

**Reasonable Accommodations in Employment—  
A General Update with Emphasis on Leave and Reassignment**

**ADA Legal Series Webinar  
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The ADA’s nondiscrimination mandate includes the obligation to provide a reasonable accommodation.<sup>1</sup> In 2008 Congress passed the ADA Amendments Act, and its mandate—to broaden the definition of disability and simplify the coverage analysis—should result in many more cases being decided on the issue of accommodation.

**1. The Interactive Process**

According to EEOC guidance and the case law, the ADA generally requires the employer and employee to engage in a flexible, interactive process in order to identify a reasonable accommodation. The employer’s obligation to do so is normally triggered by an accommodation request. Courts often rule in favor of the party who tried to engage in this process in good faith, and against the party who did not.

**2. Leave as a Reasonable Accommodation Under the ADA**

A period of medical leave is one of the most important accommodations. According to EEOC guidance, leave as an accommodation may be appropriate for a number of reasons, including medical treatment, repair of a prosthesis or equipment, temporary adverse conditions in the work environment, service-animal training, etc.

The ADA’s statutory definition of a reasonable accommodation includes “part-time or modified work schedules ... and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9)(B). Repeated EEOC guidance confirms that in a general sense, leave is a reasonable accommodation. The case law is also consistent. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 397–398 (2002) (accommodations may include breaks for medical treatment).

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<sup>1</sup> References to the “ADA” are generally meant to include the provisions of the Rehabilitation Act of 1973 that relate to employment discrimination, because the relevant substantive provisions in those statutes are the same. *See* 29 U.S.C. §§ 791(g), 793(d), and 794(d); 29 C.F.R. § 1614.203(b).

This does not mean the individual is always entitled to requested leave, of course. It just means that if the employer is not going to grant leave, it should be based on specific reasons why such leave would result in an undue hardship.

### **3. Defense of Undue Hardship**

Under the ADA an employer need not provide an accommodation if it can show that the accommodation would impose an undue hardship on the operation of its business based on case-specific circumstances. 42 U.S.C. § 12112(b)(5)(A); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–402 (2002).

“Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the statutory factors. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p)(1). The factors include (a) the nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding; (b) the overall financial resources of the facility or facilities involved, the number of persons employed at such facility, and the effect on expenses and resources; (c) the overall financial resources of the covered entity, the overall size of the business (including the number of its employees and the number, type and location of its facilities); (d) the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (e) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business. 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2).

According to both EEOC guidance and case law, generalized conclusions will not suffice. Instead, undue hardship must be based on an individualized assessment of current circumstances, and an employer cannot claim undue hardship based on:

- Fear or prejudice by coworkers or customers;
- Negative impact on morale (although employers may be able to show undue hardship if the accommodation would be unduly disruptive to the ability of other employees to work);
- The fact that co-workers may have to cover for an employee on leave.

There are lots of other possible factors. Sometimes the ability to hire a temporary worker will eliminate any undue hardship, but sometimes that is not possible. Also, if an employer determines that a particular accommodation will cause undue hardship but a different accommodation will not, the employer must provide the second accommodation.

#### **4. Length of Leave**

Neither the statute nor the regulations contain any hard and fast rules as to the maximum length of leave as an accommodation, and many courts have also rejected automatic rules. *See, e.g., Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782 (6th Cir. 1998) (“Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a ‘reasonable accommodation’ under the ADA. It is not clear why unpaid leave should be analyzed differently from any other proposed accommodation under the ADA.”).

The case law supports leave of various lengths, depending on the circumstances. Even lengthy leave may be required depending on the circumstances, and several courts have approved leave in excess of a year.

As one court noted, “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 Services, 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).

On the other hand, even more modest leaves could be an “undue hardship” under particular facts. The point, of course, is that the inquiry must be individualized.

#### **5. Leave In Excess of FMLA or Company Policies**

The appropriateness of a leave request is much clearer if the employee can show that the leave is consistent with company policy or with FMLA requirements. But it is important to note that the ADA’s accommodation obligation may require deviation from company policy. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 397–398 (2002). Thus, many courts recognize that unpaid leave in excess of that granted by company policy, or by the FMLA, may be necessary. The EEOC guidance is similar.

