MEDICAL LEAVE LAWS

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STATUTES

- Family and Medical Leave Act (FMLA), 29 USC §2601 *et seq.,* 29 CFR Part 825
- Americans With Disabilities Act As Amended (ADAAA), 42 USC 12101 *et seq.;* 29 CFR Part 1630
- Washington Law Against Discrimination (WLAD), RCW 49.60 *et seq.*
- Washington Sex Discrimination Regulations, WAC 162-30-010 *et seq.*
- Pregnancy Discrimination Act (PDA), 42 USC §2000e(k); 29 CFR Part 1604.10
- Washington Family Care Act (WFCA), RCW 49.12.005 *et seq.,* WAC 296-130-010 *et seq.*
- Washington Family Leave Act (WFLA), RCW 49.78.005 *et seq.*

COVERAGE TABLE

	ADAAA	WLAD	WFLA	WFCA	WA REGS	FMLA	PDA
ER Coverage	15+ EEs	8+ EEs	50+ EEs w/i 75 mile radius	1+ EEs	8+ EEs	50+ EEs w/i 75 mile radius	15+ EEs
EE Coverage	Qualified individual w/ disability	EEs with any sensory, mental, or physical disability	12 months and 1250 hours in preceding 12 months	All EEs w/ accrued paid sick leave or PTO	Pregnancy; childbirth; maternity leave and medical conditions arising from pregnancy	12 months and 1250 hours in preceding 12 months	Pregnancy; childbirth; maternity leave and medical conditions arising from pregnancy

	ADAAA	WLAD	WFLA	WFCA	WA REGS	FMLA	PDA
Covered Leave:	Reasonable Accommo-dation	Reasonable Accommo-dation	12 weeks unpaid leave/year	Use of accrued paid sick leave or PTO to care for family member	Time EE is sick or temporarily disabled due to pregnancy or childbirth	12 weeks unpaid leave/year	Must be as generous for women affected by pregnancy, childbirth or related medical conditions as for other disabilities
Reinstate ment?	With or Without Reasonable Accom-modation	With or Without Reasonable Accom-modation	Right to reinstate-ment to same or comparabl position	N/A	ER may deny reinstate-ment due to business necessity only; otherwise must reinstate	Right to reinstate-ment to same or comparable position	Position must be held open on the same basis as jobs are held open for EEs on sick or disability leave for other reasons

FMLA

- 50+ EEs and public agencies covered
- EEs with at least 12 months employment (need not be continuous) and 1250 hours in preceding 12 months are covered
- EE must provide 30 days notice when leave is foreseeable
- Leave for “serious health condition” of EE or family member; birth or placement of adopted or foster child.
- “Serious health condition” means: injury or impairment that involves inpatient care or continuing treatment by a health care provider.

- “Continuing treatment” is defined as:

  - i) A period of incapacity of more than 3 consecutive calendar days that involves ongoing treatment of a health care provider;
  - ii) Any period of incapacity due to pregnancy or for prenatal care;
  - iii) Any period of incapacity or treatment due to a chronic serious health condition;
  - iv) A permanent or long term period of incapacity due to a condition for which there is no effective treatment; **or**
  - v) A period of absence to receive multiple treatments for certain conditions.

FMLA (cont'd)

- An eligible employee may take up to 12 workweeks of unpaid FMLA leave during "any 12-month period." The 12-month period is calculated, at the discretion of the employer, using one of four methods:
- 1) the calendar year;
- 2) any fixed 12-month leave year;
- 3) the 12-month period measured forward from the date the leave commences; or
- 4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave
- FMLA leave may be intermittent, continuous or reduced schedule leave

FMLA (cont'd)

- ER has duty to notify EE of FMLA rights when on notice of need for leave
- EE must provide medical certification of need for FMLA leave
- ER must permit EE to return to work when her doctor releases her as "fit for duty".
- ER must return EE to same or substantially similar position
- Penalties for violations of FMLA include: wage loss, liquidated damages (equal to wage loss), interest, equitable relief, attorney fees and costs. Emotional distress damages are generally **not** available under the FMLA.

