



Interleague Play: The Interaction Between the ADA and FMLA

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The Interplay between the FMLA and ADA¹

Many medical-leave lawsuits originate from one common mistake by employers. The fact pattern is simple. An employee is out on leave due to a serious health condition. The employer grants the employee leave under the Family Medical Leave Act (“FMLA”). Twelve (12) weeks of leave come and go. When the employee fails to report back to work after the twelve week period ends the employer terminates the employee. Several months later the employer receives a Charge of Discrimination for failing to accommodate the employee’s disability under the Americans with Disabilities Act (“ADA”).

While the employer complies with its medical leave obligations under the FMLA, the employer fails to consider any potential duties under the ADA. The leave entitlement under the FMLA is straightforward: An eligible employee is entitled to up to 12 weeks of unpaid leave in any 12 month period. Leave of absence issues are more complex, however, under the ADA. If the employee suffers from a disability under the ADA, a leave of absence, perhaps in excess of 12 weeks, may be required as a reasonable accommodation.

Juries are very sympathetic to claims based on failure to provide medical leave. A California jury recently returned a \$4.5 million verdict to a plaintiff in response to her lawsuit alleging her employer rejected her request for continued leave. See, *Hill v. Asian American Drug Abuse Program, Inc.*, No. BC582516 (Cal. Sup. Ct. Jan. 19, 2018). The

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plaintiff in *Hill* took FMLA leave after breaking her arm. While out on leave, the plaintiff was diagnosed with major depressive disorder. The plaintiff requested additional leave and submitted updated medical information to her employer based on her diagnosis. Instead of granting additional leave, the employer terminated the plaintiff for failing to return to work after her FMLA leave expired. The jury found that the employer wrongfully terminated the plaintiff when it refused to grant the plaintiff additional leave as a reasonable accommodation. The jury returned a large verdict: \$4.5 million (\$1.9 million in economic and non-economic damages, \$2.6 in punitive damages). Thus, employers must take employee leave issues seriously.

Not every medical condition covered under the FMLA will be covered under the ADA. However, often an employee's medical condition will trigger duties under both laws. Before an employee returns to work from FMLA leave, employers should consider as a matter of course the interplay with the ADA and whether additional leave is appropriate. For each employee on FMLA leave, employers should assess whether they will grant additional leave once FMLA leave expires.

The Equal Employment Opportunity Commission ("EEOC") takes the position that an extended leave of absence may be a required reasonable accommodation under many circumstances, unless the employer can establish an undue hardship. The EEOC's Guidance on Reasonable Accommodation and Undue Hardship states:

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other

effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.*, if the employee can perform the essential functions of the position with or without reasonable accommodation). If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which he/she is qualified.

EEOC Guidance on Reasonable Accommodation and Undue Hardship, Question 21.

The Guidance specifically requires employers to modify their no-fault attendance policies to accommodate individuals with a disability and disapproves of any *per se* limitations on the amount of extended leave to which an employee might be entitled, even if the employee is unable to provide a fixed return date. Because leave issues under the ADA have been a consistent problem for employers, the EEOC recently issued updated guidance on the specific issue of employer-provided leave under the ADA. The EEOC's updated guidance is attached to these materials as Exhibit A.

Extended leave of absence situations should be handled on a case-by-case basis. An employer should not apply a blanket rule that employees will be terminated if unable to return to work after the expiration of the 12-week FMLA leave. Many employers have

maximum leave policies that provide employees who are on workers' compensation leave or long-term disability leave will be terminated if unable to return to work after a given time period. These policies are likely invalid and should be eliminated. Employers should request information from the employee as to when the employee will be able to return from leave and what restrictions will apply upon the return to work. The ADA requires the employer to engage in an "interactive process" with the employee to determine what accommodation is appropriate, and gathering relevant medical information is part of that process.

If the only accommodation available is an extension of the leave of absence, the employer is entitled to a clear answer from the employee or the employee's physician as to when the employee would be able to return to work, with or without a reasonable accommodation. Leave for an indefinite period of time is not reasonable. See *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994); *Rhodes v. FDIC*, 956 F. Supp. 1239 (D. Md. 1997). If an employee (or the employee's physician) is unable to indicate when, or if the employee will be able to return to work, termination may be appropriate. Under such circumstances, the employer may wish to express a willingness to rehire the employee if he or she is able to return to work in the future. If, however, the employee indicates that a return to work in the near future is likely, the employer may have an obligation to provide additional unpaid leave for a specific duration in order to accommodate the employee.

