




PARMA Annual Conference
February 20-23, 2024
Indian Wells, CA

Welcome to the crossroads: FMLA, ADA, LOA and WC

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Dawn Watkins, Los Angeles Unified School District




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SPEAKERS
SPEAKERS
SPEAKERS
SPEAKERS



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Session objectives and takeaways

At the end of this session, you should be better able to...

- Appreciate and administer the interplay of workers' compensation, the Americans with Disabilities Act, FMLA and CFRA.
- Understand the Pregnant Workers' Fairness Act
- Apply the facts to real-life situations

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Family and Medical Leave Act

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Coverage under FMLA



Employer eligibility:

- Applies to all state and local government employees regardless of size;
- Private employers with at least *50 employees*



Employee eligibility:

- Worked for employer for at least 12 months;
- Has at least 1,250 hours of service in the 12 months preceding the leave; and
- Works at a site where there are 50+ employees within a 75-mile radius


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Coverage under FMLA

- Twelve (12) workweeks of unpaid leave in a 12-month period; 26 Weeks for Care of Injured Service Member
- Continuation of health care benefits;
- Restoration to the same or equivalent job;



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Medical certification/documentation



- Employers may, but are not required to, obtain medical certifications to substantiate the leave
 - However, employers should be consistent
- Anyone but the immediate supervisor can contact the health care provider for authentication and clarification
- Can require a fitness for duty certificate if you give notice of your intent to do so at the onset of the leave

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Employee working while on leave

- Can make “de minimis” requests of employees while on leave (e.g., sending a one-off email).
Park v. Direct Energy GP, L.L.C., 832 F. App’x 288 (5th Cir. 2020)
- But you may not pressure an employee to work
Spivey v. Elixir Door & Metals Co., No. CV 519-091, 2021 WL 4691450, at *5 (S.D. Ga. Oct. 7, 2021),




California Family Rights Act

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Coverage under CFRA



Employer eligibility:

- Applies to all state and local government employees regardless of size;
- Private employers with at least 5 employees



Employee eligibility:

- Worked for employer for at least 12 months;
- Has at least 1,250 hours of service in the 12 months preceding the leave; and

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Coverage under CFRA

- Twelve (12) workweeks of unpaid leave in a 12-month period
- Continuation of health care benefits;
- Restoration to the same or equivalent job;
- Cannot be used for Pregnancy reasons. That is covered under California's Pregnancy Disability Law.



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Medical certification/documentation



- Employers may, but are not required to, obtain medical certifications to substantiate the leave
 - California has a separate form from FMLA
- CFRA's medical certification form is much more restrictive than FMLA due to privacy laws in California.
- Can require a fitness for duty certificate if you give notice of your intent to do so at the onset of the leave

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Americans with Disabilities Act

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Buckle up

20.4%

of all EEOC charges in 2008 alleged discrimination based on disability. This put disability far behind the protected classes of race and gender in terms of commonality.

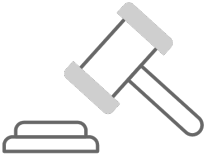
34%

of all EEOC charges in 2022 alleged discrimination based on disability. It is now the most commonly cited type of discrimination. This is a **70%** increase in disability discrimination filings. Why?

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Americans with Disabilities Act

- Americans with Disabilities Act (ADA) is a law that prohibits discrimination based on disability; it was enacted in 1990 and amended in 2008 (ADAAA)
- Under the ADA, employers are required to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would pose an undue hardship (42 USC § 12101)
- It prohibits discrimination, retaliation and harassment of disabled persons

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Definition of a disability

Disability is defined by the ADA as:

- Physical or mental impairment that substantially limits one or more major life activities, or
- A record of such an impairment, or
- Regarded as having such an impairment
- See USC 12102 (2)

NOTE: Many states have laws that define “disability” more broadly than the federal ADA law



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Definition of reasonable accommodation

- Any change in the work environment, or in the way things are customarily done, that enables an individual with a disability to enjoy equal employment opportunities
- The determination of whether an accommodation is reasonable is also made on a case-by-case basis
- Once an employee notifies of a disability or the need for accommodation, you must engage the employee in the interactive process



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Types of reasonable accommodation

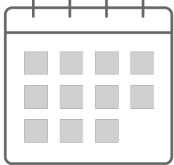
Accommodate restrictions within the position	Accommodate with a leave of absence	Accommodate with a job reassignment
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Leave as an accommodation



According to the EEOC, an employer must consider unpaid leave if the employee requires it, so long as it does not create an undue hardship for the employer, *even when*:

- The employer does not offer leave as an employee benefit
- The employee is not eligible for leave under the employer's policy
- The employee has exhausted the leave the employer provides (e.g., a workers' compensation program, FMLA or similar state or local laws)

<https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>

Remember those examples!


