

Medical Inquiries and Documentation Requests Under the FMLA, PWFA and ADA

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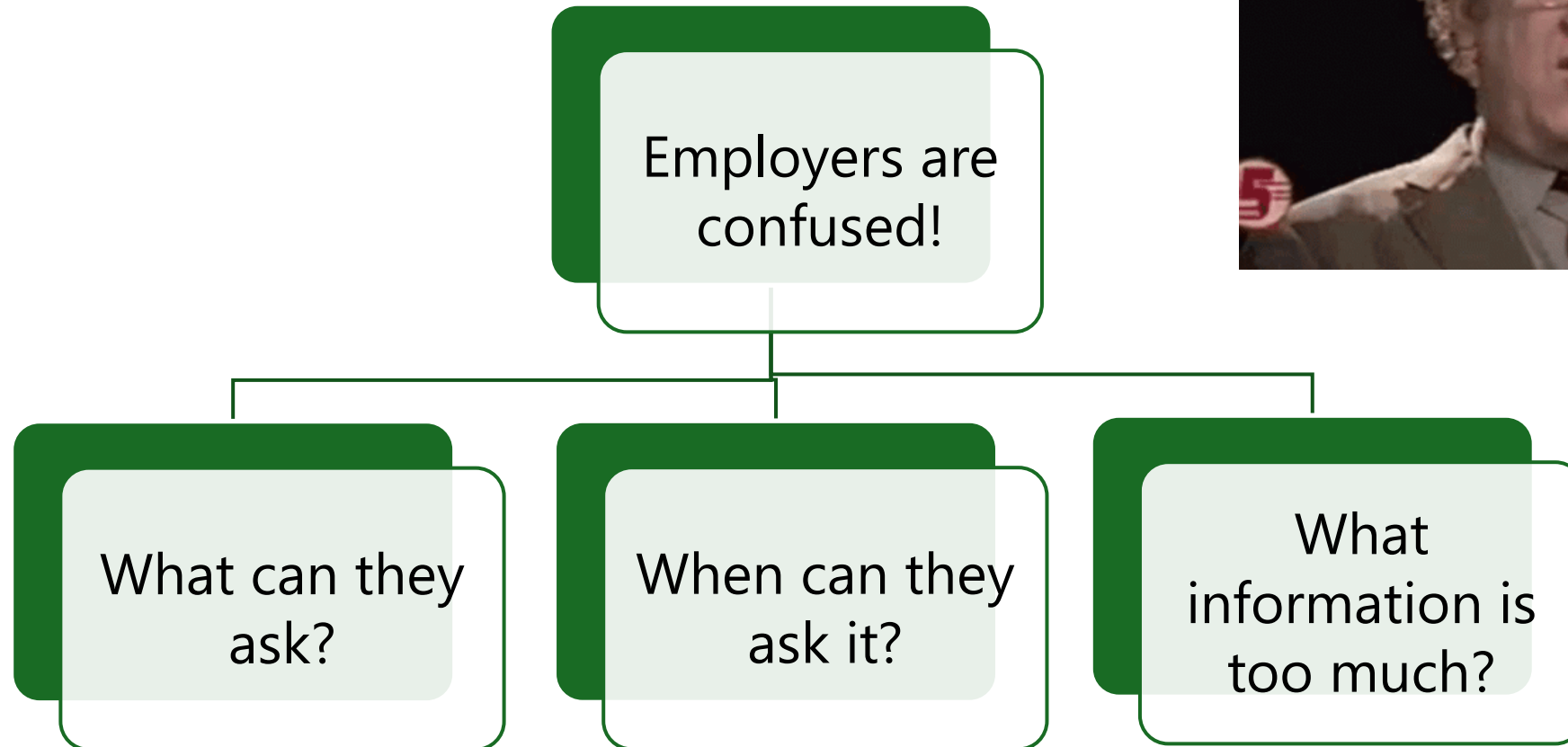
Agenda: What Can We Ask?



