

Are You Ready For The June 18th PWFA Rule?

May 21, 2024

Today's Webinar Host:

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Marketing Director

ComplianceHR



Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

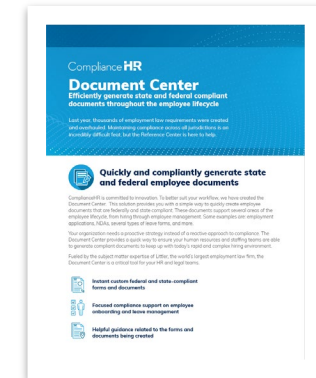
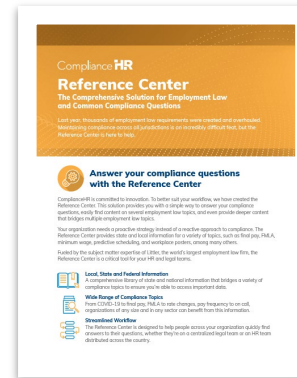
A Comprehensive Solution for Employment Law and Common HR Compliance Questions



The Document Center

Efficiently generate state and federal compliant documents throughout the employee lifecycle

HR Leave Essentials



PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The Reference Center offers:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
 - Leave, final pay, FMLA, minimum wage, and more

The Document Center supports:

- Instant custom federal and state-compliant forms and documents
- Focused compliance support on employee onboarding and leave management
- Helpful guidance related to documents created

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link at the top of your screen
3. Visit the link in the Resources panel

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

ComplianceHR Demo & Free Trial:

<https://compliancehr.com/webinar-demo/>

Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

More Information About ComplianceHR's Leave Support

Pregnancy Accommodations Under the Federal Pregnant Workers Fairness Act

In addition to the accommodations provided under California law, [Company Name] complies with the federal Pregnant Workers Fairness Act ("PWFA") by providing reasonable accommodations for known physical or mental limitations related to the pregnancy, childbirth or related medical conditions of a qualified applicant or employee, unless the accommodation would impose an undue hardship on the operation of the Company's business. "Known physical or mental limitations" are those that the applicant, employee or their representative has communicated to the Company.

Employees or applicants who wish to inform the Company of such a limitation and/or request a reasonable accommodation under this policy should contact their Human Resources representative [or insert name/contact details for appropriate company representative or department], preferably specifying in writing, what barriers or limitations prompted the request. Human Resources will evaluate information provided regarding any reported or apparent barriers or limitations and will then communicate with the applicant or employee and engage in an interactive process to determine the nature of the limitation and what, if any, reasonable accommodation(s) may be appropriate. If, through this interactive process, the Company and the individual arrive at a reasonable accommodation to the Company's business operations, the Company will provide the accommodation.

The Company will provide the accommodation to the employee.

The Company prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions under the PWFA or take any adverse action against an employee who requests or uses reasonable accommodations or opposes discrimination or alleged violation of the PWFA or believe that an adverse action or retaliation should be taken against the employee.

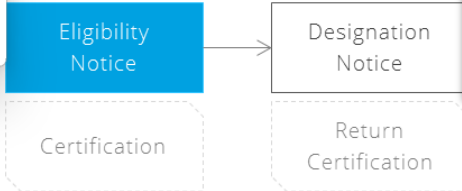
Navigator Leave

Welcome to Navigator Leave

This application generates and provides guidance regarding the forms that are used in the management process. Each form is compliant with the federal Family and Medical Leave Act and state laws that mirror the FMLA.

Select the type of form you're interested in creating.

Notice of Eligibility
Request for Leave
Notice of Eligibility
Employee Health Certification
Family Health Certification
Military Caregiver Leave
Military Emergency
Designation Notice
Return to Work Certification



PAID SICK LEAVE REPORT

REPORT OVERVIEW

This report provides an overview of the current and future laws within states, counties, and cities that generally require non-governmental contractor private employers to allow employees to accrue and use paid sick leave (PSL) and/or paid time off (PTO).

Certain exceptions and industry-specific minimum wage standards apply.