#### **6. Leave Requests for Employees to Avoid**

Many courts state that an employer is not required to grant indefinite leave while waiting for an uncertain recovery. This may be improper as a *per se* rule, but it is also true that granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship.

Employees should therefore avoid asking for indefinite leave, or responding that they have no idea when, or if, they will return. It is much better to provide a return-to-work date when requesting leave. On the other hand, absolute certainty as to that date is

not required. Also, the employer should give the individual a reasonable opportunity to identify the return date with the employee's medical provider.

## **7. Response to Leave Requests for Employers to Avoid**

As suggested in Part 5 above, an employer's fixed-leave policy is subject to challenge.<sup>2</sup> They would appear inconsistent with the ADA if they fail to consider whether additional leave could be provided without undue hardship. Note that the EEOC has filed some high-profile cases on this issue in recent years, resulting in substantial payments by some larger employers.<sup>3</sup>

Employers should also avoid efforts to turn inherent medical inexactness into a claim of indefinite leave. Likewise, employers may not be able to rely on the lack of a definite return-to-work date if it results from the employer's own failure to engage in the "interactive process." When faced with an arguably vague length of leave, the employer should explain its particular difficulty with the lack of a return date, and should request an estimated date from the employee or caregiver. Alternatively, the employer might state the length of leave that it *could* provide without incurring "undue hardship."

## **8. Alternatives to Traditional Leave**

It is important to note that there are alternative accommodations to leave that the employer or employee may have to consider, including, e.g.:

- Reasonable periods of part-time status or light duty;
- Schedule changes and flexibility;
- Telecommuting.

## **9. Other Reasonable Accommodations**

Reasonable accommodation is a very broad concept, and it invites creativity by the parties. A review of recent cases and EEOC guidance shows support for a wide variety of accommodations, including, for example:

- Temporary light duty;
- Rest & recover breaks between assignments;
- Excusing employee from the need to move between buildings;
- Allowing working from a seated position;
- Providing lifting assistance or lifting devices;
- Additional training or instructions;
- A job coach;
- Change in supervisory method;

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<sup>2</sup> These are sometimes called "no fault" leave policies, and often provide that the employer may automatically terminate employees who have been on leave for a certain period of time.

<sup>3</sup> See, e.g., <http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm>.

- Reassigning or limiting marginal functions;
- Limiting rotation to other posts;
- Limiting overtime;
- Help in the application process;
- Allowing access to diabetes supplies;
- Allowing naps at lunch break;
- Providing sign-language interpreters for meetings and trainings;
- Providing a reserved parking space;
- Providing an ergonomic keyboard;
- Providing a raised seat and grab bars in the restroom;
- Providing a glare-guard or one-handed keyboard for computer;
- Adjusting desk or shelf height.

## **10. Reassignment**

Employers generally do not have to permanently excuse an employee from performing the “essential functions” of the job, although a temporary period of reassigning such functions may be reasonable, as is reassigning non-essential functions.

If the employee is permanently unable to perform the essential job functions, even with a reasonable accommodation, the employer must still consider whether there is a vacant position (or one soon to be vacant) that the individual could be transferred into. Remember that:

- Employers do not have to grant a reassignment that would be a promotion;
- Reassignment generally does not require bumping, but may require bumping a temp if the position is considered vacant;
- Employer and employee should work together to identify vacant positions;
- Although not totally clear, the EEOC and recent case law suggest that reassignment mean actual placement, not simply allowing one to compete.

## **10. Things for the *Employer* to Avoid**

Based on recent case law, here are some facts courts have relied on in finding sufficient evidence that an employer had failed to accommodate, or failed to engage in the interactive process in good faith:

- Ignoring or failing to respond to accommodation requests;
- Delay in accommodating;

- Resisting in face of obvious need;
- Offering accommodation that did not work, with no follow-up;
- Not asking for more details or telling plaintiff that info was not specific enough;
- Firing instead of accommodating;
- “Misunderstanding” nature of accommodation despite clarity of request.

**10. Things for the *Employee* to Avoid**

In recent cases, courts have suggested that the employee may not have engaged in the interactive process in good faith based on:

- Failing to providing reasonable medical information to the employer;
- Breaking off the process prematurely by resigning;
- Failing to contact employer to request leave or other accommodation.