Handling complex situations under the ADA and FMLA is a difficult task. Without the proper information, however, the task becomes even more challenging. Employers must have adequate information to assess the applicable obligations under the FMLA and ADA. However, employers may not make any disability-related or medical inquiries or examinations of a current employee unless the information sought is job related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

The EEOC takes the position that a disability-related inquiry or medical examination may be “job related and consistent with business necessity” under the following circumstances:

When an employer has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Disability-related inquiries and medical examinations that follow up on a request for a reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job related and consistent with business necessity..... Sometimes this standard may be met when an employer knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act, Question 5. If an employer has reliable, objective evidence that an employee may be unable to perform the essential functions of the job or may pose a direct threat, the employer is entitled to sufficient documentation concerning:

- whether the employee suffers from a disability covered by the ADA;
- the functional limitations that the condition imposes;
- any potential necessary accommodations.

An employer's basis for requesting such information may be premised upon personal observations of symptoms indicating that an employee may have a condition that could impair his or her ability to perform the essential functions of the job or that an employee poses a direct threat. It may also be premised upon reliable information learned from another person.

Employers should not delay requests for appropriate information once they have notice of a potential disability or FMLA qualifying event. An employee is not required to invoke any specific language or reference to the FMLA or ADA in order to trigger an employer's obligations under the statutes. *Taylor v. Phoenixville School District*, 184 F.3d 246 (3d Cir. 1999) (an employee need not mention the ADA or specifically request a "reasonable accommodation" in order to provide adequate notice under the ADA); *Manuel v. West Lake Polymers Corp.*, 66 F.3d 558 (5th Cir. 1995) (it is not necessary that the

employee specifically mention the FMLA in order to trigger the employer's obligation to determine whether the Act applies).

If the employer has information that an absence may be for an FMLA qualifying reason, the burden is placed upon the employer to determine whether the Act applies. For example, many courts would hold that an employer must take measures to determine whether the FMLA applies in situations where an employee has been absent for more than three days and indicates that she or he is sick and submits a general doctor's excuse. Employers also may be on notice of a potential FMLA qualifying event if an employee reports off of work for single-day absences on a fairly consistent basis for potentially chronic conditions, such as migraine headaches, gastrointestinal disease, asthma, or mental illness.

Under the ADA, once an employer knows that an employee may need an adjustment or change at work for a reason related to a mental or physical condition, the employer must engage in the "interactive process" to determine whether a reasonable accommodation exists to enable the employee to perform the essential functions on the job.

While the notice does not have to be in writing, be made by the employee, or formally invoke the magic words "reasonable accommodation," the notice nonetheless must make clear that the employee wants assistance for his or her disability. In other words, the employer must know of both the disability and the employee's desire for accommodations for that disability.

Taylor v. Phoenixville School District, 184 F.3d at 313. Whether the employer has received adequate notice of a disability must be viewed in light of the employer's prior knowledge concerning the condition.

Often, the first step in the interactive process will be for the employer to request appropriate documentation from the employee relating to whether a disability exists and the nature of the limitations imposed. The EEOC's Enforcement Guidance On Reasonable Accommodation and Undue Hardship specifically recognizes that employers are entitled to receive reasonable information and documentation from an employee who might have a disability.

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation.

...

An employer may require that documentation about the disability and the functional limitations comes from an appropriate health care or rehabilitation professional.

...

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to a health care or vocation professional.

...

As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations.

...

If an individual's disability or need for reasonable accommodation is not obvious, and he or she refuses to provide the reasonable documentation requested by the employer, then she or he is not entitled to reasonable accommodation. On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for accommodation could result in liability for failure to provide a reasonable accommodation.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, Question 6. Courts consistently have held that an employee who fails to provide requested information or refuses to discuss potential accommodations is responsible for the breakdown of the interactive process and cannot later claim that the employer unlawfully failed to provide an accommodation.