[More Information](#)

Arizona

- > Coverage
- > Permitted Uses
- > Accrual and Cash Out
- > Posting and Recordkeeping
- > Miscellaneous

California

- > Coverage
- > Permitted Uses
- > Accrual and Cash Out
- > Posting and Recordkeeping
- > Miscellaneous

Navigator Leave

General Requirements

The entire federal Family and Medical Leave Act applies in states that do not have their own family and medical leave statutes. Parts of the federal FMLA will apply in states that have family and medical leave statutes that are less stringent than the federal FMLA or are silent on particular subjects.

Requirements for California

The requirements for employees in California are listed below. You can view the requirements by clicking on the category names.

> Coverage and Eligibility

[Employer Coverage](#) [Employee Eligibility](#)

Employer Coverage

Federal

Family and Medical Leave Act (FMLA)

Employers who employ 50 or more employees in 20 or more workweeks in the current or last calendar year. [Jointly employed](#) employees must be counted by both employers in determining employer coverage and employee eligibility, regardless of whether the employee is on one or both of the employers' payrolls.

State

California Family Rights Act (CFRA)

The CFRA covers all employers with 5 or more employees, including successors-in-interest and joint employers. The employees do not all need to work in California.

Pregnancy Disability Leave

Employers of five or more employees must grant leave to eligible female employees disabled by pregnancy, childbirth or related medical conditions.

Bereavement Leave

Employers with five or more employees are covered under the law.

Presented by:



Rocio Blanco Garcia

Shareholder

Littler | Miami



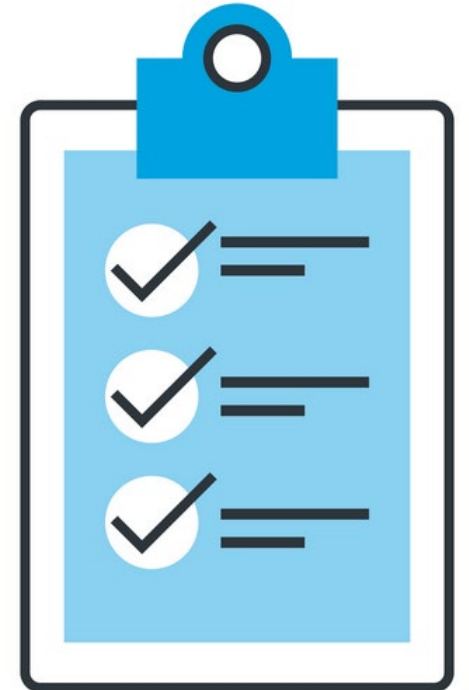
Lauren Robertson

Associate

Littler | Orlando

Agenda

- PWFA Overview
- Distinctions between ADA/PWFA requirements
- Differences in final vs. proposed rule
- Interaction with other laws



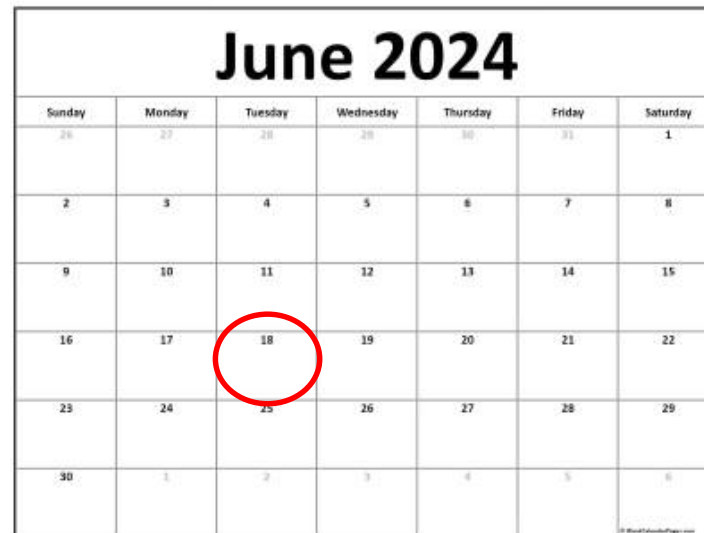
What is the PWFA?



