

Beyond Maternity Leave: Cutting-Edge Approaches to Lawful Parental Leave Programs

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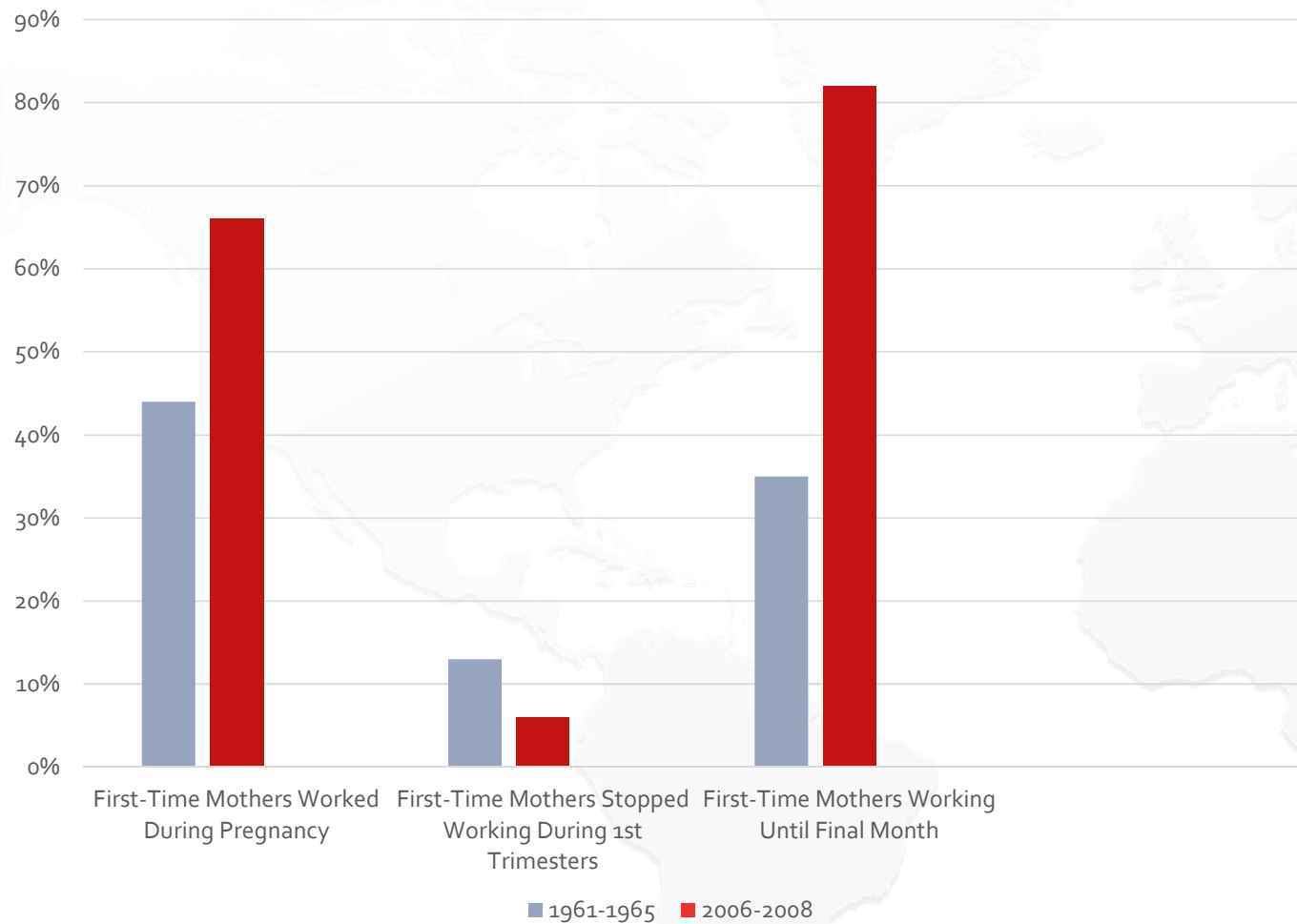
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More Pregnant Women in the Workplace

National Women's Law Center, *Fact Sheet: The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job* (June 2013)

