

FMLA, ADA and Paid Leave

Navigating the complex world of leave and accommodation

The information contained herein does not constitute legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.



Enforcement Trends

FMLA

- 192% increase in court filings from 2012 to 2015.¹
- Average jury verdict 2012-2015 = \$735k
- DOL handled 1,165 FMLA complaints in 2017 (50% found violations)
- Back wages awarded in 2017 = \$1,481,952.²

ADA

- EEOC handled 26,838 ADA complaints in 2017³
- Total settlements = \$135.2M
- Average jury verdict 2012-2015 = \$4.4M
- Only 22% of verdicts are for the employer/defendant

¹Bloomberg BNA, October 24, 2016 report

²DOL FMLA Enforcement Statistics. 2017 Statistics by Administrative Office of the U.S. Courts.

³U.S. Equal Employment Opportunity Commission, "Americans with Disabilities Act of 1990 (ADA) Charges
<https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm>.

FMLA

TOP 5 MISTAKES

- 1 Improperly determining eligibility /“deeming” employees FMLA eligible
- 2 Failure to provide required notices
- 3 Failure to calculate leave entitlement appropriately
- 4 Failure to properly designate FMLA time
- 5 Failure to monitor intermittent leaves closely

Overview – What is the FMLA?

The FMLA entitles employees to take unpaid, job-protected leave for specified family and medical reasons

Eligible employees are entitled to:

- Twelve workweeks of leave in a 12-month period
- Leave can be taken continuously, intermittently, or on a reduced work schedule

Health benefits must be maintained during leave

Employers cannot interfere with an employee's right to FMLA leave or retaliate against an employee for taking or requesting FMLA leave

Employer obligations

An employer must, within pre-determined time frames:

Evaluate eligibility for leave

- Hours worked
 - Location
 - Tenure
 - Employee status
-

Calculate entitlement for leave

- How much time available
- Coordination with state leave laws

Determine qualification of leave

- Meet the definition of a serious health condition or military leave entitlements through review of employee-provided medical certification or information
 - Meet the definition of non-medical leaves
 - Follow applicable state leave laws
-

Confirm in writing within five business days of notice or need for leave

- Eligibility
 - Rights and responsibilities
-

Confirm in writing within five business days of receipt of information

- Designation of leave

Who is covered by the FMLA?

Which employers are covered?

- **Private Sector:** 50 or more employees for at least 20 weeks in the current or preceding calendar year

What about temporary employees?

- Time worked counts toward employee's hours and tenure requirements

Which employees can take FMLA leave?

- Been employed for at least 12 months (does not need to be consecutive)
 - Any week in which employee is maintained on the payroll counts (including weeks when no work is performed)
- Employed at a site with 50 or more employees within a 75 mile radius
- Has worked at least 1,250 hours during the 12 months prior to the leave request (consecutive)
 - Only actual work is counted
 - Leaves of absence, paid or unpaid, including FMLA leave, are not counted
 - Pursuant to USERRA, employees returning from military service shall be credited with hours that would have been performed *but for* the military service

When can an employee take FMLA leave?

Birth of a child

Placement of a child for adoption or foster care

To care for a spouse, child, or parent with a serious health condition

Because of the employee's own serious health condition

Because of a qualifying exigency

To care for a family member injured in the line of duty – military caregiver leave (26 weeks)

Care for loved ones

Spouse

- Husband or wife as defined by state where marriage entered into
- Includes common law marriage

Son or daughter

- Biological or step child
- Adopted or foster child
- Legal ward
- Any child employee has day-to-day responsibility for (practical care or financial and assumed role of parent)

- Under 18, or incapable of caring for him/herself due to mental or physical disability at the time FMLA leave is to commence

Parent

- Biological, step, foster or adopted parents
- Includes in-laws or grandparents, if that individual acted as a parent to the employee when he/she was a child

You can request documentation – but proceed with care!

Required notices

GENERAL NOTICE

- General rights under the FMLA

ELIGIBILITY NOTICE

- Send Within 5 days of request for leave
- State at least one reason why if ineligible
- Once eligible, employee remains eligible for remainder of the leave year for that leave reason (although may exhaust entitlement).