Employers should recognize that employee's medical outlook while out on leave often changes. Employers should keep in contact with employees while they are on leave so they can receive updated information from the employee's health care provider as appropriate. Employers should also ensure that all communication with an employee regarding accommodations should be documented. This includes documenting all attempts to communicate with the employee while out on leave – even if the employee fails to respond. An employer's documentation will show its efforts to engage in the interactive process and help defend any claim by the employee that the employer failed to accommodate. Although the interplay of the ADA and FMLA is challenging, conducting a systematic analysis after gathering all the necessary information – along with

consultation with counsel – helps employers make appropriate decisions that can be defended in court.

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Employer-Provided Leave and the Americans with Disabilities Act¹

(May 9, 2016)

Introduction

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.

A reasonable accommodation is, generally, “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.”² That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.³ As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.

The EEOC continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

This document seeks to provide general information to employers and employees regarding when and how leave must be granted for reasons related to an employee’s disability in order to promote voluntary compliance with the ADA. It is consistent with the EEOC’s regulations enforcing Title I of the ADA, as well as the EEOC’s 2002 Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (a link to the Guidance appears at the end of this document).

Equal Access to Leave Under an Employer’s Leave Policy

Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees. Many employers offer leave -- paid and unpaid -- as an employee benefit. Some employers provide a certain number of paid leave days for employees to use as they wish. Others provide a certain number of paid leave days designated as annual leave, sick leave, or “personal days.”

If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Example 1: *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 depression⁴ 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.*

Example 2: *An employer permits employees to use paid annual leave for any purpose and does not require that they 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 repairs made to her wheelchair. 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, since the employer has denied the employee's use of annual leave due to her disability.*

Employers are entitled to have policies that require **all** employees to provide a doctor's note or other documentation to substantiate the need for leave.

Example 3: *An employee with a disability asks to take six days of paid sick leave. The employer has a policy requiring a doctor's note for any sick leave over three days that explains why leave is needed. The employee must provide the requested documentation.*

Granting Leave as a Reasonable Accommodation

The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave. As noted above, requests for leave related to disability can often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities access to those policies on equal terms as similarly situated individuals. That is not the end of an employer's obligation under the ADA though. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. (See below for a discussion of undue hardship.) That is the case even when:

- the employer does not offer leave as an employee benefit;
- the employee is not eligible for leave under the employer's policy; or
- the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances.⁵

Example 4: *An employer provides 10 days of paid annual leave and four days of paid sick leave each year to employees who have worked for the company fewer than three years. After three years, employees are eligible for 15 days of paid annual leave and eight days of paid sick leave. An employee who has worked for only two years has used his 10 days of paid annual leave and now requests six days of paid sick leave for treatment for his disability. Under its leave program, the employer must provide the employee with four days of paid sick leave but may refuse to provide paid leave for the two additional days of sick leave because the employee has not worked long enough to earn this benefit. However, the employer must provide two additional days of unpaid sick leave as a reasonable accommodation unless it can show that providing the two additional days would cause undue hardship.*

Example 5: *An employer's leave policy does not cover employees until they have worked for six months. An employee who has worked for only three months requires four weeks of leave for treatment for a disability. Although the employee is ineligible for leave under the employer's leave policy, the employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship.*

Example 6: *An employer's leave policy explicitly prohibits leave during the first six months of employment. An employee who has worked for only three months needs four weeks of leave for treatment of a disability and the employer tells him that if he takes leave, he will be fired. Although the employee is ineligible for leave under the employer's leave program, the employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship. If the employer could provide unpaid leave without causing an undue hardship, but fires the individual instead, the employer will have violated the ADA.*

Example 7: *An employer's leave policy does not cover employees who work fewer than 30 hours per week. An employee who works 25 hours per week and who has not worked enough hours to be eligible for leave under the FMLA requests one day of leave each week for the next three months for treatment of a disability. The employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship.*

An employer may not penalize an employee for using leave as a reasonable accommodation. Doing so would be a violation of the ADA because it would render the leave an ineffective accommodation; it also may constitute retaliation for use of a reasonable accommodation.⁶

Example 8: *An employee who is not covered by the FMLA requires three months of leave due to a disability. The employer determines that providing three months of leave would not cause undue hardship and grants the request. Instead of giving the employee an unsatisfactory rating during her next annual performance appraisal because she failed to meet production quotas while she was on leave, the employee's supervisor should evaluate the employee's performance taking into account her productivity for the months she did work.*

