Leave as a Reasonable Accommodation: Obligations and Options*

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TABLE OF CONTENTS

I. INTRODUCTION.

Navigating the ADA and determining whether an accommodation is reasonable is often a difficult, fact-intensive process. Even though an employee has used up or is not eligible for FMLA leave, the employer still has obligations under the ADA to provide time off and other reasonable accommodations to employees.

Employers have a variety of ways to respond to employees who require special consideration, depending on the circumstances. Some possible responses are granting leave, modifying the employee's job, changing the employee's work schedule, and terminating the employee. However, careful consideration of the ADA, EEOC guidance, and case law is required to help employers generate appropriate responses for employees with disabilities.

Developing a robust understanding of the ADA will help employers respond to challenges presented by employees with disabilities, and design workplace policies that accomplish employer needs without infringing upon employee rights.

II. BACKGROUND – DISTINCTIONS BETWEEN THE ADA AND FMLA.

A. Employer Coverage.

Title I of the ADA applies to employers "engaged in an industry affecting commerce that has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A).

The FMLA covers employers engaged in similar activities, but the number of employees necessary for an employer to be covered and obligated to provide job-protected leave is 50 or more employees within a 75-mile radius. The FMLA also imposes tenure, hours worked, and other requirements for leave eligibility. 29 U.S.C. §2611(4)(A)(i); 29 C.F.R. § 825.105.

B. Employee Eligibility.

The ADA applies only to employees and applicants who are qualified individuals with a disability who can perform the essential functions of their current job or the one that they seek "with or without reasonable accommodation." 42 U.S.C. §§ 12111(8), 12112(a). "Qualified individuals" under the ADA are persons who have the requisite skill, experience, education, and other job-related requirements that would enable them to perform the essential functions of the job. Id. § 12111(8).

To be eligible for leave under the FMLA, an employee must have worked at least 12 months for the employer and worked at least 1,250 hours in the 12 months preceding leave. 29 U.S.C. § 2611(2)(A); 29 C.F.R. § 825.110. Also, unlike the ADA, the FMLA does not apply to applicants or prospective employees.[1]

[1] Nevertheless, courts have interpreted the FMLA's anti-retaliation provision to prohibit employers from failing to hire an applicant because of that person's record of having utilized the FMLA's leave provisions. See, e.g., Duckworth v. Pratt & Whitney, Div. of United Techs. Corp., 152 F.3d 1 (1st Cir. 1998) (holding that applicant may bring FMLA interference claim where it was alleged that company interfered with his FMLA rights by refusing to rehire him based on his past use of FMLA leave).

C. "Disability" vs. "Serious Health Condition."

The key definitional terms of the ADA and the FMLA that relate to covered conditions – "disability" under the ADA and "serious health condition" under the FMLA – suggest that overlapping coverage may be a regular occurrence. Yet, they are different concepts and must be analyzed separately. In fact, the FMLA's regulations expressly provide:

> [T]he leave provisions of the [FMLA] are ***wholly distinct*** from the reasonable accommodation obligations of employers covered under the [ADA] . . . . The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S. Rep. No. 103-3, at 38 (1993). ***An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees***.

29 C.F.R. § 825.702(a) (emphasis added); see also Hatchett v. Philander Smith Coll., 251 F.3d 670, 675 n.4 (8th Cir. 2001) (noting that "intermittent FMLA leave does not excuse an employee from the essential functions of the job" as required by the ADA).

1. "Disability."

The ADA defines a disability, in relevant part, as "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(1). Major life activities include, but are not limited to, activities "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.20.[2]

2. "Serious Health Condition."

Among other coverage triggers, the FMLA provides leave for employees who have a "serious health condition" that renders the employee incapable of performing an essential function of the individual's job. 29 C.F.R. § 825.115. The definition of "essential function" under the FMLA is given the same meaning as that phrase is under the ADA. Id. § 825.123.

Under the FMLA, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves either inpatient care (including time for recovery and subsequent treatment in connection with the inpatient care) or continuing treatment by a health

[2] The ADA Amendments Act of 2009 ("ADAAA") expanded the definition of "disability" by calling for a more expansive interpretation of when an impairment "substantially limits" a "major life activity." It also eliminated consideration of mitigating measures from the disability equation. With the expanded definition of "disability," more mental and physical impairments are likely to be considered protected "serious health conditions." Nevertheless, this is not true in all cases. For example, severe hearing loss may constitute an ADA-protected disability, but it may not necessarily constitute an FMLA-covered serious health condition. Temporary, non-chronic conditions such as "broken limbs, sprained joints, concussions, appendicitis, and influenza" generally do not qualify as ADA-protected disabilities, even under the ADAAA. 29 C.F.R. Part 1630, App. § 1630.2(j). Yet, some of these conditions may qualify as a "serious health condition" for purposes of the FMLA.

care provider. 29 U.S.C. § 2612(a)(1); 29 C.F.R. § 825.113(a). "[U]nless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.," are ***not*** considered "serious health conditions" for purposes of the FMLA. Id. § 825.113(d).

Under these differing standards, a particular health condition may qualify as a "serious health condition" for purposes of the FMLA, but not a "disability" for purposes of the ADA. For example, a pregnancy or routine broken bone generally will qualify as a serious health condition, but not as a disability because they most likely do not substantially limit a major life activity.

D. Entitlement to Leave under ADA and FMLA.

A major distinction between the FMLA and the ADA relates to the specific nature and duration of leave.

The FMLA entitles eligible employees to a specific quantity of protected job absences, that is, a maximum of 12 weeks of leave in a 12-month period. An employer must provide up to 12 weeks of leave in a 12-month period ***regardless of the hardship*** that will be imposed on the employer.

Under the ADA, a "reasonable accommodation" may involve an unpaid leave of absence, working a part-time schedule in a current position, or intermittent leave. Statutorily, the ADA's definition of a reasonable accommodation does not mention "leave," but it does include "part-time or modified work schedules . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). In addition, repeated EEOC guidance confirms that leave is an accommodation. See, e.g., 29 C.F.R. Part 1630 App., § 1630.2(o) ("permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"). See EEOC Enforcement Guidance: Employer-Provided Leave and the Americans with Disability Act, (May 9, 2016) [hereinafter "2016 EEOC Guidance"]; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (Oct. 17, 2002) at Question 16.

Courts have also agreed that leave can be a reasonable accommodation. See, e.g., Moss v. Harris Cnty. Constable Precinct One, 2017 U.S. App. LEXIS 4601, *9 (5th Cir. Mar. 15, 2017) ("taking leave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of the job upon return"); Taylor v. FedEx Ground Package Sys., 2018 U.S. Dist. LEXIS 41411, at *17 (D. Conn. Feb. 26, 2018) ("[M]ost other circuits and the EEOC have concluded that, under certain circumstance[s], a finite term of medical leave may constitute a reasonable accommodation.") (citing Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 185 n.5 (2d Cir. 2006) (collecting cases)).

If an accommodation is necessary and reasonable, the employer must provide it unless the employer can show that the accommodation "would impose an ***undue hardship*** on the operation of the business . . . ." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). The determination of whether a reasonable accommodation under the ADA, in this case a leave, constitutes an "undue hardship" under the ADA is determined on a case-by-case basis, taking into account such factors as the nature and cost of the accommodation. 42 U.S.C. §12111(10)(A).

