



# PLADS

## LEGISLATIVE ADVISORY

REGULATORY UPDATES FROM  
AFLAC'S PREMIER LIFE, ABSENCE AND  
DISABILITY SOLUTIONS DIVISION



MAY 2023

We are pleased to share the May 2023 PLADS Legislative Advisory, along with information related to state and other paid and unpaid leave legislation.

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## MENTAL HEALTH IN THE WORKPLACE

May is Disability Insurance Awareness Month, a time to emphasize the importance of safeguarding your financial security in the event you become disabled. Disability insurance is financial protection against the possibility of losing your income due to injury or illness.

What would happen if you, without warning, were unable to work because of an illness or injury? Often people don't expect to become disabled and need disability insurance to protect their earnings. However, 25% of insured workers born in 2000 will become disabled between age 20 and normal retirement age.<sup>1</sup> This is an opportunity to remind employees about the value of having both short- and long-term disability insurance.

Not all disabilities are visible. Workers may experience hidden disabilities such as many mental health conditions. Coincidentally, May is also Mental Health Awareness Month, a time to highlight the significant role mental health plays in our overall health and well-being; as well as an opportunity to combat the stigma, provide support and educate each other in the workplace.



In 2021, **22.8%** of U.S. adults experienced mental illness (57.8 million people). This represents **1 in 5 adults**.

In 2021, **5.5%** of U.S. adults experienced serious mental illness (14.1 million people), representing **1 in 20 adults**.

Employees spend so much time at work (either physically in the office or remotely) that mental health and work are integrally intertwined. Mental health is just as essential to worker well-being as physical health. The connection between work and well-being has drawn enough attention that the [World Health Organization](#) and the [U.S. Surgeon General](#) recently published guidelines and frameworks identifying interventions and resources to

build workplace well-being. The World Health Organization describes mental health as a state of mental well-being that enables people to cope with stress, realize their abilities, work effectively and contribute to their communities.<sup>3</sup> The reluctance to discuss or address mental health needs may stigmatize employees and create a barrier to resources or treatment. It is important to normalize conversations about mental health to empower people to seek help.<sup>4</sup>

It seems we are making progress destigmatizing mental health in the workplace. More people are discussing mental health at work, driving a notable culture shift. Employees who said mental health is discussed in at least some way at work increased from 28% in 2021 to 53% in 2022 and to 55% in 2023.<sup>5</sup> Employees who said they are comfortable talking about their mental health challenges at work increased from 23% in 2021 to 43% in 2022 and to 46% in 2023.<sup>6</sup> However, there is still work to be done.

**In a 2021 survey of 1,500 U.S. adult workers across for-profit, nonprofit and government sectors, 76% of respondents reported at least one symptom of a mental health condition, up from 59% from 2019.<sup>7</sup>**

That same survey reported 84% of respondents said their workplace conditions had contributed to at least one mental health challenge.<sup>8</sup> Two-thirds of employees showed symptoms of anxiety or depression according to SilverCloud Health's 2021 Employee Mental Health and Well-being Checkup.<sup>9</sup> Yet, when managers ask employees how they're doing, they are probably not getting the whole story. About 84% of employees report that they rarely mean it every time they say they're "fine" or "good."<sup>10</sup>

Solutions are important because depression alone triggers an estimated 200 million lost workdays each year, and 7% of short-term disability claims stem from mental health concerns.<sup>11</sup> Unchecked, employers face increased legal risk when it comes to employee mental health and discrimination. Per EEOC's latest statistics, mental health discrimination accounted for 30% of ADA-related charges during fiscal year 2021, which is an increase of about 20% reported in fiscal year 2011.<sup>12</sup> A study conducted by Lyra indicated 80% of employees and benefits leaders believe it's an employer's responsibility to prevent employees from developing work-related mental health problems,<sup>13</sup> essentially a call to action.

- Continue to discuss mental health in the workplace to promote connection and inclusion and protect against bias and exclusion.
- Normalize and support mental health by modeling, communicating and regularly promoting comprehensive mental health care programs.
- Educate and train your managers to improve knowledge and remove stigmatizing attitudes.
- Provide reasonable work accommodations for workers with mental health conditions.
- Support mental health for the whole family including caregivers.

Using the month of May to remind ourselves to address two disability-related priorities (disability insurance and mental well-being) allows us to proactively get in front of some of our challenges in the workplace.

