




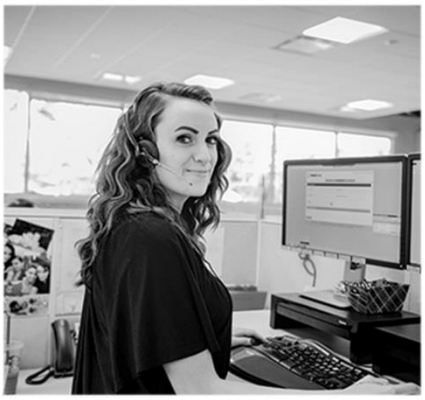

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ADA COMPLIANCE GUIDANCE: WHEN EMPLOYERS MUST PROVIDE LEAVE AS AN ADA REASONABLE ACCOMMODATION

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TABLE OF CONTENTS

Synopsis 3

Introduction – Leave Of Absence As An ADA Accommodation Is A Challenge For Employers 4

Failing To Handle ADA Leaves Of Absence Appropriately Can Be Costly 6

How Does The Employee Make A Request For Leave As An Accommodation? 10

What Steps Must The Employer Take After Receiving An Employee Request For Leave As An Accommodation? The ADA Interactive Process Explained 12

- Employers Should Follow These Best Practices For The Interactive Process 13

How Does A Leave Of Absence Work As An ADA Accommodation? 15

- Will The Leave Enable The Employee To Perform The Job? 15
- Consider These Alternatives To Continuous Leave Of Absence: Part-Time Work, Schedule Modification, Reassignment 17

Here Is A Manageable Process For Employers To Determine When Leave Is An Appropriate Accommodation 18

- Step 1: Is The Requested Leave Of Absence A "Reasonable" Accommodation? 18
  - When Is Leave A Reasonable Accommodation? 19
  - When Is A Leave Request Not Reasonable? 20
- Step 2: Is The Leave Of Absence Accommodation "Effective"? 21
- Step 3: Does The Requested Leave Impose An Undue Hardship On The Employer Or Its Operations? 22
  - What Factors Can Be Considered In Determining Undue Hardship? 23
  - Requests For Extension Of Leave Can Complicate The Situation 24
- How Long Of A Leave Of Absence Must An Employer Provide Under The ADA? 26

Employers Are Often Entitled To Medical Information To Support An ADA Leave Request 27

What Are An Employee's Rights During And After Leave? 29

- In Most Cases, An Employee Must Be Reinstated To The Same Job After An ADA Leave – But There Are Limitations 29
- Employers Must Maintain Employee Benefits Consistent With Other Leave Policies 30

Application Of ADA Accommodation Leave And FMLA Leave At The Same Time 31

Employers: Take Action To Be Prepared For ADA Leave Of Absence Requests 33

Conclusion 37

- Biographies 37
- About Reedgroup 38

Resources 39

SYNOPSIS

The Americans with Disabilities Act (ADA) requires employers to provide an employee who has a physical or mental disability, or a record of such a disability, with a workplace modification or adjustment – an accommodation – that will enable the employee to perform the essential functions of his or her position. In recent years, it has become clear that employers must consider **a leave of absence as a reasonable accommodation** even when the employee has exhausted or does not qualify for other leaves of absence.

The issues are complex, and until the spring of 2016, thorough guidance on how employers should provide **leave as an accommodation** was scarce or nonexistent. As a result, employers grappled with questions such as when and why a leave of absence is an appropriate accommodation, how long the leave should be, whether the employer can deny a leave request, and what are the employee's rights upon return from leave. In May of 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued its long-awaited guidance on leave as an accommodation, *Employer-Provided Leave and the Americans with Disabilities Act (EEOC's Leave Guidance)*[1].

To help employers and personnel managing absences for organizations, this paper synthesizes the existing guidance from the EEOC and case law on leave as an accommodation to provide the best available insights, direction, and best practice suggestions for managing ADA leave of absence obligations.

In subsequent sections, this paper:

- Explains the concepts of "reasonable" and "effective" to help practitioners determine whether a leave of absence is an appropriate accommodation and, if so, for how long;
- Explores the employer's sole reason to deny a leave of absence that would otherwise be a reasonable accommodation: that the leave will impose an "undue hardship" on the employer's operations;
- Analyzes key cases and the EEOC's perspective on leave of absence as an accommodation;
- Provides the employer a simple, workable process for handling ADA-related leave requests in an effective and lawful manner – defining the "interactive process" with a best practice framework; and
- Addresses an employee's rights during and upon return from leave of absence.

The information and advice in this paper is offered as the most current and thorough reference for handling ADA-related leaves. It will ease the ADA compliance challenge and help employers improve overall leave management and return-to-work processes for the benefit of their employees and their company.

INTRODUCTION – LEAVE OF ABSENCE AS AN ADA ACCOMMODATION IS A CHALLENGE FOR EMPLOYERS

Successful employers today strive to enhance the well-being of their employees. However, the relationship between employer and employee can face challenges when both parties attempt to understand and act on an employee's need for a leave of absence due to a disabling condition. Employees may require a leave of absence for many reasons and in many scenarios, and the company's obligations differ greatly from situation to situation.

This report was initially drafted at a time when many employers were unclear about their obligations under the Americans with Disabilities Act (ADA). It has been updated to include the EEOC's Leave Guidance. Even as the EEOC has issued guidance when it comes to leave as an accommodation, companies continue to struggle to understand when a leave of absence is a necessary and reasonable accommodation vs. when other actions can or should be taken.

In recent years the EEOC has been investigating employers who systematically terminate employees in certain situations without consideration of a leave of absence as an accommodation under the ADA. In particular, the EEOC's attention has been focused on policies that support the termination of employees who have exhausted leave or are not eligible for leave under state or federal laws or company policies, but are still not able to perform their jobs because of medical issues. EEOC lawsuits have resulted in multi-million-dollar consent decrees and onerous corrective administrative requirements. No employer aspires to get tangled up in that type of legal matter.

Prior to its May 2016 guidance, the EEOC had not provided significant direction on leave as an accommodation since 2002, when it issued a broad "Enforcement Guidance Regarding Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA)" (Guidance).[2] Yet the number of employees protected by the ADA has increased dramatically since 2009, when the ADA Amendments Act significantly expanded the definition of "disability."

The EEOC held a public meeting on leave of absence as an ADA accommodation in June 2011[3] and held out hope that further guidance would be forthcoming. Such guidance was expected to be released in April 2012, but was held back by the EEOC at the last minute.[4] In 2012 EEOC Commissioners Lipnic and Feldblum toured the country providing the EEOC's view on the accommodation process and employers' duties, touching on leave of absence as an accommodation.[5] Employers were primarily left with the EEOC's Guidance from 2002 to gain insight into the EEOC's enforcement perspective; it is now 14 years later, with some case law and commentary in the intervening years, but no further clarity from a holistic perspective until the publication of this paper in 2012. Moreover, the court cases are sometimes at odds with the EEOC interpretations, leaving employers' heads spinning and a fair amount of uncertainty regarding how to manage a request for leave of absence as an ADA accommodation. Then, finally, without advance notice, the EEOC issued its

Leave Guidance. This paper, initially issued in 2012 and updated in 2014, has been updated again to reflect new content and examples.

If you feel confused, you're not alone. In 2011, the Job Accommodation Network (JAN), a free consulting service funded by the U.S. Department of Labor's Office of Disability Employment Policy, fielded over 50,000 inquiries, mostly related to job accommodations and the ADA, according to Linda Carter Batiste, Principal Consultant with JAN.

"One of the accommodations that consistently confuses JAN's employer customers is leave time," Batiste said.

Batiste said the most common questions typically fall under the following topics:

- How much leave must be provided?
- How often must leave be given?
- How does the ADA intersect with other laws such as the federal Family and Medical Leave Act (FMLA)?
- What factors can be considered when determining whether leave poses an undue hardship?

"Unfortunately, there are no clear-cut answers to most of these questions," Batiste said. "Although JAN provides employers with available guidance and discusses other possible accommodations that might enable an employee to work rather than take leave, there remains a need for additional guidance on leave as an accommodation."[6] This paper filled the void Ms. Baptiste identified, and the EEOC's Leave Guidance offers further clarification.

Employers continue to encounter scrutiny from the EEOC and courts as disabled employees are frustrated with the management of their requests for leave. HR executives are challenged to serve their various constituents' needs for adequate competent staffing while ensuring full compliance with the ADA. With the pressure on employers to understand and comply with the complexities of the ADA, it's becoming increasingly difficult for ADA administrators to be confident that they are keeping their organizations in compliance.

This paper synthesizes the guidance available from the EEOC, the courts, and other sources regarding leave as an accommodation. It provides employers and HR managers with actual examples of court cases focused on disabled employees' requests for leave as a reasonable accommodation under the ADA, and provides interpretation to help employers develop a clear understanding of the current definition of "reasonable accommodation," particularly in the context of leaves of absence. Finally, this paper offers solutions for employers that want to improve leave management process effectiveness and compliance.