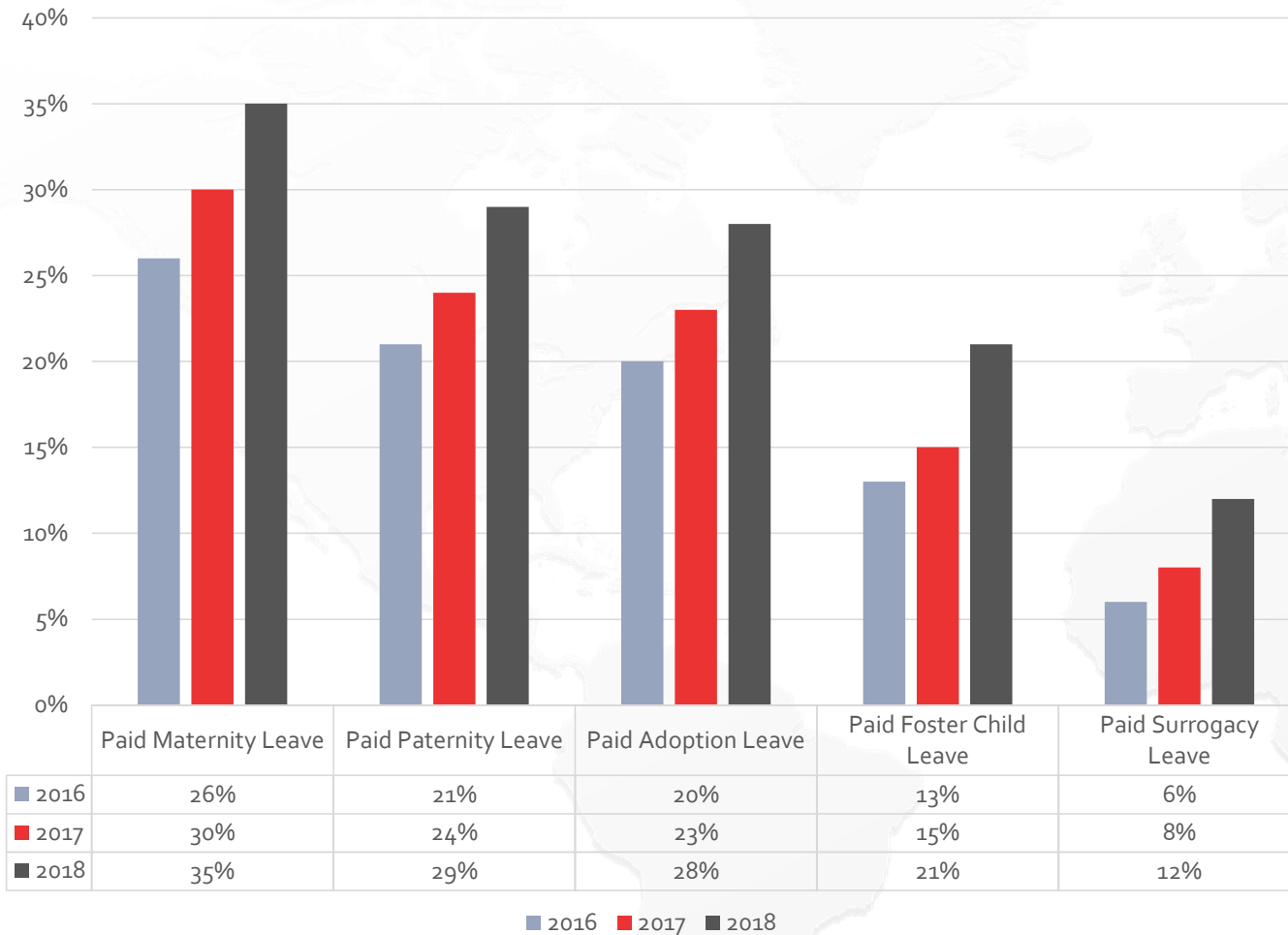
http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_bill_number.pdf



Employers Offering Paid Parental Leave

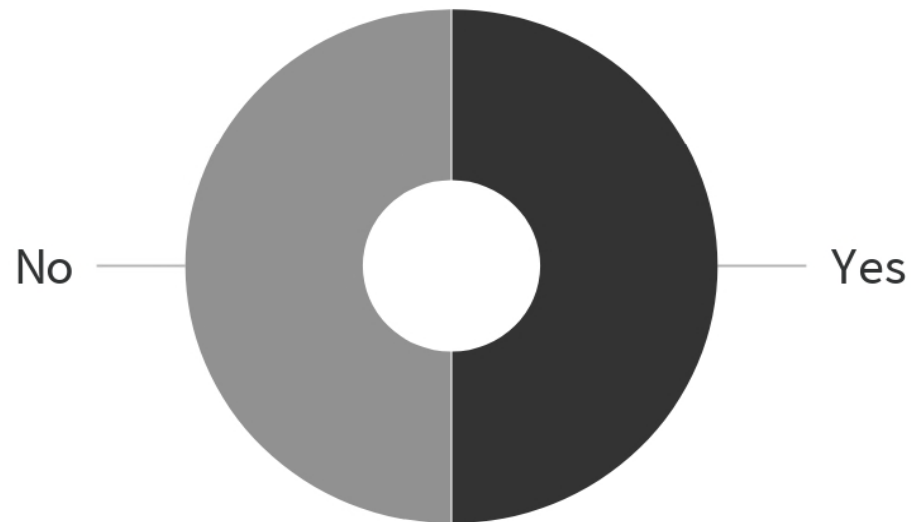
2018 Employee Benefits (SHRM)