III. TRIGGERING RIGHTS UNDER THE ADA.

A. Starting the Interactive Process.

Embarking on the interactive process begins as soon as an employee's rights under the ADA are triggered, which is "as soon as the employer knows that an individual worker is having trouble at work because of a serious medical problem." The interactive process must begin immediately and employers must analyze reasonable accommodation issues at the same time as they analyze Worker's Compensation issues. In addition, employers must engage in the interactive process at three critical stages: (1) when the employee is injured; (2) when the employee is recovering while out of work; and (3) when the employee has exhausted leave and workers' compensation benefits and continues to be unable to return to their original position, even with a reasonable accommodation. See Aaron Konopasky & Jennifer Christian, EEOC Speaks Out on Workers Compensation ADA Obligations, (Dec. 11, 2014) [hereinafter "2014 Informal EEOC Discussion"].

B. Employee's Duty to Ask for an Accommodation.

Multiple authorities demonstrate that an individual with a disability must inform the employer that an accommodation is needed. See 2016 EEOC Guidance ("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."); Walz v. Ameriprise Fin., Inc., 779 F.3d 842 (8th Cir. 2015) (holding that employee's failure-to-accommodate claim failed because she did not request an accommodation for her bipolar disorder, which was not "open, obvious, and apparent to the employer"). Moreover, the ADA requires that reasonable accommodation be made only to the "known" physical or mental limitations of an otherwise qualified individual. 42 U.S.C. § 12112(b)(5)(A). Thus, the general rule is that an employer is not "expected to accommodate disabilities of which it is unaware." 29 C.F.R. App. § 1630.9.

The request for an accommodation does not depend on the use of particular words or phrases in order to be valid, nor does it need to be in writing. Nunez v. Lifetime Prods., 2018 U.S. App. LEXIS 3652, at *5 (10th Cir. Feb. 16, 2018).

1. Successfully Putting Employer on Notice.

The following are examples of cases where the employee ***did*** sufficiently put the employer on notice of the need for an accommodation:

- An employee's request made to his manager for a clutch jack dolly to aid him in performing his job prior to his second knee replacement surgery constituted a request for a reasonable accommodation. Corbin v. Fed. Express, 2017 U.S. Dist. LEXIS 218068, at *53 (E.D. Va. May 19, 2017).
- An employee's request for light duty/desk duty due to her broken leg "initiated a discussion about reasonable accommodations." Silva v. Hidalgo Police Dep't, 575 Fed. App'x 419, 423 (5th Cir. 2014).
- Employee's brief conversation with her supervisor in which she stated that she had been diagnosed with cancer and asked about the availability of "easier jobs" was sufficient to trigger the employer's duty to begin the interactive process. Suvada v. Gordon Flesch

Co., 2013 U.S. Dist. LEXIS 131505 (N.D. Ill. Sept. 13, 2013).

- Employee's FMLA request could constitute an accommodation request where employee was not eligible for FMLA or needs additional leave after exhausting leave bank. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002); McCall v. City of Phila., No. 11-5689, 2013 U.S. Dist LEXIS 155418, *64-65 (W.D. Pa. Oct. 29, 2013); 29 C.F.R. § 825.702(c)(2) (FMLA regulation clarifying that request for leave may trigger FMLA obligations as well as an accommodation obligation under the ADA).
- Requests for STD or LTD may be treated as accommodation requests. Swift v. Bank of America, 2009 WL 723521 (D. Me. Mar. 16, 2009).
- Employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and submitting a note from his psychiatrist. Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285 (7th Cir. 1996).

Moreover, the EEOC's enforcement guidance provides the following examples of situations where employees adequately requested an accommodation under the ADA:

> **Example A**—An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I am undergoing."
>
> **Example B**—An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."
>
> **Example C**—A new employee, who uses a wheelchair, informs his employer that her wheelchair cannot fit under the desk in her office.

The EEOC's enforcement guidance also states that "a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability."

2. Failing to Put Employer On Notice.

Unlike the examples cited above, the following are examples of cases where the employee ***failed*** to put the employer on notice of a need for an accommodation:

- Finding employee failed to adequately request accommodation when he based his request to sit for five minutes per hour on improving comfort and productivity, and said his "back is a secondary issue." His reference to his back was "vague" and did not make it clear that he wanted assistance for his disability. Nunez, 2018 U.S. App. LEXIS 3652, at *6-7.
- Holding that employee did not adequately request an accommodation for a quieter work environment because he did not sufficiently link it to his stuttering disability. Patton v. Jacobs Eng'g Grp., Inc., 847 F.3d 437, 444-45 (5th Cir. 2017).
- Holding that employee did not adequately request an accommodation of leave for cervical spine surgery. The court noted that, "[n]ot only did [he] not specify how much time he wanted off, or when he wanted to take it, he did not even specify whether his plans were certain, merely stating that he planned to 'schedule' surgery. An employer cannot consider an employee's request for medical leave if it does not know such facts." Foster v. Mt. Coal Co., LLC, 2014 U.S. Dist. LEXIS 176050 (D. Colo. Dec. 22, 2014).

- Finding employee failed to inform employer of need for accommodation where no evidence of the employee's "limitations were apparent at work; where he repeatedly declined to reveal his diagnosis to his employer; where he expressed doubt about his ability to confirm his diagnosis with a doctor; and where he failed to affirmatively indicate an interest in pursuing FMLA leave after that option was suggested by his employer—even after it was apparent that his alternatives were limited." Kobus v. College of St. Scholastica, Inc., 608 F.3d 1034 (8th Cir. 2010).
- Holding that notice was insufficient where the sister of an employee who had failed to return from leave told a supervisor's secretary that the employee was "mentally falling apart and the family was trying to get her into the hospital." Miller v. Nat'l Cas. Co., 61 F.3d 627 (8th Cir. 1995).
- According to EEOC guidance, an employee who tells his supervisor that he would like a new chair because his is "uncomfortable" has ***not*** put his employer on notice of his disability because he did not "link his need for the new chair with a medical condition."

Notwithstanding the employee's affirmative duty to request an accommodation, an employer's accommodation obligation will be triggered if the employer knows of ***both*** the disability and the employee's need for accommodation. See Cannon v. Jacobs Field Servs. N. Am., 813 F.3d 586, 594-95 (5th Cir. 2016). For example, in Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008), the court held that Wal-Mart failed to accommodate an employee with cerebral palsy – even though the employee indicated on his application that he did not require an accommodation – because "an employer has a duty to reasonably accommodate an employee's disability if the disability is obvious-which is to say, if the employer knows or reasonably should know that the employee is disabled." Id. at 135.

Finally, an employer is ***not*** required to provide a reasonable accommodation when an individual says it is not needed. For example, in Larson v. Koch Ref. Co., 920 F. Supp. 1000 (D. Minn. 1995), the court held that the employer not have an obligation to accommodate an employee who openly denied having a drinking problem, even if the employer knew or should have known of his alcoholism. See also Insalaco v. Anne Arundel Cnty. Pub. Schs., 2012 U.S. Dist. LEXIS 9110 (D. Md. 2012) ("[A]n employee who denies that she requires a reasonable accommodation cannot then claim that her employer refused to accommodate her disability.").