FAILING TO HANDLE ADA LEAVES OF ABSENCE APPROPRIATELY CAN BE COSTLY

Recent EEOC activities highlight why employers should be concerned about understanding leave of absence as an ADA accommodation. The EEOC has clarified that employers' "100%-healed" policies, which require an employee to return to work with no restrictions, violate the ADA, as does an employment practice that denies an accommodation that would enable an employee to return to work. The EEOC also expects employers to allow exceptions to "maximum leave" or "no fault leave" policies as a reasonable accommodation.[7]

Example: *A clerk has been out on medical leave for 16 weeks for surgery to address a disability. The employee's doctor releases him to return to work with a 20-pound lifting restriction. The employer refuses to allow the employee to return to work with the lifting restriction, even though the employee's essential and marginal functions do not require lifting 20 pounds. The employer's action violates the ADA because the employee can perform his job.*[8]

Example: *An employee with a disability requests and is granted two months of medical leave for her disability. Three days after returning to work she requests as reasonable accommodations for her disability an ergonomic chair, adjusted lighting in her office, and a part-time schedule for eight days. In response, the company informs her that she must resume her leave and can only return to work when she is able to work full-time with no restrictions or accommodations. The employer may not prohibit the employee from returning to work solely because she needs reasonable accommodations (though the employer may deny the requested accommodations if they cause an undue hardship). If the employee requires reasonable accommodations to enable her to perform the essential functions of her job, and the accommodations requested (or effective alternatives) do not cause an undue hardship, the employer's requirement violates the ADA.*[9]

Example: *An employer covered under the FMLA grants employees a maximum of 12 weeks of leave per year. An employee uses the full 12 weeks of FMLA leave for her disability but still needs five additional weeks of leave. The employer must provide the additional leave as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship. The Commission takes the position that compliance with the FMLA does not necessarily meet an employer's obligation under the ADA, and the fact that additional leave exceeds what is permitted under the FMLA, by itself, is not sufficient to show undue hardship. However, there may be legitimate reasons that establish undue hardship, such as the impact on an employer's operations from the leave already taken and/or from granting additional leave. Also, the employer may consider*

whether other reasonable accommodations may enable the employee to return to work sooner than the employee anticipates, as long as those accommodations would be consistent with the employee's medical needs.[10]

Example: *An employer is not covered by the FMLA, and its leave policy specifies that an employee is entitled to only four days of unscheduled leave per year. An employee with a disability informs her employer that her disability may cause periodic unplanned absences and that those absences might exceed four days a year. The employee has requested a reasonable accommodation, and the employer should engage with the employee in an interactive process to determine if her disability requires intermittent absences, the likely frequency of the unplanned absences, and if granting an exception to the unplanned absence policy would cause undue hardship.*[11]

The EEOC is successfully pursuing what it calls "systemic violations" like these, obtaining a string of consent decrees focusing on inflexible time-off and leave of absence policies that violate the ADA. Several EEOC cases have resulted in multi-million-dollar consent decrees. Since the EEOC's pursuit of inflexible leave policies, only one court has tackled the issue, disagreeing that inflexible leave policies categorically violate the ADA.[12]

Systemic violations *result from an employer's company-wide policy or practice that can affect many employees subject to the policy, rather than from the mishandling of an individual employee's case.*
A ***consent decree*** *is the result of an agreed settlement between the EEOC and the employer, approved by the court. The EEOC generally requires that such decrees be made public.*

These cases demonstrate the need for employers to evaluate their current practices relating to leave of absence as a reasonable ADA accommodation. Lawsuits such as those outlined below can be detrimental to a company's financial well-being and public image:

EMPLOYER	DATE OF CONSENT DECREE	AMOUNT	CHALLENGED PRACTICE
Lowe's	May 2016	$8.6 million	Terminating employees and failing to provide reasonable accommodations when their medical leave of absence exceeded the maximum leave policy
Pactiv	November 2015	$1.7 million	(1) Disciplining and discharging employees according to attendance points policy for medical-related absences; (2) not permitting intermittent leave as a reasonable accommodation; (3) not allowing leave or extension of leave as a reasonable accommodation
CTI, Inc.	September 2015	$300,000	(1) Requiring employee receive a release for "full, unrestricted duty" prior to returning to work; (2) refusal to grant leave after FMLA leave ended
Princeton Healthcare System	June 2014	$1.35 million	(1) Enforcing a fixed leave policy that limits the amount of leave time an employee covered by the ADA may take; (2) requiring employees returning from disability leave to present a fitness for duty certification stating that they are able to return to work without any restrictions; (3) subjecting employees to progressive discipline for ADA-related absences
Interstate Distributor Co.	November 2012	$4.85 million	(1) Terminating employees who were not 100% healed and able to return to work full time/full duty at end of leave; (2) allowing a maximum leave of 12 weeks
Verizon Communications	July 2011	$20 million	Disciplining or terminating disabled employees when they reached limits of "no fault" attendance plans without considering additional time off as an ADA accommodation

Supervalu, Inc. / Jewel-Osco	January 2011	$3.2 million	Terminating employees with disabilities who were not 100% recovered at the end of medical leaves of absence without considering return to work with a worksite accommodation
United Airlines	December 2010	$600,000	Requiring reservation sales reps on disability leave either to retire or go out on extended leave, then terminating them when leave ran out without consideration of reduced hourly schedules as a reasonable ADA accommodation
Sears, Roebuck and Co.	Late 2009	$6.2 million	Terminating employees following exhaustion of workers' compensation leave without engaging in the interactive accommodation process to consider workplace accommodations or leave extension as an accommodation

In each of these cases, the employer also agreed to undertake substantial administrative obligations (equitable relief) such as posting notices of the decree, amending policies, frequent reporting to the EEOC, and providing training to all employees. The cost and time consumed by these obligations can add substantially to the burden of the consent decree.

HOW DOES THE EMPLOYEE MAKE A REQUEST FOR LEAVE AS AN ACCOMMODATION?

An employee's request for an accommodation does not need to be a formal request pursuant to a specific process. The employee does not need to mention the ADA or request a leave as a "reasonable accommodation." Moreover, the employee's request may come in any form: verbal, written, or through a third party. Any information about the employee's need for time off or the employee's concern about being able to attend work due to a disability is sufficient to invoke the employer's obligations under the ADA.[13]

> ***Example:*** *An employee tells his supervisor that he is about to have surgery and will need several weeks off for recuperation. This is enough information to notify the employer of a possible need for leave of absence as an ADA accommodation. The supervisor must share the information with the company's human resources manager for further action.*
>
> ***Example:*** *An employee's husband calls the employer's benefits manager to inquire about short term disability benefits because the employee just had an auto accident and will be unable to work for several weeks. This is a sufficient request for leave as an accommodation for the employee.*
>
> ***Example:*** *A factory worker tells his foreman that he is on new medication that causes him to feel dizzy on occasion and he is concerned about working his job on the assembly line. This information should prompt the foreman to bring in a human resources representative to engage in the interactive process with the employee to determine whether he has a disability and needs an accommodation, which might include a leave of absence while the employee adjusts to the medication.*

Regardless of the source or form, the employer should capture the accommodation request in writing for clarity and for recordkeeping purposes. The employer may require the employee to complete an accommodation request form. However, verbal information or a verbal request is sufficient to trigger the employer's ADA duty to engage in the interactive accommodation process and cannot be disregarded.[14] *See sample Accommodation Request Form.*

When a request for accommodation comes from someone other than the employee, the employer should verify with the employee (if possible) that in fact the employee wants and needs the accommodation – especially where the requested accommodation is a leave of absence that may be unpaid. The interactive process should be followed regardless of how or by whom the accommodation request is initiated.

Absent a request from the employee, the employer generally does not have obligation to ask a disabled employee if he needs an accommodation. The employer should make such inquiry, however,

if the employer knows that the employee's disability is interfering with the employee's job performance and that a disability (*e.g.,* a mental disability) prevents the employee from being able to make the accommodation request on his own behalf.[15]

When an employee's request for leave can be addressed by an employer's leave program, federal or state FMLA laws, or workers' compensation, the employer may provide leave under those programs or laws. If an employer's program or federal, state, or local law does not cover the employee's leave request, it must be treated as an ADA leave request and the employer should begin the interactive process.[16]

When an employee's request for leave falls within the employer's existing leave policy, such as a sick leave or paid time off (PTO) policy, the employer must treat the employee requesting leave due to her disability the same as it treats requests for leave unrelated to a disability.[17]

> ***Example:*** *An employer provides four days of paid sick leave each year to all employees and does not set any conditions for its use. An employee who has not used any sick leave this year requests to use three days of paid sick leave because of symptoms she is experiencing due to major depression which, she says, has flared up due to several particularly stressful months at work. The employee's supervisor says that she must provide a note from a psychiatrist if she wants the leave because "otherwise everybody who's having a little stress at work is going to tell me they are depressed and want time off." The employer's sick leave policy does not require any documentation, and requests for sick leave are routinely granted based on an employee's statement that he or she needs leave. The supervisor's action violates the ADA because the employee is being subjected to different conditions for use of sick leave than employees without her disability.*[18]
>
> ***Example:*** *An employer permits employees to use paid annual leave for any purpose and does not require employees to explain how they intend to use it. An employee with a disability requests one day of annual leave and mentions to her supervisor that she is using it to have her wheelchair repaired. Even though he has never denied other employees annual leave based on their reason for using it, the supervisor responds, "That's what sick leave is for," and requires her to designate the time off as sick leave. This violates the ADA, because the employer has denied the employee's use of annual leave due to her disability.*[19]

WHAT STEPS MUST THE EMPLOYER TAKE AFTER RECEIVING AN EMPLOYEE REQUEST FOR LEAVE AS AN ACCOMMODATION? THE ADA INTERACTIVE PROCESS EXPLAINED.

Once the employer has received the disabled employee's leave accommodation request, the employer must engage in the ADA interactive accommodation process with the employee to determine whether there is a reasonable workplace accommodation that will enable the employee to perform the essential functions of his or her position. The process includes discussion and exchange of information between the employee and the employer, and sometimes with medical professionals or others. Pertinent information may include the employee's job description, medical restrictions on the employee's performance of essential or marginal functions, and analysis of whether a particular accommodation will be suitable due to the employee's limitations.

An employer does not have to offer an accommodation to every employee who is disabled. Rather, the duty to accommodate a disabled employee arises when the employer has knowledge that a disability impairs the employee's ability to perform the essential functions of her position.[20] An employee does not have to specify the exact accommodation needed during the interactive process. The employee must only describe the problems posed by the workplace barrier in performing the essential functions of her position.[21] Following the interactive process will enable the employer to identify whether an accommodation is required for the employee and, if so, to identify an appropriate accommodation.

In many cases the employee's disability and its limitations are relatively obvious and it is simple to identify an appropriate accommodation. In such event, the employer does not have to – and should not – complete every possible step of the interactive process. Rather, the employer should proceed to implement the accommodation as soon as feasible.

The interactive accommodation process is basically the same regardless of the type of accommodation requested, although the type of information needed may vary. For example, when a leave of absence is requested, the employer will want to receive information about how long of a leave is requested, whether it will be effective to enable the employee to return to work,[22] and in addition, how long the impairment will last.[23] In assessing the leave request and the employee's ability to return to work, it may be important for the employer to know whether the employee will need other workplace accommodations to be able to perform the essential functions of her position.