- The Pregnant Workers Fairness Act (PWFA) took effect in June 2023
- It broadly requires employers to provide **reasonable accommodations** to employees for **known conditions** related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions unless doing so will cause an **undue hardship**
- Interactive process required
- No retaliation or coercion
- Does not replace federal, state, or local laws that are more protective of applicants and employees

Why Are We Talking About It Now?

- April 15, 2024 – EEOC issued its final regulation to carry out the law
- Final regulations take effect June 18, 2024
- EEOC currently accepting charges alleging violations of the PWFA



The image shows a calendar for June 2024. The title "June 2024" is centered at the top. Below the title is a grid with columns for the days of the week: Sunday, Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday. The dates are arranged in rows. The date "18" is circled in red, indicating the effective date of the regulations.

June 2024						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	31	1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	1	2	3	4	5	6

The PWFA In Greater Detail

- Applies to “qualified” applicants and employees
- Applies to “covered employers”
 - i.e., employers employing 15 or more employees (same as ADA)



The PWFA In Greater Detail

Requires accommodation of “known limitations”

- Known
 - Communicated to the employer by the employee/application or their representative or of which the employer should be aware given the circumstances
- Limitation
 - Physical and mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
- No severity required

Being “On Notice”

- Employee turns in a doctor’s note that he has restrictions indicating he/she is unable to do some aspect of the job;
- You realize that a time sheet or hours worked report looks different than usual;
- An employee has poor attendance that is about to lead to discipline and cites her need to attend OB/GYN appointments and/or nausea related to her pregnancy as reasons for the absences;
- Employee explains during the course of a counseling or disciplinary meeting that she is pregnant and her nausea is contributing to her inability to meet the required performance metric;



More Triggers



- Employee provides information—in person, via telephone, from a family member, etc.—about a medical condition related to pregnancy that may require time off work, either on occasion, or all at once;
- A manager notifies you that he has seen a significant change in an employee's behavior, work patterns or conduct and has reason to believe they may be related to her high-risk pregnancy.

The PWFA In Greater Detail

- Expansive definition of "arising out of pregnancy, childbirth, or related medical conditions"
- Covers current pregnancy, past pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion
- Preexisting conditions that are exacerbated by pregnancy or childbirth



The PWFA In Greater Detail

- No consideration of mitigating measures



Scenario #1: Preexisting Condition Exacerbated By Pregnancy



- Sarah is pregnant.
- Before pregnancy, Sarah received 2 extra breaks to eat and drink due to Type 2 diabetes (ADA accommodation).
- Sarah now needs additional accommodations during pregnancy to monitor and manage diabetes more closely to avoid or minimize adverse health consequences.

Scenario #2: Preexisting Condition Exacerbated By Pregnancy

- Mary has high blood pressure which could be managed with medication prior to pregnancy.
- When Mary became pregnant, the high blood pressure posed a risk to Mary's pregnancy; Mary now needs bed rest.



The PWFA In Greater Detail

Who Is A Qualified Employee or Applicant?

- Qualified employees/applicants, who can perform the essential functions of their job with or without an accommodation EXCEPT the employee/applicant shall be considered qualified IF:
 - The inability to perform the essential function is for a **temporary** period;
 - The essential function could be performed **in the near future; and**
 - The inability to perform the essential function can be reasonably accommodated.

The PWFA In Greater Detail

- Factors used to determine if inability is temporary:
 - Length of time employee is unable to perform the essential function
 - Whether the temporary inability can be accommodated (i.e., is there other work the employee can accomplish);
 - The nature of the essential functions including its frequency
 - Whether or not there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function
 - Whether the essential function can be postponed or remain unperformed for any length of time and, if so, for how long

The PWFA In Greater Detail

“In The Near Future” Defined

- Current pregnancy → 40 weeks from the start of the temporary suspension of the essential function
 - ✓ Leave does not count toward 40-week count
 - ✓ Clock restarts when employee returns to work
- Conditions arising after birth → no 40-week rule, determined of a case-by-case basis
- Must reassess ability to accommodate upon return to work regardless of whether employee received the same or different accommodation either prior to or during pregnancy

Scenario #3: Qualified Employee?