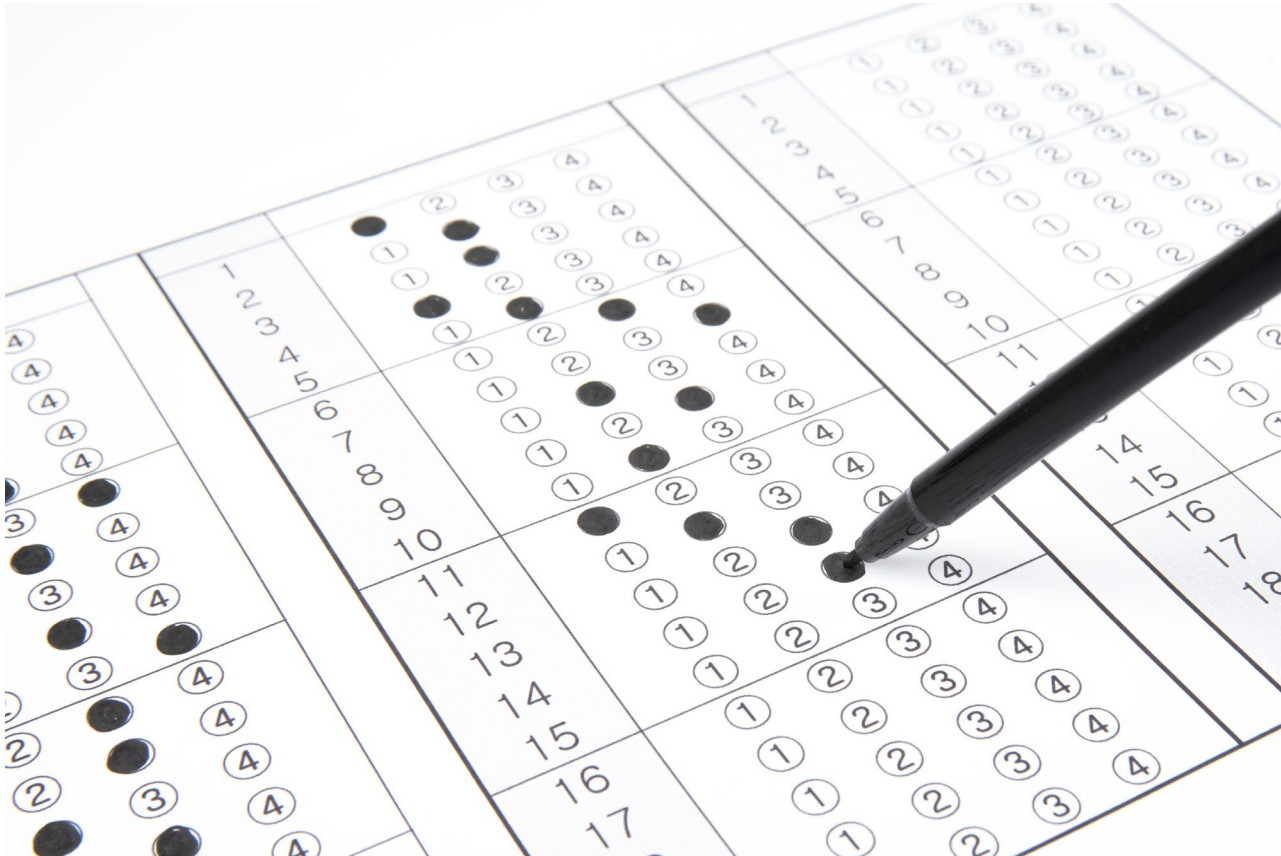
- FMLA: Test Your Knowledge
- Answers and Discussion
- ADA: Test Your Knowledge
- Answers and Discussion
- PWFA: Test Your Knowledge
- Answers and Discussion
- Questions



What? When? How?



FMLA: Test Your Knowledge!



Shelby works as a barista at I Love Coffee!

One day, she calls in saying she can't come to work and must go to the hospital to care for her daughter. She fails to provide any additional information and is absent from work for two weeks.

Which statement is the best answer?

- A. I Love Coffee may contact Shelby to find out more information about her absence to determine if it is FMLA qualifying
- B. I Love Coffee should send her FMLA eligibility and rights and responsibilities notices and a medical certification to complete and return
- C. I Love Coffee should do nothing and wait to see if Shelby calls to ask for FMLA time off
- D. A and B are true and the best answers



Nell works with Shelby at I Love Coffee. Nell requests continuous time off from work after she slipped on the ice, broke her wrist, and requires surgery.

Nell's employer gives her 15 calendar days to provide a medical certification supporting her need for FMLA.

