



From the HR Hotline

2022 Q4

Zywave's HR consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. This team, the HR Hotline, fields dozens of questions each day from employers seeking answers to their HR questions.

In recent months, employers have been requesting clarification or seeking guidance on navigating the Family and Medical Leave Act (FMLA) and other forms of employee leave. While questions surrounding these topics can vary based on locality, employer and individual circumstances, federal agencies do offer guidance that can aid employers with addressing day-to-day challenges in the workplace.

This article explores some questions and answers to common HR situations:

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What Are the Differences Between Workers' Compensation and Disability Leave?

When Are Employers Required to Provide Maternity and Paternity Leave?

Can Employers Require Employees to Use Paid Leave While on FMLA Leave?

Can Employers Require Fitness-for-Duty Certifications When Employees Return From FMLA Leave?

What Are the Differences Between Workers' Compensation and Disability Leave?

Employees needing time off because of a medical or disability-related issue may have federal leave rights under the Americans with Disabilities Act (ADA) and the FMLA. Additionally, state workers' compensation laws may have leave provisions that apply. In certain circumstances, provisions of the ADA, the FMLA and workers' compensation laws can apply to the same employee.

The ADA

The ADA is a federal law that protects the rights of people with disabilities by eliminating barriers to their participation in many aspects of working and living in the United States. Title I of the ADA prohibits covered employers from discriminating against people with disabilities. It applies to employers with 15 or more employees. While the ADA does not specifically require employers to provide medical or disability-related leave, it does require employers to reasonably accommodate individuals with disabilities. Accommodations can include modifications to work schedules, such as medical or disability-related leave. According to the U.S. Equal Employment Opportunity Commission's (EEOC) [guidance](#), there's no set leave period mandated by the ADA because accommodations depend on individual circumstances, and employee accommodation

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requests are generally granted unless doing so would result in “undue hardship” to the employer.

Often, leave as a reasonable accommodation under the ADA will need to be considered when an employee is not eligible for federal or state job-protected leave or has exhausted such leave.

The FMLA

The FMLA is a federal law designed to help workers balance work and family responsibilities by giving employees up to 12 weeks of unpaid, job-protected leave for specified family and medical reasons. The FMLA applies to private employers with 50 or more employees. Employers with fewer than 50 employees can also choose to provide benefits similar to those required by the FMLA. Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, have logged at least 1,250 hours over the 12 months immediately prior to the leave and are employed at a worksite where the employer employs at least 50 employees within a 75-mile radius of the worksite. Eligible employees may take leave for treatment of or recovery from serious health conditions. According to the U.S. Department of Labor’s (DOL) guidance, the FMLA’s definition of a serious health condition is broader than the ADA’s definition of a disability, as it includes pregnancy and many illnesses, injuries, impairments, or physical and mental conditions that require multiple treatments or intermittent absences.

Several states have enacted their own family and medical leave laws, some of which provide greater amounts of leave and benefits than those provided by the FMLA. When employees are covered by both federal and state family and medical leave laws, they may be

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entitled to greater rights or more generous benefits provided under different portions of each law.

The DOL provides a [guide](#) for employers that covers virtually every aspect of FMLA leave administration.

Workers' Compensation and Disability Insurance

Workers' compensation laws apply to almost every employer. Each state administers its own laws requiring employers to carry workers' compensation insurance. The state where an employer does business will determine any workers' compensation insurance requirements. Workers' compensation is a type of insurance that provides benefits to employees who become injured or sick at work. It typically covers injured or sick employees' medical expenses related to the illness or injury and replaces a portion of their missed wages. Workers' compensation may also cover retraining costs, compensation for permanent injuries, and death benefits. Importantly, it compensates employees for injuries and illnesses for which employers would be liable. Therefore, workers' compensation reduces an employer's liability for work-related injuries and illnesses. Employees cannot be disciplined or terminated for having applied for workers' compensation benefits.