<https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf>



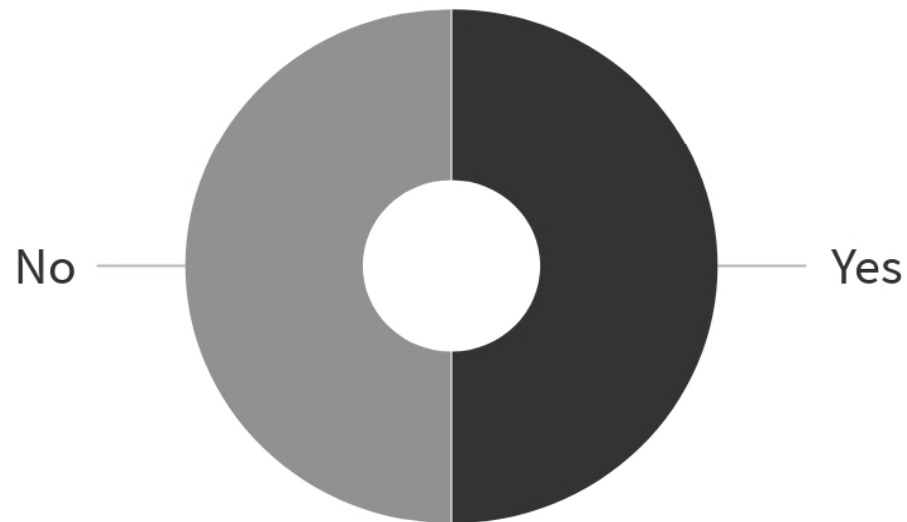
Does your Company currently offer paid maternity benefits in addition to short-term disability?

Yes No



Does your Company currently offer paid parental (maternity and paternity) benefits?

■ Yes ■ No



If yes:

More than
12 weeks

12 weeks

Between
6-12 weeks

Between
2-6 weeks

How much pay does your Company offer?

100%

Less than
100%, but at
least 60%

Less than
60%

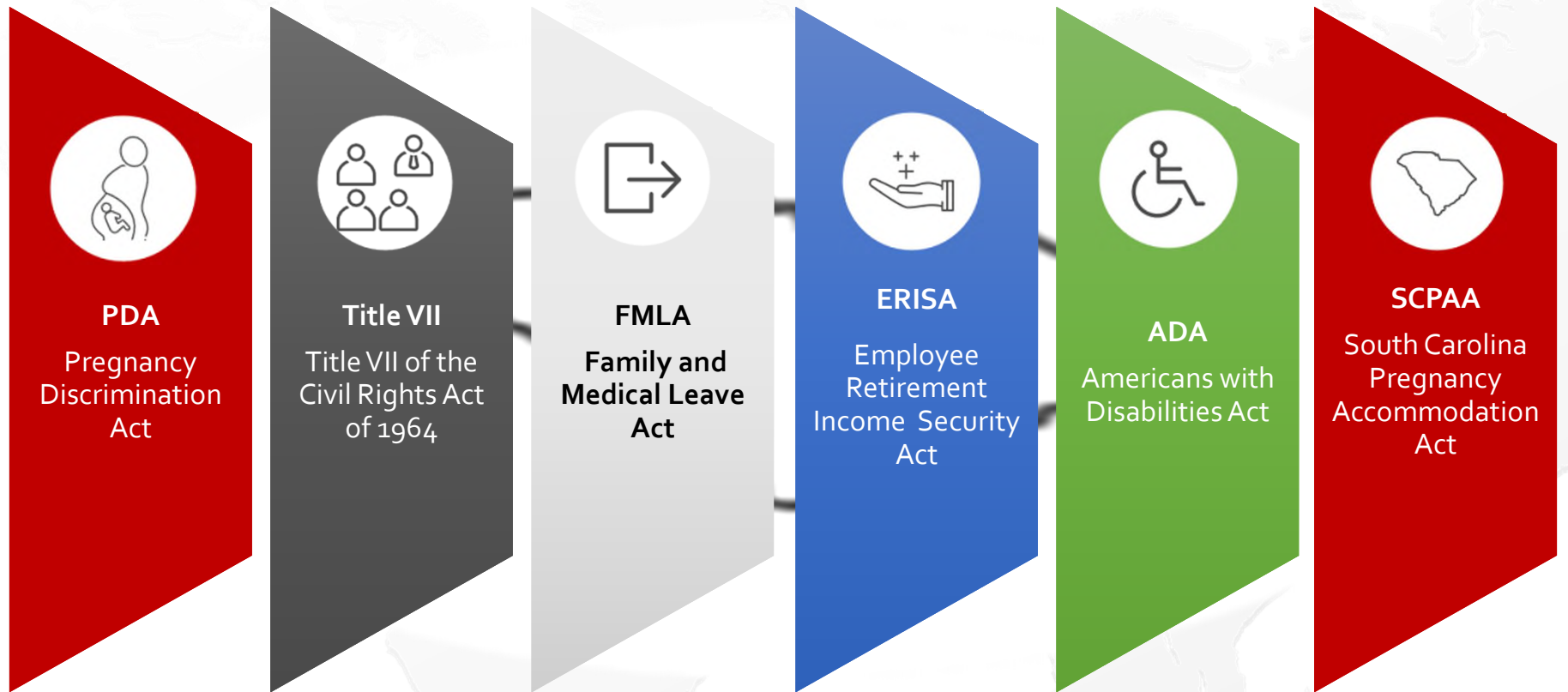
Does your paid parental leave apply equally to:

birth, adoption,
surrogacy, and
foster child leave

birth and
adoption only

birth only

The Overlapping Laws



PDA



Cannot discriminate on the basis of pregnancy in any term or condition of employment

What one word comes to mind when you hear gender discrimination?

Title VII



- ❑ Cannot discriminate based on gender or age (and other protected categories but we are going to discuss these two...)
 - Lactation
 - Fathers (i.e., men)
 - Infertility and Surrogacy? (age?)

FMLA

12 weeks

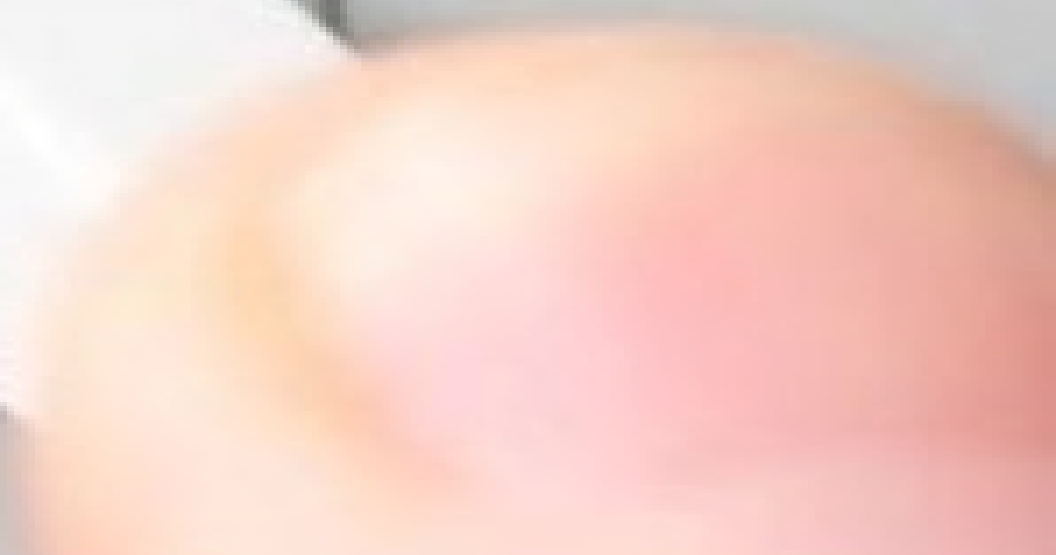
Prenatal care

Incapacity due to pregnancy

Incapacity after childbirth

Baby bonding

To care for spouse, son, or daughter with serious health condition



ERISA

Short-Term Disability

Under FMLA, cannot require use of PTO while receiving STD or other paid time off

Continuation of Benefits

Continuation of Health, Dental, Vision, Life, etc. due to reduction in hours – either reduced schedule or leave of absence



Follow Terms of Plan

ADA



- Cannot discriminate based on disability and must go further and accommodate qualified individual with disability
- Pregnancy = Disability?
- Infertility = Disability?
 - Adoption?
 - Surrogacy?

