

FMLA and ADA: Is Leave Time Now Unlimited?



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EXPAND YOUR EXPECTATIONS

Agenda



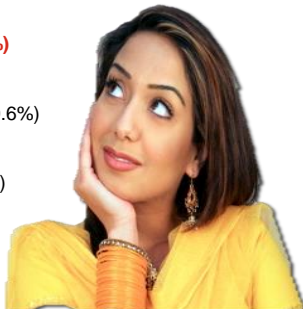
- How much leave time is reasonable as an accommodation for a disabling condition?
- What are the terms of the leave?
- The interactive process;
- Legitimate factors to consider in determining whether leave is an undue hardship; and
- The interaction of leave as a reasonable accommodation with FMLA leaves, state leave laws, short/long term disability and workers' compensation leaves.
- Q&A

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2015 EEOC Charge Recap

- Retaliation: 39,757
- Race: 31,027 (34.7%)
- **Disability: 26,968 (30.2%)**
- Sex: 26,396 (29.5%)
- Age: 20,144 (22.5%)
- National Origin: 9,438 (10.6%)
- Religion: 3,502 (3.9%)
- Color: 2,833 (3.2%)
- Equal Pay Act: 973 (1.1%)
- GINA: 257 (0.3%)



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Leave as a Reasonable Accommodation

- Issue generally arises in three ways:
 - An employee requests leave for a disabling condition;
 - Leave is a possible accommodation that may ultimately allow the employee to return to work and perform the essential functions of his/her current position; or
 - Leave is a possible accommodation that may ultimately allow the employee to return to work in a different position where the disabling condition can be accommodated to the point where the employee can perform all essential job functions.

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Order of Reasonable Accommodations

- Are reasonable accommodations available to assist the employee in performing the **current position** including a possible leave of absence?
- If no, are **vacant positions** available which the employee can perform with or without reasonable accommodations, including a possible leave of absence?
- If no, is **leave time** a reasonable accommodation because there will be a job available upon return from leave that the employee can perform with or without additional accommodations?

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Leave as a Reasonable Accommodation

- **Almost every Circuit Court of Appeal in the country has explicitly held that leave can be a reasonable accommodation.**
- **See, e.g.,** Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648-50 (1st Cir. 2000); Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 185 & n.5 (2d Cir. 2006); Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 671 (3d Cir. 1999); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) (rejecting unaccrued paid leave as a reasonable accommodation, but citing with approval the EEOC Interpretive Guidance regarding unpaid leave and accrued paid leave as reasonable accommodations); Celhrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 781-83 (6th Cir. 1998); Haschmann v. Time Warner Ent Co., 151 F.3d 591, 601 (7th Cir. 1998); Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1049 n.3 (8th Cir. 1999); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999); Smith v. Diffeo Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 967 (10th Cir. 2002); Holly v. Clairson Indus, LLC, 492 F.3d 1247, 1263 (11th Cir. 2007); Taylor v. Rice, 451 F.3d 898, 910 (D.C. Cir. 2006).

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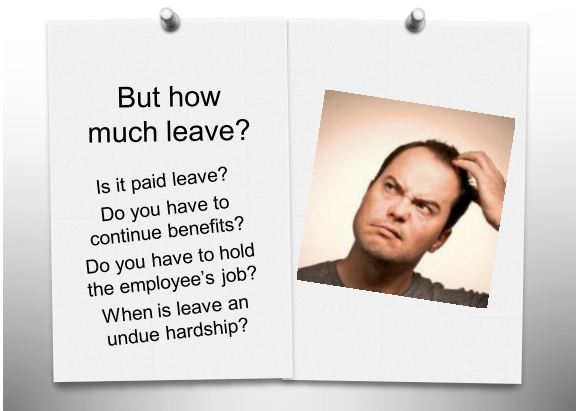
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EEOC Guidance on Leave as a Reasonable Accommodation

- First Announced as a “work-in-progress” in 2011
- Finally Issued May 9, 2016
- <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>
- The EEOC guidance reinforces that reasonable accommodations include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to non-disabled employees.
- Other related EEOC Guidance on reasonable accommodations found at:
<https://www.eeoc.gov/policy/docs/accommodation.html>

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Existing Leave Policies – EEOC Guidance

- 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, the employer should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.
- What if leave is needed due to a disabling condition that goes beyond an employer's absence/leave policies?

