

Leave As An Accommodation: How Do You Determine If It Is “Reasonable”

Adele Rapport, Attorney
US Equal Employment Opportunity Commission
Audio Conference-April 20, 2004

ADA Coverage

- 15 or more employees
- Individual with substantial limitation of major life activity
- Duty to reasonable accommodation unless it would create an undue hardship
- No absolute right to leave as opposed to other effective accommodations
- Right to reinstatement to same job

FMLA Coverage

- All public and private employers with 50 or more employees within a 50 mile radius (29 U.S.C.2611(4); 29 C.F.R. §825.104)
- Employees who have worked for 12 months (not necessarily consecutively) and *worked* 1250 hours or more (29 U.S.C. §2611(2))
- Individuals with a serious health condition, pregnancy or adoption/foster care, or who have a spouse, parent or child with serious health condition
- Right to Leave if eligible
- Right to reinstatement to same or equivalent job, except key employees

Length and Nature of Leave

ADA

- No specific length in statute or regulations
- Case law on ranges of length of leave required -could be longer than 12 weeks
- Case law on sporadic/unpredictable absences
- Evidence of reasonableness/undue hardship
 - Type of position
 - Type of work
 - Availability of others to cover for absent employee
 - Other leaves granted for other reasons
 - Timing of backfill of position

FMLA

- 12 weeks unpaid leave
- How 12 weeks are counted
- Intermittent Leave
- Benefits Required (29 U.S.C. § 2614(c)(1))

Documentation to Substantiate Eligibility for Leave

ADA

- Employee Inquiry Provisions (42 U.S.C. § 12112(d))
- Employee Inquiry Guidance
- Practical Issues
 - Who pays for medical reports?
 - How specific to reports have to be (e.g. work as tolerated)
 - How broad can inquiry be (e.g. all medical records)
 - Reasonable Follow-up



FMLA

- Employer has right to request certification of need for leave (29 C.F.R. §825.305; DOL Form)
- 15 days to return certification
- Late or inadequate certifications
- Fitness for duty certifications
- Battle of the experts



Reinstatement Rights

ADA

- Same job
- Duty to accommodate in the same job
- Duty to reassign
 - Equivalent position if possible, if not, could be part time work with no benefits

FMLA

- Same or equivalent position virtually identical to the former position. (29 C.F.R. § 2614(a))
- Same benefits
- Key Employee exception (29 U.S.C. § 2614(b))

No Retaliation Provisions

- ADA - 42 U.S.C. §12203
- FMLA - 29 U.S. C. §2615(a)(1),(2)

Interplay between the FMLA/ADA

- Statute providing greater rights controls
- Employee eligibility rights
- Notice issues
- Alternatives to leave
- Benefits
- Return from leave
- Medical records

Further Information from the EEOC

- **Web Site**
 - www.eeoc.gov
- **Regional and District Offices**
 - 800-669-4000 (V)
 - 800-800-3302 (V/TTY)