

Pregnancy Discrimination Part 2: Implications of Pregnancy on the ADAAA, FMLA and various other laws

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Americans with Disabilities Act, as amended (“ADAAA”)

Title I of the ADA protects individuals from employment discrimination on the basis of disability.

Discrimination occurs when:

- a covered employer or other entity treats an applicant or employee less favorably because she has a disability or a history of a disability, or because she is believed to have physical or mental impairment.
- the application of qualification standards, tests, or other selection criteria that screen out an individual with a disability or a class of individuals with a disability, unless that standard or test is shown to be job related for the position in question and consistent with business necessity.

Who is considered disabled?

ADA defines “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.

- No Time Limit – Under the ADAAA, there is no requirement that an impairment last a particular length of time to be substantially limiting.



Major Life Activities Affected by Pregnancy

Major life activities that may be affected by pregnancy include, but are not limited to:

Walking

Standing

Lifting

Major Bodily Functions –
Operation of the neurological,
musculoskeletal, endocrine,
and reproductive systems, and
an individual organ within a
body system

Nausea that causes severe
dehydration

Swelling in the legs due to
limited circulation

Wait...is pregnancy a disability?

NO! Pregnancy alone is not an impairment within the meaning of the ADA...

- **BUT**
 - some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended.
 - An impairment's cause is not relevant in determining whether the impairment is a disability.



Examples



Amy – In her 5th month of pregnancy she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her with preeclampsia and ordered her to remain on bed rest through the rest of her pregnancy.



Police Officer – Applicant is offered a job and disclosed on a post-offer medical questionnaire that she had gestational diabetes during her pregnancy 3 years ago, but the condition resolved itself. Offer then pulled.

Reasonable Accommodations

Pregnant employee may be entitled to a reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.

Reasonable Accommodation – a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions or enjoy equal benefits and privileges of employment.

Can I deny the requested accommodation?

Yes, **BUT** only if the requested accommodation is an “undue hardship.”

Undue Hardship – An action requiring significant difficulty or expense.

Example



Jennifer had been successfully managing a neurological disability with medication for several years. Without the medication, Jennifer experienced severe fatigue and had difficulty completing a full work day. When she became pregnant, her doctor took her off the drugs because of the risk posed to her baby. She began to experience increased fatigue and found rest during short breaks helped. Jennifer requested more breaks.

Undue Hardship?

So, what is a reasonable accommodation for a pregnant worker ?

- 1 Redistributing marginal functions that the employee is unable to perform
- 2 Altering how an essential or marginal job function is performed (modifying standing, climbing, lifting, or bending requirements)
- 3 Modification of workplace policies
- 4 Purchasing or modifying equipment and devices (chair)
- 5 Modified work schedule
- 6 Leave (may be unpaid if employee does not have accrued paid leave)
- 7 Temporary assignment to light duty