C. Documentation.

With respect to medical documentation provided by an employee to an employer, the EEOC has said that during the interactive process, an individual "does not have to be able to specify the precise accommodation" needed, but "s/he does need to describe the problems posed by the workplace barrier." See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (Oct. 17, 2002) at Question 5.

A recent Seventh Circuit case held that an employee's vague doctor's notes were insufficient to demonstrate that she was an "otherwise qualified" employee under the ADA. The employee, who had received multiple leave periods for back pain and caring for a family member, sent in two short doctor notes to her employer in an attempt to gain more leave. One note said "medical leave of absence until 11/17/10" and the other said "medical leave of absence until 12/17/10." The notes lack information regarding whether the employee was receiving

treatment or if the treatment was effective. Her notes failed to indicate that granting her more leave would allow her to return to her job. Even though the employer met with the employee to attempt to acquire more information regarding her request for leave, the employee failed to provide additional information. Thus, the court held that she was not entitled to leave under the ADA and affirmed the district court's grant of summary judgment for the employer. Whitaker v. Wis. Dep't of Health Servs., 849 F.3d 681 (7th Cir. 2017).

However, the 2014 Informal EEOC Discussion cautions that "[o]nly the employer is accountable for complying with the employment provisions of the ADA" and employers must be careful with documentation provided by treating physicians and the employer's vendors. Specifically,

> [T]reating physicians and the employer's vendors (benefits claim administrators, managed care companies) who fail to communicate with the employer during the stay-at-work and return-to-work process may be exposing the employer to increased risk/liability. When a vendor or a doctor (especially one who has been selected by the employer) fails to notify that an employee described difficulty working or an adjustment that might allow them to work, the employer could be held liable for failing to provide that accommodation – even though the information was never properly passed along.

To manage some of the risk provided by inadequate documentation, employers should engage the employee as the employer did in Whitaker to clarify ambiguities or the lack of sufficient information in documentation provided by the employee or their doctor.

IV. LEAVE UNDER THE ADA.

A. Leave as a Reasonable Accommodation.

A qualified individual with a disability who also is an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave also is being designated as FMLA leave and will count toward the employee's FMLA leave entitlement. If the employer can, as a reasonable accommodation, reinstate the employee to the same job as required by the ADA, rather than to an equivalent position which would satisfy the FMLA, the employer must grant the greater right – reinstatement to the same job – to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, even though the ADA does not require this. 29 C.F.R. § 825.702(c)(2).

B. Length of Leave.

In contrast to the FMLA's maximum leave length of 12 weeks per 12-month period, neither the text of the ADA nor the regulations contain any per se rules as to the length of leave as an accommodation. As with all accommodations, the amount of leave granted depends on the job and the disability, and must be determined on an individual basis. Employers must grant leave as a form of reasonable accommodation unless doing so would cause them undue hardship.

1. Finite Leave Can Be A Reasonable Accommodation.

Case law supports leave of various lengths, depending on the circumstances.

- Two and a half weeks. Caffa-Mobley v. Mattis, 2018 U.S. Dist. LEXIS 30997 (W.D. Ky. Feb. 27, 2018) (fact issue presented on whether employee's request for two and a half weeks of leave plus a month and a half of light duty work was reasonable accommodation).
- Two months. Berk v. Bates Adver. USA, Inc., 1997 WL 749386, at *6 (S.D.N.Y. Dec. 3, 1997) (employer should have granted leave in excess of two months to allow worker to recover from breast cancer surgery).
- Four months. Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998); Rascon v. US W. Commn's, Inc., 143 F.3d 1324, 1334 (10th Cir. 1998); Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 197–201 (S.D.N.Y. 1999).
- Six months. Miller v. Hersman, 759 F. Supp. 2d 1 (D.D.C. 2011).
- Seven months. Shannon v. City of Phil., 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999) (jury could believe that additional three-month leave after 12-week FMLA leave was required).
- One year. Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1439 (N.D. Cal. 1996), aff'd, 191 F.3d 1043 (9th Cir. 1999); But see Delgado Echevarria v. AstraZeneca Parm. LP, 856 F.3d 119 (1st Cir. 2017) (holding that a request for an additional 12 months of leave was not even a "facially reasonable accommodation").
- More than one year. White v. Honda of Am. Mfg., Inc., 191 F. Supp. 2d 933, 951 (S.D. Ohio 2002) (jury question whether employer had to provide medical leave in excess of employers 12-month leave policy). But see Melange v. City of Center Line, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012) (suggesting that an employer is not generally required to hold a position open for more than a year).
- 13 months. Ralph v. Lucent Techs., 135 F.3d 166, 172 (1st Cir.1998) (four weeks additional leave might be reasonable, despite plaintiff's previous 52 weeks of LWOP).
- 14 months. Khachatourian v. Macy's, Inc., 2017 Cal. App. Unpub. LEXIS 1886 (Cal. Ct. App. Mar. 15, 2017). ("Macy's 14-month medical leave allowance satisfied its reasonable accommodation requirements" because it was 11 months longer than that required under the FMLA and applicable California state law, and six months longer than provided for under Macy's leave policies).
- 17 months. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638 (1st Cir. 2000) (five months beyond employer's one-year job-hold policy).

According to the EEOC, even lengthy leave may be required depending on the circumstances. "For example, in the case of a very large employer, with high turnover and many fungible employees, an unpaid leave of an indefinite or very lengthy duration could be a reasonable accommodation if the leave would enable an easily replaceable employee to eventually perform the essential functions of the employee's position and the employer did not incur significant expenses as a result of maintaining the employee in the status of an employee." Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1439–1440 (N.D. Cal. 1996), aff'd, 191 F.3d 1043 (9th Cir. 1999), cert. denied, 528 U.S. 1182 (2000). Nevertheless, even more modest leaves could be an "undue hardship" under particular facts. The point, of course, is that the inquiry must be individualized.

2. Indefinite Leave Is Not A Reasonable Accommodation.

All Circuits and the EEOC agree that an indefinite leave of absence is not a reasonable accommodation under the ADA. See Delegado Echevarria v. AstraZeneca Pharm. LP, 856 F.3d 119, 127 (1st. Cir. 2017); Jarrell v. Hosp. for Special Care, 626 Fed. App'x 308, 312 (2d Cir. 2015); Tolliver v. Trinity Parish Found., 2018 U.S. App. LEXIS 1966, at *10 (3d. Cir. Jan. 25, 2018); Lassiter v. Reno, 1996 U.S. App. LEXIS 13138, *20-21 (4th Cir. May 29, 1996); Moss v. Harris Cnty. Constable Precinct One, 851 F.3d 413, 418 (5th Cir. 2017); Cotuna v. Wal-Mart Stores, Inc., 2017 U.S. App. LEXIS 22749, at *6-7 (6th Cir. Aug. 31, 2017); Bluestein v. Cent. Wis. Anesthesiology, S.C., 769 F.3d 944, 957 (7th Cir. 2014); Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016); Larson v. United Natural Foods W. Inc., 518 Fed. App'x 589, 591 (9th Cir. May 17, 2013); Lara v. State Farm Fire & Cas. Co., 121 Fed. App'x 796, 801 (10th Cir. 2005); Billups v. Emerald Coast Utils. Auth., 2017 U.S. App. LEXIS 21199, at *13-16 (11th Cir. Oct. 26, 2017); Menoken v. Lipnic, 2018 U.S. Dist. LEXIS 36070, at *22-23 (D.D.C. Mar. 6, 2018); 2016 EEOC Guidance ("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.")