ADA

Accommodation within Job

Consider Company Leave and FMLA

Grant ADA Leave if Effective

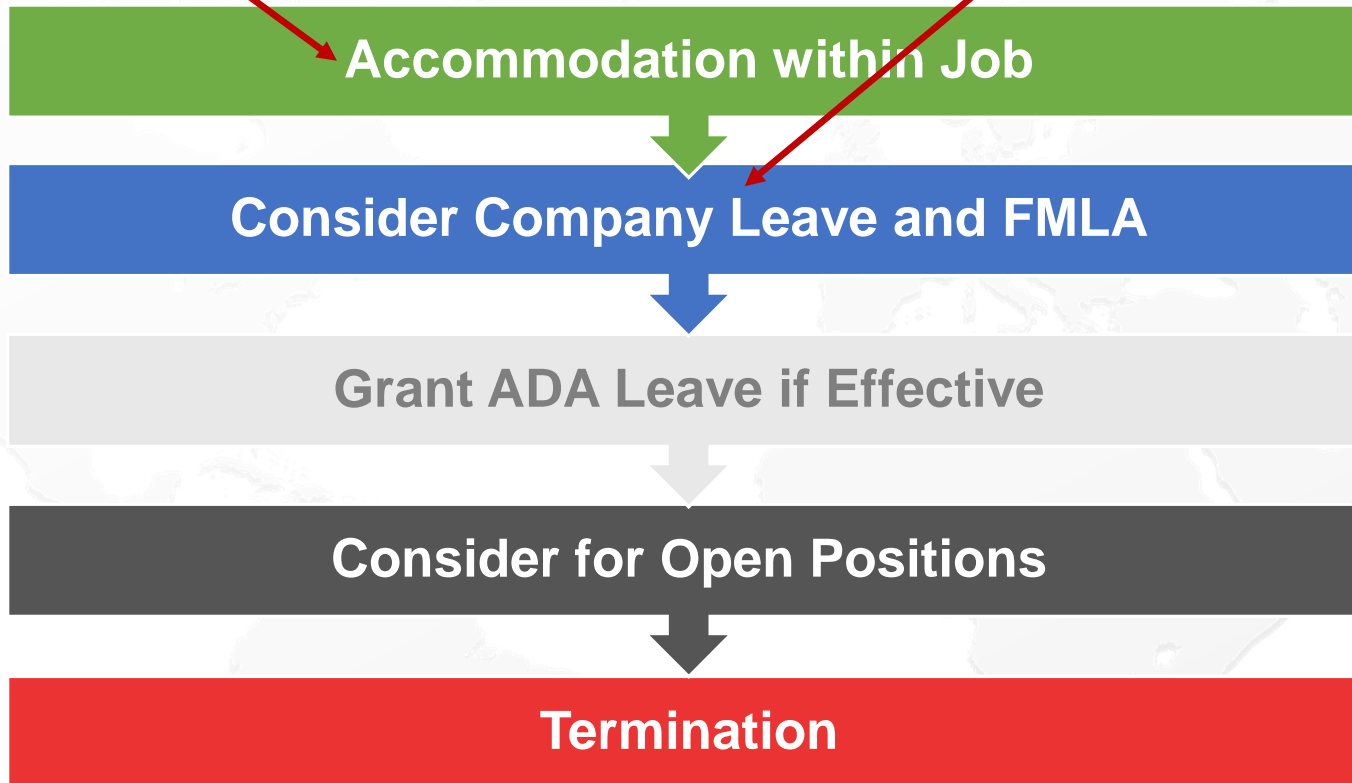
Consider for Open Positions

Termination

ADA

Cannot force
leave

This is where your
maternity/parental
leave policy comes into
play



Accommodation Rules

- ❑ The ADA requires us to provide reasonable accommodations unless the accommodation creates undue hardship
 - Accommodation means something that is effective and something more than other employees (or persons) get
- ❑ Out of the possible accommodations, the employer gets to pick which accommodation it wants to provide
 - But an employer cannot offer a lower tier accommodation when a higher tier accommodation is available

Do you currently have written procedures for HR and/or Benefits to guide accommodation decisions?

No written procedures

Some written procedures, but they don't currently address pregnancy accommodation specifically

We have comprehensive and thorough procedures that address pregnancy accommodation as well as other disabilities, vacant position process, and how to determine undue hardship

SC Pregnancy Accommodations Act



- ❑ Enacted on May 17, 2018
- ❑ Amends the SC Human Affairs Law (SCHAL)
- ❑ To a large extent adopted EEOC Guidance

What's Covered



Pregnancy



Childbirth



Related Medical
Conditions



Lactation

Tier 1

Accommodation within Job

Accommodations that permit the employee to perform all essential functions

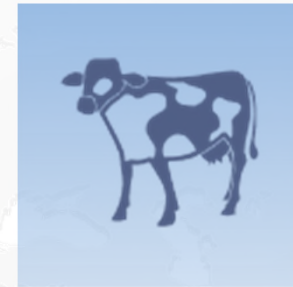
How do we determine essential functions?



