

Don't Forget About Unpaid Leave as a Possible Reasonable Accommodation in Manufacturing

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Providing a reasonable accommodation to a disabled employee under the Americans with Disabilities Act (ADA) can be one of the most difficult and complex issues employers, particularly manufacturers, face. If the employee's restrictions prevent the employee from performing the necessary job duties, an unpaid leave of absence may be considered a reasonable accommodation.

Unpaid leave poses challenges for manufacturers due to staffing requirements to meet production goals. An additional concern may be compliance with a union contract where a manufacturer has a unionized workforce. Nevertheless, if other alternative accommodations prove unworkable, unpaid leave should be considered.

Reasonable Accommodations

Reasonable accommodations for a qualified individual with a disability (one who, with or without reasonable accommodation, can perform the essential functions of a job) may include such options as eliminating non-essential job duties, physically modifying the way the job is performed, providing aids to assist the employee with the job, altering a schedule, transferring to a light duty position if light duty is offered, transferring to an open position, or providing an unpaid leave of absence, along with many other possibilities. An employer need not provide the accommodation requested by an employee. Rather, the employer must provide a reasonable accommodation that allows the employee to perform essential job functions.

If the only possible reasonable accommodation would cause the employer significant difficulty or expense, or otherwise alter the fundamental nature of the job, the accommodation may create an undue hardship and the employer need not provide the accommodation. While the standard for what is an undue hardship may vary based on the employer's size and available resources, undue hardship can be a high standard to meet in some circumstances. This may be even more so in a manufacturing setting, where an employer may have numerous employees and substantial investment in property, equipment, materials, and so on. In those cases, therefore, it can be difficult for a manufacturer to claim a proposed accommodation is an undue hardship because of cost.

Unpaid Leave of Absence

The Equal Employment Opportunity Commission's (EEOC) ADA guidance states that an unpaid leave is a form of reasonable accommodation an employer should consider. While EEOC guidance does not have the force of law, as the federal agency that enforces the ADA, EEOC guidance is often viewed by courts as persuasive. How long an employer must allow an employee to be off work is not addressed, and should be on a case-by-case basis using an individualized assessment. The EEOC and many federal courts take the position that an indefinite leave of absence with no reasonable estimate of when an employee can return to work is an undue hardship, and therefore not required. But what about when an employee's medical provider says an employee may need many weeks, or even months, off from work to recover before the employee is released to return to work? Those are difficult and fact-

specific questions that depend on the nature of the employer, the employee's job, and how long the employee may need to be off.

Making unpaid leave even more confounding for manufacturers is the fact that the federal appellate courts do not agree on the standard to be applied to unpaid leave. In particular, the U.S. Court of Appeals for the Seventh Circuit (which has jurisdiction over Illinois, Indiana, and Wisconsin) ruled in a 2017 case, recently reaffirmed in December 2020, that a multi-month non-Family and Medical Leave Act leave of absence is not a reasonable accommodation under the ADA, because an extended leave of absence does not give a disabled employee the means to work – instead, it excuses the employee from working, which the Seventh Circuit ruled is not required by the ADA. Other courts of appeal are split on this issue, with some courts tending to agree with the Seventh Circuit, while others appear to require employers to consider offering longer unpaid leave if doing so eventually will allow an employee to resume working.

Whether a manufacturer must offer an unpaid leave and for how long are complex questions that require analyzing specific facts of each situation, including but not limited to whether a labor agreement is in effect. Due to the need to staff shifts, it can be challenging for manufacturers to offer unpaid leave as an accommodation. At the same time, given the difficulties some manufacturers face in recruiting and retaining skilled workers in the 21st century, keeping a skilled, but temporarily disabled, employee by offering a period of unpaid leave as a reasonable accommodation may be preferable in the long run. Employers should consider consulting employment counsel for assistance in addressing these difficult issues. Employment counsel can guide a manufacturer in complying with its reasonable accommodation obligations and put the manufacturer in the best possible position to defend against potential claims of disability discrimination under the ADA and similar state and local laws.

Jackson Lewis attorneys are available to assist employers with this and other workplace issues.

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