When an employee requests an open-ended leave, this request can be considered indefinite leave. For example, in Ruiz v. Paradigmworks Grp., Inc., 2018 U.S. Dist. LEXIS 28878 (S.D. Cal. Feb. 22, 2018), an outreach and admissions counselor broker her ankle while at home. She was unable to work and perform the essential functions of her job while recovering from her injury. She requested and was granted two leaves, the second one extending the first. Once the second leave came to a close – 14 weeks after the first leave started – she requested a third medical leave. Rather than grant the third request, her employer terminated her 11 days later. The court found that at the time the employer received the third request, it was uncertain whether the employee would be able to return after a third leave since her first two leaves had already been extended. She essentially requested an indefinite leave of absence, which the court concluded was not a reasonable accommodation.

3. An Absolute Return to Work Date Is Not Required.

According to the EEOC, "an absolute return-to-work date is not required," so employers are not permitted to "to turn inherent medical inexactness into a claim of indefinite leave." See Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (EEOC Oct. 22, 2002), Question 44 ("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.") (available at https://www.eeoc.gov/policy/docs/accommodation.html); see also Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648-50 (1st Cir. 2000) (plaintiff's request for a two-month extension of leave after 15 months of medical leave was not a request for indefinite leave and could be denied only if employer showed undue hardship). Nevertheless, repeated requests for an extension of leave may result in the requested leave becoming "indefinite." See Brannon v. Luco Mop Co., 521 F.3d 843, 848–849 (8th Cir. 2008) (employer not required to grant third extension of return-to-work date because by that point leave became indefinite).

C. Undue Hardship.

The ADA limits reasonable accommodations to those which do not impose an "undue hardship" on the employer. "The term 'undue hardship' means an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A). According to the Senate Committee on Labor and Human Resources, an action requiring "significant difficulty or expense" is an action that is costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program. The EEOC has said that if granting leave would cause an undue hardship, then "the employer does not have to grant the leave."

Under the ADA, an undue hardship determination should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation;
- the number of persons employed at the facility;
- the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- the impact of the accommodation on the operation of the facility.

See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2).

In its 2016 Guidance, the EEOC adds factors to consider when determining whether granting leave would be an undue hardship, including:

- 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); and
- 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).

V. INTERMITTENT LEAVE.

Under the ADA, an employer is entitled to deny leave if it would pose an ***undue hardship***. An employer is also entitled to provide an accommodation other than leave (e.g., a part-time or modified work schedule, or telework), as long as the accommodation would allow

the employee to meet his or her needs related to a disability. EEOC, Reasonable Accommodation Guidance at Q&A 20.

A. Challenging Indefinite Intermittent Leave.

Where the need for intermittent leave extends over a longer term or indefinitely, the employee may be unfit for duty under the ADA.

The entitlement to take intermittent leave is not absolute. Both the Seventh and Eighth Circuits have recognized that regular attendance at work is an essential function of employment for some positions. Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013); Wisbey v. City of Lincoln, 612 F.3d 667 (8th Cir. 2010). As such, if an employee requests intermittent leave over a long or indefinite period and regular attendance is needed for their job (*i.e.*, regular attendance is an essential function), the employee may not be able to satisfy the essential function requirement of their employment under the ADA. Under these circumstances, an employer may be able to terminate the employee without violating the ADA.

1. Rejecting Intermittent Leave as a Reasonable Accommodation.

- Holding that employee's request to decline a shift whenever he experienced "discomfort" from his disability was unreasonable. Higgins v. Union Pac. R.R. Co., 2018 U.S. Dist. LEXIS 51771, at *24-25 (D. Neb. Mar. 28, 2018). See also Pickens v. Soo Line R.R. Co., 264 F.3d 773, 778 (8th Cir. 2001) (holding that an employee's requested accommodation of "be[ing] able to work only when he feels like working" was unreasonable).
- Rejecting salesperson's ADA failure to accommodate claim because her tardiness, excessive absenteeism, and failure to complete other tasks essential to her job with or without reasonable accommodation rendered her unqualified for her job. Wolf v. Lowe's Cos., 2018 U.S. Dist. LEXIS 41135 (S.D. Tex. Mar. 13, 2018).
- Holding that a management assistant's excessive absenteeism rendered her unable to perform her essential job functions. She was needed in the office to complete her assignments and her attendance problems resulted in a hardship to the other employees in her department. Works v. Berryhill, 686 Fed. Appx. 192 (4th Cir. 2017).
- Holding on a motion for summary judgment that no reasonable jury could find that an accommodation of "up to five [unplanned] absences per month (for all four disabilities [of herniated discs, sinusitis, anxiety, and depression])" was a reasonable accommodation for the locksmith-employee. The court found that "an essential function of the [locksmith-employee's] job was to make service calls at customer locations to service or install locks and related equipment," which included "emergencies and last-minute requests for service." The locksmith-employee's sporadic absenteeism disrupted the employer's ability to respond to last minute customer requests. Kazmierski v. Bonafide Safe & Lock, Inc., 2016 U.S. Dist. LEXIS 170725 (E.D. Wis. Dec. 9, 2016).
- Rejecting a motor vehicle clerk's request for her employer to not terminate her for an additional thirty to sixty days to see if her migraine medication would stop her from having intermittent attendance at work. The court explained that it was uncertain whether the employee's medication would actually permit her to maintain a regular work schedule after the additional leave, so the accommodation was not reasonable. Tegley v. Lancaster Cnty., 2014 U.S. Dist. LEXIS 91637 (D. Neb. July 7, 2014).
- Holding that no amount of intermittent leave would be a reasonable accommodation for a

mammography technician with epilepsy. The employer attempted various accommodations, "including reducing the brightness of lights, eliminating mold, and rerouting strongly perfumed patients to other technicians." Nevertheless, the technician continued to have seizures at work, which prevented her from doing her job when she had them. Olsen v. Capital Region Med. Ctr., 713 F.3d 1149 (8th Cir. 2013).

- Holding that an employee's request for "an open-ended schedule with the privilege to miss workdays frequently and without notice, and to telecommute without manager approval" was "unreasonable." Fisher v. Vizioncore, Inc., 2011 U.S. App. LEXIS 14908 (7th Cir. July 20, 2011).