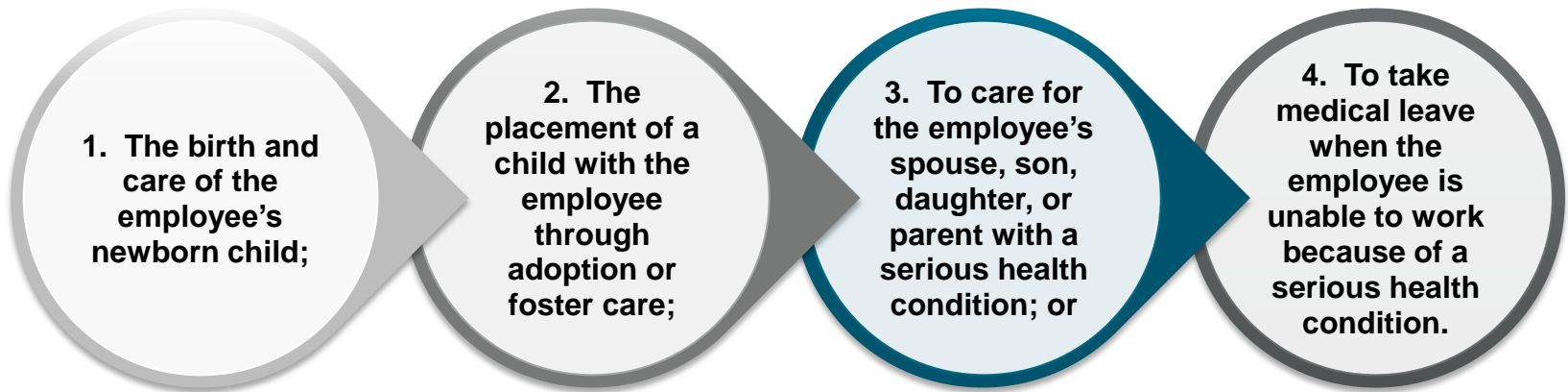
Family Medical Leave Act – A refresher

FMLA covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.



When can an employee take leave?

An eligible employee may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:



FMLA – The Skinny

Employer must maintain employee's existing leave of coverage under a group health plan while employee is on FMLA leave.

After the FMLA leave, employer must restore employee to employee's original job or equivalent job.

Spouses employed by same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy child.

Common FMLA Predicaments

Does workers' compensation leave count against an employee's FMLA?

Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?

Can the employer count time on maternity leave or pregnancy disability leave as leave under the FMLA?

The Big Whammy: What if the employee exhausts FMLA before they have the baby?

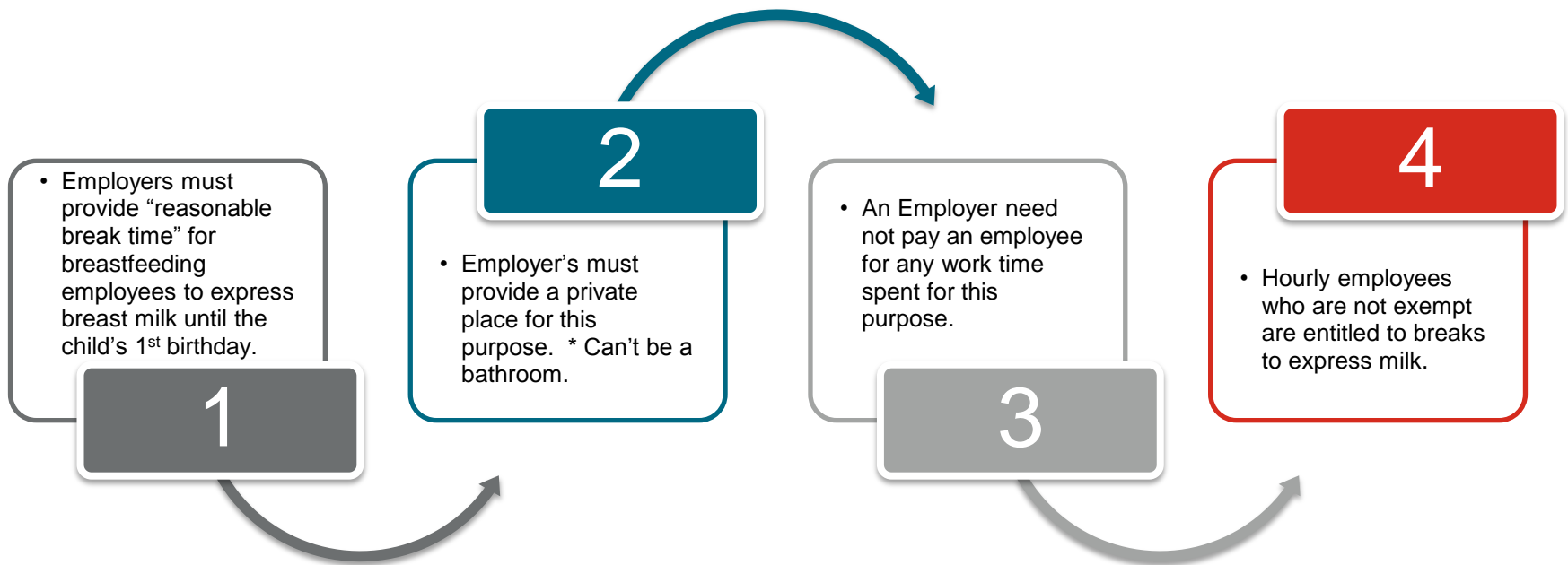
- Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated “12 month period” no longer have FMLA protections of leave or job restoration.
- **NOT SO FAST** →
 - ADA
 - Short-Term Disability Policy

TIP: Contact Legal Counsel **BEFORE** you terminate in this scenario!