Leave and the Interactive Process Generally

Communication after an Employee Requests Leave

As a general rule, the individual with a disability – who has the most knowledge about the need for reasonable accommodation – must inform the employer that an accommodation is needed. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. However, if the request for leave can be addressed by an employer's leave program, the FMLA (or a similar state or local law), or the workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot be granted under any other program, then an employer should promptly engage in an **"interactive process"** with the employee -- a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

The information required by the employer will vary from one employee to another. Sometimes the disability may be obvious; in other situations the employer may need additional information to confirm that the condition is a disability under the ADA. However, most of the focus will be on the following issues:

- the specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy);
- whether the leave will be a block of time (for example, three weeks or four months), or intermittent (for example, one day per week, six days per month, occasional days throughout the year); and
- when the need for leave will end.

Depending on the information the employee provides, the employer should consider whether the leave would cause an undue hardship (see below).

An employer may obtain information from the employee's health care provider (with the employee's permission) to confirm or to elaborate on information that the employee has provided. Employers may also ask the health care provider to respond to questions designed to enable the employer to understand the need for leave, the amount and type of leave required, and whether reasonable

accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave). Information from the health care provider may also assist the employer in determining whether the leave would pose an undue hardship. An employee requesting leave as a reasonable accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as quickly as possible.

Communication During Leave and Prior to Return to Work

The interactive process may continue even after an initial request for leave has been granted, particularly if the employee's request did not specify an exact or fairly specific return date, or when the employee requires additional leave beyond that which was originally granted.

Example 9: *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 or the employee's health care provider about the need for the 30 additional days and the likelihood that the employee will be able to return to work, with or without reasonable accommodation, if the extension is granted.*

However, an employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, although it may reach out to an employee on extended leave to check on the employee's progress.

Example 10: *An employee with a disability is granted three months of leave to recover from a surgery. After one month, the employer phones the employee and asks how the employee is doing and whether there is anything the employee needs from the employer to help the employee recover and return to work. That is an acceptable request for information. Additionally, a week prior to the end of the employee's leave, the employer again reaches out to the employee to ask whether the employee is able to return to work at the end of leave and if any additional accommodations are required. This is also an acceptable request for information.*

Maximum Leave Policies

The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship.

Example 11: *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 any 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.

Types of Maximum Leave Policies

Maximum leave policies (sometimes referred to as “no fault” leave policies) take many different forms. A common policy, especially for entities covered by the FMLA, is a flat limit of 12 weeks for both extended and intermittent leave. Other varieties exist though. Some maximum leave policies have caps much higher than 12 weeks. Others, particularly those not covered by the FMLA, set lower overall caps. Employers also frequently implement policies that limit unplanned absences. For example, a policy might permit employees to have no more than five unplanned absences during a 12-month period, after which they will be subject to progressive discipline or termination.

Employees with disabilities are not exempt from these policies as a general rule. However, such policies may have to be modified as a reasonable accommodation for absences related to a disability, unless the employer can show that doing so would cause undue hardship.

Example 12: *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.*

Communication Issues for Employers with Maximum Leave Policies

Many employers, especially larger ones and those with generous maximum leave policies, may rely on “form letters” to communicate with employees who are nearing the end of leave provided under an employer's leave program. These letters frequently instruct an employee to return to work by a certain date or face termination or other discipline. Employers who use such form letters may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship. If an employer relies on a third party provider to handle lengthy leave programs, including short- and long-term disability leave programs, it should ensure that any automatic form letters generated by these providers comply with the employer's obligations under the ADA.

Employers who handle requests under their regular leave policy separately from requests for leave as a reasonable accommodation should ensure that those responsible communicate with one another to avoid mishandling a request for accommodation. For example, an employer may hire a contractor to handle its long-term disability program, but have its human resources department handle all requests

for leave as a reasonable accommodation. The employer should ensure that the contractor is instructed to forward to the human resources department, in a timely manner, any requests for additional leave beyond the maximum period granted under the long-term disability program, and to refrain from terminating the employee until the human resources department has the opportunity to engage in an interactive process. The human resources department should contact the employee as soon as possible to explain that it will be handling the request for additional leave as a reasonable accommodation, and that all further communication from the employee on this issue should be directed to that department.