2. Accepting Intermittent Leave as a Reasonable Accommodation.

- Stating in dicta that an employer's policy of permitting its vice president "to work a flexible schedule to accommodate her multiple sclerosis" was reasonable because she did administrative work. Kazmierski v. Bonafide Safe & Lock, Inc., 2016 U.S. Dist. LEXIS 170725 (E.D. Wis. Dec. 9, 2016).
- Denying an employer's motion for summary judgment regarding a medical records receptionist's request for intermittent leave under the ADA as an accommodation due to her anxiety and depression. The employee alleged that her employer "never engaged in any dialogue with her about her possible leave arrangements, just documented her absences." The court found that "a reasonable juror could find from conflicting evidence about the efforts of both parties to address [the employee's] mental health problems that the [employer], not [the employee], [wa]s responsible for the breakdown of the interactive process to determine what reasonable accommodations she might require and that the defendants made a hasty decision to 'get rid' of an employee who might need such accommodation or had complained that she needed such accommodation." Whitney v. Franklin Gen. Hosp., 2015 U.S. Dist. LEXIS 51909 (N.D. Iowa Apr. 21, 2015).
- Rejecting an employer's motion for summary judgment on whether it was required to provide an employee with a flexible start time to accommodate scheduling blood work appointments for her disability, stating that this was a fact question for the jury as to whether this accommodation would have been reasonable. Barnhart v. Regions Hosp., 2014 U.S. Dist. LEXIS 5249 (D. Minn. Jan. 15, 2014).
- Holding that it could be a reasonable accommodation to permit an employee to miss approximately one day of work per month without a doctor's note. Underwood v. Soc. Sec. Admin., 2013 EEOPUB LEXIS 118 (EEOC 2013).

B. No-Fault Attendance Policies.

1. No-Fault Attendance Policies May Need to Be Modified.

Many employers maintain so-called "no-fault" attendance policies, whereby employees are allotted a certain number of absences within a designated timeframe, but after that number is exceeded, employees will be disciplined for additional absences regardless of the reasons for the missed work. Employers often favor these policies because they are easy for employees to understand and simple to enforce.

Absent a showing of undue hardship, an employer may be required to modify its existing attendance policy (no fault or otherwise) in order to reasonably accommodate disabled

employees. 2016 EEOC Guidance. For example, an employer that requires all employees to work from 9:00AM to 5:00PM may have to allow a disabled employee to adjust his or her arrival and departure times to 10:00AM and 6:00PM if such an adjustment would accommodate the employee's disability and not disrupt the employer's business operations. See 42 U.S.C. § 12111(9)(B). Additional accommodations may include, but are not limited to, allowing an employee to take periodic breaks or use accrued leave time (paid or unpaid) for partial or full day absences. See, e.g., E.E.O.C. v. Convergys Customer Mgmt. Group, Inc., 491 F.3d 790, 796-97 (8th Cir. 2007) (affirming jury verdict finding employee was entitled to an additional 15 minutes to return from lunch break as a reasonable accommodation).

Nevertheless, as the court described in Dee v. Board of Regents, 2016 U.S. Dist. LEXIS 42262 (S.D. Ga. Mar. 30, 2016):

> [The ADA] does ***not*** require an employer to ***automatically*** extend leave time. Instead, it provides that an employer must modify its leave policy when extending leave time is a reasonable accommodation. That is, ***this requirement is only triggered when a plaintiff has established that he is entitled to additional leave as a reasonable accommodation*** and a no-fault policy would otherwise prevent additional leave. Moreover, the conditions mentioned in the guideline – another effective accommodation and undue hardship – come into effect only after the plaintiff has established that modifying the leave policy is a reasonable accommodation. "Indeed, the enumerated conditions discuss an affirmative defense and remedial measures – issues that arise only after the plaintiff establishes liability."

Id. at *22 (citing and quoting Hwang v. Kan. State Univ., 753 F.3d 1159, 1163-64 (10th Cir. 2014)). Because the plaintiff had failed to submit evidence that additional leave was a reasonable accommodation, the court granted summary judgment in favor of the employer on the issue of whether the employer's alleged no-fault policy violated the ADA.

The EEOC takes the position that an employer's inflexible application of a no-fault attendance policy violates the ADA. EEOC Enforcement Guidance on Reasonable Accommodation & Undue Hardship (Oct. 22, 2002). The following cases illustrate the EEOC's position:

- EEOC v. UPS (settled July 2017). The EEOC sued UPS, alleging that its policy of automatically discharging employees when they reached 12 months of leave, without engaging in the interactive process violated the ADA. Julianne Bowman, the EEOC's Chicago District director, commented, "Having a multi-month leave policy alone does not guarantee compliance with the ADA. Such a policy must also include the flexibility to work with employees with disabilities who may simply require a reasonable accommodation to return to work." Under the proposed consent decree, UPS will pay $2 million to nearly 90 current and former UPS employees.
- EEOC v. Sensient Natural Ingredients LLC (settled June 2017). The EEOC sued Sensient for disability discrimination, alleging that Sensient discharged employees for surpassing the company's restrictive leave policy or were required to return to work without

accommodations or restrictions. Sensient agreed to pay up to $800,000 to settle the suit.

- EEOC v. Lowe's (settled May 2016). The EEOC sued Lowe's for terminating employees and failing to provide them reasonable accommodations when their medical leaves of absence exceeded the 180-day (and subsequently, 240-day) maximum leave policy. Lowe's agreed to pay $8.6 million to settle the suit.
- EEOC v. Verizon Communications (settled July 2011). Verizon agreed to pay $20 million to settle an EEOC lawsuit alleging that it violated the ADA by denying hundreds of employees' accommodations of exceptions from its no-fault policy.

2. Factors to Consider When Determining Whether Post-FMLA Absences (Or Absences Not Covered by FMLA) Are Covered by the ADA and Must Be Accommodated.

The Verizon settlement agreement provided the following questions to assist in an analysis of intermittent leave under the ADA:

- Does the employee have a mental or physical impairment that substantially limits one or more major life activities as defined by the ADA, and for the period on and after January 1, 2009, as amended through the ADA Amendments Act of 2008?
- Was the absence caused by the disability?
- Did the employee (or someone else on the employee's behalf) request through the Company's designated process, a period of time off from work due to a disability?
- Have the employee's absences been unreasonably unpredictable, repeated, frequent or chronic?
- Are the absences expected to be unreasonably unpredictable, repeated, frequent or chronic?
- Is the employer able to determine, from the request by or on behalf of the employee, or through the interactive reasonable accommodation process, a definite or reasonably certain period of time off that the employee would need because of a disability? and
- Does the employee's need for time off from work as a reasonable accommodation pose a significant difficulty or expense for the employer's business?

If all factors are met, the absence(s) must be considered "non-chargeable" and the employee cannot be disciplined or terminated based on the absence. See EEOC Press Release, Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011).

In other words, by using these factors and the Verizon Consent Decree as guidance, employers may have a better chance of avoiding liability for an attendance-based termination under the ADA by showing that the employee's attendance was and is expected to be unreasonably unpredictable, repeated, frequent, or chronic. A properly drafted job description, noting where appropriate the importance of predictable attendance, can be an employer's first defense in this regard.

Moreover, most federal circuit courts have held employers are generally permitted to treat regular attendance as an essential element of most positions. Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238 (9th Cir. 2012); Brannon v. Luco Mop Co., 521 F.3d 843, 849 (8th Cir. 2008); Rios-Jimenez v. Principi, 520 F.3d 31, 42 (1st Cir. 2008); E.E.O.C. v.

Yellow Freight Sys., Inc., 253 F.3d 943, 948-49 (7th Cir. 2001) (collecting cases); Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1516 (2d Cir. 1995). This means employers do not necessarily have to tolerate irregular and unreliable attendance, repeated tardiness, or excessive absenteeism. See, e.g., Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 470-71 (8th Cir. 2007) (finding employee was not entitled to take sudden, unscheduled absences as a reasonable accommodation).