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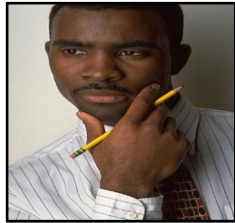
Here Is Where It Gets Tricky

- According to the 2016 EEOC Guidance, an employer must provide unpaid leave in addition to any paid leave benefits as an accommodation for a disabling condition, unless it imposes an undue hardship on the employer's business.
- This is the case even when:
 - the employer does not offer unpaid leave as an employee benefit;
 - the employee is not eligible for leave under the employer's policy; or
 - the employee has exhausted the paid and unpaid leave the employer provides by law such as any FMLA, WC leave, state leave, etc.

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In other words, employers have to consider whether making an exception to their normal leave policies for a disabled employee is an undue hardship on the business.



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“We don’t usually do that for other employees” is not a defense to a claim that you failed to consider unpaid leave as a possible reasonable accommodation.

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2016 EEOC Guidance

- Remember: "Reasonable accommodation does not require an employer to provide **paid** leave beyond what it provides as part of its paid leave policy."
- Leave as a reasonable accommodation is unpaid leave granted in addition to any paid leave policies.
- An employer may, however, be more generous with paid leave than what the law requires as long as paid leave as a reasonable accommodation is not administered in a discriminatory or other unlawful fashion.

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Example: 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 the unpaid leave would cause an undue hardship.

EEOC Guidance Example 5.

Example: 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 FMLA requests one day of leave each week for the next three months for treatment for a disability. The employer must provide unpaid leave as a reasonable accommodation unless it can show that providing unpaid leave would cause undue hardship.

EEOC Guidance Example 7

Unexcused Absences Policy

- Employers may have policies that limit unplanned absences. For example, a policy might permit no more than five unplanned absences during a 12-month period.
- 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.

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Maximum Leave Policies

- Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, the employer 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.

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Under the EEOC Guidance, it is reinforced that "an employer may not penalize an employee for using leave as a reasonable accommodation."



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Example: An employee who is not covered by the FMLA requires three months of leave due to a disability. The employer 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

- The EEOC confirms that as a general rule, the individual with the disability "must inform the employer that an accommodation is needed."
- However, the guidance states: "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."
- "If the leave cannot be granted under other policies, "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 or provide the leave as a reasonable accommodation without causing an undue hardship."

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What can be requested during the interactive process?

- Information from the employee and the HCP such as:
 - The specific reason the leave is requested;
 - Whether leave will be a block of time or intermittent or both;
 - The amount of time for the leave;
 - When the need for leave will end; and
 - Whether reasonable accommodations other than leave (or in addition to leave) may be effective.

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NOTE: “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.”

2016 EEOC Guidance

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The Interplay of the ADA and Other Leave Laws



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When an employee requests time off for a reason related or possibly related to a disability, the employer should determine the employee’s rights under all of the relevant statutes.

See *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html>, at Q&A 21.

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Given that the ADA and FMLA operate independently of each other, "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees."

29 C.F.R. § 825.702(a).

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EXAMPLE: Although the FMLA permits the employer to place an employee returning from a covered FMLA leave in the same or an "equivalent" position, the ADA requires that the person returning from leave be returned to his/her original position absent undue hardship.

EEOC Reasonable Accommodation Guidance, at Q&A 21.

Therefore, an employee covered by both statutes would need to be returned to his/her original position following a return from a medical leave, absent the employer demonstrating undue hardship.

2016 EEOC Guidance Notes:

- The ADA duty to provide leave as a reasonable accommodation applies when the employee is not eligible for FMLA leave (or a similar state leave law) **or when FMLA leave has been exhausted.**
- The ADA duty to provide leave as a reasonable accommodation applies even if the employee was injured on the job and is receiving workers' compensation benefits under state law.
- The ADA duty to provide leave as a reasonable accommodation applies even if the employee qualifies for short-term or long-term disability benefits.

