ADA
Leave as an Accommodation

Welcome! We will get started shortly.
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## Today’s Presenters

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Session Basics – Phone Lines

Participant phone lines have been muted
Session basics – asking questions

Ask questions and get answers from panelists.
The Americans with Disabilities Act: Analyzing Leaves of Absence as an Accommodation

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Factors Making Leaves Challenging

- Sometimes it is already certified and approved but sometimes it is a new leave
- Foreseeable or unforeseeable
- Difficult to verify how much notice employee had of need for leave
- Self-treating or treatment required
- Consistent or inconsistent with need stated in previously approved certification
- Sometimes covered by FMLA, ADA, or both
The ADA prohibits discrimination against a “qualified individual with a disability.”

This is defined as one who can perform the essential functions of the job, either with or without a reasonable accommodation.

The prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the accommodation would impose an undue hardship on the employer.
An “undue hardship” is “an action requiring significant difficulty or expense,” when considering various factors, such as the nature and cost of the accommodation, the employer’s financial resources, the size of its workforce, and the impact of the accommodation on its operations.

The ADA’s examples of reasonable accommodations do not include any reference to leave.
Under the ADA, leave, flexible or even part-time work schedules may be required as a reasonable accommodation if they do not pose an undue hardship.

The key to almost all ADA reasonable accommodation cases is an effective “interactive process” to explore potential accommodations.

The ADA Amendments Act (ADAAA) dramatically expands the ADA’s definition of “disability” and many temporarily disabling conditions causing attendance policies will now trigger reasonable accommodation obligations.
Blocks of leave with days/weeks of absence at a time or can be taken intermittently in days, hourly increments or even fractions of hours.

Intermittent leave must be medically necessary.

Initial medical certifications should support the medical necessity of intermittent FMLA leave.

Even if intermittent leave is medically necessary, it also is appropriate and lawful to verify that the anticipated frequency and duration of the episodes of incapacity also are medically necessary.

This requires much closer review of intermittent leave requests and comparison of previously approved medical certifications.

No “undue burden” exception
A right to **UNPAID** job-protected leave
- If entitlement exists under the FMLA
- If reasonable and not an undue hardship under the ADA

A right to be free from retaliation or discrimination for exercising rights to leave (FMLA) or reasonable accommodation (ADA)

A right to continued group health benefits (FMLA but not ADA)
State Workers’ Compensation (partial pay)
State Disability and/or sick pay laws (partial pay)
Voluntary company policies and benefits
  - Vacation, sick time, personal time, PTO, bereavement leave
  - Short-term disability or salary continuation programs
  - Long-term disability

Paid/Unpaid Leave Intersection: Substitution of paid time for unpaid FMLA and ADA leave
Many employers grant employees a defined amount of leave, usually measured in weeks or months.

Once an employee’s available leave is exhausted, the employer will terminate the employee’s employment.

The Equal Employment Opportunity Commission has challenged employers with so-called inflexible leave policies, arguing that an employee who needs more leave than allowed may nonetheless be a “qualified individual with a disability” under the ADA, entitled to additional leave time as an accommodation.
EEOC has warned employers:

"The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA [is] over . . . . Inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. [The] consent decree is a bright line marker of that reality."
Any “leave limits” analysis must begin with the fact that federal and state family and medical leave laws entitle eligible employees to a specific, minimum amount of leave.

Comparing ADA and the federal Family and Medical Leave Act, the EEOC stated that an “otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship” on the employer.

This establishes the EEOC views leave under the FMLA as the minimum or floor, but gives no guidance as to the ceiling.
In its 2002 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, the EEOC stated that unpaid leave is a form of reasonable accommodation.

May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period? No.
The EEOC reiterated this in its 2008 guidance *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* ("2008 Guidance").

If an employee with a disability needs leave beyond that provided for under an employer’s benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship; and If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship.
The 2008 Guidance provides one clear “leave limit.”

Employers “have no obligation to provide leave of indefinite duration,.....”
The scope of the employer’s reasonable accommodation obligation with regard to leave limits has been left to the courts.

What are the standards for determining whether to grant leave as a reasonable accommodation under the ADA?
Courts have approached the issue (whether explicitly or implicitly) from two perspectives.

First: whether the leave would fulfill its medical purpose, i.e., whether the leave would be “instrumental to effect or advance a change in the employee’s disabled status with respect to the job, so that the employee is enabled to do it.”

