

COMPLIANCE OVERVIEW

Provided by Rose Street Advisors

Americans with Disabilities Act: Employer-provided Leave

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in employment and requires that covered employers (those with 15 or more employees) provide reasonable accommodations to employees with disabilities. The Equal Employment Opportunity Commission (EEOC) has provided guidance on when and how leave must be granted to disabled employees as a reasonable accommodation. According to the EEOC, employers may need to take the following steps to comply with the ADA:

- ✓ Modify their policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation;
- ✓ Change their policies that require employees on extended leave to be 100 percent healed before returning to work; and
- ✓ Consider reassignment as an option for employees who cannot return to their jobs following leave.

LINKS AND RESOURCES

- EEOC's [guidance](#) on employer-provided leave and the ADA
- EEOC enforcement guidance "[Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#)"
- EEOC publication "[The ADA: Your Responsibilities as an Employer](#)"

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

ADA – GENERAL RULES

- Covered employers must provide reasonable accommodations for employees with disabilities.
- An employer is not required to provide a reasonable accommodation that would result in an undue hardship for the employer.

RULES FOR LEAVES

- Employees with disabilities must be provided with access to leave on the same basis as all other similarly situated employees.
- Employers must treat a request for leave for a medical condition as a request for a reasonable accommodation under the ADA.
- When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship.



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EQUAL ACCESS TO LEAVE

According to the EEOC, employees with disabilities must be provided with access to leave on the same basis as all other similarly situated employees. If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Example: An employer permits employees to use paid annual leave for any purpose and does not require that they explain how they intend to use it. An employee with a disability requests one day of annual leave and mentions to her supervisor that she is using it to have repairs made to her wheelchair. Even though he has never denied other employees annual leave based on their reasons for using it, the supervisor responds, "That's what sick leave is for," and requires her to designate the time off as sick leave. This violates the ADA, since the employer has denied the employee's use of annual leave due to her disability.

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

LEAVE AS A REASONABLE ACCOMMODATION

The purpose of the ADA's rules regarding reasonable accommodations is to require employers to **change the way things are customarily done** to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave.

Requests for leave related to disability can often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities with access to those policies on equal terms as similarly situated individuals.

That is not the end of an employer's obligation under the ADA though. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. That is the case even when:

- ✓ The employer does not offer leave as an employee benefit;
- ✓ The employee is not eligible for leave under the employer's policy; or

Reasonable Accommodation: A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees. As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.

- ✓ The employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

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

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

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

EMPLOYEE LEAVE – INTERACTIVE PROCESS

Communication after an Employee Requests Leave

As a general rule, the individual with a disability—who has the most knowledge about the need for reasonable accommodation—must inform the employer that an accommodation is needed.

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

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

- ✓ The specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy);

- ✓ Whether the leave will be a block of time (for example, three weeks or four months), or intermittent (for example, one day per week, six days per month, occasional days throughout the year); and
- ✓ When the need for leave will end.

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

An employer may obtain information from the employee's health care provider (with the employee's permission) to confirm or to elaborate on information that the employee has provided. Employers may also ask the health care provider to respond to questions designed to enable the employer to understand the need for leave, the amount and type of leave required, and whether reasonable accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave). Information from the health care provider may also assist the employer in determining whether the leave would pose an undue hardship.

An employee requesting leave as a reasonable accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as quickly as possible.

Communication during Leave and Prior to Returning to Work

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

Example: An employee with a disability is granted three months of leave by an employer. Near the end of the three-month leave, the employee requests an additional 30 days of leave. In this situation, the employer can request information from the employee or the employee's health care provider about the need for the 30 additional days and the likelihood that the employee will be able to return to work, with or without reasonable accommodation, if the extension is granted.

