or parent with a serious mental or physical health condition, and
- Certain qualifying reasons related to the foreign deployment of your spouse, child or parent who is a military servicemember.

An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness **may take up to 26 workweeks** of FMLA leave in a single 12-month period to care for the servicemember.

You have the right to use FMLA leave in **one block of time**. When it is medically necessary or otherwise permitted, you may take FMLA leave **intermittently in separate blocks of time, or on a reduced schedule** by working less hours each day or week. Read Fact Sheet #288(c) for more information.

FMLA leave is **unpaid leave**, but you may choose, or be required by your employer, to use any employer-provided paid leave if your employer's paid leave policy covers the reason for which you need FMLA leave.

Am I eligible to take FMLA leave?

You are an **eligible employee** if **all** of the following apply:

- You work for a covered employer.
- You have worked for your employer at least 12 months.
- You have at least 1,250 hours of service for your employer during the 12 months before your leave, and
- Your employer has at least 50 employees within 75 miles of your work location.

Airline flight crew employees have different "hours of service" requirements.

You work for a **covered employer** if **any** of the following applies:

- You work for a private employer that had at least 50 employees during at least 20 workweeks in the current or previous calendar year.
- You work for an elementary or public or private secondary school, or
- You work for a public agency, such as a local, state or federal government agency. Most federal employees are covered by Title II of the FMLA, administered by the Office of Personnel Management.

How do I request FMLA leave?

Generally, to request FMLA leave you **must**:

- Follow your employer's normal policies for requesting leave.
- Give notice at least 30 days before your need for FMLA leave, or
- If advance notice is not possible, give notice as soon as possible.

You **do not have to share a medical diagnosis** but must provide enough information to your employer so they can determine whether the leave qualifies for FMLA protection. You **must also inform your employer if FMLA leave was previously taken or approved** for the same reason when requesting additional leave.

Your employer **may request certification** from a health care provider to verify medical leave and may request certification of a qualifying exigency.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

State employees may be subject to certain limitations in pursuit of direct lawsuits regarding leave for their own serious health conditions. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress.

What does my employer need to do?

If you are eligible for FMLA leave, your employer **must**:

- Allow you to take job-protected time off work for a qualifying reason.
- Continue your group health plan coverage while you are on leave on the same basis as if you had not taken leave, and
- Allow you to return to the same job, or a virtually identical job with the same pay, benefits and other working conditions, including shift and location, at the end of your leave.

Your employer **cannot interfere with your FMLA rights** or threaten or punish you for exercising your rights under the law. For example, your employer cannot retaliate against you for requesting FMLA leave or cooperating with a WHD investigation.

After becoming aware that your need for leave is for a reason that may qualify under the FMLA, your employer **must confirm whether you are eligible or not eligible** for FMLA leave. If your employer determines that you are eligible, your employer **must notify you in writing**:

- About your FMLA rights and responsibilities, and
- How much of your requested leave, if any, will be FMLA-protected leave.

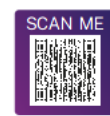
Where can I find more information?

Call 1-866-487-9243 or visit dol.gov/fmla to learn more.

If you believe your rights under the FMLA have been violated, you may file a complaint with WHD or file a private lawsuit against your employer in court. **Scan the QR code to learn about our WHD complaint process.**



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR



WH1420 REV 04/23

FMLA Poster Requirement

February 2013 and April 2016 versions still fulfill posting requirement.

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintroduction briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is: (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness"; or (2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

*The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

*Special hours of service eligibility requirements apply to airline flight crew employees.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and

a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to: • interfere with, restrain, or deny the exercise of any right provided under FMLA; and • discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or approve any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.



For additional information:
1-866-4USWAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV



U.S. Department of Labor | Wage and Hour Division

WHD Publication 1429 Revised February 2013

EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (time must be taken within 1 year of the child's birth or placement);
- To care for the employee's spouse, child, or parent who has a qualifying serious health condition;
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

While employees are on FMLA leave, employees must continue health insurance coverage, as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

BENEFITS & PROTECTIONS

ELIGIBILITY REQUIREMENTS

An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees

*Special "hours of service" requirements apply to airline flight crew employees.

REQUESTING LEAVE

Generally, employees must give 30 days' advance notice of the need for FMLA leave. If it is not possible to give 30 days' notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures.

Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employees can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

EMPLOYER RESPONSIBILITIES

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

ENFORCEMENT

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:
1-866-4-USWAGE
(1-866-487-9243) TTY: 1-877-889-5627
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U.S. Department of Labor | Wage and Hour Division

ADA or FMLA?

Taylor is normally required to work more than 8 hours per day. She has developed a chronic, serious health condition and will no longer be able to work more than 8 hours per day indefinitely. Both the ADA and the FMLA apply to Taylor and her employer.

Which law applies to allow Taylor to limit her workday to 8 hours per day indefinitely?

ADA or FMLA?

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Which law applies to allow Taylor to limit her workday to 8 hours per day indefinitely?

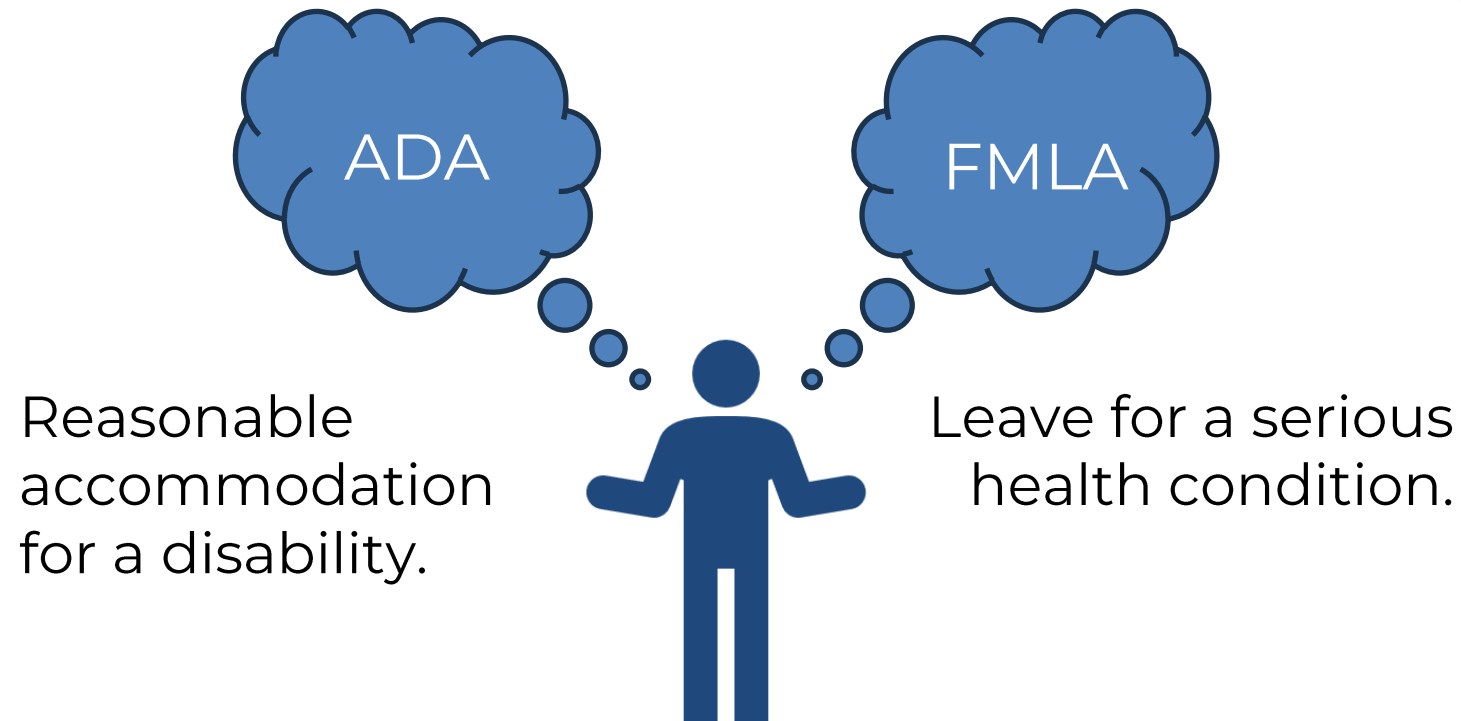
Both the FMLA and the ADA.

FMLA Leave Can Be Used Indefinitely

U.S. Department of Labor, Opinion Letter FMLA2023-1-A:

an eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement.

Distinct Rights, Overlapping Application



Questions?



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Since 1909.

Thank You