Reasonable Break Time For Nursing Mothers

Section 4207 of the Patient Protection and Affordable Care Act provides:



Note: Amended Section 7 of the FLSA. (premium payments for overtime)

Who is exempted from the “Reasonable Break Time for Nursing Mothers”?

Employers with fewer than 50 employees are not subject to these requirements if the requirements “would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer’s business.”

What is a reasonable break-time?

- DOL expects that a nursing mother typically needs 2 to 3 breaks during an 8 hour shift.
- Length of Time Needed Varies – but typically takes 15 to 20 minutes
 - **Factors to consider for determining if length is reasonable:**
 1. Time it takes to walk to and from the lactation space and the wait, if any.
 2. Whether the employee has to retrieve her pump and other supplies from another location.
 3. Whether the employee will need to unpack her own pump or if one is provided for her.
 4. Whether there is a sink and running water nearby for the employee to use to wash her hands, clean the pump parts, etc.
 5. Time it takes employee to store her milk in the fridge.

Space

Employers should make a room (either private or with partitions for use by multiple nursing employees) available. Any windows in the designated room should be covered and the employer must ensure privacy with signs or a lock on the door.

- **Examples:** Locker room that functions as a changing room as long as there is a separate space designated for nursing mothers.



What is in the “Space”?

At a minimum, the space must have a place for the nursing mother to sit and a flat surface other than the floor to place the pump.

Ideally the space has electricity so that nursing mother can plug in her pump.

Additional recommended provisions: sink, fridge

- While not required, reduces amount of break time.

But, there is no room in the inn.

Unique challenges for certain employers:



1. Fast food restaurants



2. Retail stores



3. Factories



4. Truck drivers/Delivery drivers

DOL solution: Space does not have to be permanent.

But, my employees work at a client site

DOL's position is that the employer has the obligation to provide the space, regardless of where the employee is located. When off-site, the employer should arrange with the client to set up a space.

- **Example:** Temporary Staffing Agency/Accountants

Notice

DOL encourages nursing employees to give advance notice of their intent to take breaks at work to express milk.

An employer **CAN** ask an expectant mother, if she intends to take breaks to express milk while at work.