Second: whether the leave would satisfy the statutory purpose, i.e., whether the employee’s return to work and ability to perform the essential functions of the position is “relatively proximate in a temporal sense.”
No court has held that an employer need not provide any leave as a reasonable accommodation under the ADA. It appears at least some leave is required, though indefinite leave is not.
Courts evaluate the medical prognostications of the employee’s health care provider.

What is the likelihood that the leave will enable the employee to perform the essential functions of the position upon return to work?

“Simply the possibility of improvement is not enough...; recovery must be reasonably likely,”
Courts consider both the medical affirmations as well as the absence of such information to determine whether the employee would be “qualified” at the end of the leave. For example, courts have held that a request for leave was not a request for a reasonable accommodation because:
For example, courts have held that a request for leave was not reasonable because:

“nothing ... suggests that the future would look different from the past”;

“the plaintiff failed to demonstrate that... additional time off to recuperate would have enabled her to have consistent attendance at work”;

there were no “clear prospects for recovery”;

the “record does not establish that the plaintiff would have succeeded in returning to work after an additional month’s leave”; and

plaintiff did not follow the medical regimen prescribed by her doctors, which would permit her to return to work.
An employee needing leave cannot now do the essential functions of a job.

Courts have asked whether leave would enable an employee to perform the essential functions of the position in “the near future,” “presently or in the near future,” “presently or in the immediate future,” or in the “identifiable future.”
Where an employer’s leave policy provides more leave than the employee is requesting, some courts have held that the employer must provide at least as long as a leave as its policy allows.
Courts have also considered whether the employer has hired a temporary employee to replace the employee on leave. In rejecting an employer’s undue hardship argument, a court noted that the employer was not pressured to replace the plaintiff because it had hired a temporary employee for the position.
ADA ensures an accessible workplace and reasonable accommodations for an individual with a disability seeking to participate in the workforce on the same basis as other employees.

Does the law give an individual with a disability the right to a job that he or she does not have to come to regularly?

Does the ADA protect an individual who violates his or her employer’s attendance policy or is absent excessively when those absences are related to the disability?
The extent of an employer’s obligation to accommodate periodic absences has also been left to the courts.

The typical pattern in cases addressing this issue is: (1) the plaintiff has been terminated for excessive absenteeism; and (2) he or she claims the absences were due to a disability and the employer failed to reasonably accommodate that disability by not excusing the absences.

Attendance as an essential job function: Courts generally find that it is.
Working from Home: Some courts have indicated that particular jobs may not necessarily require attendance.

For some jobs, an employee can effectively perform all work related duties at home, suggesting that working from home might be an appropriate accommodation in certain cases.
Where plaintiff with visual disturbances “simply wanted to miss work whenever she felt she needed to and apparently for so long as she felt she needed to,” the Seventh Circuit held that this request was not reasonable.

Where plaintiff had asthma and Barrett’s syndrome, the court noted that “the only imaginable accommodation would be an open-ended schedule that would allow *plaintiff+ to come and go as he pleased” and rejected “such a schedule as an unreasonable accommodation under the circumstances of this case.”
Where plaintiff with fibromyalgia sought a more flexible work schedule and that her attendance rate be computed without counting sick days relating to a shoulder injury, court held this is a request for permission to work only when her illness permits and undermines the policy of regular attendance that is essential to her job.

Where plaintiff could not get to work on time due to her obsessive compulsive disorder and sought to be able to clock in whenever she arrived at work, Eleventh Circuit held that such an accommodation was unreasonable.
Court rejected plaintiff’s suggestion that defendant-hospital retain and compensate extra employees on plaintiff’s scheduled work days to be available in case he fails to report to work. Court said this does not address how employer could accommodate plaintiff, was merely a way for the employer to deal with plaintiff’s absence, and removed an essential function of plaintiff’s job, *i.e.*, regular attendance.

Employer need not provide plaintiff’s suggested accommodation of being allowed to make up time missed when absent because it does not address the unpredictability of his absences and removes an essential function of his position.
Court held that employee’s request for “unfettered ability to leave work at any time” because there was possible exposure to an irritant was not reasonable, and that employer’s offer to let employee “exit the area” was an offer of a reasonable accommodation.