- Patricia is told by her healthcare provider 1-month into pregnancy she should avoid certain chemicals for the remainder of her pregnancy
- Essential function – exposure to these chemicals
- Patricia requests to continue her other tasks that do not require exposure to the chemicals
- Is Patricia qualified employee?



The PWFA In Greater Detail

Reasonable Accommodations

- Modified, light, or alternative duty
- Additional, longer, or more flexible breaks for restroom, or to drink water, eat, or rest
- Adjustments to food or drink policies to allow the employee to have water or food during working hours
- Making existing facilities easier to use, such as modifying parking, changing a workspace and placing it closer to a door or restroom
- Potential modifications to dress code for more comfortable attire
- Modified work schedules, such as fewer working hours, or a modified start or departure time to accommodate morning sickness/nausea/fatigue, etc.
- Breaks and private space for lactation needs (and don't forget the PUMP Act!)
- Flexible scheduling for doctor's appointments (pre- and post-delivery)
- Temporary remote work for positions which can be performed remotely
- Leave for bedrest prior to delivery, recovery from childbirth, or other postpartum needs
- **All of this—no matter what your policies say—is on the table for discussion!**

The PWFA In Greater Detail

- “Predictable Assessments” → Per se reasonable accommodations
 1. Carrying water and drink, as needed, in the employee’s work area
 2. Additional restroom breaks
 3. Standing/sitting as needed
 4. Additional breaks to eat/drink



The PWFA In Greater Detail

Leave as an Accommodation

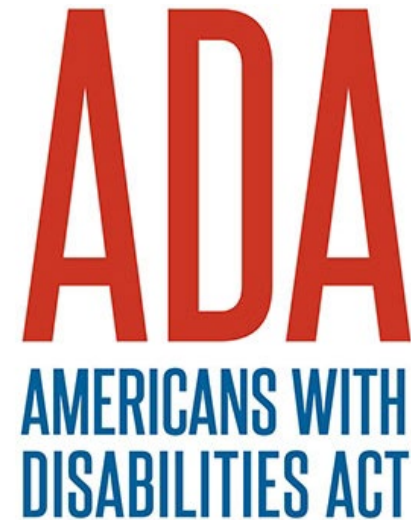
- Leave as a last resort accommodation.
 - If leave, what about FMLA and other state laws? Stay tuned!



The PWFA In Greater Detail

The Interactive Process

- Definitions largely track the ADA's interactive process
- Notice (same as ADA)
 - Oral or in writing
 - No magic words
- EEOC emphasizes should be a simple process
 - ADA form will not do
- Union representative can request accommodation on employee's behalf



The PWFA In Greater Detail

ADA v. PWFA

- Major difference between ADA/PWFA re: interactive process
 - EEOC recognizes that pregnancy is temporary in nature, places an affirmative reminder on employers to respond expeditiously
 - EEOC highly suggests employers should consider granting accommodation even if the employer believes it needs additional information
 - BUT, rule notes interim accommodation is not required
 - Requiring employee to take leave may be violative of PWFA

The PWFA In Greater Detail

- No medical documentation needed if:
 - The need for accommodation is obvious
 - An employer has the information needed
 - The request is for one of the “predictable assessments”
 - The request is for a lactation accommodation



The PWFA In Greater Detail

- When is Medical Documentation allowed?
 - Only when reasonable under the circumstances
 - Can vary by state



The PWFA In Greater Detail

Undue Hardship?