The EEOC notes that an employer cannot force or require an employee to accept an accommodation in order to perform the essential functions of the job. But, if the employee refuses to accept an effective accommodation, the employee may no longer be qualified to retain the position.[24]

Employers should follow these best practices for the interactive process

Because of the individualized nature of an employee's disability limitations, job duties, and workplace needs and the employer's business concerns, the interactive process needs to be flexible. The number of times the employer meets with the employee, the type and amount of extra information needed, and other factors must be designed for each employee's situation.[25] There are certain fundamentals, however, that should be present in every interactive process:

1. **Respond** to the employee's request for an accommodation (or other information received) promptly, and move the process forward quickly.

2. **Communicate** with the employee. Start the communications as soon as the request for an accommodation is made, in whatever form. Continue communications throughout the process and after an accommodation has been identified and implemented. Communications in person, by telephone, email, on an employer's accommodation request forms, etc., will each satisfy the employer's duty as long as the communication is effective to accomplish the purpose. Often, verbal two-way communications are the most effective and efficient. Document all verbal communications immediately.

3. **Assess the employee's particular circumstances.** Verify the essential functions of the employee's position and the limitations posed by the employee's disability on performing the essential and marginal functions.

4. **Consider whether information is needed** from any source in addition to the employee – for example, medical information about the nature of the employee's limitations and ideas for an effective accommodation. Gather such information as soon as possible.

5. **Assess each suggested accommodation** together with the employee: Is it reasonable and effective?

6. **Assess each suggested accommodation** in light of business needs and concerns: Will it impose an undue hardship?

7. **Monitor the accommodation** once it is implemented. Follow up with the employee initially to ensure the accommodation is effective, and follow up periodically to ensure that it is still necessary and appropriate if the employee's condition changes. With respect to leave as an accommodation, the employer can enforce its policy to require the employee to check in periodically to report on status, continued need for leave, and anticipated return-to-work date.[26]

> ***Note:*** *The employer's duty to engage in the interactive process is ongoing and not a one-time event.[27] The interactive process obligation continues if the employee asks for a different accommodation or the employer becomes aware that the initial accommodation is not working and a different or additional accommodation is needed. Or, if the employee originally turned down leave as an accommodation, the employer may be obligated to provide leave as an accommodation when it appears that the original agreed-upon workplace modification (e.g., a flexible start-time arrangement) is not working.[28] In some situations, the process of finding the right accommodation can be lengthy and require trying several options.[29]*

8. **Document, document, document.** Make a record of every step taken in the process – dates, persons involved, content of communications, accommodations under consideration, decisions made and reasons, and so on.

> ***NOTE:*** *The Job Accommodation Network (JAN) has commented that it is receiving numerous questions from employers about the advisability of documenting the interactive process. JAN feedback indicates that employers are concerned that such documentation may be a trap for the unwary – a record of mistakes made in the process, or grounds for challenging an accommodation decision. JAN disagrees with this concern.[30] Documentation is crucial to support an employer's good faith attempt to find a reasonable accommodation. Courts and the EEOC are more likely to accept the employer's business judgment and ultimate decision if it has engaged in a reasonable process of communication and consideration when there is a contemporaneous written record of the process rather than after-the-fact summaries of what the employer did.*

Many sources provide advice regarding how to engage in the interactive process, including the JAN, the EEOC guidances, the Interpretive Guidance in the Appendix to the ADA regulations, and the EEOC's own internal procedures used for EEOC employees and applicants.[31] In addition, public and private resources are available to help the employer and employee identify possible accommodations and, sometimes, even to assist in funding a costly accommodation.[32] See also the attached sample checklist, called *ADA Accommodation Guide to the Interactive Process.*

HOW DOES A LEAVE OF ABSENCE WORK AS AN ADA ACCOMMODATION?

Will the leave enable the employee to perform the job?

The ADA regulations provide that "[i]n general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[33]

Leave of absence is a unique type of accommodation, in that it doesn't enable the employee to perform the essential functions of the position *during* the period of accommodation. It doesn't change the work environment or the way the job is customarily done. So, how can a leave of absence enable an employee to perform his job when he isn't even working?

The purpose of a leave as an accommodation is to give the employee *time* to become able to perform the essential functions of her position upon return to work, with or without a reasonable accommodation.[34] **The need for leave must be related to the disability[35] and the leave must be likely to enable the employee to return to work.**[36] Therefore, in assessing a leave request, the employer should determine the specific purpose of the leave. What will the employee be doing that will enable her to perform the essential functions of her position with or without another workplace reasonable accommodation?

Leave may serve many purposes in enabling a disabled employee to return to work, including but not limited to allowing the employee to:

- Obtain medical treatment, rehabilitation services, or therapy;
- Recuperate from an illness, injury, or episodic manifestation of the disability;
- Obtain repairs on assistive equipment such as a wheelchair, accessible van, or prosthetic device;
- Avoid temporary adverse conditions in the work environment that could harm a disabled employee or exacerbate a disability;
- Train a service animal; or
- Receive training in the use of Braille or to learn sign language.[37]

Case law emphasizes that leave as an accommodation only has to plausibly enable the employee to perform her job; certainty that the leave will enable the employee to perform her job at the conclusion of the leave is not necessary.[38]

> ***Note:*** *Leave of absence as an ADA accommodation may be required on a stand-alone basis, such as when an employee is not eligible for any state, federal, or company leaves of absence. In addition, it might run concurrently with other leaves or benefits, such as short term disability payments or use of company paid time off. Finally, an employer may have to offer extended leave as an ADA accommodation following the exhaustion of leave rights under other laws or company policies.*

The EEOC and courts[39] recognize that the employer has the ultimate discretion to choose between alternative effective accommodations: "[A]n employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation." The employer does not need to show that the accommodation not selected would impose an undue burden. However, the EEOC advocates that if more than one accommodation is effective, the employer should give primary consideration to the employee's preference as the person with the disability.[40] Certainly, this will simplify working with the disabled employee.

The EEOC allows an employer to deny a leave request and offer an effective accommodation that would allow the employee to remain on the job and eliminate the need for leave.[41] The employer must be careful, however, that it is not interfering with the employee's ability to attend to medical needs by denying the leave request in favor of an on-the-job accommodation.[42] In addition, if the employee's leave request also qualifies under the FMLA, then the employee has a right to take a leave of absence of up to 12 workweeks in a 12-month period, even if another accommodation would enable the employee to continue working.[43]

Moreover, during the interactive process the employee may suggest a specific accommodation that enables the employee to continue working, but the employer has the right, and may have a duty, to explore other alternatives to an employee's accommodation request, including a leave of absence.

> ***Example:*** *An employee requests a telecommute arrangement to accommodate her disability. This is not feasible because the employee's essential duties include the daily use of expensive specialized equipment available only at the employer's workplace and shared by other employees. The employer may be under an obligation to suggest a leave of absence as an accommodation. In fact, barring other reasonable accommodation alternatives, the employer may be able to require the employee to take a leave of absence and use accrued sick time as an accommodation when the employee's disability flares up. Under these facts, the employer does not have to grant the employee's preferred accommodation to work from home (and purchase specialized equipment for the employee to do so).*[44]
>
> ***Example:*** *An employer appropriately provided a leave of absence as a reasonable accommodation rather than create a part-time position after it had recently eliminated part-time positions company-wide.*[45]

Consider these alternatives to continuous leave of absence: part-time work, schedule modification, reassignment

Leave as an accommodation does not always mean a total absence from work. A modified or part-time schedule, *i.e.,* offering an employee some ability to be absent from work on a part-time basis, may be a reasonable accommodation. This accommodation may include modifying workplace policies relating to part-time or reduced-hours work, or modifying an employee's shift or scheduled hours. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, or altering the timing of an employee's performance of certain functions.[46] However, unlike the FMLA, an employer does not have to modify an employee's work hours or grant a reduced schedule leave if doing so causes an undue hardship, such as a business disruption.[47]

> ***Example:*** *A shift supervisor must inspect all workers' safety equipment before the employees can start their duties. Allowing the shift supervisor to start work one hour late would be an undue hardship to this employer because it would cause a business disruption. The supervisor's late start would prevent the other shift employees from starting their work and would reduce the productivity of the crew.*

If offering a modified or part-time schedule poses an undue hardship, the employer must consider reassigning the employee to a vacant position that would enable such a schedule. But in doing so, an employer is not required to hire additional people or reallocate the employee's essential functions to other workers.[48]

In the EEOC's view, reassignment is the accommodation of last resort and should be considered only if there are no other effective accommodations that will keep the employee in his current position or if all other accommodations would impose an undue hardship. The reassignment should be to a vacant position for which the employee is qualified that provides equivalent pay, benefits, status, etc., and for which the employee is not required to compete with other applicants.[49] If no such vacant position exists, the reassignment can be to a vacant lower level position.[50]

> ***Example:*** *A medical assistant in a hospital required leave as a reasonable accommodation for her disability. Her doctor clears her to return to work but requires that she permanently use a cane when standing and walking. The employee realizes that she cannot perform significant parts of her job while using a cane and requests a reassignment to a vacant position for which she is qualified. The hospital violates the ADA if it fires the employee rather than reassigning her to a vacant position for which she is qualified and in which she could perform the essential functions while using a cane.*[51]

HERE IS A MANAGEABLE PROCESS FOR EMPLOYERS TO DETERMINE WHEN LEAVE IS AN APPROPRIATE ACCOMMODATION

The U.S. Supreme Court and the EEOC agree on the issues which must be addressed to determine whether an employer has an obligation to provide a specific accommodation.[52] However, a straightforward analytical process for making the determination has not been articulated by either the courts or the EEOC. This paper pulls the three core issues together into a manageable process for employers.

Thus, the employer should analyze an employee's request for an accommodation, including a leave of absence, in accordance with a three-step process:

1. Is the workplace modification or adjustment reasonable? That is, on its face, is the proposed accommodation plausible or feasible?

2. Is the workplace modification or adjustment effective? Does it enable the employee to perform the essential functions of the job?

3. Does the workplace modification or adjustment impose an undue hardship on the employer's business?[53]

In court opinions these three concepts are often not distinguished from each other, with a resulting blurred and overlapping analysis of reasonableness, effectiveness, and undue hardship.[54] This three-step process captures the key ADA accommodation considerations and clarifies the employer's obligation: finding a workplace modification or adjustment that enables the employee to perform the essential functions of the position, without imposing an undue hardship on the employer.