ADAAA – any events after 1/1/09

- Covers ERs with 15+ EEs
- Protects a "Qualified Individual with a Disability"
- Disability includes any **substantially limiting impairment** to a major bodily function, e.g., Crohn's disease, cancer, or AIDS.
  - It's a trap!
  - "not every impairment will constitute a disability" CFR §1630(j)(1)(ii).
  - "3% whole person impairment for Tinnitus was not a 'substantially limiting' impairment." *Curley v. City of N. Las Vegas,* D. Nev. 4/25/12
- Determination of whether an impairment limits a major life activity must be made *without consideration* of the ameliorative effects of mitigating measures, e.g., medication, hearing aids.
- A request for accommodation can include an extension of leave, so long as it does not impose an undue burden.
  - **"indefinite leave" will ALWAYS be an undue burden on an ER.**

WLAD

- Covers ERs with 8 or more EEs
- WLAD has always defined "disability" more broadly than federal law.
  - ADAAA brings federal law more closely in line with Washington Law.
- Under the WLAD, "disability" is defined as "the existence of a sensory, mental, or physical impairment" that can be permanent or temporary, and for accommodation purposes, either "the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment," or the employer must have notice of the impairment and there must be "a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(7).
  - E.g.: gender identity accommodation: Washington state law prohibits discrimination in schools and workplaces based on gender expression and identity (RCW 28A.642.010). Students and employees must be permitted to dress according to the gender in which they consistently identify and should be addressed and treated using the name and pronouns of their choice (e.g., "they").
- Duty arises on **Notice** of a condition that interferes with work.
  - *Downey v. Crowley Marine Svcs, Inc.*, 236 F.3d 1019 (9th Cir.2001) (ER's duty under WLAD was triggered by notice that EE's MS interfered with his ability to perform his job, notwithstanding EE's failure to formally request accommodation.
  - Notice by 3rd parties is adequate to trigger the ER's duty, .e.g., a friend, family member, co-worker, health professional. *Ferguson v. Wal-Mart Stores, Inc.*, 114 F.Supp.2d 1057 (2000).
- ERs must maintain confidentiality of EE's medical condition and treatment.

26 CFR § 1630.2(o)
Reasonable accommodation means:

- Modifications or adjustments to a job application process or work process or environment. GOAL: so EE can enjoy equal benefits and privileges as are enjoyed by non-disabled EEs.
- Accessibility & usability;
- Job restructuring: part time, modified work schedules, reassignment to a vacant position, assistive equipment, training materials or policies, provision of qualified readers or interpreters, other similar accommodations.
- ER required to **INITIATE** an informal, interactive process when ER knows of existence of the disability. Process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome the limitations.
    - *Barnett v. US Air, Inc.*, F.3d 1105, 114 (9th Cir.2000), *vac'd on other grounds,* 535 US 391 (2002).
    - "Failing to accommodate" includes both refusing to provide EE with a proposed accommodation AND refusing to engage in an interactive process. *Bowman v. St. Luke's Quakertown Hospital* (E.D. Pa, 12/13/12).
- Absent undue hardship to ER.
    - Is it too expensive? Get discovery on the profitability of the company.
    - Transfer to a new supervisor is NOT a required accommodation.

PDA

- Covers ERs with 15 or more EEs.
- Contrast overlapping laws:
- WLAD regulations on "Pregnancy, Childbirth, and Pregnancy Related Conditions" specifically require ER to "provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth" and require employers to "treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities." WAC 162-30-020(4)(a).
- When the application of an employer's general leave policy to pregnancy or childbirth does not afford equal opportunity for women, such as when an employer provides "so little leave time that a pregnant woman must terminate employment," "such a leave policy has a disparate impact on women" and is therefore an "unfair practice" "unless the policy is justified by business necessity." WAC 162-30-020(4)(b).
- The WLAD also requires an employer to "allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating to pregnancy or childbirth." WAC 162-30-020(4)(c). "Refusal to do so must be justified by adequate facts concerning business necessity." *Id*.
- Pregnancy disability and childbirth leave is separate from leave taken under the Washington State Family Leave Act (FLA) and the Family and Medical Leave Act (FMLA), which require an employee to work for one year before qualifying for leave. RCW 49.78.390(1) ("Leave under this chapter and leave under the federal family and medical leave act of 1993 . . . is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth.").
- Disability leave related to childbirth or pregnancy **cannot be designated to run concurrently with other leave** taken under the WFLA/FMLA.

- Thanks to Katie Chamberlain of MacDonald, Hogue & Bayless for generously sharing her materials.

PDA, continued:

- If an EE requests work restrictions due to a pregnancy-related impairment that does *not* constitute a disability under Washington law, the ER's response is subject to a gender discrimination analysis, rather than a disability accommodation analysis. *Hegwine v. Longview Fibre Company, Inc.,* 162 Wash. 2d 340 (2007).
- However: [T]he decision that no accommodation analysis is to be applied by a court in evaluating a pregnancy related employment discrimination claim in no way mandates, or supports, employers forcing pregnant Ees to perform jobs beyond their physical capabilities. Should an ER hire a pregnant EE, that EE must receive the same treatment as any other EE with similar physical limitations. *See* WAC 162–30–020(3)(a)(ii) (unfair practice to impose different terms and conditions of employment because of pregnancy). *Id.* at 352 n.5.
- In *Hegwine*, the ER offered the plaintiff a job contingent on the successful completion of a physical exam. During the exam, plaintiff disclosed that she was pregnant, and defendant required her to provide a medical form from her doctor. Plaintiff's doctor filled out the form and indicated how many pounds she could lift. The defendant subsequently increased the lifting requirements for the job, twice, and then withdrew the job offer.

