

# ADA Q&A...ADA + FMLA = Job Protections for Parents

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Advocates frequently hear from parents of children with disabilities who have experienced employment discrimination based on their child's disability. These parents often ask if Title I of the Americans with Disabilities Act (ADA) protects them—as well as their children—from employment discrimination.

The questions parents regularly ask relate to: 1) hiring or firing actions based on having a child with a disability; 2) employer-provided health insurance; and 3) attendance policies and employee leave issues.

There are some protections for parents in all of these areas but they do not all fall under the ADA. However, using the Family and Medical Leave Act (FMLA) of 1993 and state laws, as well as the ADA, parents who work for covered employers can weave together some protections in all of these areas.

## **Q. Was it legal for my employer to fire me after my child was born with a disability?**

**A.** No. It is unlawful under the ADA and the Minnesota Human Rights Act for covered employers to discriminate against a qualified individual because a person is known to be related to an individual who has a disability. This “association” provision of the ADA applies to parents but is not limited to those who have a family relationship with an individual with a disability. Although the ADA only applies to employers of 15 or more employees, there is a comparable section of the Minnesota Human Rights Act prohibiting discrimination on the basis of “familial status” that applies to all Minnesota employers, regardless of size.

## **Q. Can an employer refuse to hire me because my child's medical needs may increase health insurance costs?**

**A.** Under the Americans with Disabilities Act, an employer cannot fire or refuse to hire

an individual because the individual has a family member or dependent with a disability that is not covered by the employer's current health insurance plan, or that may increase the employer's future health care costs.

## **Q. Can an employer offer me a different insurance package than other employees because of my child's medical expenses?**

**A.** Employers may not reduce the level of insurance benefits to an employee simply because that employee has a dependent with a disability. This is true even if the provision of such benefits would result in increased health insurance costs for the employer.

## **Q. Can my employer-provided health insurance rule out coverage for certain disabilities?**

**A.** No. Disability-based distinctions are illegal under the ADA. It is legal, however, to place restrictions on certain medications and procedures (for example, on mental health therapy or blood transfusions), providing all employees and their families have the same restrictions, not just those with disabilities.

The EEOC has also indicated that employers may be able to prove, in some cases, that a disability-based insurance practice is necessary to prevent a drastic increase in premium payments, co-payments or deductibles, or a drastic change in the scope of coverage that effectively makes the health insurance plan unavailable to a significant number of other employees, or so unattractive that the employer cannot compete in recruiting and maintaining qualified workers.

## **Q. Is it legal for my employer to have a health insurance plan that includes a pre-existing conditions clause that has the effect of denying coverage to my child with a disability?**

**A.** Yes. According to the Equal Employment Opportunities Commission (EEOC), an employer may continue to offer health

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insurance plans that contain pre-existing condition exclusions, even if this adversely affects people with disabilities—as long as the restrictions are uniformly applied to all insured individuals regardless of disability. Neither does the ADA require that dependent coverage be the same in scope as coverage of employees. For example, a \$100,000 benefit cap for employees, but only \$50,000 cap for dependents, would be permitted.

**Q. Where can I get more information on how the ADA applies to Health Benefit Plans?**

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A. Contact the Great Lakes Disability and Business Technical Assistance Center at 1 (800) 949-4232 and ask for a copy of the Cornell University article, “Health Benefit Plans and the Americans with Disabilities Act.”

**Q. My child has frequent doctor’s appointments, therapies and orthotic fittings. I am worried that I will be fired because I have missed the maximum number of days allowed by my employer. Doesn’t this policy discriminate against me because it does not allow me the time I need to care for my disabled child?**

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A. A uniformly applied attendance policy does not violate the ADA even if it has a more severe effect on individuals with disabilities, or on employees who have family members with disabilities. However, an individual with a disability may request a modification of such an attendance policy as a reasonable accommodation.

**Q. Does the ADA entitle parents to receive reasonable accommodations such as flexible scheduling from their employers?**

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A. No, it does not. The ADA does not require an employer to provide a reasonable accommodation to an applicant or employee without a disability simply because that person has a relationship with someone with a disability. This includes leave, or modified work schedules that would allow parents to care for a child with a disability. However, the Family and Medical Leave Act of 1993, and the Minnesota Family Leave Law do provide parents with protections in this area.

**Q. What is the Family and Medical Leave Act?**

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A. The Family and Medical Leave Act (FMLA) is a federal law passed in 1993. Its final regulations became effective in February 1995. The FMLA requires covered employers to provide eligible employees up to 12 weeks of unpaid leave each year for specified family and medical reasons.

**Q. What employers are covered by the FMLA?**

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A. The FMLA applies to all public agencies including state, local and federal employers and local education agencies

(schools), and private sector employers who employ 50 or more employees.

**Q. Does the FMLA law apply differently to public sector employees?**

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A. The 50-employee test does not apply to public sector employees or to schools. However, the public agency or school system must employ 50 employees within a 75 mile area around the work site. There are some special provisions that apply to the employees of schools. Generally these rules provide for FMLA leave to be taken in blocks of time when the leave is needed intermittently or is required near the end of a school term.