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

MAXIMUM LEAVE POLICIES

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

Types of Maximum Leave Policies

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

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

Example: An employer is not covered by the FMLA, and its leave policy specifies that an employee is entitled to only four days of unscheduled leave per year. An employee with a disability informs her employer that her disability may cause periodic unplanned absences and that those absences might exceed four days a year. The employee has requested a reasonable accommodation, and the employer should engage with the employee in an interactive process to determine if her disability requires intermittent absences, the likely frequency of the unplanned absences, and if granting an exception to the unplanned absence policy would cause undue hardship.

Communication Issues

Many employers, especially larger ones and those with generous maximum leave policies, may rely on "form letters" to communicate with employees who are nearing the end of leave provided under an employer's leave program. These letters frequently instruct an employee to return to work by a certain date or face termination or other discipline.

Employers who use these form letters may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship.

An employer and employee should continue to communicate about whether the employee is ready to return to work or whether additional leave is necessary. If an employee requests additional leave that will exceed an employer's maximum leave policy, the employer may engage in an interactive process as described above, including obtaining medical

Compliance Tips: If an employer relies on a third-party provider to handle lengthy leave programs, including short- and long-term disability leave programs, it should ensure that any automatic form letters generated by these providers comply with the employer's obligations under the ADA. Also, employers who handle requests under their regular leave policies separately from requests for leave as a reasonable accommodation should ensure that those responsible communicate with one another to avoid mishandling requests for accommodation.

documentation specifying the amount of the additional leave needed, the reasons for the additional leave and why the initial estimate of a return date proved inaccurate.

An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship.

RETURN TO WORK AND REASONABLE ACCOMMODATION (INCLUDING REASSIGNMENT)

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

100 Percent Healed Policies

An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions—that is, be "100 percent" healed or recovered—if the employee can perform his or her job with or without reasonable accommodation, unless the employer can show that providing the needed accommodations would cause an undue hardship.

Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat."

Example: An employee with a disability requests and is granted two months of medical leave for her disability. Three days after returning to work, she requests as reasonable accommodations for her disability an ergonomic chair, adjusted lighting in her office and a part-time schedule for eight days. In response, the company requires the employee to continue on leave and informs her that she cannot return to work until she is able to work full-time with no restrictions or accommodations.

The employer may not prohibit the employee from returning to work solely because she needs reasonable accommodations (though the employer may deny the requested accommodations if they cause an undue hardship). If the employee requires reasonable accommodations to enable her to perform the essential functions of her job and the accommodations requested (or effective alternatives) do not cause an undue hardship, the employer's requirement violates the ADA.

Issues Related to the Interactive Process and Return to Work

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

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

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

Reassignment

In some situations, the requested reasonable accommodation will be reassignment to a new job because the disability prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship. The EEOC takes the position that if reassignment is required, an employer must place the employee in a vacant position for which he or she is qualified, without requiring the employee to compete with other applicants for open positions.

Reassignment does not include promotion, and generally an employer does not have to place someone in a vacant position as a reasonable accommodation when another employee is entitled to the position under a uniformly applied seniority system.

Example: A medical assistant in a hospital required leave as a reasonable accommodation for her disability. Her doctor clears her to return to work but requires that she permanently use a cane when standing and walking. The employee realizes that she cannot perform significant parts of her job while using a cane and requests a reassignment to a vacant position for which she is qualified. The hospital violates the ADA if it fires the employee rather than reassigning her to a vacant position for which she is qualified and in which she could perform the essential functions while using a cane.

UNDUE HARDSHIP

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

- ✓ The amount and/or length of leave required;

- ✓ The frequency of the leave;
- ✓ Whether there is any flexibility with respect to the days on which leave is taken;
- ✓ Whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);
- ✓ The impact of the employee's absence on co-workers and on whether specific job duties are being performed in an appropriate and timely manner; and
- ✓ The impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

In many instances, an employee (or the employee's doctor) can provide a definitive date on which the employee can return to work. In some instances, only an approximate date or range of dates can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified in light of changed circumstances, such as where an employee's recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis.

Key Point

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 does not have to be provided as a reasonable accommodation.**

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may take into account leave already taken—whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.

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

Source: U.S. Equal Employment Opportunity Commission