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EEOC Guidance: Communications During Leave

- Employers may rely on “form letters” to communicate with employees **who are nearing the end of leave** provided under an employer’s leave program or under state/federal law like FMLA or related state leave laws.
- The interactive process may continue even after an initial request for leave has been granted in the event the reasonable accommodation analysis changes due to new developments.
- EEOC Guidance: “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.”

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Form Letters – 2016 EEOC Guidance

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.

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Does “reasonable” include holding the employee’s job and continuing benefits while on unpaid leave?

- Yes, according to the EEOC guidance.
- However, the EEOC also states that 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 in another position.

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What length of leave is reasonable?

- Case-by-case analysis – fact specific
- Requires individualized assessment
- Requires interactive process;
- According to the EEOC Guidance, leave must be granted to the person with a disability unless it is an undue hardship;
- An employer must provide a reasonable accommodation to a qualified employee under the ADA unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” 42 U.S.C. § 12112(b)(5)(A); see also 29 C.F.R. §1630.9(a).

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Requested Leave Found Reasonable

- *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000) (leave for cancer treatments)
- **Held:** The employee’s request for an additional two-month leave after 15 months of leave did not constitute an undue hardship because the company had been using temporary employees to cover the work in her absence and there was no evidence that they cost the company more or were unsatisfactory in their performance.

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Requested Leave Found Reasonable

- *Nunes v. Wal-Mart Stores*, 164 F.3d 1243 (9th Cir. 1999)(employee leave due to fainting episodes)
- **Held:** Employee took a two-month leave, returned to work for six months, then went out on another leave for eight months. She sought an additional one to two months of leave as a reasonable accommodation. The court noted that the employer’s own policy of allowing eligible employees up to one year of unpaid leave and its regular practice as a large retailer of hiring temporary workers factored into the analysis regarding whether the accommodation sought would impose an undue hardship.

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Requested Leave Found Not Reasonable

- *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 671 (3d Cir. 1999)
- **Held:** It would have been an undue hardship for the employer to extend the employee's unpaid leave beyond the approximately nine weeks already given where the employee was a program director in charge of managing a program and overseeing staff.

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Requested Leave Found Not Reasonable

- *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000)
- **Held:** Where the employee had already received 18 months of leave and was seeking additional time for medical evaluations, the court found the request was unreasonable because the employee could not show that the delay in getting the information was due to the employee's disability. The employee's request was deemed to be a request for indefinite leave and an undue hardship.

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2016 EEOC Guidance – Indefinite Leave

- "Indefinite leave – meaning that an employee cannot say whether or when he/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."
- However, note that the EEOC guidance recognizes that the following are not requests for indefinite leave:
 - "Employee can return sometime during the end of September or around October 1"
 - "Employee can return between September 1 and September 30"

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Remember: A leave request is not “indefinite” simply because the nature of the employee's condition is such that only an approximate return date is provided.

See *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 648;

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“In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.”
2012 EEOC *Reasonable Accommodation Guidance*, at Q&A 44.

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Other than a request for indefinite leave, what other factors can be considered in determining undue hardship?



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Undue Hardship: Learn It, Live It, Love It



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2016 EEOC Guidance: Undue Hardship Factors

- The amount and/or length of leave required (for example, four months, three days per week, six days per month, 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);

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2016 EEOC Guidance: Undue Hardship Factors

- Whether the need for intermittent leave on specific dates is predictable or unpredictable;
- The impact of the employee's absence on coworkers and on whether specific job duties are 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 substantial overtime).

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2016 EEOC Guidance: Undue Hardship Factors

- 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.
- Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work – will constitute an undue hardship.

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Considering Prior Leave

- The EEOC Guidance notes that 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.

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Best Practices

- Develop a solid, reasonable accommodation interactive process with your HR team and follow it.
- Develop form letters to help simplify the documentation of the process.
- Develop a history of reasonable accommodations granted and denied to make sure future decisions are consistent (if based on the same facts) and to assist with the defense of litigation (attorney-client privilege).
- Develop training for managers and supervisors to help them recognize leave requests that may also be requests for reasonable accommodation and to encourage prompt reporting to HR.

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What questions do you have?



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