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Examples of “disability” under ADA

- Diabetes
- Stress/anxiety
- Irritable bowel syndrome
- Cancer
- Chronic high blood pressure
- Herniated disc and pain requiring surgery



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Interplay between FMLA and ADA

General rule:

When an employee exhausts leave under the FMLA, the employer must consider whether a leave (or a workplace accommodation) under the ADA would be reasonable.

See 29 CFR 825.702(a)

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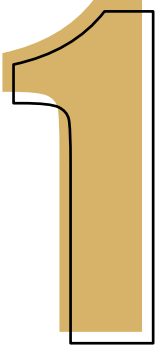
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Interplay between FMLA and ADA

Example 1:

An employee with an ADA-qualifying disability needs 16 weeks of leave for treatment related to the disability and is eligible for FMLA.

Must the employer grant the leave? If so, how much?



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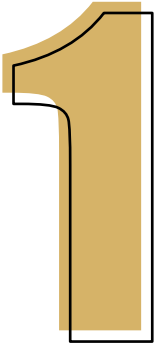
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Interplay between FMLA and ADA



FMLA would allow the employer to deny the extra 4 weeks of leave; however...

- The EEOC has said that an “otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship” on the employer.
- Thus, the employer can only deny the 13th - 16th weeks of leave if it can show the additional weeks of leave posed an undue hardship.




In determining this, the employer can look at the totality of the 16 weeks, including the first 12 weeks of job-protected leave.



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<p>Interplay between FMLA and ADA</p> <p><i>Example 2:</i></p> <p>An employee with an ADA-qualifying disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Is this permissible?</p>	




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<p>Interplay between FMLA and ADA</p> <p><i>FMLA would allow the employer to place the employee in an equivalent position; however...</i></p> <p>The ADA requires the employer to return the employee to their original position unless the employer can show undue hardship, or that the employee is no longer qualified for the original position (with or without reasonable accommodation).</p>	


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<h2>Interplay between FMLA and ADA</h2> <p><i>Example 3:</i></p> <p>An employee with an ADA-qualifying disability has taken 12 weeks of FMLA leave and notifies his employer that he is ready to return to work, but he is no longer able to perform the essential functions of his position or an equivalent position. May you terminate this employee?</p>	
	

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<h2>Interplay between FMLA and ADA</h2> <p><i>FMLA would allow you to terminate the employee; however...</i></p> <ul style="list-style-type: none"> • ADA requires you to determine if the employee could perform the essential functions of the position with a reasonable accommodation (either a workplace accommodation or a leave of absence). • If the answer under the ADA analysis is no, you must determine whether there is a vacant position available for which the employee is qualified. <ul style="list-style-type: none"> – A job reassignment is often called the “accommodation of last resort.” 	
	

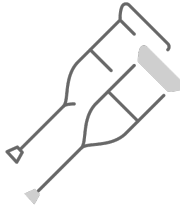
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Leave under workers' compensation

No specific limit for the amount of leave an injured worker may have for an on-the-job injury.

- *Concurrent running of FMLA and workers' comp is permitted.*
 - Impact: Workers' Compensation benefits will replace lost wages, but FMLA will obligate the employer to maintain other health benefits.
 - Cannot force the employee to use their accrued paid leave (permitted under FMLA) because workers' compensation is considered paid leave.
 - FMLA would protect the employee's job, which would not occur under workers' compensation absent an employment contract or a CBA.

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Return to work/light duty


- If an employee has a doctor's note releasing them to return to work, do NOT demand they get a note from another physician and/or prevent them from returning to work.
- Light duty: if an employee is released for light duty work, the employee may reject the light duty work, but forfeits workers' compensation benefits.
- Employer is not required to bring employee back to work when he/she is released at light or restricted duty if a position is not available.
- Remember to consider other relevant law; some jobs such as food handlers or commercial drivers have state or federally-mandated requirements.