An employer and employee should continue to communicate about whether the employee is ready to return to work or whether additional leave is necessary. For example, the employee may contact a supervisor, human resources official, or anyone else designated by the employer to handle the leave to provide updates about the employee's ability to return to work (with or without reasonable accommodation), or about any need for additional leave.

If an employee requests additional leave that will exceed an employer's maximum leave policy (whether the leave is a block of time or intermittent), the employer may engage in an interactive process as described above, including obtaining medical documentation specifying the amount of the additional leave needed, the reasons for the additional leave, and why the initial estimate of a return date proved inaccurate. An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship.

Return to Work and Reasonable Accommodation (Including Reassignment)

Employees on leave for a disability may request reasonable accommodation in order to return to work. The request may be made by the employee, or it may be made in a doctor's note releasing the employee to return to work with certain restrictions.

100% Healed Policies

An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be "100%" healed or recovered -- if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship.⁷ Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "significant risk of substantial harm" to self or to others. If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

Example 13: *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 but 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 and he does not pose a direct threat.*

Example 14: *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 requires the employee to continue on leave and informs her that she cannot return to work until 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.*

Issues Related to the Interactive Process and Return to Work

If an employee returns from a leave of absence with restrictions from his or her doctor, the employer may ask why the restrictions are required and how long they may be needed, and it may explore with the employee and his doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor's recommended limitations. In some situations, there may be more than one way to meet a medical restriction.

Example 15: *An employee with a disability has been out on leave for three months. The employee's doctor releases her to return to work, but imposes a medical restriction requiring her to take a 15-minute break every 90 minutes. Taking a rest break is a form of reasonable accommodation. When the employer asks the purpose of the break, the doctor explains that the employee needs to sit for 15 minutes after standing and walking for 90 minutes. The employer asks if the employee could do seated work during the break; the doctor says yes. To comply with the ADA, the employer rearranges when certain marginal functions are performed so that the employee can perform those job duties when seated and therefore not take the 15-minute break.*

If necessary, an employer should initiate the interactive process upon receiving a request for reasonable accommodation from an employee on leave for a disability who wants to return to work (or after receiving a doctor's note outlining work restrictions). Some issues that may need to be explored include:

- the specific accommodation(s) an employee requires;
- the reason an accommodation or work restriction is needed (that is, the limitations that prevent an employee from returning to work without reasonable accommodation);
- the length of time an employee will need the reasonable accommodation;
- possible alternative accommodations that might effectively meet the employee's disability-related needs; and
- whether any of the accommodations would cause an undue hardship.

Reassignment

In some situations, the requested reasonable accommodation will be reassignment to a new job because the disability prevents the employee from performing one or more essential functions of the

current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship. The Commission takes the position that if reassignment is required, an employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions.⁸ Reassignment does not include promotion, and generally an employer does not have to place someone in a vacant position as a reasonable accommodation when another employee is entitled to the position under a uniformly-applied seniority system.⁹

Example 16: *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.*

Undue Hardship

When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship. If it would, the employer does not have to grant the leave. Determination of whether providing leave would result in undue hardship may involve consideration of the following:

- the amount and/or length of leave required (for example, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);
- the frequency of the leave (for example, three days per week, three days per month, every Thursday);
- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
- whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and
- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

In many instances an employee (or the employee's doctor) can provide a definitive date on which the employee can return to work (for example, October 1). In some instances, only an approximate date (for example, "sometime during the end of September" or "around October 1") or range of dates (for example, between September 1 and September 30) can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified in light of changed circumstances, such as where an employee's recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis. However, indefinite leave -- meaning that an employee cannot say whether or when she will be able to return to work at all -- will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation.

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which 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.

