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Americans with Disabilities Act: Excusing Absences as a Reasonable Accommodation (Part 1)

**What the ADA Does and Does Not
Require When an Employee
Requests a Leave of Absence**

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If, as Woody Allen surmised, showing up is 80 percent of success, how much time off must an employer give an injured or ill employee before the employment relationship is not successful and the employee can be terminated?

This Special Report, the first of a two-part series, explores what the Americans with Disabilities Act does or does not require when employees take large “blocks” of leave, i.e., consecutive weeks or months of time off due to illness or injuries. Part 2 of the series will examine short increments of time off, a day or two “here and there,” that are unplanned and without notice to the employer.

The “law,” or “lore,” requiring employers to accommodate employees in these situations has reshaped employer attendance and productivity expectations. Some say the law, as interpreted by the Equal Employment Opportunity Commission, goes too far and creates an elusive and unworkable standard for managing employee attendance and productivity.

Whether you are interested in understanding better your obligations to provide employees time off due to their own illness or injury or want to defend an existing or emerging claim that you have been too “intolerant” of employee absences, we hope you find these Special Reports helpful.

Introduction to “Blocks of Leave” Dilemma

Many employers grant employees a defined amount of leave, usually measured in weeks or months or until a triggering event, such as the expiration of short-term disability benefits. Implicit in such a policy is that once an employee’s available leave is exhausted, the employer will terminate the employee’s employment. But the Equal Employment Opportunity Commission has challenged employers with so-called inflexible leave policies, arguing that an employee who needs more leave than allowed may nonetheless be a “qualified individual with a disability” under the ADA, entitled to additional leave time as an accommodation.

In 2009, the EEOC brought a class action suit against an international package delivery company, claiming the company violated the ADA by rejecting requests for medical leave extensions beyond its 12-month leave policy. Also in 2009, the EEOC settled a lawsuit in which the agency alleged that a national retailer was inflexible in its administration of leave policies for employees with work-related injuries. The retailer paid \$6.2 million (a “record-setting” amount, according to the EEOC) as part of a consent decree. When announcing the settlement, an EEOC spokesperson warned employers, “The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA [is] over Inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. [The] consent decree is a bright line marker of that reality.”

Some courts differ from the EEOC on whether employees who cannot come to work are qualified individuals with a disability under the ADA. It is a “rather common-sense idea ...that if one is not able to be at work, one cannot be a qualified individual,” the U.S. Court of Appeals for the Seventh Circuit has observed repeatedly. The Fourth Circuit has found that an employee “who does not come to work cannot perform any of his job functions, essential or otherwise.” Other courts have held that a request for extended leave is an admission, or confession, that the employee is not a qualified individual with a disability and is not entitled to an accommodation or more leave time under the ADA.

“[T]here are limits to how far an employer must go in granting medical leave,” noted the Seventh Circuit. What are those limits? This Special Report will discuss the law, EEOC regulations and guidance, and court decisions addressing this issue.

I. The Americans with Disabilities Act

The ADA prohibits discrimination against a “qualified individual with a disability.” This is defined as one who can perform the essential functions of the job, either with or without a reasonable accommodation. The prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the accommodation would impose an undue hardship on the employer. An “undue hardship” is “an action requiring significant difficulty or expense,” when considering various factors, such as the nature and cost of the accommodation, the employer’s financial resources, the size of its workforce, and the impact of the accommodation on its operations. The ADA’s examples of reasonable accommodations do not include any reference to leave.

Any “leave limits” analysis must begin with the fact that federal and state family and medical leave laws entitle eligible employees to a specific, minimum amount of leave. Comparing ADA and the federal Family and Medical Leave Act, the EEOC stated that an “otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship” on the employer. This establishes the EEOC views leave under the FMLA as the minimum or floor, but gives no guidance as to the ceiling. That is, the agency gives no guidance as to how much additional leave an employer must provide as a reasonable accommodation under the ADA.

II. EEOC Regulations and Guidance

The EEOC’s 1997 ADA regulations do not mention leave as a reasonable accommodation. In its 2002 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, the EEOC stated that unpaid leave is a form of reasonable accommodation. In the Guidance, the EEOC posed and answered the following about an employer’s ability to terminate an employee with a disability who has exhausted available leave but needs more:

May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

The EEOC reiterated this in its 2008 guidance *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* ("2008 Guidance"). It stated:

- If an employee with a disability needs leave ... beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship; and
- If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship. Modifications may include allowing an employee to use accrued paid leave or unpaid leave,...."