# THE IMPORTANCE OF JOB DESCRIPTIONS AND THE ADA

The Americans with Disability Act (ADA)<sup>14</sup> provides protection for employees with disabilities from discrimination. Title I and Title V of the ADA protects against employment-based discrimination to disabled applicants and employees, and provides reasonable accommodations in the workplace. The ADA requires that employers engage the individual in the interactive process. And in cases where an active employee has requested an accommodation, the job description is one of many considerations in the process. Job descriptions are helpful in determining essential functions and can be used for determining if an accommodation request is reasonable or not under the ADA.

## Essential job functions

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation.<sup>15</sup> An essential function is a fundamental duty of a job that cannot be removed without fundamentally changing the nature of the job.<sup>16</sup> Essential functions can be determined in a number of ways, including:

- Job analysis.
- Time spent performing a function.
- The consequences if the individual does not perform the function.
- If the position exists to perform the function.
- The number of employees available to perform the function.
- The degree of expertise or skill required to perform the function.
- Physical demands of the job.<sup>17</sup>

In addition to determining the essential job functions, employers should determine job functions that are marginal and can be removed without fundamentally changing the job.

## Job descriptions

A job description is a written document that describes the job, outlines essential job functions, physical and cognitive demands of the job, where the job is performed, job requirements, travel needs, working conditions and expectations of the job.<sup>18</sup> When writing a job description, the employer would determine the essential functions of the job, normally through a job analysis. Inclusion of the manager in the process is an important consideration for a thorough job description, and when possible, interview the employee(s) about their day-to-day job functions and evaluate time spent performing the task. A job description should be written to focus on results or outcome of a job function, not solely on the way it is performed.<sup>19</sup>

Many courts have found job descriptions useful in determining if a job function is essential in relation to reasonable accommodations and the ADA. For example, in *Walker v. Children's Hospital of Wisconsin*, 2020 U.S. App. LEXIS 11513 (7th Cir. 2020), the court held that "collaboration" with co-workers was an essential function of the employee's job as a data analyst, in part because the job description listed "ability to effectively work with others" as essential.<sup>20</sup>

Additionally, in *Tonyan v. Dunham's Athleisure Corp.*, 966 F.3d 681 (7th Cir. 2020), the court held that lifting 40 pounds was an essential function for a store manager of a sporting goods retailer, based on a number of factors including the detailed job description.<sup>21</sup>

### **The importance of writing and maintaining job descriptions**

When an employee requests an accommodation, in order to determine if an accommodation request is reasonable, the employer must understand the essential functions of the job. Employers should write and maintain a job description for each position within the organization. This clearly and effectively communicates the job responsibilities to the employee in that position. Job descriptions can also aid in determining physical and cognitive demands of the position in relation to accommodation options that might be available. Job descriptions are important for aiding in the interactive process and providing a fair representation of the job and conditions in which the job will be performed.<sup>22</sup>

- According to the Job Accommodation Network (JAN), job descriptions are helpful in determining essential job functions for the purposes of making accommodations under the ADA.<sup>23</sup>
- According to the Equal Employment Opportunity Commission (EEOC), an effective job description can help employers identify the essential functions of a job and determine whether a reasonable accommodation can be made for an employee with a disability.<sup>24</sup>
  - The EEOC indicates job descriptions are an important tool in ensuring compliance within the ADA. Employers should create job descriptions that accurately reflect the essential job functions, as well as any physical and mental demands in order for employees with disabilities to determine if they can effectively perform the job with or without reasonable accommodation.<sup>25</sup>

The creation of the job descriptions is the beginning, but a common mistake that can be made is when employers don't consider the ongoing maintenance. It cannot be emphasized enough that maintaining the job descriptions is equally as important as creating them. According to JAN, maintaining accurate and up-to-date job descriptions can help employers avoid legal disputes related to disability discrimination.<sup>26</sup> Employers should update their job descriptions when there are significant changes to the job duties, job requirements, when there are policy or organization changes, changes to employment law and changes as modern employment and technology evolve.

### **What employers should consider**

- Conduct a job analysis to determine essential functions for roles without existing job descriptions.
- Establish a timeframe (biannually, annually, etc.) to review job descriptions.
- Assess current inventory of job descriptions to determine what exists, what is missing, along with those that are expired or no longer relevant.
- If merging or acquiring a new company, create a process to inventory existing job descriptions.
- Include the importance of job descriptions in management training and ADA interactive process training.



## MAY IS MILITARY APPRECIATION MONTH

On Monday, May 29, 2023, the country celebrates Memorial Day honoring U.S. Military personnel who died while serving in the United States armed forces. Not only do we remember the service and sacrifice on this day, but May has been marked officially as Military Appreciation Month. Congress designated May as National Military Month in 1999, which also includes other military appreciation days such as Military Spouse Appreciation Day and Armed Forces Day.