Similar to workers' compensation, disability insurance replaces a percentage of an employee's wages for a set period of time if an injury or illness prevents them from working. However, unlike workers' compensation, disability insurance covers both work-related and nonwork-related injuries and illnesses. Either short-term or long-term disability insurance can be offered. Employees generally obtain disability insurance through their employer, but they can also purchase their own policy. In some situations,

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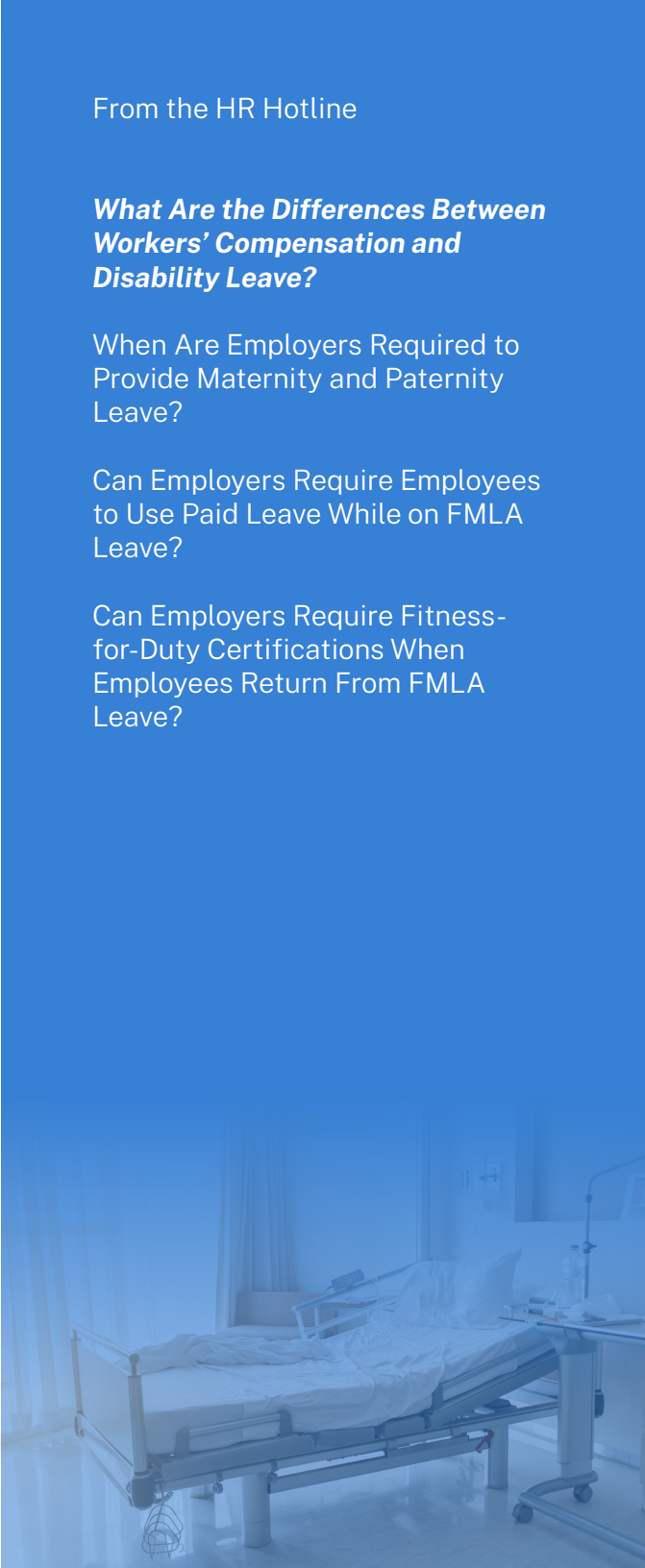
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employees may qualify to receive both workers' compensation and short-term disability insurance.

An employee's work-related injury or illness may also be considered a serious health condition under the FMLA. Employers covered under the federal FMLA may want to review an employee's FMLA eligibility when leave from work is required due to a work-related injury. In such situations, workers' compensation will run concurrently with an employee's FMLA leave entitlement.

To learn more, here are some resources for employers:

- The Job Accommodation Network's [guidance on accommodations](#)
- The EEOC's [guidance on accommodations for small employers](#)
- The DOL's [online compliance assistance resources for employers](#)
- The DOL's [FMLA Advisor](#) for employers
- The federal government's website for [Benefits and Insurance for People with Disabilities](#)
- The DOL's disability insurance [website](#)
- The DOL's [list of state workers' compensation officials](#)



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When Are Employers Required to Provide Maternity and Paternity Leave?