Example 17: *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 granted and the additional impact on the employer's operations in granting three more weeks of leave.*

Example 18: *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 granted and the additional impact on the employer's operations in granting four more weeks of leave.*

Example 19: *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 had to postpone meetings necessary to complete a project for one of the employer's clients, in turn causing delays in meeting the client's needs. In addition, the employer has had to reallocate some of the employee's job duties, resulting both in increased workloads and changes in work priorities for coworkers that are interfering 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.*

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

Example 20: *An employer is not covered under the FMLA. An employee with a disability requires 16 weeks of leave as a reasonable accommodation. The employer determines that it can grant the request and hold open the job. However, due to unforeseen circumstances that arise after seven weeks of leave, the employer determines that it would be an undue hardship to continue holding the job open. The job is filled within three weeks by promoting a qualified employee. Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly-vacant position as a reasonable accommodation.*

Additional Information

The EEOC has issued a number of documents that discuss how the ADA addresses various leave issues:

- Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, www.eeoc.gov/policy/docs/accommodation.html (see “Leave” under “Types of Reasonable Accommodations”)
- Enforcement Guidance on Pregnancy Discrimination and Related Issues, www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (see section II.B., ADA and Reasonable Accommodation)
- The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, www.eeoc.gov/policy/docs/fmlaada.html (see “Comparison of ADA and FMLA Leave” and “ADA Compliance When the FMLA Also Applies”)
- Enforcement Guidance: Workers’ Compensation and the ADA, www.eeoc.gov/policy/docs/workcomp.html (see “Return to Work Decisions” and “Reasonable Accommodation”)
- The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, www.eeoc.gov/facts/performance-conduct.html (see “Attendance issues”)

Additional information on the requirements of the ADA and section 501 of the Rehabilitation Act can be found on EEOC’s website, www.eeoc.gov.

¹ This document also applies to Federal employees protected under section 501 of the Rehabilitation Act, which has the same non-discrimination requirements as the ADA.

² 29 C.F.R. pt. 1630 app. §1630.2(o).

³ Employers also may have to provide leave mandated by Federal, state, or local laws. For example, the Federal Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide up to 12 weeks of leave per year to eligible employees. The FMLA covers private sector employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year. The law also covers local, state, or Federal government agencies, as well as public or private elementary or secondary schools, regardless of the number of employees. An eligible employee must: (1) have worked for a covered employer for at least 12 months, (2) have worked at least 1,250 hours during the 12-month period immediately preceding the leave, and (3) work at a location where the employer has at least 50 employees within 75 miles. More information on the FMLA is available at www.dol.gov/whd/regs/compliance/whdfs28.pdf. The EEOC previously issued a Fact Sheet concerning the interaction of FMLA, ADA, and Title VII rights, available at <https://www.eeoc.gov/policy/docs/fmlaada.html>.

⁴ All examples assume that the employee's medical condition meets the broad definition of disability found in the ADA. For more information on the definition of disability, see www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

⁵ The examples used in this document assume that the leave requested is "reasonable," as that term is defined under U.S. Airways v. Barnett, 535 U.S. 391 (2002), and as discussed in the EEOC's Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, www.eeoc.gov/policy/docs/accommodation.html. The examples also assume that leave is the only effective reasonable accommodation, meaning it alone meets the employee's needs. But, as part of the interactive process an employer may discuss with an employee whether an alternative form of reasonable accommodation would meet the employee's needs. In some situations, a combination of leave and other reasonable accommodations (for example, part-time work, telework, a number of breaks, and removal of marginal functions) may enable an employee to return to work sooner and therefore require less leave.

⁶ Penalizing an employee for use of leave as a reasonable accommodation may also raise a disparate treatment issue if the employer grants similar amounts of leave to non-disabled employees but does not penalize them.

⁷ See consent decree in EEOC v. Brookdale Senior Living Communities, Inc. (D. Colo. No. 14-cv-02643-KMT)(resolved August 17, 2015). EEOC alleged that the company refused an employee's request to return to work after leave for fibromyalgia because she was unable to return to work without restrictions or accommodations. See also consent decree in EEOC v. Americold Logistics (W.D. Ky. No. 4:12-cv-47-JHM)(resolved June 14, 2013). In this case, the EEOC alleged that the employer refused to explore or to provide reasonable accommodation that would allow an employee with chronic lumbar back pain to return to work and instead fired the employee because she was not 100% healed. See also Kauffman v. Petersen Health Care VII, LLC, 769 F.3d 958 (7th Cir. 2014)(permitting an employer to require that an employee be 100% healed would negate the ADA's requirement that an employer provide reasonable accommodation if it enables an employee to perform his job).

⁸ See Question 29 in EEOC's Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, www.eeoc.gov/policy/docs/accommodation.html.

⁹ For more information on the requirements and limitations of reassignment, see EEOC's Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, www.eeoc.gov/policy/docs/accommodation.html.