The 2008 Guidance further eliminates any doubts with the following example:

Example 37: An employer's policy allows employees one year of medical leave but then requires either that they return (with or without reasonable accommodation, if appropriate) or be terminated. An employee with a disability who has been on medical leave for almost one year informs her employer that she will need a total of 13 months of leave for treatment of her disability and then she will be able to return to work....[T]he employer must provide the additional month of leave as a reasonable accommodation unless it would cause an undue hardship....The mere fact that granting the requested accommodation requires the employer to modify its leave policy for this employee does not constitute undue hardship. (Footnotes omitted.)

The 2008 Guidance provides one clear "leave limit." Employers "have no obligation to provide leave of indefinite duration,...." The 2008 Guidance also includes an example which suggests that the definition of "indefinite" is flexible. In the example, an employer grants an employee's initial request for 12 weeks of leave and the employee's later request for six additional weeks. The employee's health care provider explains that the employee is not responding to the treatment as expected and that the six additional weeks may not be sufficient. Critically, the example notes that the "doctor states that the employee's current condition does not permit a clear answer as to when he will be able to return to work." In this situation, according to the EEOC, the doctor's information supports a conclusion that the employee's request for an additional defined period of leave (i.e., six weeks) has, in fact, become a request for indefinite leave that could be denied as an undue hardship.

III. Supreme Court on Reasonable Accommodation

In 2002, the United States Supreme Court issued its only decision concerning an employer's reasonable accommodation obligation under the ADA and the burdens of proof when litigating such a case. In *US Airways, Inc. v. Barnett*, the Court held in a 5-4 decision that in filling a vacancy, granting a preference to a disabled employee over more senior employees was not "reasonable in the run of cases" and such accommodation requests are unreasonable absent "special circumstances."

In accommodation cases, the Court held that an employee has the burden of proving that a requested accommodation is "reasonable in the run of cases" by showing that the accommodation is "reasonable on its face" or, if it is not, that "special circumstances" make the accommodation reasonable in the specific situation. If the plaintiff meets this burden, the employer in opposition must prove the proposed accommodation poses an undue hardship on its operation.

Justice Scalia, dissenting, opined that the "principal defect" of the majority opinion is its mistaken interpretation that the ADA suspends all employment rules and practices if a proposed accommodation is a "reasonable" means of enabling a disabled employee to keep a job. The ADA's

accommodation provision "becomes a standard-less grab bag — leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed 'reasonable' to 'make up for' the particular employee's disability," Justice Scalia contended.

The scope of the employer's reasonable accommodation obligation with regard to leave limits has been left to the courts. Has the judicial analysis of "leave limits" been a "standard-less grab bag"? If not, what are the standards for determining whether to grant leave as a reasonable accommodation under the ADA?

IV. Court Decisions

From the more than one hundred decisions in which courts have considered and answered the ADA "leave limits" question, one can glean a few general principles.

First, courts have ignored the *US Airways* analytical framework. Eight years after the Supreme Court's decision, there is a dearth of judicial guidance or comment on whether a request for more leave is "reasonable in the run of cases" or "reasonable on its face" and whether "special circumstances" make it reasonable in a particular case.

Second, an employee's request for indefinite leave is not a request for a reasonable accommodation, as the EEOC has also noted. The Fourth Circuit's statement that "[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect" has been oft-cited. As with the 2008 EEOC Guidance, courts have taken a pragmatic view in determining whether repeated requests for defined periods of leave, in essence, are requests for indefinite leave.

Beyond these generalizations, courts have approached the issue (whether explicitly or implicitly) from two perspectives. The first is whether the leave would fulfill its medical purpose, i.e., whether the leave would be "instrumental to effect or advance a change in the employee's disabled status with respect to the job, so that the employee is enabled to do it." The second is whether the leave would satisfy the statutory purpose, i.e., whether the employee's return to work and ability to perform the essential functions of the position is "relatively proximate in a temporal sense." Courts focus on the temporal issue because the definition of "qualified individual with a disability" contains "no reference to a person's *future* ability to perform the essential functions of his position ...the precise issues [is] whether an individual 'can' (not 'will be able to') perform the job with reasonable accommodations."