Parental leave under the FMLA grants eligible employees of covered employers unpaid, job-protected leave for childbirth, newborn care and care for a child placed with the employees for adoption or foster care. An employee who meets FMLA eligibility requirements may take leave up to 12 workweeks of leave in a 12-month period to bond with a newborn or newly placed child within one year of the child's birth or placement. Both new mothers and fathers can take leave, and neither is favored over the other. With regard to FMLA leave, employers are forbidden from discriminating based on the gender of the parent.

Employees may be eligible for FMLA parental leave if they have been employed by a covered employer for at least 1,250 hours during the 12 months immediately preceding the leave. To be eligible, an employee must also work at a location where the employer has at least 50 employees within 75 miles. While FMLA parental leave is unpaid, some employers allow or require eligible employees to use existing accrued paid leave to run concurrently with FMLA leave. For more information regarding requiring employees to use paid leave with FMLA leave, please see the following section.

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According to the FMLA's regulations, a mother can use 12 weeks of FMLA leave for childbirth, prenatal care, incapacity related to pregnancy and her own serious health condition following the childbirth. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated due to pregnancy or childbirth. Same-sex spouses have the same leave rights under the FMLA as opposite-sex spouses.

The DOL's guidance explains that eligible spouses working for the same employer are limited to a total of 12 workweeks of leave in a 12-month period for the birth of a new child or the placement of an adopted or foster child. This only applies to employees who are legally married, even if the two unmarried employees live together or have a child together. These limitations apply even if the spouses are employed at different locations that are more than 75 miles apart. If only one spouse is eligible for FMLA leave, that individual is entitled to the full 12 workweeks of leave. These limitations do not apply to leave for one's own serious health condition, including the recovery period following the birth of a child, the care for a qualifying family member with a serious health condition and for any qualifying exigency arising from a qualifying family member who is a military member on active duty.

A growing number of states and localities — such as California, New York, New Jersey and Washington — have established parental or family leave laws. Some of these state leave laws require employers to pay employees for the time they are away from work. Other states leave it to employers to decide whether to provide maternity or parental leave as part of employee benefits packages. Because parental leave laws vary depending on location, employers are encouraged to discuss any specific maternity and paternity leave questions with an employment attorney.

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To learn more, employers can review the DOL's [The Employer's Guide to The Family and Medical Leave Act](#) and additional resources on the department's [website](#).

Can Employers Require Employees to Use Paid Leave While on FMLA Leave?

According to the DOL, employers may require or eligible employees may choose to substitute accrued paid leave for unpaid FMLA leave. This means that accrued paid leave runs concurrently with unpaid FMLA leave. An employee's ability to substitute accrued paid leave for FMLA leave is determined by the employer's normal leave policy. When employees use paid leave for an FMLA-covered reason, that leave is FMLA-protected. Employees receive pay according to their employer's applicable paid leave policy.

In order to substitute accrued paid leave for FMLA leave, the DOL guidance explains that an employee must have both earned the leave and is able to use that leave during the FMLA leave period. Employers cannot require employees to substitute leave that is not yet accrued or available; however, they may voluntarily advance paid leave to employees, and employees may voluntarily accept the leave during an FMLA absence.

The DOL guidance provides that when accrued paid leave is substituted for FMLA leave, either at the employee's or the