WA REGS

- Covers ERs with 8 or more EEs
- **Unfair Practices**: It is an unfair practice for an ER, because of pregnancy or childbirth to:
  - Refuse to hire or promote, terminate or demote a woman;
  - Impose different terms and conditions of employment on a woman. Exception: Where ER can demonstrate business necessity for the employment action.
  - Base employment decisions or actions on negative assumptions about pregnant women.

WA REGS (cont'd)

- **Leave Policies**: An ER ***shall*** provide a woman a leave of absence ***for the period of time*** that she is sick or temporarily disabled because of pregnancy or childbirth.
- ERs must treat a woman the same as other EEs on leave for sickness or temporary disability.
- Where a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.
- An ER ***shall*** allow a woman to return to the same job, or a similar job if she has taken a leave of absence ***only*** for the actual period of disability relating to pregnancy or childbirth, except for business necessity.

WFCA

- Covers ERs with 1 or more EEs
- Provides protected leave to care for sick family members using EE's ***paid*** PTO. The paid PTO must be ***accrued*** at the time it is used
- "Family members" include: minor children with health condition (HC) requiring treatment or supervision; spouses, registered domestic partners, adult children, parents, parents-in-law, and grandparents with serious HC or emergency condition
- Includes preventive care, adult child who cannot care for him or herself because of a disability, and spouse or registered domestic partners who are temporarily disabled due to pregnancy or childbirth

WFLA

- Covers ERs with 50 or more EEs within a 75 mile radius, and gov't agencies
- EE must have worked 12 months and 1,250 hours in previous 12 months
- Entitles EE to 12 weeks of leave within any 12 month period
- EXCEPT DURING PREGNANCY DISABILITY LEAVE, the FLA and FMLA run concurrently
- When a woman takes leave for a pregnancy related disability, the FLA does not run concurrently with FMLA but is in addition to the FMLA.
- When the pregnancy related disability leave is over, the woman has an additional 12 weeks of leave under FLA for bonding and caring for the baby.

EXAMPLE 1

- EE works until birth (no disability during pregnancy), has no serious complications during birth, and, upon advice of her doctor, takes 6 weeks of leave for recovery from childbirth. What medical leave protections does she have and under what statutes?

ANSWER EX. 1

- EE has 6 weeks of pregnancy disability leave (WLAD/WACS);
- Except for pregnancy disability leave, the FLA and FMLA run concurrently. Thus:
  - Her FMLA and FLA do not begin to run until the end of the 6 weeks of pregnancy disability leave.
  - FMLA and FLA run concurrently for 12 weeks after the pregnancy disability leave to bond with the baby.
  - 12 weeks under FLA/FMLA + 6 weeks under WLAD.
- TOTAL LEAVE = 18 WEEKS

EXAMPLE 2

- EE has serious cramping and bleeding complications during the middle of her pregnancy. Her doctor advises her to take time off of work and she takes 6 weeks. Six (6) weeks before she is to give birth, she has additional complications and her doctor advises her to stop working and go on bed rest until the baby is born. She has a C-section and has complications, and her doctor advises her not to return to work for 8 weeks after the birth. What leave is she entitled to and under what laws?

ANSWER EX. 2

- The first 6 weeks are taken under WLAD (disability: cramping and bleeding);
- The second 6 weeks are also taken under WLAD (additional complications under doctor's orders to stop working & go on bedrest);
- The 8 weeks of leave after the C-section are taken as disability leave under WLAD.
- After her doctor releases her from disability leave, she is still entitled to 12 weeks of FLA, to care for and bond with her baby.
- TOTAL LEAVE = 32 WEEKS

Example 3

- EE's mother has cancer and is undergoing treatment. She needs him to drive her to chemotherapy appointments every Wednesday and Friday. He needs to take off 4.5 hours each day to drive her, wait for the chemo, and drive her home. He has 200 hours of PTO. Can he take time off twice a week to drive his mother to chemo, and if so, under what statutes?

Example 3 Answer

- If EE has worked at least 1,250 hours in the previous 12 month and has been employed at least 12 months, and the ER is a covered ER (at least 50 EEs within a 75 mile radius of the EE's workplace or a gov't agency) then he is entitled to take up to 12 weeks (480 hours) off to care for his mother's serious health condition under the FMLA. Because he has accrued PTO, he can take 200 paid hours under the FCA.
  - Short answer: He gets paid for 200 hours of the 480 possible hours of leave available to him.