Step 1: Is the requested leave of absence a "reasonable" accommodation?

A reasonable accommodation is one that "ordinarily, in the run of cases" is plausible or appears to be feasible. In general, a leave of absence may be a reasonable accommodation.[55] The devil is in the details: such as the length of a continuous leave, the unpredictability and frequency of intermittent absences, the degree or lack of certainty of the employee's return-to-work date, etc. Unfortunately, there are very few hard and fast rules when it comes to whether leave is a reasonable accommodation in specific circumstances and, if so, for how long. Both the EEOC and court opinions emphasize that a case-by-case analysis is necessary. However, a few certainties do exist. In addition, examination of cases that have addressed leave as an accommodation can provide some direction in shaping the analysis.

When is leave a reasonable accommodation?

Several cases have specified two limits to the bounds of reasonableness for a leave of absence as an accommodation: 1) the employee must provide the employer with an estimated date when she can resume her essential duties, because without an expected end date, an employer is unable to determine whether the accommodation is a reasonable one; and 2) a leave request must assure an employer that an employee can perform the essential functions of her position in the "near future."[56] Of course, "near future" is not defined and will still be subject to an analysis of what is reasonable, effective, and not an undue hardship.

> ***Note:*** *These cases demonstrate how the courts often blur the three distinct points of analysis. The first requirement, that the employee must provide the employer with an estimated return-to-work date, enables the employer to assess whether the leave is "reasonable" (plausible or feasible). However, the second requirement, ensuring that the leave will enable the employee to perform the essential functions of the position, goes to whether the leave is an effective accommodation, not whether it is a reasonable accommodation.*

The EEOC asserts that it is a reasonable accommodation for an employer to modify its employment policies, where appropriate, to accommodate an employee's impairment. This may include modifying "no-fault" or other leave or attendance policies so that an employee is not terminated automatically if she cannot return to work after a period of time specified under the employer's leave policy.[57] In fact, the failure to do so resulted in the multi-million-dollar consent decrees discussed above. The employer must engage in the interactive process at the exhaustion of a leave plan or entitlement to determine if additional leave can be offered as a reasonable accommodation without an undue hardship.

Neither the EEOC nor the courts expect employers to offer paid leave as a reasonable accommodation. However, an employer cannot discriminate or treat the employee with the disability differently than other employees. If the employer offers paid leave or other benefits during leave to other, similarly situated employees, the employer should also offer paid leave and the same benefits to the same extent when granting a disabled employee leave as a reasonable accommodation.[58] Allowing the employee to use paid leave accrued under plans such as vacation or paid time off during a leave is a reasonable accommodation. If the employee's accrued paid time off is not sufficient to cover the entire leave requested by the employee, the remainder of the leave can be unpaid.[59]

As noted above, there are no hard rules on leave as an accommodation, including the length of a reasonable leave. One federal court, however, has suggested that "in nearly any case" six months' leave is more than sufficient, citing the EEOC's own enforcement guidance manual to support the court's opinion.[60] Nonetheless, the following specific examples do provide some information as to when leave of absence was deemed by the court to be a reasonable accommodation:

- A two- to four-week leave of absence to accommodate an employee's flare-up, especially when the employee's position had remained open for 6 months prior to the employee's transfer into the position;[61]
- Leave of absence as an accommodation when the employer allows other employees to take advantage of a company's leave policy;[62]
- Leave to receive medical care and treatment;[63]
- An accommodation of returning to work part-time, temporarily, after a leave of absence, until the employee is able to return to the job full-time;[64]
- A temporary leave that gives the employee time to work with her physician to design an effective treatment program, particularly when the leave request is less than the leave an employer grants as paid disability leave or offers to non-disabled, sick employees;[65]
- A 4-month leave, which is less than the amount allowed in the company's leave of absence policy, when the employee's prognosis is good that at the conclusion of the 4-month leave, the employee should be able to return to work;[66]
- A maximum of 2-months' leave requested to recover from a surgery was reasonable even where the employee did not have the specific dates of the surgery, but an approximate time period.[67]

When is a leave request not reasonable?

The cases and the EEOC agree that, generally, the following are not reasonable leave accommodations:

- An indefinite leave;
- Complete exemption from time and attendance requirements;
- Open-ended schedules (*e.g.*, the ability to arrive or leave whenever the employee's disability necessitates);
- Irregular, unreliable attendance; or
- Repeated instances of tardiness or absenteeism that occur with some frequency over an extended period of time and often without advance notice.[68]

Below are specific examples from cases in which the courts deemed a requested leave of absence not a reasonable accommodation:

- Modification to an inflexible leave policy allowing an employee to take leave beyond the six months of paid leave already taken under the policy;[69]
- Additional leave beyond an original year and a half leave, especially when there was no clear prospect for recovery;[70]
- A leave of absence for the same amount of time as its year-long salary continuation program when, after a ten-month leave, the employee cannot establish that upon the conclusion of the remaining two months of the salary continuation program, the employee could return to work;[71]
- Unlimited sick days to use intermittently as the employee chooses;[72]
- Continued intermittent absences as an accommodation when past intermittent absences have not enabled the employee to perform her position;[73]
- Additional leave beyond a nine-month leave and previous 12 weeks of FMLA leave;[74] And
- A request for an indefinite extension of light-duty status.[75]

Step 2: Is the leave of absence accommodation "effective"?

Even if an accommodation is reasonable on its face, "in the ordinary run of cases," the accommodation must also be *effective*, in that it enables the employee to perform the essential functions of the job.[76] The EEOC sometimes expresses this as a requirement that the accommodation allows the employee to be a "qualified individual with a disability" who can perform the essential functions of the position with or without a reasonable accommodation.[77] Whether leave is effective as an accommodation is a fact-specific inquiry, weighing many factors:

- Nature of the employee's disability and limitations;
- Anticipated duration of leave;
- The employee's position – essential and marginal functions;
- What purpose the leave will serve to enable the employee to perform essential functions;
- Likelihood (not certainty) that the employee will be able to perform essential functions at the end of leave (will be a "qualified" individual with a disability);
- The success or failure of accommodations tried in the past for the employee's condition; and

- The alternatives to leave as an accommodation.[78]

The employer is entitled to medical information to determine both the scope of the limitations imposed by the employee's disability and whether a particular accommodation will be effective. Refer to "Medical information to support leave as an accommodation" below.

Step 3: Does the requested leave impose an undue hardship on the employer or its operations?

Even if an accommodation is reasonable and effective, the employer does not have to provide that accommodation if it will impose an undue hardship on the employer's business.[79] This is the only limitation on an employer's obligation to provide a reasonable accommodation.[80] Undue hardship is defined as "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation.[81] Significant financial difficulty refers to the cost of providing the accommodation. Significant operational difficulty means an accommodation that is unduly extensive, substantial, disruptive, or those that would fundamentally alter the nature of the business operation.[82]

In many instances the employer will not have to go through a detailed undue hardship assessment. The employer will often know without analysis that the requested accommodation will not impose a burden and should proceed by granting the accommodation.

There are no set rules on how long of a leave constitutes an undue hardship. An employer must assess each employee's situation and the impact of the leave request individually. The EEOC requires that an employer base the undue hardship determination on an individualized assessment of current circumstances that show a specific reasonable accommodation would be very difficult or expensive for the employer. Generalized assumptions or unsupported assertions will not establish an undue hardship. Rather, the employer will have to support its claim of undue hardship with specific facts and evidence.[83]

> ***Example:*** *An employer that provides personal leaves of absence of up to 90 days for a variety of reasons cannot take a blanket position that any leave over the 90-day policy imposes an undue hardship.[84] Rather, the employer must make an assessment of whether additional leave will be an undue hardship under the particular facts of the situation.*
> *Similarly, it may be disingenuous for the employer to argue that any accommodation leave less than the 90-day duration of personal leaves is an undue hardship, since it regularly lets other employees take leaves of that length.*

Employers should consider outside sources before declaring an undue hardship. This includes looking for funding from a state or rehabilitation agency to pay for part or all of a requested accommodation, and checking whether there are available tax credits or deductions for the cost of the accommodation. In addition, an employee can be requested to fund part of the cost of an accommodation. Only the net cost of the accommodation can be considered by the employer in the undue hardship analysis.[85]

The EEOC states that, although an employer may have to modify time and attendance policies as a reasonable accommodation, an employer does not have to grant an open-ended schedule or accept irregular, unreliable attendance such that an employee can arrive or leave work whenever the employee's disability necessitates.[86] Usually, an employer can demonstrate that such an unpredictable schedule causes one or more of a variety of problems, such as:

- An inability to ensure a sufficient number of employees to accomplish the work required;
- A failure to meet work goals or to serve customers/clients adequately;
- A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; and
- Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.[87]

Cases are in agreement that erratic, unscheduled, and unpredictable absences for an indefinite period of time are not reasonable accommodations.[88]

In addition, as one case notes, an employer does not have to wait an indefinite period for an accommodation to achieve its intended effect.[89]

What factors can be considered in determining undue hardship?