- Reasonable accommodation not required if doing so would impose an **undue hardship** on the employer's business operations
- Factors (think of what you already do under ADA)
 - Nature and net cost of accommodation
 - Financial resources
 - Number of employees
 - Number, type, and location of employer's facilities
 - Employer's operation (composition, structure, functions, geographic separateness and administrative/fiscal relationship of facility)

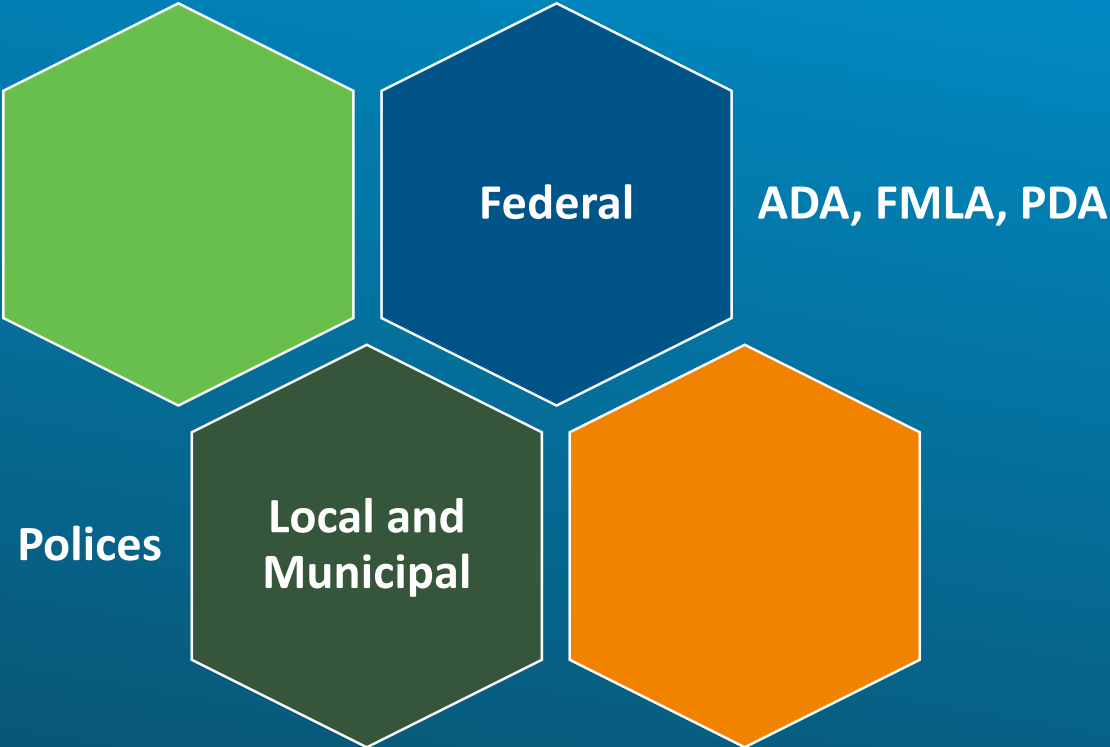
Six Facts That Can Kill Your Undue Hardship Argument

1. A policy that provides for leaves of that length. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).
2. The employee's past leaves, without incident. *Mallon v. U.S. Physical Therapy Ltd.*, 16 A.D. Cas. 818 (D. Minn. 2005).
3. Successful coverage during this leave by co-workers or subordinates. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998).

Six Facts That Can Kill Your Undue Hardship Argument

4. Successful coverage, or ability to cover this leave by temporary employees.
Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000); Nunes, supra.
5. Termination right before the employee's expected return. Miller v. Hersman, 759 F. Supp. 2d 1 (D.D.C. 2011); Austin v. Better Bus. Bureau of Middle Tem. Inc., 24 A.D. Cas. (BNA) 535 (M.D. Tenn. 2011).
6. Failure to quickly replace the employee after termination. Haushmann, supra (took 6 months to replace); Garcia-Ayala, supra (never replaced).