The statute's use of the present tense creates a conceptual conundrum: "When a period of leave from a job may appropriately be considered an accommodation that enables an employee to perform that job presents a troublesome problem, partly because of the oxymoronic anomaly it harbors..." observed one judge. "Not working is not a means to perform the job's essential functions," observed another.

No court has held that an employer need not provide any leave as a reasonable accommodation under the ADA (although the Second Circuit has noted recently that it has "never expressly held" that medical leaves are "reasonable accommodations" under the ADA). It appears at least some leave is required, though indefinite leave is not. Between these two points on a continuum, how much leave must an employer provide? "These are difficult, fact intensive, case-by-case analysis, ill-served by per se rules or stereotypes," observed a First Circuit judge. And that is when courts may analyze the medical

and temporal evidence to assess whether the ADA's statutory purpose would be fulfilled by requiring the leave.

A. The Medical Evidence Analysis

Under the medical evidence analysis, courts evaluate the medical prognostications of the employee's health care provider. What is the likelihood that the leave will enable the employee to perform the essential functions of the position upon return to work? "Simply the possibility of improvement is not enough...; recovery must be reasonably likely," noted a First Circuit judge.

Courts consider both the medical affirmations as well as the absence of such information to determine whether the employee would be "qualified" at the end of the leave. For example, courts have held that a request for leave was not a request for a reasonable accommodation because:

- "nothing ... suggest[s] that the future would look different from the past";
- "the plaintiff failed to demonstrate that... additional time off to recuperate would have enabled her to have consistent attendance at work";
- there were no "clear prospects for recovery";
- the "record does not establish that [the plaintiff] would have succeeded in returning to work after an additional month's leave"; and
- plaintiff did not follow the medical regimen prescribed by her doctors, which would permit her to return to work.

Where the plaintiff's physician was optimistic about designing an effective treatment program that would enable plaintiff to return to work at the end of the requested leave, and where an employee in an experimental treatment program told his supervisor one week before his termination that "he was confident that he would be able to return to work" within two months, the court held that the leave requests were for a reasonable accommodation.

The Ninth Circuit seems to impose the lowest threshold when conducting the medical evidence analysis. It has held that "the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful [in returning the employee to work] to prove that it is a reasonable accommodation." It determined that "as long as a reasonable accommodation...could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation."

B. The Temporal Evidence Analysis

Mindful that an employee needing leave cannot now do the essential functions of a job, courts have created other temporal terms that are almost in the present tense. They have asked whether leave would enable an employee to perform the essential functions of the position in "the near future," "presently or in the near future," "presently or in the immediate future," or in the "identifiable future." Without saying it explicitly, the decisions suggest that some timeframes are close enough to the present to satisfy the ADA's present tense requirement.

In its 2008 Guidance, the EEOC does not discuss "temporal proximity." It seemed, however, to take the view that as long as the request is not for an indefinite leave, leave may be a request for a reasonable accommodation. Requests for leaves "that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a

time period for return (e.g., a doctor's note says that the employee will return some time between March 1 and April 1) ... are not requests for indefinite leave," according to the 2008 Guidance.

The Seventh Circuit, giving the clearest guidance among the courts, has held repeatedly that the "inability to work for a *multi-month* period removes a person from the class protected by the ADA."

C. Combining Medical and Temporal Evidence Analyses

While courts do not often neatly compartmentalize their medical and temporal analyses, their conclusions frequently recognize that they have considered both. For example, in holding that an employer did not unlawfully refuse to provide additional leave as a reasonable accommodation, courts have held:

- The "employer was not advised with sufficient specificity that in the 'immediate future' [the plaintiff] would be able to resume his job or an equivalent position."
- When "an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation."
- The plaintiff failed to make a prima facie case that his requested accommodation of two weeks unpaid leave to consult with a doctor was reasonable because he made no showing that the employer, at the time of the request, had any assurance that the accommodation would allow the employee to perform the essential functions of his job.
- The employee could not work for one year after a transient ischemic attack, and there was no assurance that additional attacks would not occur during a leave, potentially extending the leave for an indeterminate period of time.
- The plaintiff had already been on a medical leave for 10 months and sought two more months, [and the plaintiff] "could not represent that he likely would have been able to work within a month or two" and "had no way of knowing when his doctor would allow him to return to work in any capacity."