Undue hardship must be determined on an individualized basis in each case, taking into account the employee's limitations from the disability, the employee's position, and the employer's business resources and needs. There is no one-size-fits-all answer to whether leave of absence as an accommodation will constitute an undue hardship. Factors to consider include, without limitation:

- Cost of the leave to get the employee's work done (overtime, temporary help, extra training);
- Overall financial resources of the employer and/or the facility providing the leave;
- Number of employees in total and/or at the facility;
- Number of employees in the particular/similar position who can share the workload;
- Number of employees with the necessary skills & qualifications to take over the employee's duties;

- Availability of temps with necessary skills & qualifications to perform the employee's duties;
- Effect of employee's leave on business operations, workflow, production, etc.;
- Type, number, and location of the employer's facilities from which to draw additional support to perform the employee's duties;
- Employer's ability to ensure a sufficient number of employees to accomplish the required work;
- Employer's ability to meet goals or to adequately serve its clients/customers; and
- Employer's need to shift work to other employees, preventing them from their own work or imposing significant additional burdens on those employees.[90]

If past practices suggest that temporary labor or some other temporary solution can address the employer's need to have the employee's job duties performed, the employer cannot claim a hardship. If some or all of the essential functions of a position have been performed easily by temporary employees in the past, this could indicate that the employer is not under a business pressure to immediately fill a disabled employee's position permanently. Therefore, a leave of absence for the employee is probably a reasonable accommodation. If there is evidence that the cost of temporary help is great or unavailable or unsuited to the position, then the employer may have an undue hardship.[91]

The EEOC will not accept an undue hardship claim based on the employer's customers' or employees' fears or prejudices, nor can an undue hardship claim be based on the fact that the accommodation might negatively impact employee morale.[92]

> ***Example:*** *An employee of a chain of toy stores has a physical disability that has been accommodated on the job by the employer. On December 1, the employee discovers that he needs to have surgery within the next week for an issue related to his disability, and will require about 5 weeks off from work. The employer had previously told its employees that no one could have time off in December because of the busy holiday season. The employer determines that it can cover the employee's absence without undue hardship by using employees from nearby stores to cover all shifts. The employer is concerned, however, that the other employees in the store will be upset because they don't get the holidays off and the employee in question does. The employer must grant the employee's request for time off to meet his medical needs, despite the concern about the morale of the other employees.*

Requests for extension of leave can complicate the situation.

One significant challenge to employers is assessing an employee's request for an extension of his leave. An employer does not necessarily have to grant an endless number of leave extensions; the employee must be able to demonstrate that he will be able to return to work at the conclusion of the

leave extension.[93] However, once a leave request has been granted and survived by the employer and its workforce, it becomes problematic for the employer to argue that an extension of a few *more* days or weeks turns the leave into an undue hardship.[94]

A possible solution is for an employer to make an undue hardship analysis regarding the length of a leave it can support at the beginning of the employee's time off, even if the initial amount of leave requested is not a hardship or is covered by a job-protected leave right such as the FMLA. Then, when extensions are requested, the employer has already set the ceiling for how much leave it can tolerate in the employee's particular circumstances before it becomes an undue hardship.

> ***Example:*** *An employee requests and is granted 10 weeks of FMLA leave for surgery, recovery, and physical therapy. Shortly before the employee's scheduled return to work, he notifies the employer that he is recovering more slowly than expected and requests another 4 weeks of leave. The employee is entitled to 2 more weeks of FMLA leave, and the employer figures it can stretch its workforce and production schedules enough to cover the final 2 weeks of leave as an ADA accommodation.*
> *The employee then develops complications and requests an additional 4 weeks of leave, bringing the total requested leave time up to 18 weeks. The employee's coworkers are experiencing significant strain from covering the employee's duties, and the employee's department is significantly behind on meeting deliverables to customers. But it will take 4 weeks just to hire and train a replacement for the employee on leave.*
> *Had the employer assessed at the commencement of the employee's leave just how long it could allow the employee to take leave without suffering an undue hardship, the determination might have been that anything longer than 6 weeks would constitute an undue hardship. The employer would have had to grant up to 12 weeks pursuant to the FMLA but then could have replaced the employee or hired temporary help when he was unable to return at the end of that time. Instead, the employer kept eking by without sufficient help, jeopardizing the well-being of other employees and the company's profits and good will.*[95]

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond what was originally granted, the employer may take into account leave already taken -- whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.[96]

> ***Examples:*** *An employee has exhausted her FMLA leave but requires 15 additional days of leave due to her disability. In determining whether an undue hardship exists, the employer may consider the impact of the 12 weeks of FMLA leave already taken and the additional impact on the employer's operations in granting three more weeks of leave.*[97]

An employee has exhausted both his FMLA leave and the additional eight weeks of leave available under the employer's leave program, but requires another four weeks of leave due to his disability. In determining whether an undue hardship exists, the employer may consider the impact of the 20 weeks of leave already taken and the additional impact on the employer's operations in granting four more weeks of leave.[98]

An employer not covered by the FMLA initially grants an employee intermittent leave for a disability. After six months, the employer realizes that the employee is using far more leave than expected and asks for medical documentation to explain the additional use of leave and the outlook for the next six months. The documentation reveals that the employee could need as much leave in the coming six months as he already used. As a result of the increased number of absences, the employer has postponed meetings necessary to complete a client project, in turn causing delays in meeting the client's needs. In addition, some of the employee's job duties were reassigned, causing coworkers to have increased workloads and shifting work priorities, which interfered with meeting the needs of other clients. Based on this information, the employer determines that additional intermittent leave as described in the doctor's letter would be an undue hardship.[99]

How long of a leave of absence must an employer provide under the ADA?

The simple answer is that there is no simple answer, and the EEOC's 2016 guidance doesn't answer this question either. The question of length is often what makes leave of absence as an accommodation so difficult to manage. Only one federal appeals court has tackled this issue under the amended, current ADA law, suggesting that in most instances leave beyond six months is not reasonable.[100] However, because only one court has addressed the question, it remains necessary to assess each employee's accommodation request individually in light of employee's and employer's circumstances. The employer must follow the first two steps of the process outlined above to determine whether a leave of the requested length is reasonable and effective. Similarly, if the employer is concerned that the length of leave requested will impose an undue hardship, the third step will guide the employer to a sensible decision.

EMPLOYERS ARE OFTEN ENTITLED TO MEDICAL INFORMATION TO SUPPORT AN ADA LEAVE REQUEST

Often an employee's disability and the need for leave as an accommodation are obvious. In such a case the employer does not need and should not request medical information from the employee.[101] In addition, the employer should consider whether the employee has previously submitted medical information for another purpose, such as to support an FMLA leave or short term disability benefits, which is adequate and current enough to support a leave under the ADA.

On the other hand, if the employee's disability and/or the need for leave as an accommodation is not obvious, the employer is entitled to receive reasonable documentation about the employee's impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. In addition, the employer can request information to help it understand how a particular accommodation will enable the employee to perform his job.[102] Thus, if the requested accommodation is a leave of absence, the employer should request information regarding how the leave is going to enable the employee to return to work and perform the essential functions of the position (with or without another reasonable accommodation), when the employee will be able to return, and whether the employee will need an on-the-job accommodation upon return.[103] Employers are allowed to have a policy that requires all employees, whether requesting ADA leave or not, to provide a doctor's note or other documentation to substantiate the need for leave.[104]

> ***Example:*** *An employee with a disability asks to take six days of paid sick leave. For any sick leave lasting more than three days, the employer requires a doctor's note explaining why leave is needed. The employee must provide the requested documentation.*[105]

An employee should cooperate with an employer's questions, including a request for medical documentation, and work with her health care provider to obtain the requested information promptly.[106] An employee's duty to cooperate in the interactive process includes when the employee requires additional leave beyond what was originally requested and granted.

> ***Example:*** *An employee with a disability is granted three months of leave by an employer. Near the end of the three-month leave, the employee requests an additional 30 days of leave. In this situation, the employer can request information from the employee and her health care provider about the need for the additional 30 days and the likelihood that the employee will return to work, with or without a reasonable accommodation, if the employer grants the extension.*[107]

Medical information may be obtained by providing the employee with a medical form or letter with questions to be completed by the employee's health care provider. See *ADA Accommodation Assessment Form*. Unlike the FMLA, the ADA allows the employer to follow up with the provider to obtain additional information, or to discuss the employee's leave request (assuming the employee has signed a medical release.) However, similar to the FMLA, the EEOC suggests that the employer should first provide a written response to the employee indicating why the documentation is insufficient and allow the employee to provide the missing documentation.[108] The documentation should establish that the person has an ADA disability and that the disability necessitates a reasonable accommodation. The documentation can address the employee's disability and functional limitations.[109] As with all disability inquiries, the medical information sought must be job related and consistent with business necessity.[110]

All medical information received by the employer during the accommodation process or in relation to the employee's needs must be kept confidential and filed apart from the employee's personnel file.

WHAT ARE AN EMPLOYEE'S RIGHTS DURING AND AFTER LEAVE?

In most cases, an employee must be reinstated to the same job after an ADA leave – but there are limitations

The employer's obligations with respect to reinstatement following an ADA leave of absence fall into several tiers.

1. **Reinstatement to same position.** When an employer provides a disabled employee with a leave of absence as an accommodation, the ADA requires the employer to hold the employee's job open as part of that reasonable accommodation, barring an undue hardship.[111] This is stricter than the FMLA, which allows an employer to reinstate an employee to an *equivalent* position.

   Additionally, if the employee is no longer qualified for the original position at the conclusion of the leave, even with another workplace accommodation, then the employer does not have to reinstate the employee to the original position.[112]

2. **Reinstatement to a vacant equivalent position.** If the employer cannot hold the position open for the entire duration of an ADA leave without incurring an undue hardship, then the employer must consider whether it has a vacant, equivalent position for which the employee is qualified. If so, the employer must reassign the employee to that position during the leave and "reinstate" the employee to that position at the leave's conclusion, at the same level of pay and benefits as the employee's original position.[113]

3. **Reinstatement to a vacant lesser position.** The employer's third reinstatement option, after an employee's leave of absence, is to assign the employee to a vacant lower-level position. In this event the employer does not have to match the pay and benefits of the employee's original position. The employer must first show that returning the employee to the original position, or placement in an equivalent vacant position, would constitute an undue hardship.

4. **No reinstatement.** If there is no vacant lesser position in which the employee could be placed without undue hardship, the employer does not have to reinstate the employee.[114] However, the employer will bear a heavy burden to show that none of the foregoing reinstatement options were possible without causing an undue hardship.

Employers must maintain employee benefits consistent with other leave policies

If an employer grants any type of leave (*e.g.,* continuous, intermittent, modified, or reduced schedule) as a reasonable accommodation to an employee with a disability, the employer must continue the employee's health insurance coverage during the leave in the same manner and to the same extent, if any, that the employer provides coverage for other employees in the same leave or part-time status. The coverage must be on the same terms normally provided to employees in the same leave status.[115]

APPLICATION OF SIMULTANEOUS ADA ACCOMMODATION LEAVE AND FMLA LEAVE

In many cases a leave of absence as an ADA accommodation will also qualify for FMLA leave, or leave provided by a state law. In such a case the employee has a right to take a leave of absence for the period provided by the law (*e.g.,* up to 12 workweeks in a 12-month period under the FMLA), even if a different accommodation would enable the employee to continue working.[116] The leave time may be counted simultaneously toward the employee's FMLA or state leave entitlement, and toward providing the employee with leave of absence as a reasonable accommodation.[117]

If an employee's leave request is covered by both the FMLA or a state leave law and the ADA, the employer must analyze the employee's rights separately under each statute and provide the employee with the rights under each act. If the two acts conflict, the employee is entitled to the benefits of whichever law provides the employee with the greater rights or protections.