Job Description



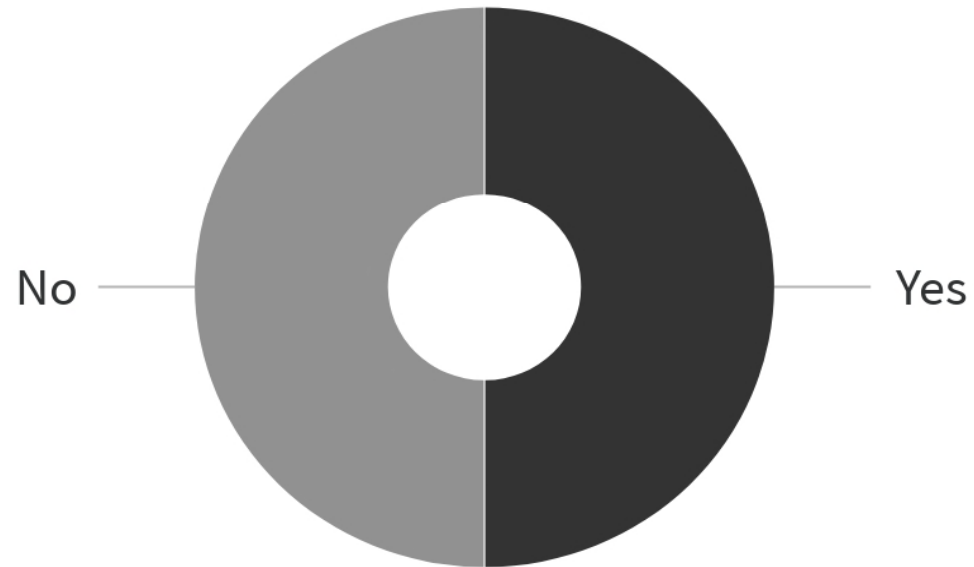
Jigsaw Puzzle



Sacred Cows

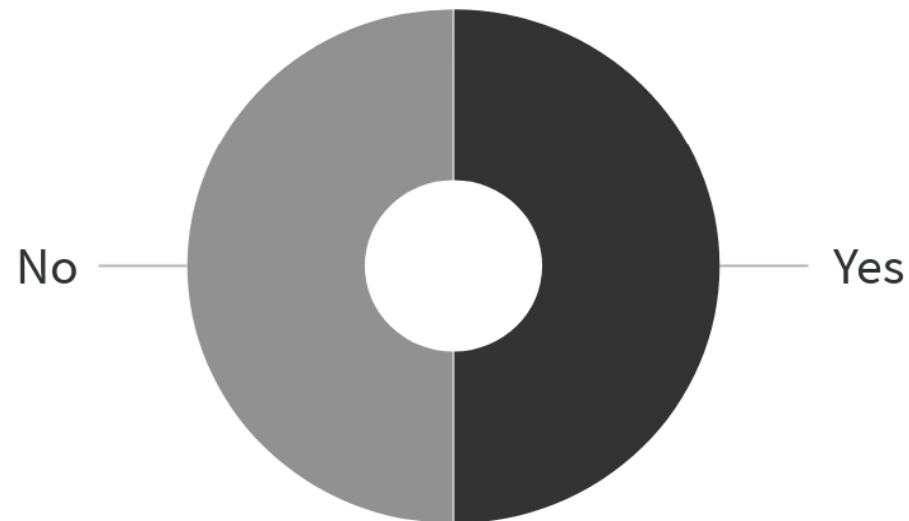
Are your Company's job descriptions up to date?

Yes No



Do your job descriptions address mental functions of the job such as "ability to concentrate" or "manage a fast-paced and stressful environment"?

■ Yes ■ No



On-the-Job Accommodations

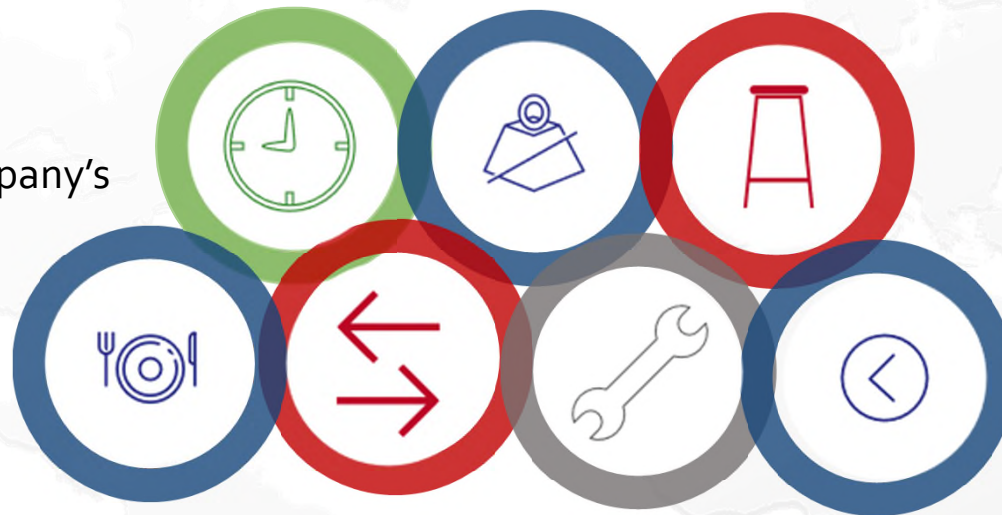
Providing more frequent or longer break periods

Providing assistance with manual labor and limits on lifting

Providing seating or allowing the employee to sit more frequently if the job requires the employee to stand

Modifying the Company's food or drink policy

Providing job restructuring or light-duty work, if available



Temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified

Acquiring or modifying equipment or devices necessary for performing

Non-Required Accommodations

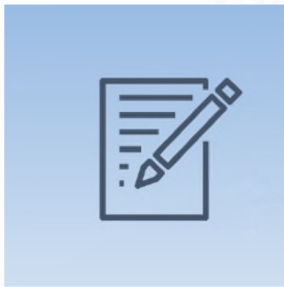
- Hire employees that would not have otherwise been hired
- Discharge an employee, transfer an employee with more seniority, or promote an employee who is not qualified
- Create a new position, including a light-duty position, unless it would be provided for another equivalent employee
- Pay for more frequent or longer break periods, unless the break period would otherwise be paid