Nevertheless, regular attendance is not a *per se* essential function of all jobs. Courts are more likely to find regular predictable attendance to be an essential job function where:

- the job requires a level of specialization or creates other circumstances where it is difficult to replace the employee;
- the job requires performance at the place of employment;
- the employment tasks are time sensitive;
- the performance requires teamwork;
- the work is critical, and failure to be present would adversely affect the entire company;
- the number of available employees to cover absences in limited; and
- the employer has strictly enforced its attendance policy — in other words, the employer has a history of treating attendance as an essential job function.

Since each employee's circumstances are unique, employers must review whether their no-fault attendance policies need to be modified on a case-by-case basis.

VI. REINSTATEMENT AFTER LEAVE.

A. Employee Returned to Original Position.

At the end of an FMLA leave entitlement, an employer is required to reinstate the employee to the same position or to a position, equivalent to that which the employee held when leave commenced, with equivalent pay, benefits, and other terms and conditions of employment, even if the employee has been replaced or his position has been restructured to accommodate his absence. 29 C.F.R. § 825.214.

Although an employer may satisfy its FMLA obligations by offering the employee an equivalent full-time position, this may run afoul of the ADA, which requires that the employee be returned to his or her original position, subject to certain restrictions. If the employee is unable to perform the same or equivalent position (even with reasonable accommodation) because of a disability, the ADA could require the employer to make a reasonable accommodation at that time (*e.g.*, by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship). 29 C.F.R. § 825.702(c)(4).

B. Reassignment of Employee Due to Disability.

1. Generally.

If an employee is unable to return to his or her original job but is able to perform another job, the employer should work with the employee to determine whether a vacant position exists for which the employee is qualified either with or without an accommodation. ADA, 42 U.S.C. § 12111(9) (listing reassignment to a vacant position as a reasonable accommodation). See also

Green v. BakeMark USA, LLC, 2017 U.S. App. LEXIS 5488, *10 (6th Cir. Mar. 27, 2017) (a reasonable accommodation may include reassignment to a vacant position).

The Eighth Circuit explains the requirements for reassignment to be appropriate as the following:

> [I]n certain situations, reassignment to a vacant position can be a reasonable accommodation, where the employee can perform the essential functions of the new position. Reassignment is not required of employers in every instance, however, and is 'an accommodation of last resort' when the employee cannot be accommodated in his existing position. In the case of a reassignment, the employer is not required to create a new position or move other employees from their jobs in order to open up a position. Rather, assignment to another position is a required accommodation only if there is a vacant position for which the employee is otherwise qualified.

Minnihan v. Medicom Communs. Corp., 779 F.3d 803, 814 (8th Cir. 2015) (citations omitted) (holding that reassignment to a vacant position was a reasonable accommodation because the employee could not fulfill the driving essential function of his previous position with or without a reasonable accommodation). Employers are also not required to promote an employee as a reassignment. Kallail v. Alliant Energy Corporate Servs., 691 F.3d 925 (8th Cir. 2012).

Other circuits agree with the Eighth Circuit's basic requirements for reassignment. See Crano v. Graphic Packaging Corp., 2003 U.S. App. LEXIS 11286 (10th Cir. 2003) (reassignment is available to current employees, not applicants or former employees); Waltherr-Willard v. Mariemont City Sch., 2015 U.S. App. LEXIS 2323 (6th Cir. 2015) (employer is not required to move other employees to create a vacancy); Curry v. Dep't of Veteran Affairs, 2013 U.S. App. LEXIS 10134 (11th Cir. 2013) (employer is not required to promote an employee for purposes of reassignment); McBride v. BIC Consumer Prods., 583 F.3d 92 (2d Cir. 2009) (employer has no duty to reassign employee to a position for which they are unqualified).

Even if there is not a vacancy for an equivalent position, employers must also consider lower-level vacancies for reassignment. Stern v. St. Anthony's Health Ctr., 788 F.3d 276 (7th Cir. 2015) (demotions are possible reassignments when there is no equivalent position vacancy, even though no equivalent or lower-level vacancies existed for the plaintiff).

The Supreme Court has also held that although it would "ordinarily be unreasonable" to require employers to modify seniority practices to reassign an employee with a disability, an employer may be required to make such a modification where seniority is not an expected right. The requirement to modify seniority practices may be appropriate where the employer retains "the right to change the seniority system unilaterally [and] exercises that right fairly frequently, reducing employee expectations that the system will be followed" or the employer's seniority practices already have exceptions so that "one further exception is unlikely to matter." U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

2. Priority of Candidates for Open Positions.

Presently, the employer's obligation to reassign an employee who can no longer perform

her original job depends on the circuit. Some circuits permit an employer to require an employee with a disability to compete with other candidates for an open position, while others do not.

In the Eighth Circuit, employers are not required "to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007). Under Huber, employers must only provide reassignment as a reasonable accommodation if the employee is otherwise qualified for the vacant position and such reassignment does not contravene the employer's policies on hiring. The Eighth Circuit explained the ADA "is not an affirmative action statute" and "only requires [the employer] to allow [the disabled employee to compete for the job, but does not require [the employer]] to turn away a superior applicant." See also EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333 (11th Cir. 2016) (following Eighth Circuit's approach to reassignment and holding "the ADA does not automatically mandate reassignment without competition.")

On the contrary and in contradiction with the Eighth Circuit, the Seventh Circuit has stated that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer." EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012). Like the EEOC, the Seventh Circuit does not require the disabled employee to be the best qualified individual. 2016 EEOC Guidance, at "Reassignment." Instead, the disabled employee must only possess the prerequisite skills, education or experience for position. If the disabled employee possesses the prerequisite qualifications, the employer's obligation to reassign the disabled individual is mandatory and the disabled individual does not need to apply for the vacant position.

A recent case from the Seventh Circuit confirmed that an employer is not required to reassign an employee to a position that would have been a promotion for which the employee was not the most qualified applicant. Brown v. Milwaukee Bd. of Sch. Dirs., 855 F.3d 818 (7th Cir. 2017). In Brown, the employee was an assistant principal in the Milwaukee Public Schools. She injured her knee while dealing with an unruly student, requiring surgery, and she took a three-year leave of absence for which she was entitled. Her doctor said that she could return to work as long as she did not have contact with unruly students. This permanent restriction resulted in the employee's inability to take most of the school district jobs. The Seventh Circuit found that the employee was not qualified to perform the essential functions of her assistant principal position or four vacant positions in light of her doctor's restriction. In addition, the court found that the employee was not entitled to the fifth vacant position because it would have been a promotion. Thus, the court held that no reasonable accommodation was possible.

VII. KEEPING AN EMPLOYEE'S JOB OPEN AT THE END OF LEAVE.

A. Generally.

Under the FMLA, an employer is not required to hold a position open if an employee cannot return to work once FMLA leave is exhausted. But, the employer should consider whether the employee might be considered a qualified disabled employee entitled to a reasonable accommodation (including reassignment to a vacant position) before terminating the employee due to his or her failure to return from leave.

B. Additional Leave under the ADA.

Once the 12 weeks of FMLA leave is exhausted, an employee who is able to work can be ordered to return to work or accept light duty work. If the employee cannot work, the employer must consider whether the employee is disabled under the ADA, and if so, whether an accommodation is possible.