Interaction with Other Laws



Recognizing Lurking FMLA Issues

Not Everything is About Whether We Can “Accommodate” It



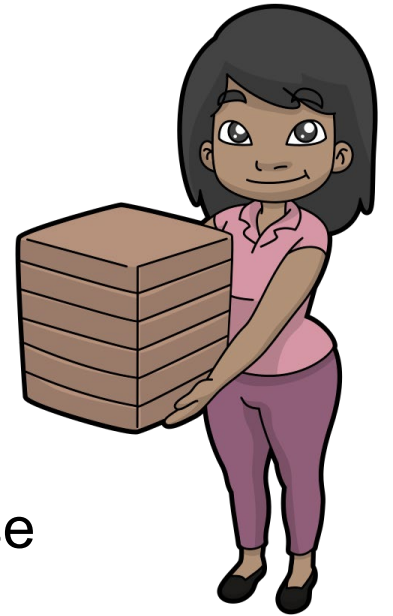
- Laura has a note from her doctor stating she needs to work a part-time schedule (20 hours) while pregnant
 - Typical operational response: “We don’t have part-time jobs” or “We cannot accommodate part-time work in the practice right now—we are way too busy”
 - WAIT—this is a form of intermittent/reduced schedule FMLA for an eligible employee

Communicating With the Employee

- Critical—but often forgotten
- Understanding the accommodation request and talking it through with the employee—may need to involve the supervisor, manager, risk, safety, others, *but only share with them what is strictly necessary*
 - **Seek complete clarity about whether the employee is asking for time OFF of work (leave), or flexibility with regard to the work (accommodations).**
- The information gathered from the health care provider(s) in support of the request—if it lands in our hands—should be screened off from supervisors/managers
- Asking the employee about his/her limitations and his/her own understanding of the medical information
- May need to go back to the provider or the employee multiple times

Scenario #4: Required to Accommodate?

- Celia is a factory worker whose job requires her to regularly move boxes that weigh 50 pounds.
- Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time.
- When Celia returns to work after giving birth, which was by cesarean section, Celia requests that, for 3 months, her tasks be limited to those that do not require moving boxes of more than 30 pounds because heavier lifting could increase the risk to her health and her continued recovery from childbirth.



Scenario #5: Need to Continue Accommodation?

- Jackie's position at a factory involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands.
- For the one year when she is nursing, Jackie seeks the accommodation of a temporary suspension of an essential function—working with the chemicals—because of the risk that the chemicals will contaminate the milk she produces.
- The employer provides the accommodation.
- After Jackie stops nursing, she no longer has any known limitations.

Scenario #6: Need to Accommodate?

- Arisa works in a fulfillment center that tracks employee productivity using personal tracking devices that monitor an employee's time on task and how long it takes an employee to complete a task.
- If the technology determines that an employee is spending insufficient time on task or taking too long to complete a task, the employee receives a warning, which can escalate to a reprimand and further discipline.
- Arisa is pregnant and, as a reasonable accommodation, is permitted to take bathroom breaks as necessary.
- Because the wearable technology determines that due to the approved additional bathroom breaks Arisa is spending insufficient time on task, Arisa receives a warning.

Scenario #7: Need to Accommodate?



- Juanita, a customer service agent who is pregnant, requests two additional 10-minute rest breaks and additional bathroom breaks, as needed, during the workday.
- ABC Company determines that these breaks would not pose an undue hardship and grants the request.
- Because of the additional breaks, Juanita responds to three fewer calls during a shift.
- Juanita supervisor gives her a lower performance rating because of her decrease in productivity.

Scenario #8: Interim Accommodation?

- Nour is pregnant, and she drives a delivery van. Her employer uses vans that do not have air conditioning. It is summer and the temperature is over 100 degrees.
- Nour tells her supervisor she is pregnant and needs a change at work because of the risk to her health and the health of her pregnancy because of the excessive heat. Her supervisor orders equipment that will help Nour, such as a personal cooling vest or neck fan.
- While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do.
- What do we do?

Final Reminders



Similarities

- Reasonable accommodation
- Undue hardship

Distinctions

- Temporary nature of pregnancy
- Must consider removing an essential function of the employee's job
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available



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Questions?

Please add any additional questions to the Q&A box

Thank you!