RIGHTS & RESPONSIBILITIES NOTICE

- Provide at the same time as eligibility notice
- Must include information on: calculation method, certification requirements and consequences, paid leave, insurance premium payments and consequences, insurance maintenance, job restoration

DESIGNATION NOTICE

- Within 5 business days of determining that leave qualifies as FMLA
- Must include exactly how much time is designated
- If not possible to determine time (e.g. intermittent), must provide when employee asks about availability but no more often than every 30 days
- Must inform about Fit-for-duty requirements and essential job functions if those are to be addressed in Fit for Duty
- Failure to designate – employer is liable only if employee can demonstrate harm

State leave laws

FMLA-like leave laws

Pregnancy disability

Bonding

Bone marrow

Volunteer fire fighters (emergency workers)

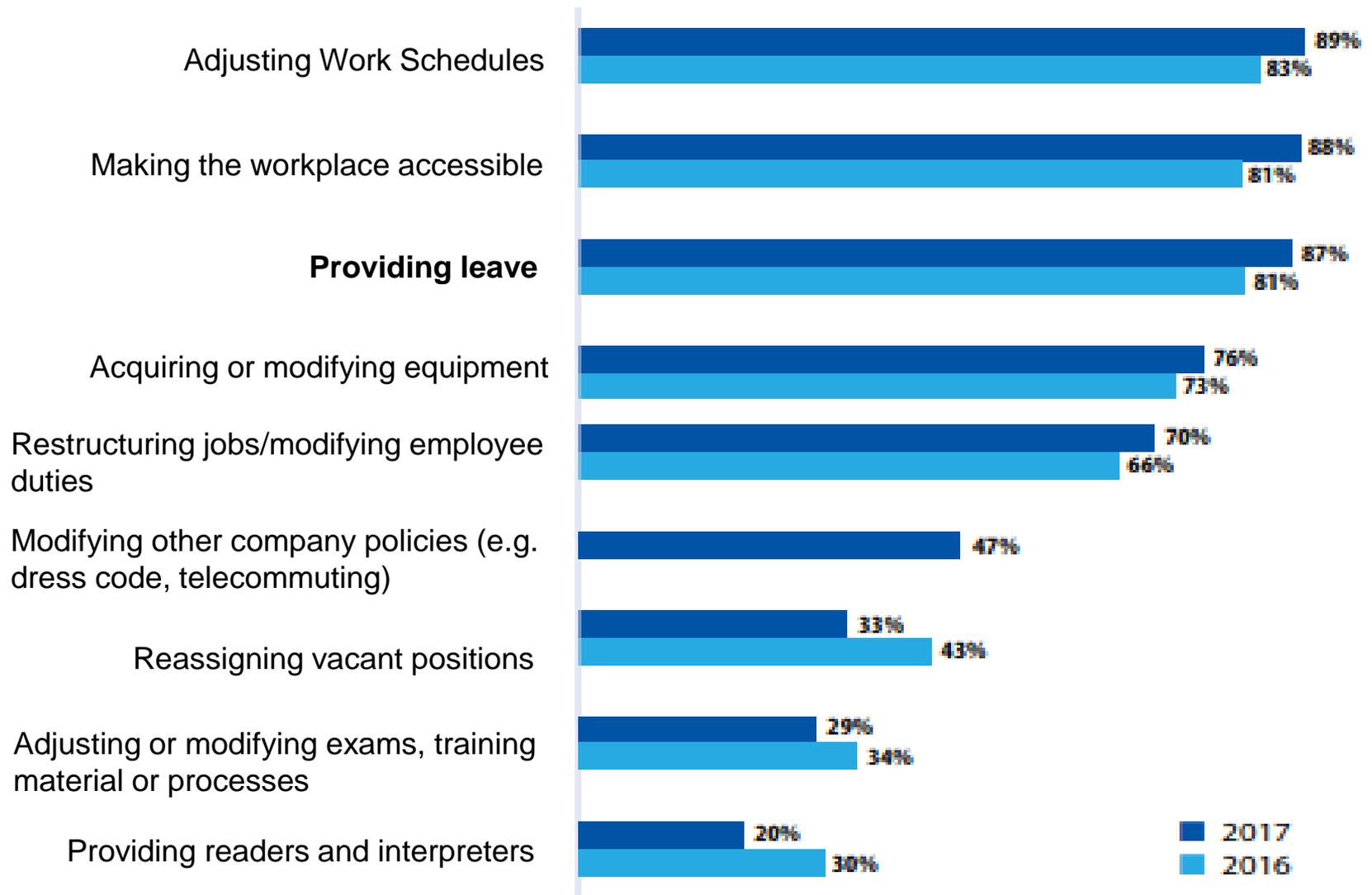
School activities leave laws

Domestic violence/crime victim leave laws

Kin care

ADA

Most Common ADA Accommodations



Leave as an ADA accommodation



EEOC Guidance

- The requires covered employers provide reasonable accommodations to employees with disabilities
- A reasonable accommodation can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.