1. Assessing Leave Lengths and Options.

According to the EEOC's enforcement guidance,

> 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 a 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., 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 s/he is qualified***.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question No. 21 (Oct. 17, 2002) (emphasis added). As you can see, the "undue hardship" analysis is particularly important when addressing whether leave is a reasonable accommodation.

The EEOC Guidance offers the following examples:

> **Example A**—An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.
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> **Example B**—An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an

equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C—An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Id. (footnotes omitted).

Decisions about what an employer can do to reasonably accommodate an employee cannot be made in isolation. The employee must be consulted and involved in the process – i.e., engaging the "interactive process." Id., FAQ No. 2 ("The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.").

Employers should communicate with employees both during FMLA and after FMLA. In a recent presentation, EEOC Commissioner Chai Feldblum emphasized the importance of engaging the employee early on in their leave and maintaining regular contact with and them to assess the continued need for leave or a different workplace accommodation.

Given the importance of the "undue hardship" analysis, employers should assess the relevant factors early in the process. With regard to leave, employers generally conduct the undue hardship analysis only after the employee has exhausted FMLA leave and is requesting additional leave as an accommodation. Cmmr. Feldblum noted that employers have the flexibility as early as "day one" of an employee's FMLA leave to assess whether the absence constitutes an undue hardship.

2. No End Date for Leave Can Be An Undue Burden.

With regard to leave as an "undue hardship," the failure of the employee to provide a return date in certain circumstances is evidence of an undue hardship. According to the EEOC Guidance, "if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave." Thus, "undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position." The Guidance offers the following examples:

Example A—An experienced chef at a top restaurant requests leave for treatment

> of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.
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> **Example B**—An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question No. 44 (Oct. 17, 2002).

Additionally, some courts have held the lack of a fixed date is not reasonable, or amounts to a request for indefinite leave. For example, in Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., 691 F.3d 1211 (10th Cir. 2012), the court held that an employee on ADA leave must provide employer with reasonable estimate of when he will be able to return to full duty. Likewise, in Silva v. City of Hidalgo, Texas, 575 Fed. Appx. 419 (5th Cir. 2014), the absence of a return date was tantamount to a request for indefinite leave, which was unreasonable.

3. Lengthy Leaves Can Be Unreasonable.

On September 20, 2017, the Seventh Circuit affirmed that a multi-month leave of absence was beyond the scope of a reasonable accommodation under the ADA. Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), cert. denied __ U.S. __ (Apr. 2, 2018). The plaintiff employee took a 12-week FMLA leave for serious back pain. On the last day of leave, the employee had back surgery for which he needed an additional two or three months of leave. The employee requested more leave, but his employer discharged him. The court held that a multi-month leave of absence was unreasonable because "a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job." The court added that the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA."

Moreover, the Tenth Circuit suggests that a leave of absence longer than six months is almost never a reasonable accommodation. Specifically, in Hwang v. Kan. State Univ., 753 F.3d 1159 (10th Cir. 2014), the plaintiff was an assistant professor who was a good instructor, but having quite a difficult year. After signing a one-year contract to teach but before fall classes started, she received news that she had cancer and required treatment. She requested and was granted a six-month leave of absence. As that leave period drew to a close and spring semester was about to begin, she asked for more time off, promising to return by the summer term. However, the University's inflexible leave policy limited employees to ***no more than*** six months of leave. When the plaintiff could not return, the University terminated her employment. The plaintiff sued, complaining that denying her more than six months' leave violated the

Rehabilitation Act, which is identical in all respects to the ADA.

The trial court quickly dismissed the plaintiff's legal claims and the Tenth Circuit agreed with the dismissal. According to the Tenth Circuit, if an employee needs a "***brief***" absence from work, it may be "legally required," so that the employee can perform his or her essential job duties. However, according to the Tenth Circuit, anything longer likely is not defensible:

> It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions — and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations — typically things like adding ramps or allowing more flexible working hours — are ***all about enabling employees to work***, ***not to not work***.

Id. at 1161-62. (citing, *inter alia*, 42 U.S.C. § 12111(9)) (emphasis added).

The question becomes: how do employers distinguish between a legally-required "brief" respite and a leave period that is "so long" that it is not legally required? The Tenth Circuit articulated three factors courts should examine: (1) the essential duties in question, (2) the nature and length of the leave sought, and (3) the impact on fellow employees. For example, "taking extensive time off may be more problematic, say, for a medical professional who must be accessible in an emergency than a tax preparer who's just survived April 15." Id. at 4-5.

In fact, the court suggested that it would be difficult (if not impossible) for the ADA to require a leave of absence longer than six months, noting that "[t]he Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work — not to turn employers into safety net providers for those who cannot work." Id. at 1162.

The court next looked to the EEOC's guidance, which provides that employers must modify their existing policies for qualified disabled employees in certain instances:

> If an employee with a disability ***needs*** additional unpaid leave ***as a reasonable accommodation***, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

Id. (quoting EEOC Enforcement Guidance) (emphasis added). According to the court, the question posed by the EEOC's guidance was: "When *is* a modification to an inflexible leave policy legally necessary to provide a reasonable accommodation." Id. (emphasis in original).

The Tenth Circuit rejected the plaintiff's suggestion that the EEOC guidance required employers to "always" modify an inflexible policy unless one of the two enumerated conditions

is met. According to the court, "these two enumerated conditions come into play only *after* it's clear that the leave policy modification *is* a reasonable accommodation necessary to ensure the employee can perform his essential job functions." Id. at 7 (emphasis in original). Thus, no policy modification is legally required unless the additional leave is (1) "reasonable" and (2) "necessary to ensure the employee can perform his essential job functions." Id.

The Tenth Circuit even managed to use the EEOC's Guidance to support its finding that more than six months of leave was not a reasonable accommodation:

> The [EEOC] expressly states [in its enforcement guidance on reasonable accommodations] that an employer does not have to retain an employee unable to perform her essential job functions for six months just because another job she can perform will open up then. An employer doesn't have to do so much, the EEOC says, "because ***six months is beyond a reasonable amount of time***" . . . Here then the EEOC seems to agree with our conclusion that ***holding onto a non-performing employee for six months just isn't something the Rehabilitation Act ordinarily compels***.

Id. at 1163 (emphasis added). But, because the court used the modifier "ordinarily," it seemed to leave the door open that, in certain cases, more than six months of leave may be legally required.

Finally, the court suggested that an "inflexible" leave policy actually tends to protect the rights of the disabled, reasoning that these policies ensure that "disabled employees' leave requests aren't secretly singled out for discriminatory treatment, as can happen in a leave system with fewer rules, more discretion and less transparency." The court cited the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S. 391 (2002), which extolled the benefits of "seniority systems," including those set forth in a collective bargaining agreement. Inflexible policies may be unlawful where: (a) they provide too little leave to "provide accommodation enough for employees who are capable of performing their jobs' essential functions with just a little more forgiven absence" or (b) they are not consistently enforced, so that "other employees are routinely granted dispensations that disabled employees are not." After finding that six months of leave was sufficient and that the plaintiff alleged no disparate application of the policy by the University, the court held that the University's six-month leave policy is "more than sufficient to comply with the Act in ***nearly any case***." Again, though, use of the modifier "nearly" denotes that six months of leave may not be sufficient in ***every*** case. That is, the Tenth Circuit seems to suggest that there may be instances in which an employer must modify (or grant exceptions to) an inflexible maximum leave policy.