Nell does not return the certification until 30 calendar days after her employer requested it. She says she did not reach out to her health care provider earlier because she was busy and preoccupied with other matters



Which statement is true?

A. I Love Coffee may deny Nell FMLA for leave taken on days 16-30, but not for leave on days 1 -15 or leave on day 31 and after

B. I Love Coffee must give Nell a grace period and provide her with FMLA protections the entire time



Eric also works at I Love Coffee. He tells his boss that he is feeling down and needs to take time off. HR asks for a medical certification to support possible FMLA leave. Eric does not return the certification but does provide a note from his doctor that says: “Eric has anxiety and depression and needs time off as needed.”

Which statement is the best practice?

A. I Love Coffee should accept the note

B. I Love Coffee should identify in writing what additional information is needed and give Eric 7 days to provide it

C. I Love Coffee should just call Eric and tell him to get further clarification from his physician; no need to put this request in writing as that may negatively impact Eric’s anxiety



FMLA Discussion



Employee Communications: FMLA Leave

If leave is foreseeable, employee must give 30 days notice



If not foreseeable, notice must be as soon as practicable

- Employee must provide the employer with enough information about:
 - Whether the FMLA may apply
 - Timing and duration of the leave
- No need to use the word “FMLA”
- Only calling in “sick” is not enough



Employer Communications: FMLA Leave

Employers can inquire about the employee's leave:

They can ask

- Why leave is needed
- When did they first learn of the need to be absent
- When do they expect to return to work
- Will they be seeing a doctor

Employees need to comply with employer's regular call in procedures



FMLA-Medical Certification Basics

An employer may require an employee to submit a certification from a health care provider to support the need for FMLA leave in the following instances:

- To care for a covered family member with a serious health condition, or
- For the employee's own serious health condition, or
- Military family leave reasons (qualifying exigency, care for a servicemember or veteran)



FMLA-Medical Certification Basics

- The employee **CANNOT** be required to provide a certification for leave to bond with a newborn, adopted, or foster child
- BUT employers **CAN** request documentation to confirm the family relationship



FMLA-Medical Certification: Contents

- Date the serious health condition began and how long it will last
- Appropriate medical facts about the condition supporting the need for leave such as symptoms, hospitalization, or doctor's visits
- For the employee's own serious health condition:
 - ✓ information showing employee cannot perform the essential job functions
 - ✓ nature of other work restrictions
- For leave to care for a family member:
 - ✓ a statement establishing the family member needs care
 - ✓ estimate of when and how long the leave is needed
- For intermittent leave, an estimate of frequency and duration



FMLA-Medical Certification: Contents

- Only information relevant to the serious health condition
- May also seek information relevant to short term disability or workers compensation benefits
- Nothing prevents an employer from requesting information permitted under the ADA
- NO information about genetic tests, genetic services, or evidence of disease among the employee's family members



More On Medical Certifications

- Notice of Eligibility/Rights and Responsibilities Notice needs to reference certification requirement
- Must be complete and sufficient
 - ✓ Incomplete: one or more of the applicable entries on the form have not been completed
 - ✓ Insufficient: the information provided is vague, unclear, or non-responsive
- If incomplete OR insufficient, employer must identify any deficiency *in writing* and provide 7 days for employee to cure



More On Medical Certifications

- Employee has 15 days to provide the employer with the certification
- Additional time allowed if employee made diligent good faith efforts to meet the deadline
- Absent special circumstances, an employer may deny the period after the initial 15 days from when the certification was requested, until the certificate is provided
- If a certificate is never provided, the entire leave is not FMLA and can be denied



Qualifying Exigency: Certification Requirements

A copy of the military member's active-duty orders

Only need to provide once

An employer also may contact the Department of Defense to verify

Appropriate facts related to the qualifying exigency

If the employee is using leave to meet with an alternate childcare provider or a financial consultant, the employee may need to provide the contact information of the third party with whom the employee is meeting.

