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Beyond the Basics: Disability and Pregnancy Accommodations in Manufacturing

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ADA and PWFA

- Quick Refreshers on both ADA and PWFA
- Digging Deeper
- Answering Your Questions

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ADA Refresher

- Employer must go through the **Interactive Process** to address any needed accommodations, regardless of the ultimate result.
- Employer should **document**:
 - All accommodations considered with reasons any considered accommodation was not provided; and
 - All accommodations provided including duration for each.
- Focus for Employer when considering accommodations:
 - **Reasonable** – allows Employer to meet business goals without being unduly burdensome; and
 - **Effective** – allows Employee to safely and effectively perform job duties and meet Employer work expectations.

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ADA Interactive Process

- **Employer** determines essential functions of the job.
- **Employee's healthcare provider** is the first resource for providing an employee's restrictions and limitations, if those are not apparent.
- **Employer**, with Employee, determine accommodations. **Be creative.**
- **Employer** selects reasonable and effective accommodation and communicates in writing with parameters to Employee.
- **Employer** explains why a denied accommodation is not reasonable based on business needs or is not effective in assisting the employee to be able to perform essential job duties.
- **Employer/Supervisor** monitors effectiveness and/or changes, including if business needs change or Employee restrictions change.

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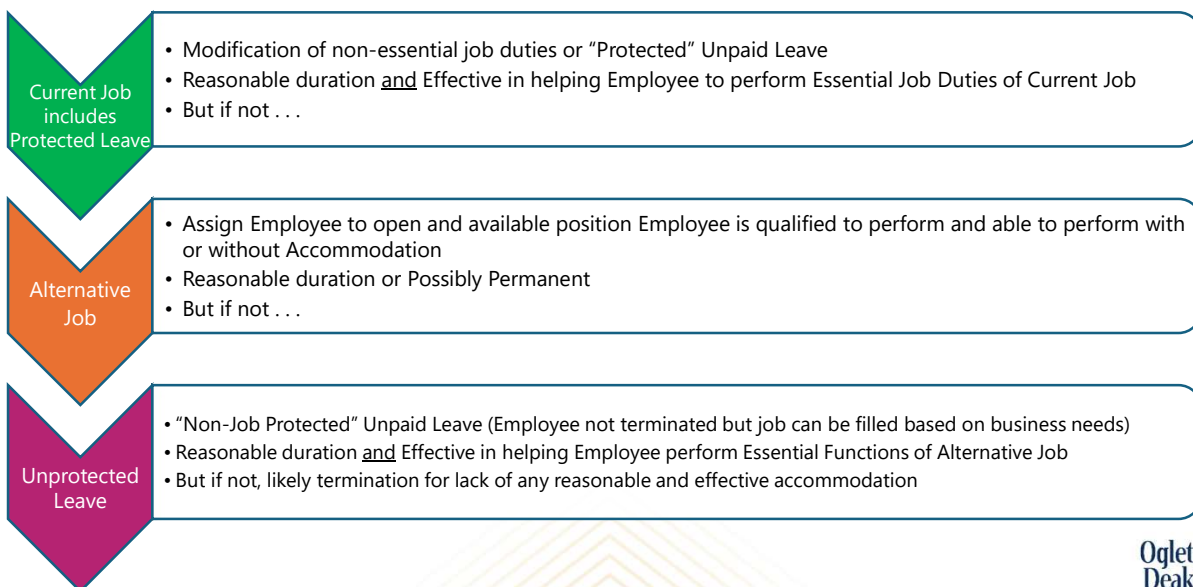
ADA Limits on Medical Inquiries and Exams

- Employer is prohibited from making medical inquiries and requiring medical exams, *unless* job related and consistent with business needs.
- If the need for leave or accommodation is not obvious, an employer may pose medical inquiries to confirm the FMLA or ADA applies and the scope of any restrictions/limitations so the employer can determine any leave or accommodations the employee may need.
- EEOC Guidance - Before requiring a medical exam by a provider selected by the Employer, the Employer should first try to obtain needed information from Employee's provider.