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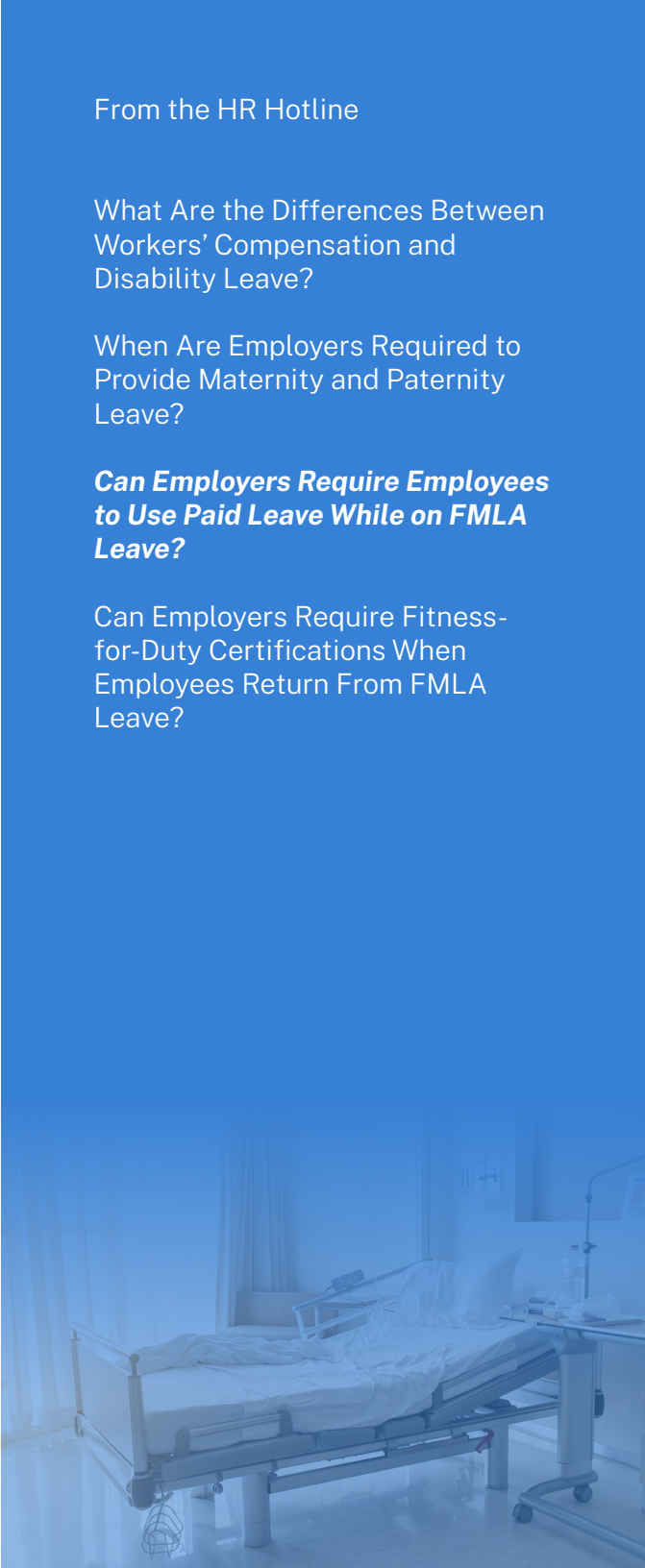
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employer's choosing, the employer must inform the employee of any procedural requirements of its paid leave policy that the employee needs to satisfy in the Rights and Responsibilities Notice. An employee's failure to comply with the employer's procedural requirements may result in not being entitled to substitute accrued paid leave. This does not, however, impact the employee's entitlement to FMLA leave. If an employer's policy for using paid leave requires a doctor's note for each absence, the employee using paid leave concurrently with FMLA leave must provide a doctor's note for each absence to receive the paid leave. If the employee does not provide a doctor's note, the employee is still entitled to unpaid FMLA leave.

For more information, employers can review the DOL's resource, [The Employer's Guide to The Family and Medical Leave Act](#), and review the department's [model Rights and Responsibilities Notice](#).

However, it must be noted that an employer may **not** require the use of available employer-paid leave during any periods of FMLA leave that are not unpaid. For example, if an employee is receiving disability or workers' compensation benefits during FMLA leave, the FMLA leave is not considered to be otherwise unpaid, and the employer's ability to require the use of paid leave does not apply. See [Section 825.207 of the FMLA regulations](#).



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That DOL clarifies that an employer may require an employee to submit a fitness-for-duty certification to return to work after an FMLA-qualifying leave; however, this certification can only be requested for the health condition that caused the employee's need for FMLA leave. Certain limitations apply to the frequency with which an employer may request a fitness-for-duty certification for employee absences taken on an intermittent or reduced schedule basis.

According to the DOL's guidance, if an employer requires a fitness-for-duty certification to address an employee's ability to perform the essential functions of their job, the employer must indicate this in the Designation Notice and provide the employee with a list of the essential functions of their job position. Employers are required to pay for the costs associated with a fitness-for-duty certification. An employer may delay restoring an employee to their position until the employee submits a fitness-for-duty certification. An employer may also contact the employee's health care provider to authenticate or clarify the certification; however, the employer may not delay the employee's return to work while contacting the health care provider, and the employer may not require second or third opinions.