The third party may be contacted to confirm that the meeting is taking place and the nature of the meeting

A copy of the military member's rest and recuperation orders



Military Caregiver: Current Servicemember

- An employee may be required to provide the employer with a certification completed by an authorized health care provider
- U. S. Department of Labor's optional certification form WH-385
- No second or third opinion when a certification is from a military-affiliated health care provider

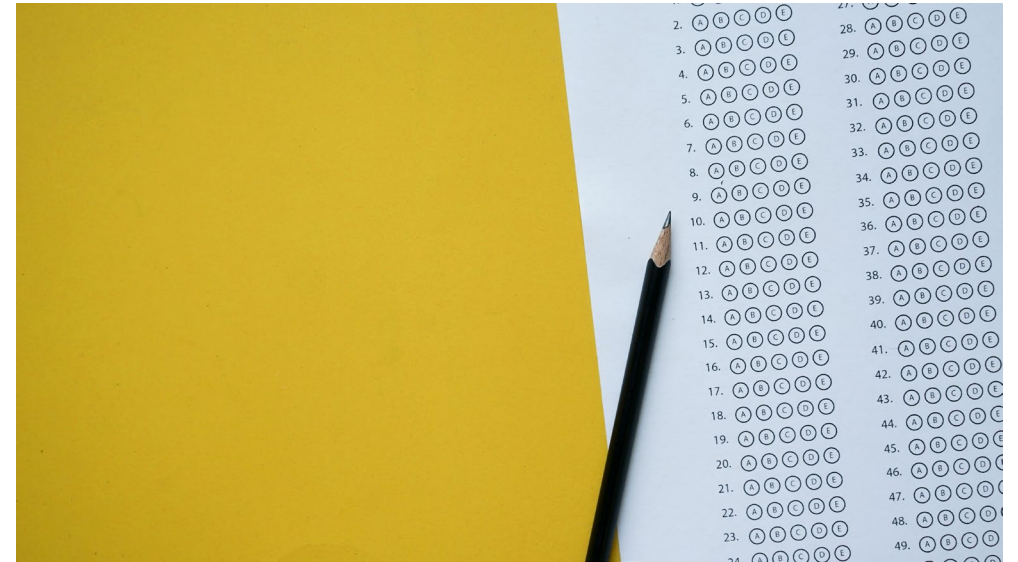


Military Caregiver: Veteran

- Employee may be required to provide the employer a certification completed by an authorized health care provider
- Employee may submit a copy of a VASRD rating determination or enrollment documentation from the VA Program of Comprehensive Assistance for Family Caregivers to certify that the veteran has a serious injury or illness
- Employee may still be required to provide confirmation of family relationship and documentation of discharge date and status
- U.S. Department of Labor's optional form [WH-385-V](#)
- NO second or third opinion when a certification is provided by a military-affiliated health care provider



ADA: Test Your Knowledge!



Holly works for The Beans, another coffee shop in town. She has been out on continuous leave after sustaining injuries in a car accident. She exhausts leave under the FMLA and has asked for an extension of leave as a reasonable accommodation under the ADA.

May Holly's employer request new medical documentation to support the need for a leave extension?



- A. No. The Beans already received a FMLA certification
- B. Yes. The Beans should always initiate ADA paperwork once FMLA exhausts as FMLA paperwork is more limited than what employers may request under the ADA
- C. Maybe! Depending on what was already provided, The Beans may be able ask Holly to provide additional or supplemental medical information to support the continuing need for leave



Paula also works at The Beans and needs a workplace accommodation due to her severe arthritis

Paula provides to The Beans medical documentation from a nurse to support her accommodation request

Is The Beans able to reject this request because it is not from a physician?

Yes, provided The Beans has a policy of only permitting documentation from physicians in all similar situated circumstances

No, under the ADA, the provider does not have to be a physician



Market Energy Company permits telework as an option for all employees, provided they submit an official written request. Supporting documentation is usually not required.



Bryce is an employee of Market Energy Company and needs to work from home due to treatments he must administer related to intense migraines he experiences every two weeks or so. Market Energy requires that Bryce submit a medical certification to support his request.

Has Market Energy violated the ADA?

No. Market Energy may request medical documentation to support an accommodation request

Yes. Market Energy should not require Bryce, who has a disability, to provide supporting medical information if non-disabled employees are not required to do so



ADA Discussion



ADA: What information can you get?



Requesting Medical Information: ADA

Pre-offer: NO disability related questions and medical examination even if job related

Conditional job offer: May make disability related questions so long as all employees in that job category are asked the same question or given the same examination

Employment: Disability related questions and medical examination permitted if job related and consistent with business necessary.