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Interplay of ADA, FMLA, and workers' compensation laws

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Medical documentation

ADA

- You may require sufficient documentation to establish that the employee has a disability – presuming the disability isn't obvious
- Documentation must be reasonable and must relate to the specific condition for which leave as an accommodation has been requested.

FMLA

- You may require medical certification of the serious health condition (the Department of Labor has model forms)
- You may require second or third medical opinions (at your expense) and periodic recertification of a serious health condition.

Workers' compensation

- You may require medical information that pertains to the employee's on-the-job injury, e.g., return to work notes, medical work restrictions

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Medical documentation

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Benefits while on leave

ADA

No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leave of absence.

FMLA

Health coverage must be continued at same level as prior to the leave; other benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave.

Workers' compensation

You may require medical information that pertains to the employee's on-the-job injury, e.g., return to work notes, medical work restrictions

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Light (restricted) duty

<p><i>ADA</i></p> <p>Requires consideration of light duty as a reasonable accommodation.</p>	<p><i>FMLA</i></p> <p>Does not require employee to accept light duty if employee prefers FMLA leave and has it available.</p>	<p><i>Workers' compensation</i></p> <p>Requires employee to accept available light duty ("suitable employment") or forfeit compensation benefits.</p>
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Pregnant Workers' Fairness Act

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PWFA – high level

- Prohibits employment practices that discriminate against employees seeking reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.
- One of the PWFA’s primary provisions is the obligation for employers to interactively dialogue with pregnant employees who request accommodations (similar to the ADA’s obligation).
- The PWFA adopts the same meanings of “qualified employee,” “reasonable accommodation,” and “undue hardship” as defined in the Americans with Disabilities Act (ADA).



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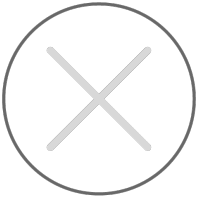
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Getting more into the weeds

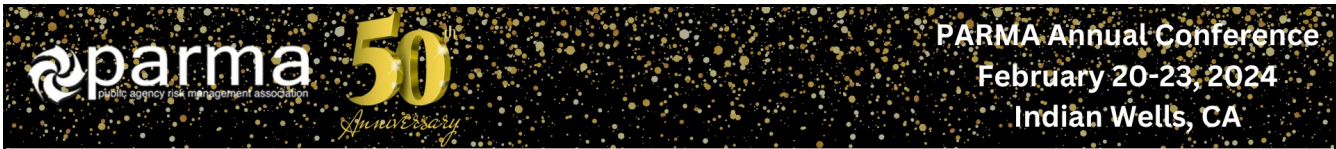
Covered employees cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person’s need for a reasonable accommodation
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation)
- Interfere with any individual’s rights under the PWFA



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Why was the PWFA necessary?

Because there were gaps in protection for pregnant women under federal law

Americans with Disabilities Act

“Routine pregnancy” is not a disability though a pregnancy with complications may rise to the level of a disability

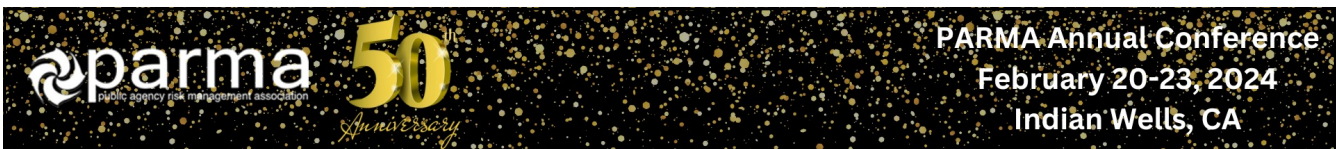
- (11th Cir. – 2018) pregnancy with complications including two blood transfusions was not a disability under the ADA, and the claim for failure to permit telework was dismissed (employee worked in Georgia – where there is no pregnancy accommodation law)

Pregnancy Discrimination Act Act

PDA does not require employers to accommodate pregnant women

- (7th Cir. – 2022) Recent 7th Circuit Case concluding that a large retailer did not violate PDA when it provided light duty to those injured at work but not pregnant women

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Why was the PWFA necessary?