The Tenth Circuit's decision in Hwang is valuable because it provides guidance regarding how much leave employers must give to their employees before termination becomes an option. In short, according to the Tenth Circuit, a six-month leave of absence will ***almost always*** satisfy the requirements of the ADA/Rehabilitation Act. Nevertheless, this is the opinion of one appellate court (covering the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming). Other circuit courts have not squarely addressed this issue, and courts in other circuits may reach a different result.

4. Eighth Circuit Case Law: Violating the ADA for Failing to Consider

Additional Leave or Other Possible Accommodations.

In the Eighth Circuit, two recent cases demonstrate that employers may violate the ADA if they fail to consider additional leave or other possible accommodations after an employee exhausts employer-provided leave. In Gregor v. Polar Semiconductor, Inc., 2013 U.S. Dist. LEXIS 19355 (D. Minn. Feb. 13, 2013), Judge Doty denied the employer's motion for summary judgment with respect to the employee's accommodation claim, noting that the employer terminated the employee "retroactively . . . once his short-term disability benefits lapsed." Indeed, the record showed that the termination predated any discussions regarding accommodations or reassignment. Judge Doty also noted that the employer failed to consider reassigning the employee to a vacant position as part of an accommodation. Even though the employee seemed "disinterested" in applying for new positions with the employer, the court noted that the employer "did not engage in any discussion regarding reassignment until after it terminated [the employee]." This was important because, after his termination, the employee lost access to the employer's intranet in order to more easily apply for jobs.

Next, in Leneau v. DCI Plasma Center of Duluth, LLC, 2012 U.S. Dist. LEXIS 131852 (D. Minn. Sept. 17, 2012), Judge Tunheim similarly denied the employer's motion for summary judgment with respect to the plaintiff's claim that the employer failed to provide her with a reasonable accommodation of "returning to work part time after an additional leave of absence." With regard to the additional leave accommodation, the court noted that the employee "was not even given an opportunity to talk to [her employer] about whether additional time off work would be a reasonable accommodation."

While none of these cases addressed a situation where the employer had a maximum leave policy, courts in the Eighth Circuit may agree with the Tenth Circuit's reasoning that a maximum leave policy is valid unless (a) it provides an "unreasonably short" leave period (e.g., "may not provide accommodation enough for employees who are capable of performing their essential functions with just a little more forgiven absence") or (b) the maximum leave policy is really a sham and "other employees are routinely granted dispensations that disabled employees are not." However, in light of the EEOC's current enforcement policy as well as the fact that no court in the Eighth Circuit has adopted the Seventh Circuit or the Tenth Circuit's analysis, employers should remain committed to the ADA's interactive process at the end of a leave of absence in order to determine whether accommodation (including additional leave, reassignment, or other possible accommodations) is possible.

VIII. ALTERNATIVES TO LEAVE.

Even if leave is unavailable for whatever reason, there are alternatives that the employer may have to consider.

A. Reasonable Periods of Part-Time Status.

If an employee needs to work part-time (a reduced schedule leave) after returning to his or her same job, the employee is entitled under the FMLA to have group health plan coverage maintained for the remainder of their FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. Ralph v. Lucent Techs., Inc., 135 F.3d 166 (1st Cir. 1998)

(court upholds preliminary injunction requiring four-week trial return to part-time work for employee recovering from PTSD).

In addition, because the employee is working a part-time schedule as a reasonable accommodation required by the ADA, the employer could not take advantage of the FMLA's provision allowing temporary assignment to a different alternative position for individuals requiring part-time work or other intermittent leave.

Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, the employer must continue the schedule only if the employee is a qualified individual with a disability under the ADA and is unable to return to the same full-time position at that time, and the part-time schedule does not create an undue hardship for the employer. When the FMLA leave expires, the employee would be entitled only to those employment benefits ordinarily provided by the employer to part-time employees. 29 C.F.R. § 825.702(c)(3).

B. Schedule Changes and Flexible Work Arrangements.

Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible, restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace.

For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.

C. Offer of Modified Work or a Restructured Job ("Light Duty").

While light-duty work may be a reasonable accommodation under the ADA, the FMLA prohibits an employer from forcing an employee to take a light-duty assignment in lieu of leave under the FMLA. 29 C.F.R. § 825.220(d); see also Light Duty, FMLA Op. 17 (Nov. 15, 1993). An employee may insist on taking an FMLA leave if he or she is eligible for such treatment. There is no FMLA prohibition against offering a light-duty assignment. If an employee accepts an employer's offer of a light-duty assignment in lieu of leave, the employee's time spent performing the light-duty assignment is not counted as time spent on leave under the FMLA.

An employer may – but is not necessarily required, in all instances, to – offer a light-duty position as a reasonable accommodation under the ADA. See 29 C.F.R. § 825.702(d)(1); see also Artis v. Palos Cmty. Hosp., 2004 U.S. Dist. LEXIS 20150 (N.D. Ill. Sept. 22, 2004) (employee may take a light duty position instead of leave under the FMLA, but an employer cannot require light duty in lieu of such leave); Roberts v. Owens-Illinois, Inc., 2004 U.S. Dist. LEXIS 8534 (S.D. Ind. May 14, 2004) (employer did not violate the FMLA when it failed to inform employee that her light duty position counted toward her FMLA leave because employee was not prejudiced by not knowing since she could not perform her job duties at the end of her 12 weeks

of FMLA leave). An employer may be required to restructure a job to provide light-duty work only if the more demanding duties are not essential functions of the position. An employer need not create a special job for an employee with a disability, and need not abandon essential functions of the job.

But, employers must engage in the interactive process with employees when they return from leave if it appears that a reasonable accommodation may be needed. For example, the EEOC sued Wesley Health System, LLC in July 2017 for failing to engage in the interactive process with an employee who returned from work after a three-month leave. The employee returned to work after the leave with a release from her doctor that said she could work full duty, but with a heavy-lifting restriction. Even though the employee presented the release, her employer discharged her due to the restriction without engaging in the interactive process. EEOC v. Wesley Health Sys., LLC d/b/a Merit Health Wesley f/k/a Merit Health, Case No. 2:17-CV-126-KS-MTP, Compl. filed on July 25, 2017 in the United States District Court for the Southern District of Mississippi, Eastern Division.

In addition, it generally has been held that there is no duty for an employer to create a light-duty position as a reasonable accommodation when one is not available. Yet, reassignment to a vacant light-duty position may be a reasonable accommodation in certain circumstances, and, in some cases, it may be more preferable to the employer than other alternative accommodations that the disabled employee might seek. See Hoeft v. Ford Motor Co., 2017 U.S. Dist. LEXIS 48818, at *9-10 (E.D. Mich. Mar. 31, 2017) (although reasonable accommodation may include reassignment to vacant light-duty position, it would not require employer to create light-duty position or convert temporary light-duty position into permanent position).

In viewing these two statutory treatments in combination, where an employee's medical condition qualifies as a "serious health condition" under the FMLA in addition to a "disability" under the ADA, an employer may not have the option of refusing the employee's request for leave and opt for an alternative reasonable accommodation even if leave would constitute an undue hardship. See EEOC Fact Sheet, "The Family and Medical Leave Act, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964" (Nov. 1995), Q. 18.