There are a few leave laws that are applicable to leaves that can be taken by members of the military and their families. In 2008, the Family and Medical Leave Act (FMLA) was amended to add the following leave reasons and entitlement:

1. To permit an eligible employee who is the spouse, child, parent or next of kin of a current service member with a serious injury or illness incurred in the line of duty on active duty to take up to 26 workweeks of FMLA leave during a single 12-month period to care for the service member (military caregiver leave).
2. To allow an eligible employee whose spouse, child or parent is a member of the National Guard or reserves to take up to 12 workweeks of leave for qualifying exigencies arising out of the military member's active duty or call to active duty in support of a contingency operation (qualifying exigency leave).

In 2010, FMLA was expanded again to allow military family members (including a parent, spouse or sibling) to take unpaid, job-protected leave to:

- Care for a wounded, ill or injured service member for up to 24 workweeks in a 12-month period.
- Address qualifying contingencies arising from a deployment, such as:
  - Preparing legal documents or addressing financial issues BEFORE a deployment (this includes Power of Attorney, wills, financial preparedness classes).
  - Finding childcare BEFORE a deployment.
  - Attending school events for a child or dependent.
  - Attending pre- or post-deployment briefs.
  - Attending a military member's send-off or homecoming.

<https://www.militaryfamily.org/info-resources/paid-family-leave/>

Most states also have military-related leaves for employees and families of employees. These state leaves can be paid or unpaid and can vary widely from state to state as well as in comparison to FMLA. While some states modeled their leave benefits to reflect the FMLA model (Connecticut and Maine), some states have drafted separate leave benefits outside of the FMLA model such as leaves for military caregiver, military service and military family leaves in addition to leaves for Civil Air Patrol, military family ceremonies, and reserves and National Guard. The Department of Defense has even issued a new policy to provide 12 weeks of paid parental leave to service members who have had a child through birth, adoption or a long-term foster care placement of at least 24 months. (<https://www.defense.gov/News/News-Stories/Article/Article/3345492/service-members-get-extended-parental-leave/>).

The paid statutory leave states that include military provisions are:

- Colorado.
- Connecticut.
- Massachusetts.
- Maryland.
- New York.
- Washington.
- California.
- Delaware.

Paid statutory benefits will include a wage replacement up to a maximum weekly benefit.

There may be additional leave benefits that could be available to servicemembers and their families through company paid and unpaid leaves or other private and government agencies.



## MAY IS NATIONAL FOSTER CARE MONTH

Since 1988, U.S. presidents issue annual proclamations in recognition of National Foster Care Month, which occurs in May. The purpose of National Foster Care Month continues to evolve over time. Current activities focus on increasing the visibility of the needs of children and youth in foster care and highlighting how the child welfare system can prioritize foster care as a service to families and promote reunification (<https://www.acf.hhs.gov/cb/faq/foster-care-5>). There are 391,000 American children and youth currently in foster care, and this month focuses on showing appreciation to the adults who choose to open their homes (<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/28/a-proclamation-on-national-foster-care-month-2023/>).

For those parents to open their homes, they need time to care for and bond with their new family. The Federal Family and Medical Leave Act (FMLA) provides 12 unpaid, job-protected weeks of leave for eligible foster parents to bond with the newly placed or repeatedly placed child. Neither a minimum period for the foster care placement, nor a permanent placement is required for an employee to qualify for FMLA leave for the placement. Employees may use FMLA leave intermittently or to work a reduced schedule, but only if the employee and the employer agree (<https://www.dol.gov/agencies/whd/fact-sheets/28q-taking-leave-for-birth-placement-child>).

Many states also have their own unpaid family leave laws, sometimes referred to as state FMLAs. These laws typically offer similar protections and cover leaves for foster care, but they may cover people or situations not covered by the federal FMLA. For example, California, Connecticut, Hawaii, Maine, New Jersey, Oregon, Rhode Island, Vermont and



Wisconsin, as well as Washington, D.C. provide unpaid foster care leave benefits (<https://www.americanprogress.org/article/the-state-of-unpaid-family-and-medical-leave-in-the-u-s-in-2023/>). While their exact protections vary, state FMLAs typically provide similar rights to the federal FMLA, such as the right to reinstatement and protection against retaliation but, like the FMLA, do not provide a right to pay (<https://www.americanprogress.org/article/the-state-of-unpaid-family-and-medical-leave-in-the-u-s-in-2023/>).