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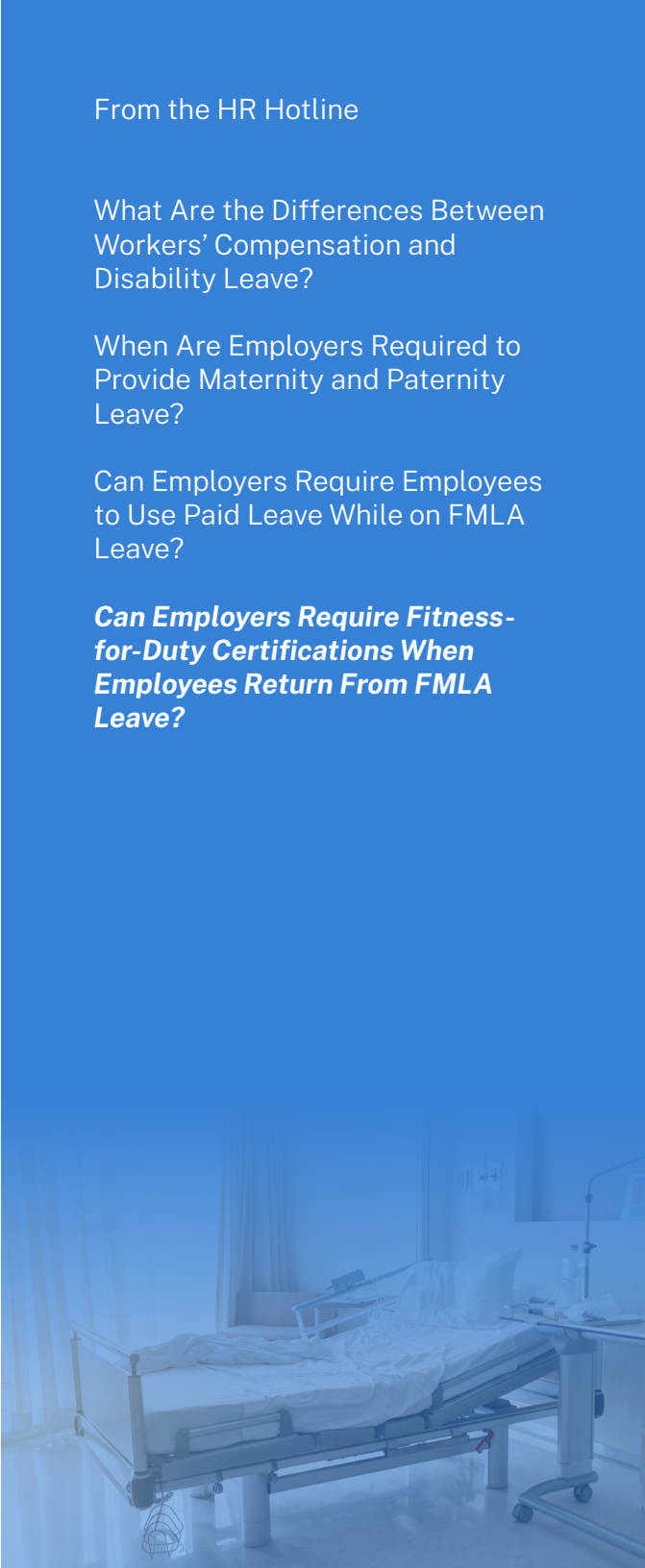
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The DOL's guidance explains that, separate from an employer's ability to request a fitness-for-duty certification, an employer may require an employee to submit to an examination by the employer's medical staff at the employer's expense as long as the examination is job-related and consistent with business necessity. An employer may not deny or delay reinstating an employee returning from FMLA leave pending an examination by the employer's medical staff.

For more information, the DOL clarifies employer and employee certification and notice responsibilities under the FMLA in its resource, [The Employer's Guide to The Family and Medical Leave Act](#). Employers may also review the DOL's model Designation Notice available on the department's [website](#).



Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll continue to keep you apprised of noteworthy updates on these topics. For resources on any of these topics discussed, contact us today.