Best practice

Evaluate leave as an accommodation when:

- Employee has requested leave but is not eligible, or
- Employee exhausts their leave entitlement but has a continued need for leave
- Purpose is to allow the employee to recover and return to work within a reasonable time
- Indefinite leave is not reasonable according to the EEOC
- Unreasonably, unpredictable attendance is not reasonable

Employer challenges

Interactive Process



Overwhelmed HR staff without the time or skill to interact

Not recognizing requests for accommodations

Failure to implement and monitor reasonable accommodations

Medical Considerations



Privacy and confidentiality must be maintained

Lack of medical understanding to assess medical information

Asking appropriate medical questions (job related and consistent with business necessity)

Policies and Practices



Keeping policies compliant (e.g. no inflexible leave policies) and formally documented

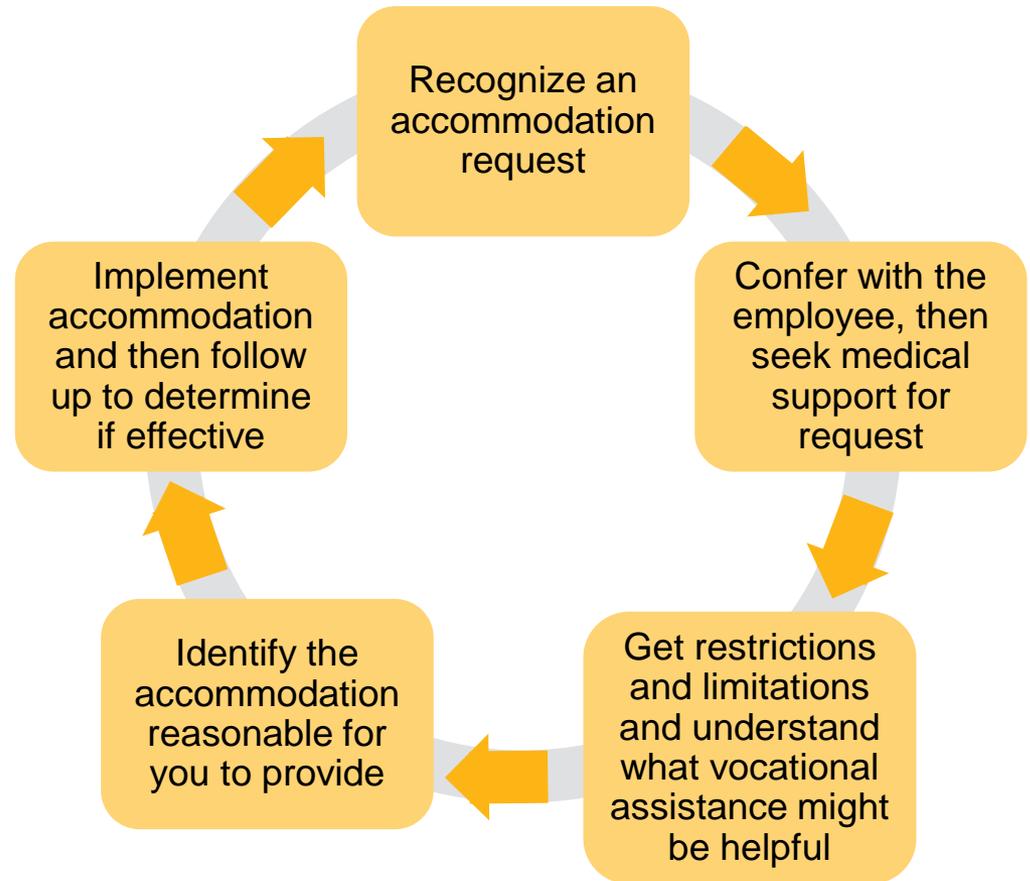
Consistency between sites or business areas

Consistent manager and supervisor training

ADA interactive process overview

To understand what is reasonable, often an interactive process is required

- Get the employee's perspective on their condition and their limitations
- Find out what barriers they are experiencing because of limitations
- Ask them what could be done to help them overcome those barriers



Evaluating ADA request



Is the employee disabled?

- Is there an impairment?
- Does it impact a major life activity?
- Is that major life activity substantially limited?



Is the employee a qualified individual?

- Does the employee have the skills and experience required?
- What are the employee's essential job functions?
- Can the employee perform those functions, with or without a reasonable accommodation?



Is the employee entitled to a reasonable accommodation?

- What has the employee requested?
- Is the accommodation reasonable?
- Does the accommodation create an undue hardship?

Paid Leave

What is Paid Family Leave (PFL)?

Know the
difference

Accrued paid leave laws

- Laws passed by states that mandate if an employer provides paid leave, it must allow the employee to take it for enumerated reasons and it must be job protected.

Paid family leave insurance

- Benefits administered by the state. Typically, the employee pays into a fund through payroll deduction, and the employee files for benefits with the state. These may or may not provide job protection.

Employer mandated paid leave

- These are laws passed by states, counties or municipalities that mandate that employers provide paid leave to their employees for enumerated reasons.