Below is a chart comparing the key provisions of the FMLA and leave of absence as an accommodation under the ADA. The EEOC provides additional guidance on the interaction of the two laws and how to manage them together.[118]

FMLA Leave vs. ADA Accommodation Leave

ISSUE	*FMLA*	*ADA*
Covered employers	▪ 50 or more employees w/in 75 miles	▪ 15 or more employees ***Note:*** Because of this lower employee threshold, more employers are covered by the ADA than by the FMLA.
Eligible employees – service requirements	▪ 12 months (nonconsecutive) ▪ 1,250 hours in last 12 months ▪ [Also, work at a site w/ 50 employees w/in 75 miles]	▪ No length/hours of service requirements; employee coverage from day 1 ▪ No worksite size requirement
Covered reasons	▪ Employee SHC ▪ Family SHC ▪ Bonding (Parental leave) ▪ Military exigencies ▪ Injured service member	▪ Employee's own disability (physical or mental impairment that substantially limits one or more major life activities)
Employer's leave obligation	▪ Eligible employee's right to leave of absence for a covered reason is nearly unqualified	▪ Leave is a reasonable accommodation in general; employer must show that it would impose undue hardship in particular case

Benefits	▪ Continued health care coverage on same terms as pre-leave	▪ Employer must provide benefits during ADA leave on same conditions as provided to employees on other leaves
Duration	▪ 12 weeks maximum per leave year for employee's own serious health condition ***Note:*** FMLA leave may be followed by other leave rights, such as state or company leaves or an ADA accommodation leave	▪ Not specified, but not indefinite or open-ended. "Reasonable" accommodation could last a long time (intermittent or reduced schedule might be indefinite if not an undue hardship)
Job protection	▪ Right to restoration to the same or equivalent position	Unless employer shows undue hardship: ▪ Restoration to same position required ▪ 2nd option = placement in vacant equivalent position ▪ 3rd option = placement in vacant lower position ▪ More options for transfer or termination than under FMLA

EMPLOYERS: TAKE ACTION TO BE PREPARED FOR ADA LEAVE OF ABSENCE REQUESTS

Employers' failure to accommodate disabled employees through leaves of absence is clearly a focus of EEOC enforcement activities. Employers must understand all of their legal obligations prior to discharging or disciplining an employee who has requested a leave or is on leave due to a medical condition.

The EEOC lawsuits we've witnessed since 2009 have been based on systemic failures, such as internal processes that are too rigid and inflexible. Employers have the responsibility to be proactive and institute the tools and processes that will enable them to make appropriate judgments when faced with leave requests from disabled employees. Taking these steps will help protect employers from lawsuits by the EEOC – in addition to providing employees optimal rights and benefits.

So – how does an employer move toward a best practice application of ADA leave management? The employer must lay the groundwork before an employee ever requests an accommodation. Well-designed policies, processes, training, checklists, and forms will enable an employer to maneuver the request for leave as an accommodation with minimal apprehension, workplace disruption, and risk. Here are immediate action items for employers:

1. **Review your company policies:** Having the correct policies in place enables the employer to use the policies as tools to minimize the impact of employee absences. In addition, promulgating and informing employees about appropriate policies helps the employer in defense of an ADA claim.

    a. **Review and update policies on leave, absences, and no-fault attendance:**

    - Reconsider any policies with provisions for automatic termination at the end of any kind of leave for medical reasons. One court has suggested that an inflexible leave policy can serve to protect rather than threaten the rights of the disabled. But even that court agrees that such policies are not free from scrutiny, particularly if the policy doesn't offer enough time off or is applied unfairly.[119] Until more courts or the EEOC further address leave as an accommodation, providing a fair review process for consideration of extended leave as an ADA accommodation remains wise;
    - Specify employee reporting procedures and deadlines for foreseeable and unforeseeable leave of all types;
    - Require periodic status reports from all employees on leave[120]; and
    - Design policies that will consider individual circumstances and/or allow for fairly applied exceptions. For example, in describing the limits of a company

personal leave, specify that exceptions may be made in appropriate circumstances as an accommodation for an individual with a disability.

b. Implement an ADA policy and notify employees:

- State that the company will provide reasonable accommodations for disabilities; and
- Urge employees to identify accommodation or workplace needs before performance or attendance issues occur.
- Update notification letters, including those regarding FMLA, disability, or workers' compensation leave or benefits, to direct the employee to request additional unpaid leave as an accommodation as soon as possible after the need for additional leave is known. [121]

2. Review and update job descriptions – make them accurate and realistic:

a. Identify the essential functions – the most important job duties, the critical elements that must be performed to achieve the objectives of the job:[122]

- Include attendance, punctuality, reliability, etc., as essential functions if the other essential functions must be performed at a specific time and/or place, or cannot be performed remotely or on a sporadic basis, etc.

b. Identify the job qualifications – the requisite skill, experience, education and other job-related requirements for the position. Also known as "qualification standards," these must be job related and consistent with business necessity,[123] and may include the following:

- Specific training;
- Specific licenses or certificates;
- Certain physical or mental abilities (*e.g.*, meeting vision, hearing or lifting requirements; showing an ability to run or climb; exercising good judgment);
- Ability to meet health or safety requirements; and
- Certain attributes such as the ability to work with other people or to work under pressure.[124]

c. Identify the performance/production standards – the quantity and quality of work that must be produced and the timetables for producing it[125] – especially relating to essential functions.

3. **Designate a company representative (and a backup) responsible for compliance with the ADA, FMLA, and other leave laws:**

    a. Don't skimp – arm the company expert with ongoing training, updates and outside resources.

    b. Promote and publicize the company's focus on compliance and employee assistance.

    c. Make the designated representative(s) known throughout the company – but also give alternative avenues for complaints or requesting an accommodation.

    d. Consider investing in professional resources, software or outsourcing to ensure compliance and an optimal employee experience.

4. **Train supervisors and vendors:**

    a. Arm supervisors with the basics of leave of absence laws.

    b. Highlight the confidentiality issues inherent in medical and disability leaves.

    c. Make the supervisors issue-spotters – not experts. Help them to understand their role.

    d. Provide contacts for reporting concerns, leave requests, and other information.

    e. Ensure vendors who administer other programs, such as disability or workers' compensation, are instructed to promptly forward to the appropriate human resources or leave vendor all requests for additional leave beyond the maximum period granted under the program.[126]

5. **Implement guidelines for a flexible interactive accommodation process that still provides checkpoints and safety nets:**

    a. The ADA requires an employer to engage in an interactive process with a disabled employee to find a reasonable workplace accommodation that enables the employee to perform the essential functions of his position.[127] See "What Steps Must the Employer Take After Receiving an Employee Request for Leave as an Accommodation? The Interactive Process Explained," above, and sample checklist called: *ADA Accommodation Guide to the Interactive Process.*

    b. Employers must remember three key points in designing and implementing the interactive process:

        - It's INTERACTIVE – the employer must communicate with employee, and vice versa. No particular mode of communication is required, but in-person discussions are often the most effective and efficient.

- It's an ONGOING PROCESS – not a one-time event. Monitoring the effectiveness of the accommodation is critical immediately after implementation and periodically thereafter. The employer's obligation to interact with the employee continues if the original accommodation is not effective, or if the employee's/employer's circumstances change.

- It's INDIVIDUALIZED for each employee. Consider the employee's position, impairment, limitations, etc. – there is no "one size fits all."[128]

6. Develop forms to document the ADA process with each employee:

a. Develop a form for an employee to use in requesting an accommodation – but remember that a verbal request for an accommodation, without the use of any specific words, is enough to initiate the employer's ADA interactive process obligations. See attached sample *Employee Accommodation Request Form*.

b. Develop and use a checklist for the ADA accommodation process, including all communications with the employee, medical providers, and others; all accommodations considered; reasons for denying any requested accommodation, etc. See attached sample checklist called: *ADA Accommodation Guide to the Interactive Process.*

c. Develop an accommodation assessment form for completion by the employee's health care provider. This should allow for flexibility in designating the information needed from the provider for the specific employee, his disability limitations, and his position. Make sure that the form carries a warning not to provide genetic information, in compliance with the Genetic Information Nondiscrimination Act. See attached sample *ADA Accommodation Assessment Form.*

CONCLUSION

Assessing and providing leave of absence as an ADA accommodation is a complex employer obligation. It has been made riskier by the disagreement between the EEOC, which targets automatic termination practices and inflexible leave policies, and courts, which could find such policies fair. In this paper we have synthesized guidance from the EEOC and case law, and added best practices to provide employers with a manageable process for handling ADA leave requests. Employers must now proactively institute policies and procedures so that they are prepared when an ADA leave request is made.

Biographies

Megan Holstein, Esq.

Megan Holstein, Esq., is Vice President of Compliance at ReedGroup. Ms. Holstein provides leadership, product creation, and effective guidance to ensure ReedGroup's software and service products are best in class and compliant with governing law. Specifically, Ms. Holstein's work focuses on, and she has developed an expertise in, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and their state law equivalents, as well as disability and family leave benefits, including ERISA as it pertains to short- and long-term disability plans.

Ms. Holstein is the product owner for ReedGroup's ADA and Workplace Accommodation product offering. She co-authored ReedGroup's LeaveAdvisor online reference tool and ReedGroup's whitepapers regarding leave as an accommodation under the ADA, absences and accommodations for pregnant employees, and paid sick leave laws.

Ms. Holstein's experience in employment law and leave of absence compliance includes in-house counsel with two publicly traded companies, and her own consulting and law firm where she provided legal counsel regarding all employment matters, conducted compliance audits, training, and workplace investigations. Prior to her in-house counsel position and consulting firm, Ms. Holstein was in private practice where she represented clients in state and federal courts and agency proceedings in all areas of employment law.