**Q. Who are eligible employees under the FMLA?**

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A. Eligible employees work for an employer of 50 or more employees, worked for at least a total of 12 months, have worked at least 1250 hours over the prior 12 months AND, work at a location where at least 50 employees are employed by the employer with 75 miles.

**Q. When are you entitled to FMLA leave?**

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A. A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons: birth or placement of a child for adoption or foster care; to care for an immediate family member (spouse, child or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition.

**Q. What does the FMLA consider to be “serious health conditions”?**

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A. Most relevant to parents of children with disabilities, the FMLA considers “serious health conditions” to mean “continuing treatment by a health care provider for a chronic or long-term condition that is incurable or, if not treated, would likely result in a period of incapacity for more than three calendar days.” It also covers illnesses, injuries, or physical or mental conditions that involve any period of incapacity or treatment connected with inpatient care; any period requiring absence of more than three calendar days from work, school or other daily activities that also involve continuing treatment of a health care provider; and prenatal care.

**Q. Am I entitled to any paid leave under the FMLA?**

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A. The FMLA only requires employers to provide unpaid leave. However, employers or covered employees may choose to use accrued paid leave to cover some or all of the otherwise unpaid FMLA leave. The employer is

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responsible for designating paid leave as FMLA leave based on information provided by the employee.

**Q. Will I risk losing my health care coverage while I am on leave?**

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A. No. Employers must maintain group health insurance coverage for an employee on FMLA leave—if the employee had such insurance before leave. The employee must pay a normal share of health insurance premiums while on unpaid leave.

**Q. Does FMLA leave have to be taken in whole days or whole weeks, or in one continuous block of time?**

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A. Leave for a serious health condition may be taken intermittently when “medically necessary.” The FMLA also permits leave for birth or placement for adoption or foster care to be taken intermittently—that is in blocks of time or through reducing the normal weekly or daily work schedule—subject to approval by the employer.

**Q. What do I have to do to request FMLA leave from my employer?**

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A. You may be required to provide your employer with 30 days advance notice when the need for leave is “foreseeable.” When such advance notice is not possible, or the need for the leave can’t be foreseen, you must give your employer notice as soon as “practicable.”

**Q. What kind of proof is required for my illness or that of an immediate member of my family?**

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A. You may be required to submit documentation, called a medical certification, from the health care provider who is treating you or your immediate family member.

**Q. What kinds of health care providers may provide certification of a serious health care condition?**

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A. Health care providers who may provide certification of a serious health condition include doctors of medicine or osteopathy authorized to practice by the state; podiatrists, dentists, clinical psychologists, optometrists and chiropractors authorized to practice in the state; nurse practitioners and midwives; and Christian Science practitioners.

**Q. Can my employer refuse to grant me FMLA leave?**

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A. If you are an “eligible” employee who has met FMLA’s notice and certification requirements, and if you have not exhausted your FMLA leave for the year, you may not be denied FMLA leave.

**Q. Will I lose my job if I take FMLA leave?**

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A. Generally, no. Upon return after FMLA leave, most employees must be restored to their original job with equivalent pay and benefits. However, an employer may deny reinstatement to work—but not the use of FMLA leave or maintenance of health insurance coverage during the leave—to certain highly paid, salaried “key” employees. Where restoration to employment will cause “grievous economic injury,” the employer may refuse to reinstate “key” employees after using FMLA leave. A key employee is a salaried employee who is among the highest paid ten percent of employees within 75 miles of the work site.

**Q. What if my employer does not know about the Family and Medical Leave Act?**

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A. Your employer may contact the nearest office of the Wage and Hour Division of the U.S. Department of Labor for information and guidance.

**Q. What if I believe my employer is violating the FMLA?**

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A. You can file, or have another person file on your behalf, a complaint with the Employment Standards Administration Wage and Hour Division. The Minneapolis office of the U.S. Department of Labor, Wage and Hour Division can be reached by calling (612) 370-3371. You can also file a private lawsuit.

**Q. Do I have any right to take family leave if I work for a small employer that is not covered by the FMLA?**

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A. Yes. Although more limited in its provisions, the Minnesota Family Leave Law applies to employers with 21 or more workers at any one site. It requires employers to grant eligible employees time off to care for a sick child on the same terms as would be required for the employee’s own illness or injury. (It also provides six weeks of unpaid leave for the birth of a child or arrival of an adopted child.) To be an eligible employee under the Minnesota Family Leave Law you must have worked for your company at least 12 months, and average at least half-time employment. During your leave, your employer must continue your health insurance coverage, although you may be required to pay full cost. You are also guaranteed return to your old job or an equivalent position.

**Q. Where can I go if I have more questions?**

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A. If you have questions about the Minnesota Family Leave Law, contact the Minnesota Department of Labor, St. Paul, (651)284-5000. The Legislative Commission on the Economic Status of Women has also published a helpful guide called “Are You Entitled to Family Leave?” It is available by calling (651) 296-8590 or 1 (800) 657-3949. Another informative brochure, “Compliance Guide to the Family and Medical

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Leave Act,” is available from the U.S. Department of Labor, Wage and Hour Division, Minneapolis office, (612) 370-3371. These resources, as well as the ADA Title I technical Assistance Manual and the EEOC’s guidance on the ADA and employer provided health insurance, were utilized in developing this article.

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