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ADA: Order of Accommodations to Consider



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PWFA Refresher

- Must provide reasonable accommodations to **known limitations** related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operations of the business.
- Goal is to keep employees working and **leave is a last resort** (unless employee specifically requests leave).
- An employee is still qualified if they **cannot** perform 1 or more essential functions if temporary and can be performed in near future (40 weeks pregnancy; individualized assessment for non-pregnancy).

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PWFA Predictable Assessments

- Employers should grant some accommodations in **virtually all cases** and will rarely be an undue hardship
- No supporting documentation or extensive individualized assessment for:
 - Allowing an employee to carry water and drink in the work area
 - Allowing additional restroom breaks
 - Allowing sitting in jobs that require standing, and standing in jobs that require sitting
 - Allowing breaks as needed to eat and drink
 - Timing and location of lactation breaks

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Section 1

FMLA / ADA Leave Duration & Job Protection

Indefinite leave, job protection, and undue hardship

Q&A

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The ADA and Job-Protected Leave??? I'm confused...

What is the basis for saying an employer must consider job-protected leave as an ADA accommodation?

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The ADA and Job-Protected Leave?

- a) The ADA requires an employer to consider any reasonable accommodation that could assist the employee in being able to perform the essential functions of the employee's assigned job, which may include a reasonable period of leave to improve and/or obtain treatment so then the employee can perform the essential functions of the job.
- b) If an employer fails to consider providing a reasonable period of job-protected leave as an ADA accommodation, the employer has in essence skipped to only considering a permanent reassignment to an alternative position which is supposed to be the last step in the ADA accommodation process, not the first step.

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The ADA and Job-Protected Leave?



- a) The ADA requires an employer to consider any reasonable accommodation that could assist the employee in being able to perform the essential functions of the employee's assigned job, which may include a reasonable period of leave to improve and/or obtain treatment so then the employee can perform the essential functions of the job.



- b) If an employer fails to consider providing a reasonable period of job-protected leave as an ADA accommodation, the employer has in essence skipped to only considering a permanent reassignment to an alternative position which is supposed to be the last step in the ADA accommodation process, not the first step.

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Another leave extension? When does this end?

When is leave no longer reasonable and/or causes an undue hardship, if every 2 months the medical documentation extends the needed leave only 1-2 additional months?

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What steps can an employer take to support showing a short leave extension is not reasonable?

- a) Document the total amount of leave already provided and document the key business reasons it is no longer reasonable to extend leave again.
- b) Document the number of times the employee's treating provider has determined restrictions are expected to last only a short additional period and then extended again for another short period, to show the provider is uncertain on the total duration of the employee's restrictions.
- c) Determine and offer alternative accommodations that can be reasonably offered instead. For example, if the employee's regular job can no longer be held for the employee due to business needs, offer a currently open position that the employee is qualified for and can perform based on any known restrictions. Or offer the employee a reasonable period of non-job protected leave to allow time for the Company and employee to explore alternative open positions the employee may be able to perform in a reasonable period of time.

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I don't need FMLA leave since I can work part-time while pregnant.

Jan is pregnant and just provided HR medical documentation that she needs to immediately stop working 40 hours per week and reduce her schedule to only 20 hours per week.

Jan is eligible for FMLA leave but wants to save her FMLA leave for after she delivers.

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What could HR do?

- a) Allow Jan to not use FMLA leave on a reduced schedule basis even though it applies, but document it was offered and refused to avoid a charge that you failed to provide FMLA leave. Also, inform Jan that she will lose coverage under the Health Plan since the Health Plan only allows coverage to continue when an employee is either working 32 hours per week or is on an approved FMLA leave.
- b) Allow Jan the reduced schedule, but require her to use FMLA leave since it applies. Explain to Jan that even if she exhausts FMLA leave prior to delivery, she will be eligible for leave during any childbirth recovery period as an accommodation under the PWFA.
- c) Tell Jan that it will be an undue hardship on the Company to have her work only a reduced schedule prior to delivery and then still need additional time off after delivery, so she will be terminated but can reapply in the future.