Independent violation to ask improper questions regardless of how the information is used



ADA Documentation: Basic Rules

Does not require employers to request medical information after receiving a request for accommodation

Does not require employers to use standardized forms

In all instances, even if the employer has a form for employees and physicians to use, they must look at the facts and circumstances; modification of the form may be

appropriate
Do not ask medical questions beyond what's allowed for any given situation

Asking for new medical documentation to prove disability each time an employee asks for an accommodation can violate the ADA



ADA Documentation: Basic Rules

- If the disability or need for accommodation are not obvious employers may ask for documents that are:
 - Sufficient to substantiate that the employee has an ADA disability
 - Show the need for the reasonable accommodation requested
 - Job related and consistent with business necessity
 - **BUT DO NOT** ask for unrelated documentation or documentation the employer already has!



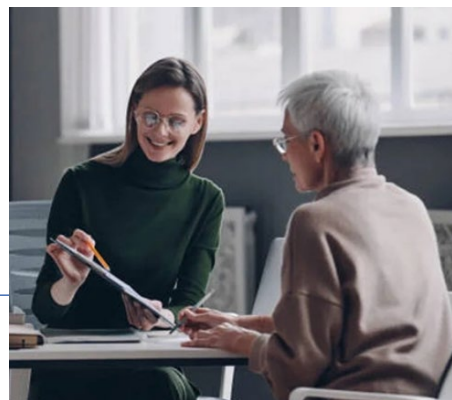
ADA Documentation: Basic Rules

- Sufficient medical documentation should describe:
 - the nature, severity, and duration of the impairment
 - the activity or activities that the impairment limits
 - the extent to which the impairment limits the employee's ability to perform the activity or activities
 - substantiate why the requested reasonable accommodation is needed



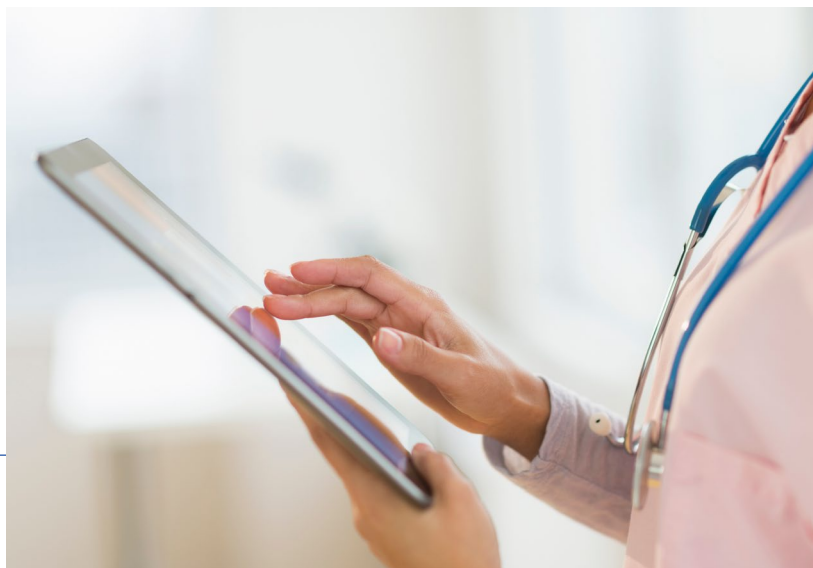
ADA Documentation: Timing

- Unlike the FMLA, the ADA does not have a set timeframe for providing medical documentation to support a request for accommodation
- However, employers may have a reasonable accommodation policy that includes a timeframe for employees to respond
- Allowing anywhere from ten to fifteen business days may be reasonable
- If an employee does not provide the information in a timely manner, it is up to the employer's discretion how to handle the situation
- Good practice; inform the employee in writing that the information was not received and identify what is needed



ADA Documentation: Medical Release

- Cannot request a person's complete medical file
- Do not use a general release for all medical records
- If the employer must communicate directly with the provider, use a limited release



PWFA: Test Your Knowledge!





Maria tells her supervisor she is pregnant and needs to avoid working with certain chemicals in the workplace. Given the chemicals and the fact that Maria is pregnant, she needs the change immediately.

Which is the best course of action?