Court held plaintiff’s request was not for a reasonable accommodation where she asked that her predecessor in her position relieve her from time to time; that she be allowed to use vacation days as sick days as in the past; and that the employer “just accommodate her until she found the medication necessary to correct her problem.” Court held that plaintiff’s predecessor had her own work to perform and employer did not have substitutes readily available to fill in for plaintiff.
2008 EEOC Enforcement Guidance

Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee’s disability necessitates), or accept irregular, unreliable attendance.
Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice. The chronic, frequent, and unpredictable nature of such absences may put a strain on the employer’s operations for a variety of reasons, such as the following:
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;

incurring significant additional costs when other employees work overtime or when temporary workers must be hired.
EEOC Examples:

After exhausting FMLA leave, an assembly line employee with asthma needs more unforeseeable time off. The EEOC opines that due to the lack of notice of the absences, the strain they place on the assembly line, and the lack of time to obtain a replacement, accommodating the employee’s absences would be an undue hardship and “*assuming no position is available for reassignment, the employer does not have to retain the employee.”
An office worker with epilepsy, ineligible for FMLA leave, has two seizures at work within three months and, each time, takes the rest of the day off but returns the next day. The employee’s doctor predicts the employee will have approximately six seizures annually. The EEOC noted that, though unpredictable, the leave was “only one day ...every few months” and said that providing the leave as needed would not be an undue hardship.
EEOC Examples

After exhausting FMLA leave, an event coordinator requests more intermittent leave as a reasonable accommodation. The leave dates are unpredictable but are expected to last one to three days. After the employer agrees to provide the accommodation, the employee takes 14 leave days over the next two months. The employee’s doctor predicts the employee will need similar amounts of leave for at least the next six months. Because event planning requires staff to meet strict deadlines and the employee’s sudden absences create significant problems; the employer cannot plan work around the employee’s absences and makes additional leave an undue hardship.
Does an employer have to grant a reasonable accommodation to an employee with a disability who waited until after attendance problems developed to request it?

An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation. However, if the employee’s infraction does not merit termination but some lesser disciplinary action (e.g., a warning), and the employee then requests reasonable accommodation, the employer must consider the request and determine if it can provide a reasonable accommodation without causing undue hardship.
An employee with diabetes is given a written warning for excessive absenteeism, and then tells his employer that his absences were related to his diabetes, and asks that the discipline be withdrawn and he be provided leave when necessary. The employee’s doctor predicts that the employee’s diabetes will be well controlled within the one to two months and that there might still be a need for leave during this transitional period, but expects the employee would be out of work no more than three or four days. The EEOC stated that the employer does not have to withdraw the written warning, but it must grant the requested accommodation unless it would pose an undue hardship.
EEOC Example

A bank manager was given a verbal warning for arriving an hour late regularly, prompting her to ask that she be allowed to arrive at 9 a.m. instead of 8 a.m. because of the side effects of medication she takes for her disability. Arriving at 9 a.m. would not affect the ability of the manager or others to do their jobs but the bank denies the request because it would not set a good punctuality example for other employees. The EEOC opined that the denial of the bank manager’s request violated the ADA.
**ADA is Last Step:** Employers must remember that the ADA is the last piece of their leave-management analysis. Employers must confront the ADA leave question if employees have first exhausted all leave entitlements under state and federal leave laws, such as the FMLA.
**Under-employment:** Employers must be wary of claims that they may have “under-employed” individuals on leave because they have not fully explored “non-leave” accommodations that might have eliminated or reduced the need for leave. These accommodations might include restructuring job responsibilities, eliminating non-essential job functions, allowing employees to work from home while recovering from illnesses or injuries, or reassigning employees to existing, vacant positions.
Leave Tracking: The inability to track accurately the amount of leave provided under FMLA or company policies, such as short-term disability or workers’ compensation benefit programs, also may hamper an effective defense of ADA claims.
Case-by-case Basis: The EEOC clearly believes that inflexible leave “policies” are unlawful because they preclude the possibility of additional leave as a reasonable accommodation. Employers are drawn to such policies to reduce the risk of disparate treatment or retaliation and ease leave administration.
Communication: To reduce the emotion that often drives employment litigation, employers should notify employees who are out on leave, before the leave ends, whether and when they may be entitled to additional leave as a reasonable accommodation. Employers can develop template letters communicating these standards and expectations. Taking such steps also aids employers in obtaining meaningful medical information from healthcare providers that may be reticent to part with employee medical information.
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