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What could HR do?

- ☒ a) Allow Jan to not use FMLA leave on a reduced schedule basis even though it applies, but document it was offered and refused to avoid a charge that you failed to provide FMLA leave. Also, inform Jan that she will lose coverage under the Health Plan since the Health Plan only allows coverage to continue when an employee is either working 32 hours per week or is on an approved FMLA leave.
- ☒ b) Allow Jan the reduced schedule, but require her to use FMLA leave since it applies. Explain to Jan that even if she exhausts FMLA leave prior to delivery, she will be eligible for leave during any childbirth recovery period as an accommodation under the PWFA.
- c) Tell Jan that it will be an undue hardship on the Company to have her work only a reduced schedule prior to delivery and then still need additional time off after delivery, so she will be terminated but can reapply in the future.

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Section 2

PWFA Scope & Eligibility

Coverage, qualifying conditions, and duration of protections

Q&A

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Hello, and May I Have Some Leave, Please?

Simone was hired 3 months ago, and she just told the Company that she will need leave for the birth of her child in 4 months. HR knows she will not yet be eligible for FMLA leave at that time.

Her spouse, Chuck, was hired by the Company last month, and emailed HR asking whether he can take leave after the birth for baby bonding.

What should HR determine in this scenario?

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Poll #1 Answer

- a) Determine that Simone and Chuck may not take any leave because neither will be eligible for FMLA in 4 months.
- b) Determine that Simone and Chuck can be separated from employment for the time needed for birth and baby bonding, then they can apply again when they are ready to return to work.
- ☒ c) Determine that Simone will be able to take leave as a PWFA accommodation; but Chuck will not be able to take baby bonding leave under PWFA.

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A Sad Event

Roxanne is pregnant and has taken her 12 weeks of FMLA leave for required bedrest during pregnancy. Unfortunately, Roxanne experiences a miscarriage. She asks for time off to recover, but has no remaining FMLA leave.

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What next steps would you take?

- a) Express your sympathies to Roxanne, and explain that she may be able to take more time for physical recovery, medical appointments, and related reasons.
- b) Express your sympathies to Roxanne, but explain that she has no more leave available because her 12 weeks of FMLA expired.
- c) Express your sympathies to Roxanne, and explain that she can take more leave, but she will need to be separated from employment and can reapply when she is ready to come back to work.

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What next steps would you take?

- ☒ a) Express your sympathies to Roxanne, and explain that she may be able to take more time for physical recovery, medical appointments, and related reasons under the PWFA.
- b) Express your sympathies to Roxanne, but explain that she has no more leave available because her 12 weeks of FMLA has expired.
- c) Express your sympathies to Roxanne, and explain that she can take more leave, but she will need to be separated from employment and can reapply when she is ready to come back to work.

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Section 3

Post-Partum / Recovery Leave Duration

Leave length, FMLA interaction, and extended accommodations

Q&A

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Layla is very excited to start her new job as a leave and accommodation coordinator for the Company. She arrives to her first day of work to find some accommodation requests waiting for her review:

- A request for 12 weeks of PWFA leave to recover from birth
- A request for intermittent leave pre-pregnancy for IVF treatments
- A request for modified hours and periods of no disruptions while working due to post-partum depression

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What should Layla do?

- a) Approve the 12 weeks of recovery from birth, deny the intermittent leave for IVF treatments, and request additional supporting information for the post-partum depression request.
- b) Request supporting documentation for recovery from birth, for the leave for IVF treatments, and for the post-partum depression request.
- c) Only approve 6 weeks for the recovery from birth, approve the intermittent leave for IVF for 3 months, and limit the post-partum depression request to 12 months.