Light Duty

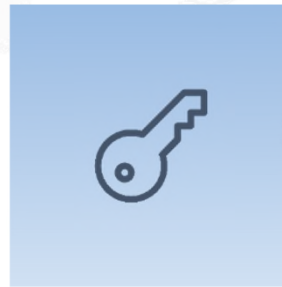
Employer must provide light duty for a pregnant worker if it provides light duty for employees who are not pregnant, but who are similar in their ability or inability to work (unless ad hoc and only a few days duration)



Light Duty



Created Position



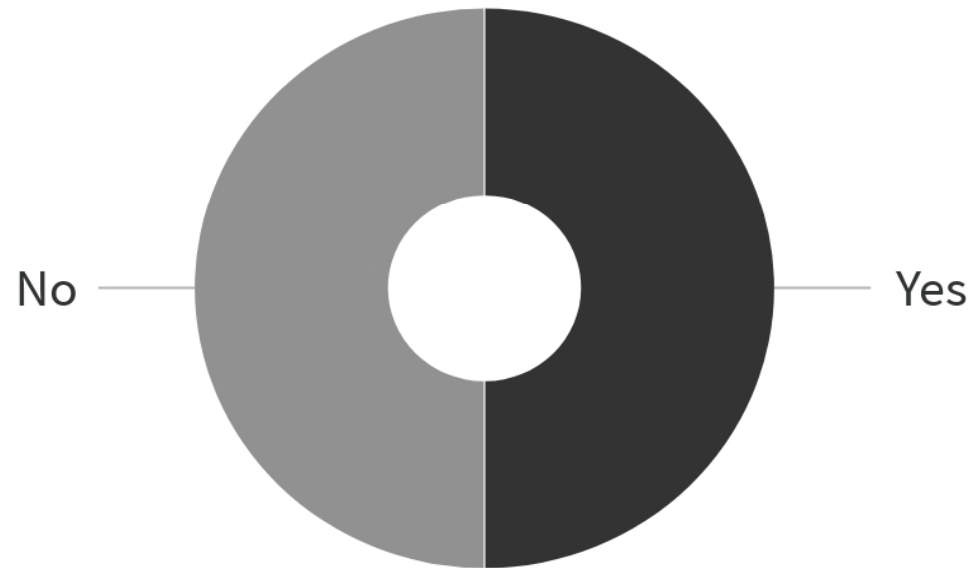
Reserved Position



Temporary
Reassignment

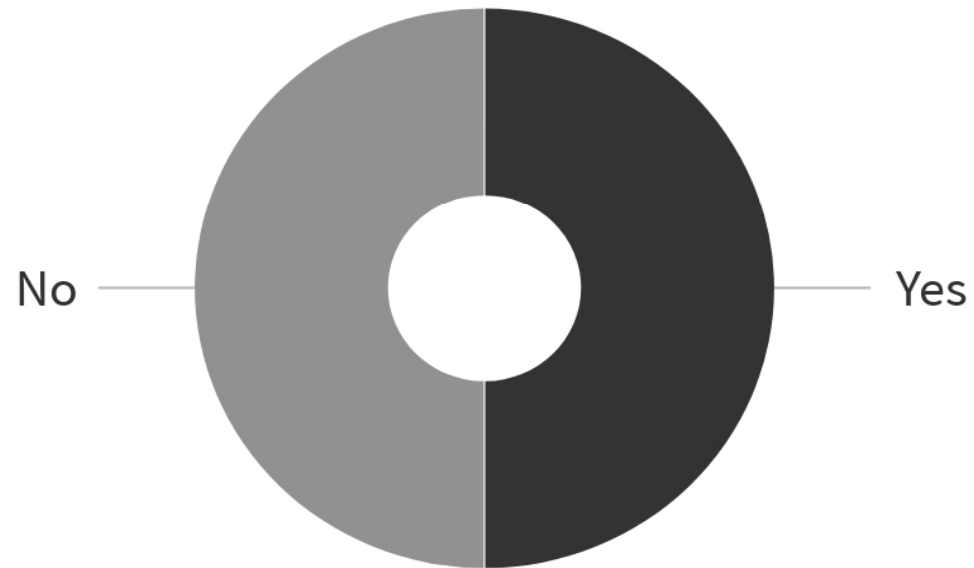
Do you currently only offer light-duty to employees injured on the job?

Yes No



Do you have reserved light-duty positions?

