

Under-Performing Pregnant or Disabled Employees: Balancing Performance Management with the ADA, FMLA, and Pregnant Workers Fairness Act



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Performance conversations can quickly become legal minefields when an employee is pregnant, has a disability, or has requested protected leave. Too often, well-meaning employers delay intervention, mishandle documentation, or apply policies inconsistently, opening the door to claims under laws like the Americans with Disabilities Act (ADA), the Pregnant Workers Fairness Act (PWFA), and the Family and Medical Leave Act (FMLA). Employers navigating sensitive performance management matters should understand the laws at play and focus on the fundamentals: document thoroughly, communicate clearly, and take decisive action.

Know the Landscape: ADA, PWFA, and FMLA in the Performance Context

Americans with Disabilities Act (ADA)

The ADA prohibits discrimination against qualified individuals with disabilities. It requires employers to provide reasonable accommodations that enable those individuals to perform the essential functions of their jobs—unless doing so would cause an undue hardship.

Importantly, employees with disabilities must still meet legitimate performance and conduct standards. But before disciplining or terminating such an employee, an employer must consider whether:

- The performance issue is related to the disability.
- A reasonable accommodation could help the employee meet expectations.
- The employee was given a meaningful opportunity to improve.

Pregnant Workers Fairness Act (PWFA)

Effective June 27, 2023, the PWFA expands protections for pregnant workers by requiring employers to offer reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions—similar to the ADA framework.

Key differences between the PWFA and ADA include:

- The PWFA applies even to temporary or moderate limitations (e.g., lifting restrictions, more frequent breaks, and part-time

schedules).

- Employers cannot require a pregnant employee to take leave if another accommodation is available.
- The statute prohibits retaliation for requesting or using a pregnancy-related accommodation.

Performance issues that arise in the context of pregnancy or a related condition should be handled carefully—especially if the employee has requested (or is entitled to) accommodation under the PWFA.

Family and Medical Leave Act (FMLA)

The FMLA entitles eligible employees to up to 12 weeks of unpaid, job-protected leave for serious health conditions (including pregnancy), family caregiving, and bonding with a new child.

Employers must tread carefully if an employee is underperforming while on FMLA leave or shortly after returning. Disciplining or terminating an employee for conduct related to a protected leave period can easily be construed as interference or retaliation—even if the employer’s intent was neutral.

Common Pitfalls When Performance and Protected Status Intersect

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Ignoring the Role of Accommodation

Employers must explore accommodations under both the ADA and PWFA before taking adverse action. If an employee’s performance is suffering due to a medical condition or pregnancy-related limitation, your first step is not discipline—it’s engagement.

Legal obligation: Initiate the interactive process to determine if a reasonable accommodation would enable the employee to meet expectations.

Failing to engage in this process is a leading cause of liability under both laws. Accommodations may include modified duties, schedule changes, ergonomic supports, remote work or temporary reassignment.

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Inconsistent Application of Performance Standards

If an employer holds a pregnant or disabled employee to a higher (or lower) standard than others, the result is rarely good.

Legal risk: Disparate treatment claims under Title VII, the ADA, the PWFA, or state human rights laws.

Ensure your expectations, metrics, and disciplinary procedures are applied consistently—particularly regarding attendance, deadlines, and work quality.

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Poor or Biased Documentation

Vague or emotionally charged performance documentation (“She’s not committed anymore since becoming pregnant”) is both unhelpful and legally risky.

Best practice: Stick to objective, quantifiable facts. Instead of “seems distracted,” document details, like: “missed three deadlines in March; quality of reports has declined, with five factual errors noted.”

Good documentation provides a legitimate, non-discriminatory basis for action—and will support your decision if it’s challenged later.

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Disciplining During or After FMLA Leave Without a Clear Basis

Courts closely scrutinize adverse actions taken during or shortly after FMLA leave. Even if you have valid concerns, timing matters.

Tip: If an employee's performance issues predate the leave, ensure you have clear records to show that the concerns existed—and were addressed—before the leave began. Avoid the appearance of retaliation by proceeding only when the documentation supports your decision.

Practical Steps for Employers: How to Manage Performance Issues Lawfully and Effectively

- **Train Managers to Spot Accommodation Triggers.** Supervisors should loop in HR or legal before acting whenever an employee references a medical condition, pregnancy limitation, or medical leave.
- **Engage Early and Document Diligently.** Don't delay performance conversations out of fear—address issues early, but do so thoughtfully. Document any meetings, expectations, improvement plans, and accommodations discussed or offered.
- **Apply Policies Uniformly.** Consistency is key, whether it's an attendance policy, quality standard or progressive discipline process.
- **Explore Accommodations Before Discipline.** Particularly where medical or pregnancy-related limitations are at play, you must first assess whether the employee can meet expectations with reasonable support.
- **Avoid "Gotcha" Terminations.** Avoid abrupt disciplinary action if performance concerns haven't been clearly documented and communicated. Courts frown on surprise terminations, especially after protected leave or accommodation requests.
- **Consult Counsel Before Termination.** Before terminating a pregnant or disabled employee—or one who recently returned from leave—have a legal review of the facts, documentation, and process. A brief consultation can prevent months of costly litigation.

Pregnancy and disability do not shield employees from accountability, but they do change how employers must approach performance management. With the passage of the Pregnant Workers Fairness Act and the continued complexity of ADA and FMLA compliance, employers must proceed with care, compassion, and a clear understanding of their legal duties.

Performance issues don't go away on their own, but mishandling them can create far bigger problems. The key is to act early, engage meaningfully, and document everything.