Ms. Holstein received her Juris Doctor degree from the University of Colorado School of Law and her Bachelor of Arts in Sociology from the University of Illinois at Chicago, where she graduated with highest honors and received Phi Beta Kappa.

Ms. Holstein is admitted to practice in Colorado and New York. She volunteers her time at Peak to Peak Charter School, a nationally ranked top-100 school, where she has served as a board member and board president, as well as a member of the following committees: curriculum, accountability, and hiring and organizational development. Ms. Holstein is a former planning commissioner for the Town of Erie, Colorado.

Lori Welty, Esq.

Lori Welty is a Compliance Attorney with ReedGroup where she focuses on state, federal, and local leave law compliance. She has authored and co-authored numerous leave of absence and employment law blog articles and whitepapers, including the recent "The Baby Bump – Navigating the Rocky Road of Absences and Accommodations with Pregnant Employees" whitepaper. Prior to working for Reed Group, Ms. Welty worked as an attorney for a national furniture retailer in the areas of employment and real estate law, and as an employment and general business litigator for a large Denver law firm. She graduated from the University of Colorado School of Law as an Order of the Coif candidate, and received her undergraduate degree from Johns Hopkins University, where she was inducted into the Golden Key National Honor Society. Ms. Welty is licensed to practice law in Colorado.

About ReedGroup

With 30 years of experience serving Fortune 100 companies in their leave of absence needs, ReedGroup offers products and services to help employers with absence management. ReedGroup provides organizations the most up to date, accurate knowledge and tools to help them mitigate risk, avoid EEOC and court scrutiny, and improve their absence management capabilities and outcomes.

ReedGroup is the recognized leader in helping organizations reduce the cost, compliance risk, and complexity of employee absence. Our products and services address FMLA, ADA, state and other leave laws, workers' compensation, and short- and long-term disability programs. Headquartered in Westminster, Colorado, ReedGroup has been a trusted partner to employers, insurers, TPAs, government organizations, attorneys, and health care providers for over 35 years. ReedGroup's world-class team of clinical and absence management experts help organizations deploy ReedGroup products and services to improve employee health and productivity. For more information, visit www.reedgroup.com or call 866-218-4650.

RESOURCES

Disability Management Employer Coalition (DMEC) http://www.dmec.org/.

EEOC Internal Document, *Procedures for Providing Reasonable Accommodation for Individuals with Disabilities,* Sec. II.D.; *http://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm.*

EEOC presentation, *"Let's Talk ADA",* Miami, September 20, 2012.

EEOC public meeting, leave of absence as an ADA accommodation, June 8, 2011; http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, U.S. Equal Employment Opportunity Commission (October 17, 2002); http://www.eeoc.gov/policy/docs/accommodation.html**.**

Job Accommodation Network (JAN): http://askjan.org/index.html.

Society for Human Resource Management (SHRM): http://www.shrm.org.

The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities; http://eeoc.gov/facts/performance-conduct.html#issues.

The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 Fact Sheet, Equal Employment Opportunity Commission; http://www.eeoc.gov/policy/docs/fmlaada.html.

[1] *Enforcement Guidance: Employer-Provided Leave and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission (May 9 2016), https://www.eeoc.gov/eeoc/publications/ada-leave.cfm [herinafter EEOC Leave Guidance].

2 *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* U.S. Equal Employment Opportunity Commission (October 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter *EEOC Guidance*].
3 A video of the meeting, transcripts of the meeting and testimony, and other materials are available at http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm.
4 Commissioner Feldblum stated informally that the Commission was split 3-2 in favor of releasing the proposed guidance but felt that, because of the significance of the topic, stronger Commission support was called for**.** "Breakfast with EEOC Commissioner Chai Feldblum," University of Denver Sturm College of Law, August 28, 2012. Since that time one commissioner has resigned so the commission is now composed of only four commissioners, split 2-2 on the issue. A fifth commissioner will be appointed at some time.
5 EEOC presentation, *"Let's Talk ADA",* Miami, September 20, 2012.
6 Statement of Linda Carter Batiste, Principal Consultant, Job Accommodation Network, November 8, 2012.
7 EEOC Leave Guidance, *supra* note 1 at pages 1 and 5.
8 EEOC Leave Guidance, *supra* note 1 at Example 13.
9 EEOC Leave Guidance, *supra* note 1 at Example 14.
10 EEOC Leave Guidance, *supra* note 1 at Example 11.
11 EEOC Leave Guidance, *supra* note 1 at Example 12.
12 *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Circ. 2014).
13 *EEOC v. C.R. England, Inc.,* 644 F.3d 1028, 1049, (10th Cir. 2011); Jones v. UPS, Inc., 502 F.3d 1176, 1194 (10th Cir. 2007); EEOC Guidance, *supra* note 2*,* at Question 1.
14 EEOC Guidance, *supra* note 2*,* at Questions 2, 3; *Yarberry v. Gregg Appliances, Inc.*, 625 F. App'x 729, 738 (6th Cir. 2015) (employer was aware off employee's sudden disabling onset and commitment to mental health facility)**.**
15 EEOC Guidance, *supra* note 2*,* at Question 40.
16 EEOC Leave Guidance, *supra* note 1 at page 3.
17 EEOC Leave Guidance, *supra* note 1 at page 1.
18 EEOC Leave Guidance, *supra* note 1 at Example 1.
19 EEOC Leave Guidance, *supra* note 1 at Example 2.
20 42 U.S.C. § 12112(b)(5)(A). The duty to accommodate applies to employees with an actual physical or mental impairment and those with a record of an impairment. It does not apply to employees who are regarded as having an impairment. 29 C.F.R. § 1630.2(o)(4).
21 *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 313 (3rd Cir. 1999); EEOC Guidance, *supra* note 2*,* at Question 1.
22 *Roberts v. Bd. Of County Comm'rs*, 691 F.3d 1211, 1218 (10th Cir. 2012); EEOC Leave Guidance, *supra* note 1 at page 3.
23 *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000)(overruled on other grounds by *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001); *Taylor v. Pepsi-Cola Co*., 196 F.3d 1106, 1110 (10th Cir. 1999); EEOC Leave Guidance, *supra* note 1 at page 3.
24 29 C.F.R. § 1630.9(d); EEOC Guidance, *supra* note 2*,* at Question 11.
25 29 C.F.R. part 1630 app. § 1630.9.
26 EEOC Guidance, *supra* note 2*,* at Question 44; EEOC presentation, *"Let's Talk ADA",* Miami, September 20, 2012.
27 *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1137-1138 (9th Cir. 2001).
28 *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1138-1139 (9th Cir. 2001).
29 *Clayborne v. Potter*, 448 F.Supp.2d 185, 193 (D.C. Dist. 2006).
30 Interview with Linda Carter Batiste, J.D., Principal Consultant, Job Accommodation Network; November 5, 2012.
31 *The Interactive Process,* Job Accommodation Network; http://askjan.org/media/eaps/interactiveprocessEAP.doc (last checked 11/16/2012); EEOC Guidance, *supra* note 1*,* at Questions 5-10**;** 29 C.F.R. part 1630 app. § 1630.9; EEOC Internal Document, *Procedures for Providing Reasonable Accommodation for Individuals with Disabilities,* Sec. II.D.; *http://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm* (last checked 11/16/2012).
32 www.askjan.org.
33 29 C.F.R. § 1630, Appendix 1630(2)(o); EEOC Leave Guidance, *supra* note 1 at page 2.
34 *Criado v. IBM Corporation*, 145 F.3d 437, 443-444 (1st Cir. 1998); EEOC Guidance, *supra* note 1*,* at "Reasonable Accommodation" Section.
35 EEOC Guidance, *supra* note 2*,* at "Leave" Section Preceding Question 17*; Peebles v. Potter*, 354 F.3d 761**,** 771 (8th Cir. 2004)(Bye, concurring);29 C.F.R. § 1630.9(a).
36 *Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995); Brannon v. Luco Mop Company*, 521 F.3d 843, 849 (8th Cir. 2008).
37 29 CFR § 1630.2(o)(2)(ii)(2012); EEOC Guidance, *supra* note 2*,* at "Leave" Section Preceding Question 17.
38 *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1136 (9th Cir. 2001).
39 *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Circ. 2014).
40 EEOC Guidance, *supra* note 2*,* at Question 9.
41 *Corder v. Lucent Technologies, Inc.*, 162 F.3d 924, 928 (7th Cir. 1998).
42 EEOC Guidance, *supra* note 2*,* at Question 20.
43 *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil rights Act of 1964 Fact Sheet*, Question 18, Equal Employment Opportunity Commission, http://www.eeoc.gov/policy/docs/fmlaada.html, (last modified July 6, 2000) [hereinafter *EEOC FMLA, ADA, and Title VII*].
44 *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1137-1139 (9th Cir. 2001); *Vande Zande v. State of Wisconsin Dept. of Administration*, 44 F.3d 538, 544-545 (7th Cir. 1995).