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What should Layla do?

- a) Approve the 12 weeks of recovery from birth, deny the intermittent leave for IVF treatments, and request additional supporting information for the post-partum depression request.
- ☒ b) Request supporting documentation for recovery from birth, for the leave for IVF treatments, and for the post-partum depression request.
- c) Only approve 6 weeks for the recovery from birth, approve the intermittent leave for IVF for 3 months, and limit the post-partum depression request to 12 months.

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How Much Time Off?

Judy informed HR that she is pregnant, and then a few weeks later brought in a doctor note that stated she needed to be on bedrest for the remainder of the pregnancy and then needed leave to recover from childbirth. Judy is not eligible for FMLA or any other state leave law.

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What next steps would you take?

- a) Decide that almost nine months of leave followed by leave for childbirth is not required, and tell Judy that she will need to quit and then reapply when she is ready to come back to work.
- b) Engage in the interactive process with Judy to explore whether she needs continuous leave or if she can perform some part-time work even if alternative work, and continue the interactive process to determine the amount of leave needed for childbirth recovery.
- c) Tell Judy that this is really a lot to ask of the Company, and while you will let her off for bedrest, you are not sure of leave after that.

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What next steps would you take?

- a) Decide that almost nine months of leave followed by leave for childbirth is not required, and tell Judy that she will need to quit and then reapply when she is ready to come back to work.
- ☒ b) Engage in the interactive process with Judy to explore whether she needs continuous leave or if she can perform some part-time work even if alternative work, and continue the interactive process to determine the amount of leave needed for childbirth recovery.
- c) Tell Judy that this is really a lot to ask of the Company, and while you will let her off for bedrest, you are not sure of leave after that.

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Section 4

Interactive Process & Job Reassignment

Temporary positions, pay, and return-to-work obligations

Q&A

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Oops – Watch your step.

Nancy was not wearing the correct safety footwear at work and she slipped as she was walking in the warehouse. She re-injured her back from a prior fall and was assigned lifting restrictions.

Nancy's manager was out for the rest of the week so HR could not discuss whether there were accommodations that could assist her with performing her regular job that requires lifting.

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What next steps would you take?

- a) Place Nancy on job-protected leave as an ADA accommodation or under FMLA until the manager returns so the manager can determine if there is any alternative work she can temporarily perform that does not require lifting since there is no open position that she qualifies to perform.
- b) Since Nancy is not eligible for FMLA, place Nancy temporarily in a known alternative open job that does not require lifting and pay her at the assigned rate for the job which is less than she normally receives.
- c) Since Nancy is eligible for FMLA, give her the option to either start FMLA leave since she cannot perform the required lifting for her regular job or to transfer temporarily to a known alternative job that does not require lifting and pay her at the assigned rate for the job which is less than she normally receives.

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What should HR do?

- ☒ a) Place Nancy on job-protected leave as an ADA accommodation or under FMLA until the manager returns so the manager can determine if there is any alternative work she can temporarily perform that does not require lifting since there is no open position that she qualifies to perform.
- ☒ b) Since Nancy is not eligible for FMLA, place Nancy temporarily in a known alternative open job that does not require lifting and pay her at the assigned rate for the job which is less than she normally receives.
- ☒ c) Since Nancy is eligible for FMLA, give her the option to either start FMLA leave since she cannot perform the required lifting for her regular job or to transfer temporarily to a known alternative job that does not require lifting and pay her at the assigned rate for the job which is less than she normally receives.

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Oops – Watch your step.

Nancy agreed to the alternative work even though at a lesser rate of pay, especially since her worker's compensation claim was approved and she received a temporary partial disability benefit along with her lower wages.

Nancy's manager returned and spoke with HR about their being a business need to back-fill Nancy's position because of a customer contract that will be in jeopardy of not fulfilling and could cost the Company significant money if Nancy is unable to work in her regular position for any length of time.