Yes No



Job Restructuring

- Not required to create a job that doesn't exist
- Not required to eliminate an essential function

- Not required to turn a temporary light duty assignment into a permanent position

- Not required to reassign essential functions to another employee

- Not required to create a new job or recreate an old job

Job Restructuring

- ❑ Removing non-essential functions
- ❑ When group of employees are in a pool getting the work done
 - Where job rotation is not an essential function, and
 - no job is more onerous than the other, and
 - there are full assignments the employee can do within his/her restrictions

Tier 2

Consider Company Leave and FMLA



Grant ADA Leave if Effective



Intermittent Leave

FMLA	ADA
The FMLA provides intermittent leave when medically necessary	The ADA provides leave, including intermittent leave
DRs appts and for FLARES (that cause the employee to be unable to perform one or more essential functions)	When it will work – i.e., have the employee return to performing ALL essential functions (including regular, predictable, full attendance) Here is the thing about pregnancy – it will eventually end

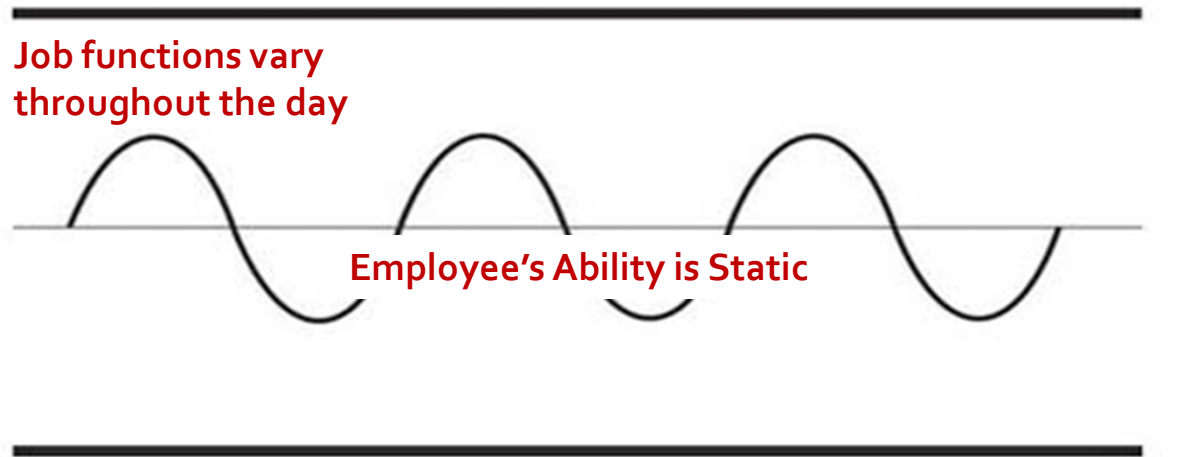
**Employee Ability
Because of Flares**

Job Functions Aggregated

When does
intermittent
leave apply?

= FMLA

To get under ADA this
pattern has to end.



Job functions vary
throughout the day

Employee's Ability is Static

When does
intermittent
leave NOT
apply?

This is light duty.
Follow light duty rules.

Tier 3 & 4

The Line of Displacement
Job Protection Ends

This is a
permanent
job
reassignment

Consider for Open Positions



Termination

Compliance Action Items

- ❑ Update policies, procedures, and processes to address accommodations, leave, light-duty, and job reassignment
- ❑ Specifically include pregnancy and pregnancy-related conditions, including lactation, in list of protected categories in EEO and harassment policies
- ❑ Provide the required notices and post the required poster (in SC)
- ❑ Train front-line supervisors and managers on the requirements and how to spot or handle pregnancy-related accommodation requests when they arise

SCPAA Notice Requirements



New Employees

At commencement of
employment



Existing Employees

By September 14, 2018 –
if didn't, send now



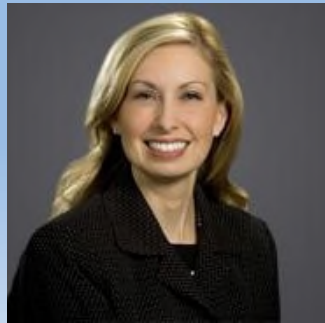
Poster

Conspicuously posted in
an area accessible to
employees

Policy Considerations

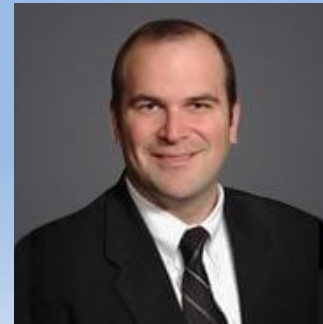
- ❑ Just leave or paid leave?
- ❑ How much paid leave and how will it coordinate with existing PTO and STD benefits?
- ❑ Length of service requirement?
- ❑ Gender-neutral bonding time separate from presumed period of disability
 - No medical documentation required for bonding under FMLA, but can require medical documentation for disability
 - Can require proof of birth, adoption, or surrogacy and in loco parentis (intended to be in parental status)
- ❑ Adoption? Through what age? (Carve out adoption of spouse's or partner's children?)
- ❑ Surrogacy? Foster child leave?

Thank You



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