45 *Terrell v. USAir*, 132 F.3d 621, 626-627 (11th Cir. 1998).
46 EEOC Guidance, *supra* note 1, at Questions 22-23; *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, U.S. Equal Employment Opportunity Commission, Question 19, http://www.eeoc.gov/facts/performance-conduct.html, (last modified 1/20/2011) [hereinafter *EEOC ADA Performance Standards*].
47 EEOC Guidance, *supra* note 2, at Questions 22-23.
48 *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1366-1367 (11th Cir. 2000); *Hatchett v. Philander Smith Coll.,* 251 F.3d 670, 675 (8th Cir.2001).
49 EEOC Leave Guidance, *supra* note 1 at page 6.
50 EEOC Guidance, *supra* note 2, at "Reassignment" Section.
51 EEOC Leave Guidance, *supra* note 1 at Example 16.
52 *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402; 122 S.Ct. 1516 (2002); EEOC Guidance, *supra* note 2, at "General Principles; Reasonable Accommodation" Section.
53 29 CFR § 1630.2(o)(ii); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402; 122 S.Ct. 1516 (2002).
54 *See Haschmann v. Time Warner Entertainment Company, L.P.*, 151 F.3d 591, 601-603 (7th Cir. 1998)(discussion by the court that because employer could not show the leave request was an undue hardship, the plaintiff's leave was therefore reasonable); *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233, 1238 (9th Cir. 2012) (Court's discussion whether a NICU nurse's physical attendance at work and the hospital's needs to populate its difficult-to-staff unit revolved around whether the leave was reasonable rather than whether the hospital experienced an undue hardship in granting the leave).
55 29 C.F.R. part 1630 app. § 1630.2(o); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782 (6th Cir. 1998); EEOC Guidance, *supra* note 2, at "Leave" Section preceding Question 17.
56 Dunn v. Chattanooga Pub. Co., 993 F. Supp. 2d 830, 844 (E.D. Tenn. 2014); *Roberts v. Bd. Of County Comm'rs*, 691 F.3d 1211, 1218 (10th Cir. 2012); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996); *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000)(overruled on other grounds by *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001); *Brannon v. Luco Mop Company*, 521 F.3d 843, 849 (8th Cir. 2008).
57 EEOC Leave Guidance, *supra* note 1 at page 1.
58 *Cehrs v. Northeast Ohio Alzheimer's*, 155 F.3d 775, 782-783 (6th Cir. 1998); EEOC Leave Guidance, supra note 1 at pages 1-2; EEOC Guidance, *supra* note 2, at "Leave" Section Preceding Question 17.
59 EEOC Guidance, *supra* note 2, at "Leave" Section.
60 *Hwang v. Kansas State University*, 2014 WL 2212071, *4 (10th Circ. 2014).
61 *Haschmann v. Time Warner Entertainment Company, L.P.*, 151 F.3d 591, 601 (7th Cir. 1998).
62 29 C.F.R. § 1630.4(a)(v); *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006).
63 *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996).
64 *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 338 (2nd Cir. 2000).
65 *Criado v. IBM Corporation*, 145 F.3d 437, 444 (1st Cir. 1998).
66 *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998)(overruled on other grounds by *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808 (2001).
67 *Dunn v. Chattanooga Pub. Co.*, *supra* note 56.
68 The following cases and summaries are cited by the EEOC in *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities,* fn. 73, http://eeoc.gov/facts/performance-conduct.html#issues (last modified January 20, 2011): *Brenneman v. MedCentral Health Sys.,* 366 F.3d 412, 420 (6th Cir. 2004), cert. denied, 543 U.S. 1146 (2005) (pharmacist with diabetes absent at least 109 times over a 5-year period was unqualified because of excessive absenteeism); *Conneen v. MBNA Am. Bank N.A.,* 334 F.3d 318, 331-33 at note 49 (3d Cir. 2003) (termination for excessive tardiness lawful where employee, who once was given a modified schedule as a reasonable accommodation, failed to request resumption of this accommodation when she again began arriving late due to morning sedation and instead gave her employer reasons unrelated to her disability for the late arrival); *Amadio v. Ford Motor Co.,* 238 F.3d 919, 928 (7th Cir. 2001) (employer is not required to give an open-ended schedule to allow an employee to come and go as he pleases); *Buckles v. First Data Resources, Inc.,* 176 F.3d 1098, 1101 (8th Cir. 1999) (employee with numerous absences unable to meet essential function of regular and reliable attendance); *Carr v. Reno,* 23 F.3d 525, 530 (D.C. Cir. 1994) (an employee is not qualified if he has prolonged, frequent, and unpredictable absences); *Quinn v. Veneman*, EEOC Appeal No. 01A34982 (December 21, 2004) (termination of employee with depression for repeated unexcused late arrivals was lawful where employee failed to provide medical documentation justifying any change in attendance requirements, and evidence showed supervisor met with employee at least 20 times over a two-year period to discuss attendance problems); *Lopez v. Potter,* EEOC Appeal No. 01996955 (January 16, 2002) (employer did not have to excuse employee's persistent tardiness due to alcoholism and thus its use of progressive discipline, culminating in termination, was lawful).
69 *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Circ. 2014).
70 *Walsh v. UPS*, 201 F.3d 718, 727 (6th Cir. 2000).
71 *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 -1226 (11th Cir. 1997).
72 *EEOC v. Yellow Freight System*, 253 F.3d 943, 950-951 (7th Cir. 2001).
73 *Tyndall v. National Education Centers Incorporated of California*, 31 F.3d 209, 214 (4th Cir. 1994); *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003).
74 *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 481 (5th Cir. 2000).
75 *Frazier-White v. Gee*, 818 F.3d 1249 (11th Cir. 2016)
76 29 CFR § 1630.2(o)(2)(ii)(2012). *See, US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402; 122 S.Ct. 1516, 1523 (2002).
77 EEOC Guidance, *supra* note 2, at "Reasonable Accommodation" Section.

78 *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003); *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1136 (9th Cir. 2001); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647-648 (1st Cir. 2000); *Nunes v. Wal-Mart Stores, Inc*., 164 F.3d 1243, 1247 (9th Cir. 1999).
79 29 C.F.R. § 1630.15(d).
80 42 U.S.C. § 12112 (b)(5)(A); EEOC Guidance, *supra* note 2*,* at fn 16.
81 42 U.S.C. § 12111 (10); 29 C.F.R. § 1630.2(p)(1) and (2).
82 EEOC Guidance, *supra* note 2*,* at "Undue Hardship Issues" Section.
83 EEOC Guidance, *supra* note 2*,* at "Undue Hardship Issues" Section; 29 C.F.R. part 1630 app. § 1630.15(d).
84 *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-650 (1st Cir. 2000); *Lafever v. Acosta, Inc*., 2011 WL 1935888, *3-4 (N.D. Ca. 2011); *The Americans with Disabilities Act: A Primer for Small Business*, "Types of Reasonable Accommodations" Section, U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/publications/adahandbook.cfm (last checked 11/16/2012).
85 29 C.F.R. part 1630 app. § 1630.2(p); EEOC Guidance, *supra* note 2*,* at "Undue Hardship Issues" section.
86 EEOC ADA Performance Standards, *supra* note 34, at Question 20; *EEOC v. Yellow Freight System*, 253 F.3d 943, 950-951 (7th Cir. 2001); *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 471 (8th Cir. 2008).
87 EEOC Guidance, *supra* note 2*,* at Question 20.
88 *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233, 1238 (9th Cir. 2012); *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009); *Rask v. Fresenius Medical Care North America*, 509 F.3d 466, 471 (8th Cir. 2008); *Amadio v. Ford Motor Company*, 238 F.3d 919, 928 (7th Cir. 2001); *Waggoner v. Olin Corporation*, 169 F.3d 481, 485 (7th Cir. 1999).
89 *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995).
90 *See, e.g.,* 29 C.F.R. § 1630.2(p)(2); EEOC Leave Guidance, supra note 1 at page 6.
91 *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-650 (1st Cir. 2000).
92 29 C.F.R. part 1630 app. § 1630.15(d); EEOC Guidance, *supra* note 2*,* at Undue Hardship Issues Section.
93 *Peyton v. Fred's Stores of Arkansas*, 561 F.3d 900, 903 (8th Cir. 2009); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996).
94 *Austin v. Better Bus. Bureau of Middle Tenn, Inc.* 2011 WL 1042245, *4 (M.D. Tenn. 2011); *Mallon v. US Physical Therapy* Ltd., 395 F.Supp.2d 810, 820 (D. Minn. 2005).
95 *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002) (reassigning an absent employee's duties to coworkers resulted in the coworkers being unable to perform their own duties).
96 EEOC Leave Guidance, *supra* note 1 at page 6.
97 EEOC Leave Guidance, *supra* note 1 at Example 17.
98 EEOC Leave Guidance, *supra* note 1 at Example 18.
99 EEOC Leave Guidance, *supra* note 1 at Example 19.
100 *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Circ. 2014).
101 EEOC Guidance, *supra* note 2*,* at Question 76; *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act,* Question 7, U.S. Equal Employment Opportunity Commission (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html [hereinafter *EEOC ADA Medical Examinations*].
102 29 C.F.R. § 1630.14(c); EEOC ADA Medical Examinations**,** *supra* note 77, at Question 17.
103 EEOC Leave Guidance, *supra* note 1 at page 3.
104 EEOC Leave Guidance, *supra* note 1 at page 2.
105 EEOC Leave Guidance, *supra* note 1 at Example 3.
106 EEOC Leave Guidance, *supra* note 1 at page 3.
107 EEOC Leave Guidance, *supra* note 1 at Example 9.
108 EEOC Guidance, *supra* note 2*,* at Question 7.
109 EEOC Guidance, *supra* note 2*,* at Question 6; EEOC ADA Medical Examinations*, supra* note 77, at Section A.7 of "JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY" section.
110 *EEOC ADA Medical Examinations, supra* note 77, at Question 5.
111 EEOC Guidance, *supra* note 2*,* at Question 21, Ex.B.
112 29 C.F.R. part 1630 app. § 1630.2(o); EEOC Guidance, *supra* note 2*,* at Question 21, Ex.B; EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 14.
113 29 C.F.R. part 1630 app. § 1630.2(o); EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 14.
114 EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 14.
115 EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 15.
116 29 U.S.C. § 2612(a); EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 18.
117 EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 16.
118 EEOC FMLA, ADA, and Title VII, *supra* note 31, at Question 14.
119 *Hwang v. Kansas State University*, 2014 WL 2212071 *4 (10t Circ. 2014)
120 EEOC Guidance, *supra* note 2.
121 EEOC Leave Guidance, *supra* note 1 at page 4.
122 EEOC ADA Performance Standards, *supra* note 34, at Sec. II.
123 42 U.S.C. §§ 12112(b)(6), 12113(a) (2000); 29 C.F.R. §§ 1630.10 and 1630.15(b)(1).
124 EEOC ADA Performance Standards, *supra* note 34, at Sec. II.

125 EEOC ADA Performance Standards, *supra* note 34, at Sec. II.
126 EEOC Leave Guidance, *supra* note 1 at page 4.
127 EEOC Guidance, *supra* note 2, at "Requesting a Reasonable Accommodation" Section.
128 *Humphrey v. Memorial Hospitals Assoc.,* 239 F.3d 1128, 1137-1138 (9th Cir. 2001).