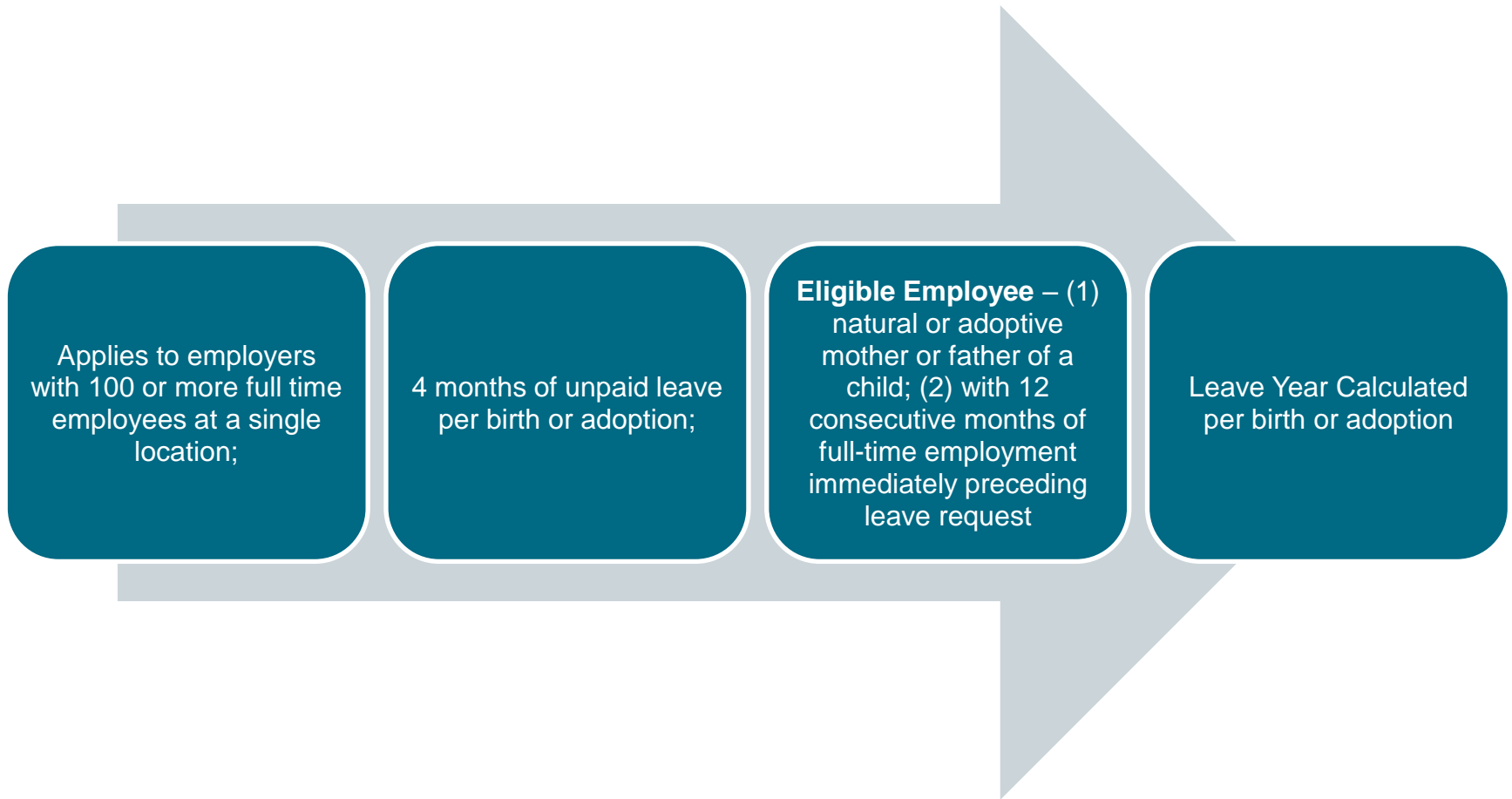
Seriously? We can't do all of this.

Undue Hardship Exception:

- Have to demonstrate employ less than 50 employees AND
- “Significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”

DOL does not think nursing breaks can be counted as FMLA Leave!

Tennessee Parental Leave Act



Tennessee Parental Leave Act (continued)

- Reasons for Leave
 - Birth of employee's child
 - Adoption of a child
 - Pregnancy
 - Nursing an infant

Types of Leave: Continuous (no contemplation of intermittent leave)

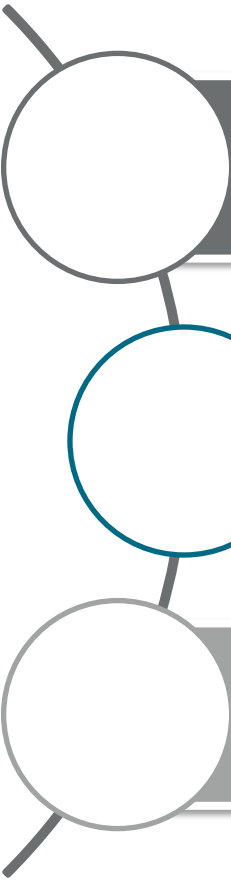
Reinstatement: Following leave, an employee who gave at least 3 months' advance notice (unless medical emergency or notice of adoption prevented notice) must be restored to the same or similar position

State Laws

- The PDA is a “floor.” States can enact laws providing more benefits.
 - For example, California requires employers to provide up to 4 months of unpaid pregnancy disability leave.



State Laws (continued)



At least a dozen states and a number of cities have laws on pregnancy discrimination.

Many of these also require employers to provide a reasonable accommodation.

California, New Jersey, Louisiana, Philadelphia and New York are examples.

State Laws (continued)



Expect more states and local governments, to enact these laws.



On August 26, 2014 Illinois passed a law requiring employers to provide pregnant workers a reasonable accommodation.



Some of these state and local laws provide for accommodation that go beyond the requirements of the ADAAA.

Tips & Best Practices

Develop, disseminate, and enforce policies

Train Managers

Conduct employee surveys and review policies to identify any need for change

Respond to pregnancy discrimination claims promptly

Protect against retaliation