That said, many states do provide rights to paid time off that include parental leaves such as foster care. These laws vary substantially when it comes to eligibility, wage replacement, rights provided and duration. As of January 2023, these states include: California, Colorado, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Washington and Washington, D.C.

There may be additional leave benefits that could be available to families through company paid and unpaid leaves or other private and government agencies.

For more information, please see: <https://www.acf.hhs.gov/cb/faq/foster-care-5>.

## STATE/OTHER PAID LEAVE LEGISLATION

### MASSACHUSETTS

#### **Massachusetts Paid Family Medical Leave announces new updates to website and rules**

The Massachusetts Department of Family Medical Leave (DFML), the administrators of Massachusetts Paid Family Medical Leave (MA PFML) are now allowing employees to request an extension of their leave for up to 30 days after the scheduled end of their approved leave. Previously, employees had only 14 days after their approved leave ended to request an extension.

Employees also are now able to access the following on the MA PFML website:

- The ability to download their 1099-G tax forms via the application website.
- Handouts and toolkits that have been translated into Chinese (Simplified), Haitian-Creole, Portuguese and Spanish. These documents are available on [www.mass.gov/dfml](http://www.mass.gov/dfml).
- The ability to see more detailed information about the status of their pending application in the application website.

The DFML also has been chosen to participate in Mass.gov's launch of their chatbot, Ask MA. Ask MA is a conversational chatbot. Conversational chatbots are designed to intelligently respond to user conversations and interactions concerning a specific domain of knowledge.

On the employer side, the DFML has made some updates:

- The Employer Review experience has been improved by simplifying the language, providing data validation and adding alerts about possible reductions to the Other Leave and Benefits section.

- Employers must meet minimum requirements for private and self-insured plans to remain compliant and continue to qualify for exemptions from participation in the state program. As a result, the DFML has published Important Guidance on Benefit Calculations and Application Ownership (<https://www.mass.gov/info-details/important-guidance-on-benefit-calculations-and-application-ownership>).

For more information, please see: <https://www.mass.gov/orgs/department-of-family-and-medical-leave>.

## WASHINGTON

### Washington Paid Family Medical Leave modifies premium provisions

On April 20, 2023, Washington State Governor Jay Inslee signed legislation that would require the Employment Security Department (ESD), the agency that oversees the Washington Paid Family Medical Leave program, to review the premium provisions of their PFML program.

On or around Oct. 20 of each year, the ESD must calculate the total premium rate as follows:

- Calculate an amount that equals 140% of the prior fiscal year's expenses, including the total amount of benefits paid and ESD's administrative costs.
- Subtract the Account balance as of Sept. 30 from the amount determined above.
- Divide the difference above by the prior fiscal year's taxable wages.

The quotient must be carried to the fourth decimal place and rounded up to the nearest one hundredth of 1%.

The ESD must set the total premium rate at the rate calculated above subject to the following conditions:

- If the ESD determines the total premium rate exceeds a rate necessary to maintain a three-month reserve at the end of the following rate collection year, it must set the total premium rate at the minimum rate necessary to close the rate collection year with a three-month reserve.
- The total premium rate must not exceed 1.20%.

For more information, please see: <https://apps.leg.wa.gov/billsummary/?BillNumber=5286&Year=2023&Initiative=false>.

# STATE/OTHER LEAVE LEGISLATION

## VIRGINIA

### **Organ Donation Leave – SB 1086**

On April 12, 2023, Governor Glenn Youngkin signed into law an unpaid organ donor leave that allows an eligible employee to donate one or more of their organs, to include bone marrow to be medically transplanted into another individual.

The new law, effective July 1, 2023, provides for the following:

#### **Covered employers:**

Employers, except for an agency of the federal government, that employs 50 or more employees.

#### **Eligibility requirement as the leave start date:**

- Employed for at least 12-months.
- Worked 1,250 hours during the previous 12 months.

#### **Duration:**

- Up to 60 days of leave in any 12-month period for organ donations.
- Up to 30 days of leave in any 12-month period for bone marrow donation.

#### **Leave coordination:**

Does not run concurrently with the Family Medical Leave Act.

#### **Compensation:**

Leave is unpaid. However, employees may use accrued and other time off benefits such as vacation, sick time/hours or paid time off (PTO) as wage replacement during the leave.

#### **Benefits:**

Time taken may not be considered a break in continuous service for the purpose of salary adjustments, sick leave, vacation, paid time off, annual leave, seniority or other benefits.

Employers are required to maintain coverage of the employee's health benefit plan during leave in the same manner that coverage would have been provided had the employee continued working.