Although the Family and Medical Leave Act (FMLA) considers pregnancy a “serious health condition,” it has eligibility requirements/restrictions that exclude many employees:

- Must have worked for that employer for at least 12 months at time of leave
- Must have worked at least 1,250 hours in the 12 months before the leave
- Must work at a worksite that has 50 or more employees within 75 miles
- Only 12 weeks allotment per year




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PWFA vs. ADA

The PWFA is *broader* and gives pregnant women, or women affected by pregnancy/childbirth, *greater rights* than employees covered only by the ADA

- PWFA expressly requires ERs to grant accommodations that relieve an EE from performing an essential job function if it is just temporary
 - ERs are expressly prohibited from requiring leave if another reasonable accommodation is available
 - ER are expressly prohibited from imposing an accommodation unless it was arrived at through the interactive process

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Current state and local laws requiring pregnancy accommodation

To the extent that they offer employees greater benefits, they are still in effect!

Some state laws prohibit employers from requiring medical documentation for certain accommodations, such as:

- Restroom breaks
- A stool or other place to sit
- Limits on lifting



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Possible accommodations

Job restructuring (to remove essential or non-essential job functions)

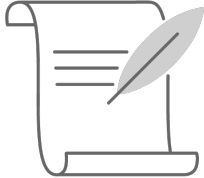
Light duty	Reassignment	Equipment modification
Telework	Modified schedules	Leave

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PWFA: draft provisions

- On August 7, 2023, the EEOC released draft regulations for the PWFA.
- The public has until October 11, 2023 to submit comment to the proposed rules.
- At some point after October 11, 2023 the final regulations will be released.
- The draft regulations are over 250 pages.
- We reviewed them so you don't have to.
- Here are the biggest takeaways.

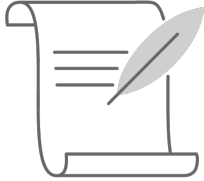
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PWFA: draft provisions, cont'd

1. Under the PWFA, Employees do not have to prove disability – just a limitation
2. The definition of “related conditions” is to be interpreted broadly
3. No magic words to request PWFA accommodation
4. Certain accommodations are de facto, reasonable and not burdensome
5. The near future may be a longer time than you think
6. Do not request documentation willy-nilly
 - Carrying water and drinking, as needed
 - Taking additional restroom breaks
 - Sitting/standing
 - Breaks as needed to eat and drink
 - The need to lactate or pump
7. Unnecessary delays violate the law

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What should employers do?

It is also incumbent on employers to *update* your internal accommodation *policies/processes*

- Does your policy mention the PWFA?
- Does your policy imply an accommodation can never suspend an essential job function?
- Do you only provide accommodations for employees with a “disability?”



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Hypothetical

Jane Doe, an assembly line worker, has called in sick for three consecutive days, citing extreme back pain. She has been with ABC Manufacturing, a company with over 500 employees, for three years working full-time with very few absences. Jane calls in sick for the fourth day stating that she was examined by her doctor who took x-rays and stated that she needs complete bed rest and possibly back surgery and will be unable to work for an extended period of time. She states that her doctor thinks the condition is caused by the type of work she has been doing.

Jane has taken no FMLA time during the past 12 months.



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Analysis of Jane Doe’s absence

Employer coverage
ABC Manufacturing is covered under and must comply with the ADA, FMLA and state Workers’ Compensation Laws.

Employee eligibility
Jane’s situation may be eligible for protection under the ADA and FMLA, depending on the severity of her condition.

Regarding WC, a claim must be filed, processed, and either accepted/denied by the carrier to determine coverage.



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Analysis of Jane Doe's absence

Length of leave

With proper medical certification, her time off will be designated as FMLA leave.

- Should her absence exceed 12 weeks, additional leave of absence may be a reasonable accommodation under the ADA.
- If the condition is determined to be work-related, workers' compensation leave will run concurrently with the FMLA leave.



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Analysis of Jane Doe's absence

Medical documentation

FMLA medical certification may be required. Medical documentation will be required on an ongoing basis by the WC carrier if the claim is accepted.

Light duty

Not required at the present time as Jane is unable to work in any capacity until further notice.

When she is able to return to work, if she has medical restrictions, light duty, if available, must be offered as a reasonable accommodation under the ADA unless this creates an undue hardship on the employer.

If her injury is deemed to be job-related, light duty should be offered under Workers' Compensation.

Under FMLA, light duty may be offered, but cannot be required if leave is still available.