A. Put Maria on unpaid leave right away and tell her she cannot return until you receive supporting documentation

B. Determine if there is an appropriate interim reasonable accommodation available that would enable Maria to continue working yet remain safe during her pregnancy; ask for documentation to assist in determining the best alternative accommodation

C. Engage with Maria right away but have her continue performing her duties while you wait for her to provide supporting documentation



Sarah's employer, Baths and Beds requires everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Sarah, a production worker who is 5 months pregnant, requests additional bathroom breaks.

Which statement is false?

- A. Baths and Beds may wait until it receives supporting documentation from Sarah before providing the accommodation
- B. Baths and Beds must grant the accommodation despite its policy because it cannot deny a request simply because Sarah failed to submit supporting documentation
- C. Baths and Beds must grant the accommodation without delay because this is not a situation where an employer can request documentation under the



Farah is a nurse working at BX Health and she has diabetes. BX Health accommodates her with breaks to eat small meals throughout the day and breaks to check her insulin levels. Farah becomes pregnant and experiences morning sickness that makes it difficult for her to eat in the morning. As a result, she needs more breaks to eat later in the day and occasionally needs a break to rest while at work.

Which statement is true?

- A. Farah's new accommodation would be analyzed under the PWFA only; the ADA would not apply
- B. Under the PWFA, absent undue hardship, the employer must provide Farah with the additional accommodations she requires due to her pregnancy
- C. Farah's new accommodation would be analyzed under the ADA and not the PWFA because when both laws apply, the ADA's provisions take priority



PWFA Discussion



PWFA: What information can you get?



PWFA Requests for Information



- ✓ Request for accommodation does not need to be in writing, in a specific format, use specific words, or be on a specific form
- ✓ Employer should engage in the interactive process and discuss the accommodation need with the employee rather than focus on medical documentation for support
- ✓ Although an employer is not required to seek medical information from an employee's health care provider, the employer may obtain if reasonable under the circumstances
- ✓ If a form is used, the form should be a simple one that does not deter the employee from pursuing the request and does not delay the provision of an accommodation



PWFA Examples of Accommodation Requests

- Emily, a pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness"
- Molly gave birth 3 months ago and tells the person who assigns her work at the employment agency, "I need an hour off once a week for treatments to help with my back problem that started during my pregnancy"
- Jennie, an employee, tells a human resources specialist that she is worried about continuing to lift heavy boxes because she is concerned that it will harm her pregnancy
- At Mindy's request, Mindy's spouse requests light duty for Mindy because she has a lifting restriction related to her pregnancy; Mindy's spouse uses the employer's established process for requesting a reasonable accommodation
- Amy tells a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because she is pregnant, but does not complete the employer's online form for requesting an accommodation
- Becky tells a supervisor that she needs time off to recover from childbirth



Remember ADA restrictions!

The ADA restrictions on disability-related questions and medical apply to the PWFA

Example:

Company Two requires Margo, who requests an accommodation due to a pregnancy-related limitation, to fill out a form identifying her physical and mental impairments is not likely job-related and consistent with business necessity, as required by the ADA



PWFA Documentation: Reasonableness

- Employer may only request documentation that is reasonable under the circumstances to determine:
 - whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation); and
 - needs an adjustment or change at work due to the limitation



Documentation: What is reasonable documentation?

- Minimal amount that:
 - (1) confirms the physical or mental condition
 - (2) confirms that the condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
 - (3) describes what change or adjustment of work is needed



Predictable Assessments

Certain accommodations should be granted easily:

- Carrying and drinking water as needed in the work area
- Additional restroom breaks
- Allowed to stand or sit
- Breaks to eat and drink

These accommodations:

- Are almost always reasonable
- Will rarely cause undue hardship
- Prohibit employer from requesting medical documentation
- Should be provided quickly



PWFA and Documentation

Not Reasonable when:

Limitation and need for reasonable accommodation are obvious and employee provides **self-confirmation**

Employer already has sufficient information

Involves lactation or pumping and employee provides **self-confirmation**

Involves one of the **predictable assessments** and employee provides **self-confirmation**

If the employer's policy does not otherwise require supporting documentation to support the same type of accommodation for employees not covered by the PWFA



PWFA and documentation: Self-confirmation

A simple statement where employee confirms the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and the adjustment or change at work needed due to the limitation

May be made in any manner and can be made as part of the request for reasonable accommodation

May not require a specific format or form



Questions?