#### **Job protection:**

Employees who return to work after taking leave under Organ Donation Leave are entitled to job restoration to the same job or equivalent job with equivalent benefits, pay and other terms and conditions of employment. Employers may deny restoration of employment for matters unrelated to the rights to take leave under the act.

Employers are also prohibited from retaliating against employees for requesting or exercising their right to Organ Donation Leave or who have alleged a violation of the Organ Donation Leave law. Violations of the law can result in fines:

- 1st violation: Up to \$1,000.
- Violations that occur within two years of any prior violation: Up to \$2,500 for the 2nd violation and up to \$5,000 for successive violations.

For more information, please visit: [Bill Tracking - 2023 session > Legislation \(virginia.gov\)](#).

- <sup>1</sup> <https://disabilitycanhappen.org/overview/> "Social security administration disability and death probability tables for insured workers born in 2000" by Johanna Maleh, FSA, EA, and Tiffany Bosley, FSA an2020-6.fm (ssa.gov). Accessed 05/2/23.
- <sup>2</sup> <https://nami.org/mhstats> Mental Health By the Numbers | NAMI: National Alliance on Mental Illness. Accessed 05/2/23.
- <sup>3</sup> [MH@Work Executive Summary Eng \(who.int\)](#). Accessed 05/2/23
- <sup>4</sup> [How to Talk About Mental Health | SAMHSA](#). Last Updated: 04/24/2023. Accessed 05/02/23.
- <sup>5</sup> [2023 State of Workforce Mental Health Report \(intelligencebank.com\)](#). Accessed 05/2/23.
- <sup>6</sup> [2023 State of Workforce Mental Health Report \(intelligencebank.com\)](#). Accessed 05/2/23.
- <sup>7</sup> Mind Share Partners. (2021). 2021 Mental health at work report. <https://www.mindsharepartners.org/mentalhealthatworkreport-2021>.
- <sup>8</sup> Mind Share Partners. (2021). 2021 Mental health at work report. <https://www.mindsharepartners.org/mentalhealthatworkreport-2021>.
- <sup>9</sup> [https://www.silvercloudhealth.com/us/press\\_releases/u.s.-workers-are-not-okay-and-employers-are-usually-the-last-to-know](https://www.silvercloudhealth.com/us/press_releases/u.s.-workers-are-not-okay-and-employers-are-usually-the-last-to-know).
- <sup>10</sup> <https://fortune.com/> "U.S. workers are not okay—and employers are usually the last to know." Published 9.20.2021. Accessed 4.21.23
- <sup>11</sup> [Mental health is on a spectrum & your coverage should be too](#) | Aflac accessed 4.21.23.
- <sup>12</sup> [Mental health claims on the rise: New normal for disability-related charges? \(employerlawreport.com\)](#). Published 04/12/22. Accessed 05/02/23.
- <sup>13</sup> [The Next Frontier In Workforce Mental Health: Three Groups Who Need Support \(forbes.com\)](#). Published 04/17/23. Accessed 05/02/23.
- <sup>14</sup> Americans with Disability Act Amendments Act of 2008
- <sup>15</sup> <https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>
- <sup>16</sup> Americans with Disability Act Amendments Act of 2008
- <sup>17</sup> <https://askjan.org/topics/jobdesc.cfm>
- <sup>18</sup> <https://askjan.org/topics/jobdesc.cfm>
- <sup>19</sup> <https://adata.org/faq/does-ada-require-employers-develop-written-job-descriptions#:~:text=The%20ADA%20does%20not%20require,along%20with%20other%20relevant%20factors.>
- <sup>20</sup> Resolving ADA Workplace Questions; How Courts and Agencies are dealing with Employment Issues; Ed. 53; September 2022; David K. Fram, Esq.; Published by the National Employment Law Institute, page 74
- <sup>21</sup> Resolving ADA Workplace Questions; How Courts and Agencies are dealing with Employment Issues; Ed. 53; September 2022; David K. Fram, Esq.; Published by the National Employment Law Institute, page 73
- <sup>22</sup> <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/why-you-should-have-job-descriptions.aspx>
- <sup>23</sup> <https://askjan.org/topics/jobdesc.cfm>
- <sup>24</sup> <https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer>
- <sup>26</sup> <https://www.eeoc.gov/disability-discrimination-and-employment-decisions>
- <sup>26</sup> <https://askjan.org/topics/jobdesc.cfm>



These are educational materials only. Employers should consult their own counsel for obligations for state-mandated leave and disability programs. Products and services are provided by Continental American Insurance Company. In New York, products and services are provided by American Family Life Assurance Company of New York. Products may not be available in all states and may vary depending on state law.

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