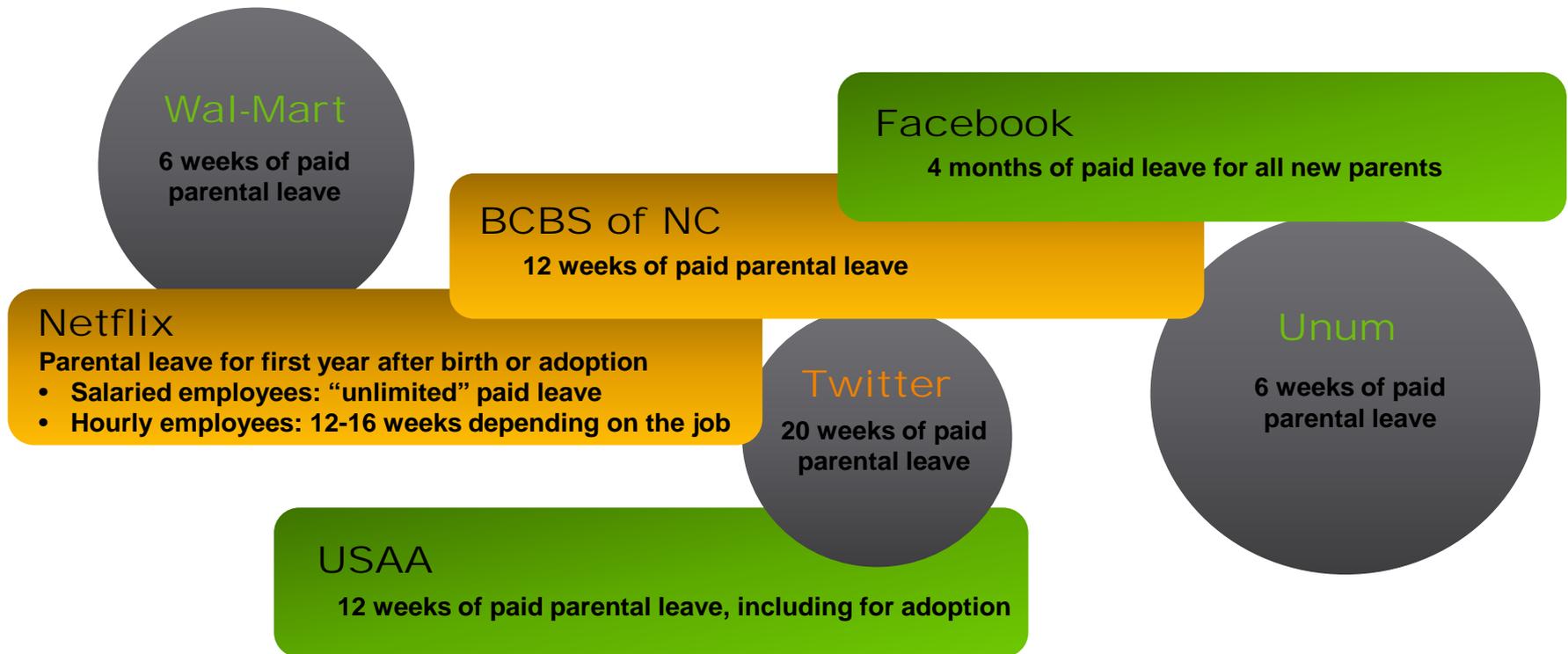
Voluntary employer-provided leave policies

- Many employers choose to provide paid leave when not legally required, i.e. paid parental or caregiver leave.

Corporate Paid Family Leave Programs

CURRENT MARKET TRENDS

More than 100 brand-name companies across a range of industries have announced new or expanded paid leave policies over the last three years.



Unum's Solution

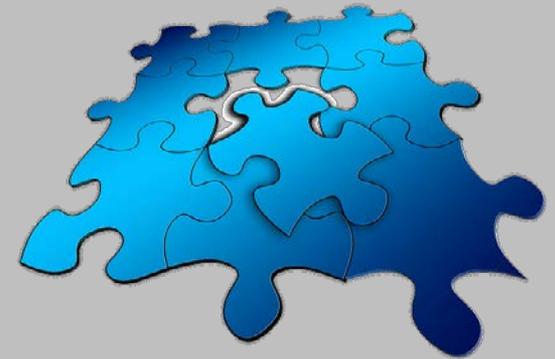
One experience - flexible integration



Interpreting laws, regulations and compliance - Let us take on the burden of understanding and integrating



One intake / one experience - A simple experience for employees with all your benefits under one roof



Flexible, integrated solutions – Help with administering corporate policies and integrating with mandated coverages

Questions?