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What should HR do?

- a) If Nancy is eligible for FMLA even though she opted to work instead of take leave, explain to the Manager he can temporarily back-fill Nancy's position, but she retains reinstatement rights to return to that position, at least at this time.
- b) Since Nancy is not eligible for FMLA and since there will be an undue hardship to the business if her reassignment remains temporary instead of permanent, inform Nancy that her reassignment as an accommodation under the ADA is now permanent. Also let her know that if her prior position becomes available in the future and she is able to perform the essential job duties, she can reapply for the position.
- c) Since Nancy is not eligible for FMLA, keep Nancy's reassignment as a temporary one and request confirmation of the expected duration of her lifting restriction. Once received, discuss with Nancy's manager the expected duration of her lifting restriction to understand the business's needs to fill the position.

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What should HR do?

- ☒ a) If Nancy is eligible for FMLA even though she opted to work instead of take leave, explain to the Manager he can temporarily back-fill Nancy's position, but she retains reinstatement rights to return to that position, at least at this time.
- b) Since Nancy is not eligible for FMLA and since there will be an undue hardship to the business if her reassignment remains temporary instead of permanent, inform Nancy that her reassignment as an accommodation under the ADA is now permanent. Also let her know that if her prior position becomes available in the future and she is able to perform the essential job duties, she can reapply for the position.
- ☒ c) Since Nancy is not eligible for FMLA, keep Nancy's reassignment as a temporary one and request confirmation of the expected duration of her lifting restriction. Once received, discuss with Nancy's manager the expected duration of her lifting restriction to understand the business's needs to fill the position.

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Section 5

Lactation / Pumping Accommodations

Space, time, and scheduling requirements for nursing employees

Q&A

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Who Starts the Conversation?

Joanne has been on leave recovering from childbirth, and she is expected to return to work next week. HR is unsure whether Joanne will need space for lactation/pumping, so decides to wait until Joanne returns to see what happens.

Is HR on the right track?

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Poll #2 Answer

- a) Yes, HR has no idea whether Joanne will even plan to pump, so Joanne can let HR know when she returns.
- b) Yes, because it is only Joanne's responsibility to request space and breaks for pumping.
- ☒ c) No, because HR should have an idea of what Joanne's needs are and make sure that there is adequate space upon Joanne's return to work.

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Next Steps?

HR talks with Joanne and confirms that Joanne does need breaks to pump. The lactation room is set up and compliant. Joanne returns to work, and a week after her return, management tells HR that Joanne is taking 4 pumping breaks throughout the day, and that seems excessive.

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What should HR do?

- a) HR can tell Joanne that she is limited to 2 lactation breaks per shift.
- b) HR can request Joanne to provide medical information from her doctor supporting the need for 4 lactation breaks per shift.
- c) HR should work with Joanne and management to discuss providing the additional breaks and flexible scheduling as an accommodation.

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What should HR do?

- a) HR can tell Joanne that she is limited to 2 lactation breaks per shift.
- b) HR can request Joanne to provide medical information from her doctor supporting the need for 4 lactation breaks per shift.
- ☒ c) HR should work with Joanne and management to discuss providing the additional breaks and flexible scheduling as an accommodation.

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Section 6

Safety, Medical Documentation, & Fitness-for-Duty

Requesting records, certification forms, and FFD
exams

Q&A

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No, really, I am fine. Just ignore what you saw.

Mike's supervisor has observed on 3 occasions in the last month episodes of Mike seeming to become dizzy, having trouble with balance, and almost falling but catching himself.

Mike's supervisor has asked Mike each time if he is ok and if he needs anything. Mike always insists he is fine.

The most recent incident resulted in Mike almost falling into his machine which could have caused him significant injury and could have caused others on the same line to be injured if there had been a sudden disruption with the machine.

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What should the Manager and/or HR do?