D. Additional Variables to Consider

Other variables can affect the determination of whether granting leave would be an undue hardship to an employer. Where an employer's leave policy provides more leave than the employee is requesting, some courts have held that the employer must provide at least as long a leave as its policy allows. However, when an employee was terminated after 10 months of leave and sought two additional months, consistent with the employer's salary continuation policy, the court held, "A particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy." These views arguably can be reconciled by applying the *US Airways* framework; by finding that the additional leave sought is not "reasonable in the run of cases," however, the employer's more generous leave policy or practice creates the special circumstances that make it reasonable in the particular case. If courts analyzed the question in this manner, under *US Airways*, employees would bear the burden of proving that special circumstances existed making the leave reasonable.

Courts have also considered whether the employer has hired a temporary employee to replace the employee on leave. In rejecting an employer's undue hardship argument, a court noted that the employer was not pressured to replace the plaintiff because it had hired a temporary employee for the

position. The dissent in the case rebuked this reasoning, arguing that the court's opinion "morphs the meaning of the statute by suggesting that an accommodation that permits the employer, without hardship, to hire someone else to perform the essential functions of the job is equivalent to an accommodation that permits the disabled employee to perform the essential functions of the job."

Conclusion

Unlike Woody Allen's bright-line guide for achieving success, there are few bright lines to guide employers in determining how much time off must be granted an injured or ill employee before that employee is no longer qualified for the position. An employer must consider whether the leave will enable the employee to return to work soon enough and factor in its internal leave policies and whether its use of temporary employees has mitigated any hardship caused by the leave. To avoid the EEOC's scrutiny, an employer must avoid policies and practices that create or give the appearance of creating an "inflexible" leave policy.

This is not to say, however, that the EEOC's enforcement position concerning leave is beyond scrutiny or inevitably will be upheld in court. The controversy surrounding leave as a reasonable accommodation seems destined to find its way to the Supreme Court. Until then, employers must track the law of each circuit and, if challenged, harvest the best of the legal theories supporting their positions.

Appendix A

Practical Considerations in Managing Leaves

ADA is Last Step: Employers must remember that the ADA is the last piece of their leave-management analysis. Employers must confront the ADA leave question if employees have first exhausted all leave entitlements under state and federal leave laws, such as the FMLA.

The question of leave under state law is increasingly complex and challenging even as it is critical for employers to master. Employers also must provide leave they commit to under company leave policies. So the ADA is the final step in a three-step leave analysis. Employers would be well-served to analyze all leave or attendance issues in this manner.

Beware of Under-employment: Employers must be wary of claims that they may have “under-employed” individuals on leave because they have not fully explored “non-leave” accommodations that might have eliminated or reduced the need for leave. These accommodations might include restructuring job responsibilities, eliminating non-essential job functions, allowing employees to work from home while recovering from illnesses or injuries, or reassigning employees to existing, vacant positions.

Leave Tracking: The inability to track accurately the amount of leave provided under FMLA or company policies, such as short-term disability or workers’ compensation benefit programs, also may hamper an effective defense of ADA claims.

Case-by-case Basis: The EEOC clearly believes that inflexible leave “policies” are unlawful because they preclude the possibility of additional leave as a reasonable accommodation. Employers are drawn to such policies to reduce the risk of disparate treatment or retaliation claims (under the ADA or other laws, including Title VII of the Civil Right Act) and ease leave administration. At this point, the law, however, makes it exceedingly risky to maintain an inflexible leave policy. Rather, employers should consider adopting policies that communicate their intent to review and consider potential leave extensions on a case-by-case basis.

Communication: To reduce the emotion that often drives employment litigation, employers should notify employees who are out on leave, before the leave ends, whether and when they may be entitled to additional leave as a reasonable accommodation. Employers can develop template letters communicating these standards and expectations. Taking such steps also aids employers in obtaining meaningful medical information from healthcare providers that may be reticent to part with employee medical information.

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