

ADA, FMLA

Leave as a Disability Accommodation

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Under the federal Family and Medical Leave Act, employees with serious health conditions are entitled to take 12 weeks of unpaid leave, with a guaranteed right to return to their jobs. However, when the employee has a health condition that may also be a disability under the Americans with Disabilities Act Amendments Act, that may not be enough.

Leave as an Accommodation?

Under the ADAAA, a person has a disability when a physical or mental impairment substantially limits a major life activity. That's true even when the health condition is sporadic or in remission.

Employers must reasonably accommodate disabilities in a way that allows the employee to perform the essential functions of the job. That generally means the employer must provide some assistive device (such as an ergonomic chair), change the employee's schedule (for example, with flexible or reduced hours), or even allow the employee to telecommute or transfer to an open position, if doing so would allow the disabled employee to complete all essential job tasks.

There is a limit, however, to what an employer is required to do. An accommodation is considered "reasonable" so long as it does not create an "undue hardship" for the employer. An undue hardship is defined as a significant difficulty or expense, and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. However, undue hardships are not only financial burdens to the organization. Undue hardships also take into account accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature of the business. Employers must undertake this analysis on a case by case basis. (See 42 U.S.C. §1630.2(p); *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA.*)

Allowing the employee to take a defined leave of absence may also be a reasonable accommodation if, at the end of the leave, the disabled employee will be able to resume work and perform the essential functions of their job.

The Impact of FMLA Leave on the “Undue Hardship” Analysis

The EEOC considers a blanket requirement that an employee be ready to return to work after his or her FMLA leave ends, at full capacity, a violation of the ADAAA. In fact, in litigation filed in 2010, an EEOC attorney was quoted as saying, “inflexible leave policies which ignore reasonable accommodations that will make it possible to get employees back on the job are illegal.”

Thus, we now know that an employer must, after an employee’s leave of absence ends, give consideration to whether the employee is entitled to additional leave as a reasonable accommodation. (See ¶461, *Leave Beyond FMLA Allotment as Reasonable Accommodation*, in *The Leave & Disability Coordination Handbook*.)

That is not to say, however, that the undue hardship standard is abandoned where leave is the proposed accommodation for an employee’s disability. Employers may factor the employee’s 12 weeks of FMLA leave into the analysis, yet “undue hardship” remains a high threshold to meet. Employers must be prepared to explain how the leave would create a hardship, and should begin by being able to answer the following key questions: (1) What is the impact of not having an individual in the position?; (2) What is the impact of the redistribution of the essential functions of the position?; (3) How are the functions carried out while the person is out on FMLA leave?; and (4) What is the impact to the business if the functions are not carried out?

While the morale of other employees may not be considered, the tangible impact on the work of other employees is a valid consideration. Of course, all undue hardships and impacts on the business should be well documented.

What Employers Should Do

Each time an employee seeks additional leave at the end of his or her FMLA leave, look at the situation carefully. It is legally impermissible to have a blanket policy refusing such leave extensions. (See ¶613, *Attendance Policies and Abuse of Leave*, in the *Handbook*.)

Companies must evaluate each situation to determine whether the serious health condition that compelled the employee to seek leave is actually an ADAAA disability. If so, a leave extension as an accommodation may be required.

The duration of that leave extension will depend on the particular circumstances. The size of the company, the nature of the employee’s job, the number of employees available to take on those responsibilities and the length of the leave requested are all factors you should consider.

Remember, this accommodation issue arises only when an employee seeks leave for his or her own serious health condition, and that condition is also considered a disability. There are other reasons that an employee might seek FMLA leave that would not involve the ADAAA at all – for example for the birth of a child or to care for a sick child or parent. In these alternate situations, the ADAAA is not implicated in any way.

So, should your company revise its leave of absence policy? The policy should indicate that employees must discuss any additional leave with HR if they feel they need any accommodation in addition to FMLA leave. That way, the burden is on the employee to seek additional leave. Then, when he or she does, you can engage in a dialogue to make sure that a leave extension is both warranted and required.

Employers Are Not Required to Grant *Indefinite* Leaves of Absence

Most importantly, indefinite leave requests are never considered “reasonable” accommodations under the ADAAA. However, if a doctor indicates an indefinite leave is needed, seek more information before discharging the employee.

Courts want to see that employers are communicating the consequences with employees before terminating them. Inform the employee that an indefinite leave request is unreasonable, and that he or she should ask his or her doctor for a more definite leave period. Tell the employee that if he or she can't propose a leave of some definite length, you can deny the leave or fill the position. After obtaining a HIPAA release, you may also speak directly with the doctor. In this way, the employee can discuss options with the physician and make well-reasoned choices before being terminated.

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