- a) Place Mike on an immediate leave due to objective concerns of safety. Inform Mike he must take a form to his provider to have completed before he can return to work. The form requests confirmation of any health-related restrictions and a cover sheet is attached that informs the provider of the observations at work involving the 3 incidents in the past month with a spot for the provider to acknowledge having reviewed the information before completing the form.
- b) Based on the latest incident, suspend Mike for not being safe at work and inform him that the incident will be investigated and may lead to discipline, including termination.
- c) Ask Mike if he needs any leave or accommodation and if he says no, document that he denied needing leave or an accommodation.

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What should the Manager and/or HR do?

- ☒ a) Place Mike on an immediate leave due to objective concerns of safety. Inform Mike he must take a form to his provider to have completed before he can return to work. The form requests confirmation of any health-related restrictions and a cover sheet is attached that informs the provider of the observations at work involving the 3 incidents in the past month with a spot for the provider to acknowledge having reviewed the information before completing the form.
- b) Based on the latest incident, suspend Mike for not being safe at work and inform him that the incident will be investigated and may lead to discipline, including termination.
- c) Ask Mike if he needs any leave or accommodation and if he says no, document that he denied needing leave or an accommodation.

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I guess I'm not fine.

Mike's healthcare provider confirmed he read the cover sheet about the 3 incidents that occurred at work.

The provider also placed several restrictions on Mike indefinitely until tests can be run, including that Mike is not permitted to work around machinery and can only perform "desk work."

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What can HR do?

- a) Inform Mike that his leave is being designated as FMLA leave starting when he first was placed on leave.
- b) Require Mike to follow the Company's normal process to be approved for FMLA which includes having his provider complete the FMLA Certification Form and/or having him contact the Company's TPA that manages FMLA so they can obtain the forms and decide whether to approve FMLA leave.
- c) Even though HR knows there is desk work that Mike could perform, and had performed a few years ago when he had a work injury, that work is not offered to him, because the location of the work would require Mike to walk through the shop floor at the start of the day, the end of the day, and for each break to go to the breakroom and restroom, which would cause him to be near machines and other moving equipment several times during the day.

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What can HR do?

- ☒ a) Inform Mike that his leave is being designated as FMLA leave starting when he first was placed on leave.
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Section 7

**Industry-Specific:
Transportation / DOT**

DOT-regulated drivers and essential function
challenges

Q&A

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**Do DOT medical requirements change the ADA
limits on medical inquiries and exams?**

John works in the warehouse to load parts and deliver them to distributors.

John must have a valid DOT medical certification to be able to legally drive the delivery truck.

John was off work for 3 days and told his manager it was due to a flare-up of his prior back injury and the doctor put him back on an opioid for pain relief.

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What can HR do?

- a) Inform John that he must stay on leave until he provides confirmation from his healthcare provider that he is able to safely drive the Company truck and that he would still meet the requirements under DOT to operate the truck.
- b) Ask John to have his healthcare provider confirm all restrictions that he may have that could impact his ability to perform his job which includes lifting over 50 pounds frequently and driving a delivery truck up to 6 hours in a 10-hour shift.
- c) Tell John that since he is only 1 of 3 drivers for the Company, his job cannot be held for him for any length of time so the Company will need to back-fill his job, but the Company will reassign him to an alternative job that does not involve driving and lifting.

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What can HR do?

- ☒ a) Inform John that he must stay on leave until he provides confirmation from his healthcare provider that he is able to safely drive the Company truck and that he would still meet the requirements under DOT to operate the truck.
- ☒ b) Ask John to have his healthcare provider confirm all restrictions that he may have that could impact his ability to perform his job which includes lifting over 50 pounds frequently and driving a delivery truck up to 6 hours in a 10-hour shift.
- c) Tell John that since he is only 1 of 3 drivers for the Company, his job cannot be held for him for any length of time so the Company will need to back-fill his job, but the Company will reassign him to an alternative job that does not involve driving and lifting.

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Thank you!

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