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Analysis of Jane Doe's absence

Benefits while on leave

Not required under the ADA. Under FMLA, Alice's health benefits will be continued at the same level as prior to her leave and she will receive other benefit continuation given for employees on similar non-FMLA leave. No additional benefits under WC required.

Reinstatement

Jane must be reinstated to her previous job under the ADA unless doing so would create an undue hardship on her employer. If she can return before her 12 weeks of FMLA leave have been exhausted, she will be reinstated in her previous or a similar position. No reinstatement provisions under WC law, but be careful of retaliatory discharge claim.



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Hypothetical

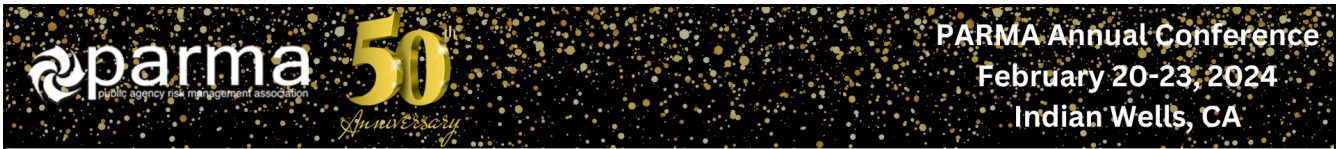
Emily Employee works for Fran's Fashions, a retail organization with 140 locations across the country. She is pregnant and requests that she be allowed to keep water at the checkout register – her typical workstation. However, Fran's Fashions has a policy prohibiting food or drink at the register.

Emily just started with Fun Fashions 3 months ago.

How should Fun Fashions respond? Which laws apply? If Fun Fashions decides to allow the request, what documentation should they seek?



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Analysis of Emily Employee’s request

ADA and FMLA

FMLA doesn’t apply since Emily has only been at Fun Fashions for a few months. ADA doesn’t apply because there is no indication that her pregnancy is disabling under the ADA.

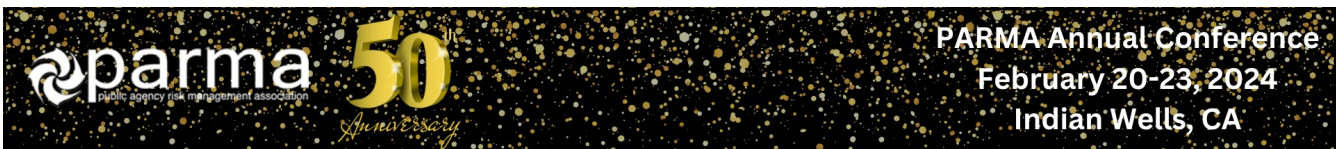
PWFA

Applies because she has requested an accommodation related to her pregnancy. While Fun Fashion prohibits food or drink at the work station, the company will need to determine if allowing her to do so would unduly burden the organization.

Documentation

While some states prohibit requesting documentation for pregnant employees who need breaks for food and/or water, not require allowing the employee to have it at their desk. However, the draft regulations propose this situation (“carrying water and drinking”) as a “predictable assessment” and if adopted, would presume that this is reasonable and would prohibit requiring documentation.

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In review

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Workers’ compensation, the Americans with Disabilities Act, FMLA, and the PWFA form a “Bermuda Parallelogram” of considerations when employees must miss work due to a health condition

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While the rules for each law are different, they intersect, inter-relate and in some cases complement each other.

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Employees are aware of these laws; you should treat them consistently



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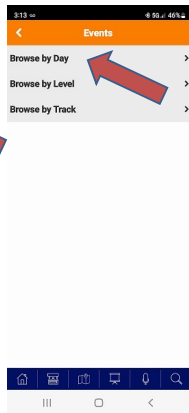
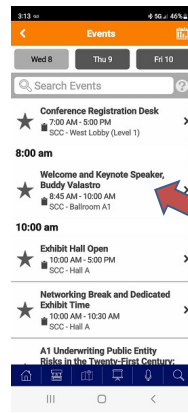
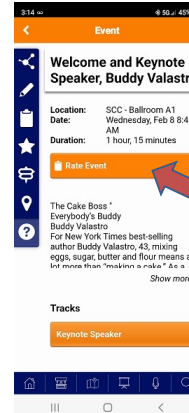


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