Extended Leave Under the ADA: How Long is Too Long?

By Linda Schoonmaker and Austin Brayley

Federal law seeks to protect individuals in the workforce from loss of employment due to serious health conditions that might interfere with an employee's attendance or ability to perform certain job functions. Traditionally, the Family and Medical Leave Act (FMLA) has been the primary statutory authority under which extended medical leave is offered to employees. In recent years, however, the U.S. Equal Employment Opportunity Commission (EEOC) has embraced a growing trend recognizing that additional medical-related leave may be available to employees as a "reasonable accommodation" under the Americans with Disabilities Act (ADA). Whereas the FMLA limits annual leave to 12 weeks, the ADA contains no such explicit limit. Instead, the ADA has been interpreted to require that leave be provided as an accommodation to a qualified employee unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer. The practical implication is that employers may not enforce strict maximum leave policies and must instead give thoughtful consideration to the impact of an employee taking leave on business operations and staffing levels before turning down an employee's medical leave request.

This article highlights key differences between the FMLA and the ADA with respect to providing job-protected leave to employees; explores the EEOC's position regarding leave as a reasonable accommodation under the ADA; and discusses factors employers should consider in determining under what circumstances they must or, alternatively, need not provide extended leave to an employee under either law.

FMLA Basics

The FMLA requires covered employers to provide employees job-protected leave for qualified medical and family reasons including personal illness.[1] Leave can be taken in various lengths, but the maximum available is 12 weeks in a calendar year.[2] FMLA leave may also be taken intermittently as needed.[3] In order for an employee to be eligible for leave under the FMLA, he must: (1) have been employed by a covered employer for at least 12 months; (2) have had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) be employed at a worksite where the employer employs 50 or more employees within 75 miles or at a public agency, public school board, or elementary or secondary school.[4]

The FMLA provides that an employer may require an employee to have his need for leave certified by a health care provider prior to approving him for leave. "On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment."[5] But, once an employee has exhausted his 12 weeks of FMLA leave, any additional leave taken is not entitled to that law's protections. Accordingly, it is not uncommon for an employee unable to return to work upon the expiration of his 12 weeks of FMLA leave to be terminated on the basis that the employee's absence is not protected, and the employer owes him no duty to continue his employment. For reasons described herein, however, an immediate termination based on the expiration of FMLA leave can be problematic.

ADA Basics

The ADA prohibits discrimination in employment on the basis of disability and requires that covered employers provide reasonable accommodations to applicants and employees with disabilities that would

[1] The FMLA also permits employees to take leave to attend to the serious health condition of the employee's parent, spouse, or child, or for pregnancy or care of a newborn child, or for adoption or foster care of a child. For purposes of this article, only leave based on an employee's own health condition(s) will be addressed.

[2] 29 U.S.C. § 2612 (2012).

[3] *Id.*

[4] 29 C.F.R. §§ 825.104, 825.110, 825.600 (2016).

[5] *Id.* § 825.214.

enable them to perform their essential job duties.[6] Whereas the FMLA makes leave available only to employees who have satisfied length of service requirements and are employed by sizable employers, the ADA's protections extend to every "qualified individual" with a disability regardless of tenure or hours worked, provided the minimum 15-employee threshold is met.[7]

The ADA does not expressly address the issue of a medical leave. As a general rule, the individual with a disability must inform the employer that an accommodation of whatever nature is needed.[8] From there, the employer is responsible for promptly engaging in an "interactive process" with the employee, designed to enable the employer to obtain relevant information to determine the feasibility of providing the reasonable accommodation.[9] An employer may additionally obtain information from the employee's health care provider to confirm or to elaborate on information that the employee has provided, or ask questions to aid the employer in understanding whether an accommodation other than the one requested by the employee would be effective.[10]

The EEOC's Position: Leave as a Reasonable Accommodation Under the ADA

The EEOC, the federal government agency charged with enforcing the ADA and other employment discrimination statutes, has taken the position that medical leave can be a reasonable accommodation under the ADA. Although in principle this is not a novel interpretation of the law—nearly every federal circuit court of appeals has recognized leave as a reasonable accommodation in at least some circumstances—the EEOC has taken a particularly progressive stance on the issue. Under EEOC interpretive guidance, including a recently released resource document entitled "Employer-Provided Leave and the Americans with Disabilities Act,"[11] an employee may be entitled to leave under the ADA even in situations where (1) the employee has already exhausted all available leave under the FMLA and similar state laws, (2) the employee is not entitled to leave under the employer's policies, and (3) the employer does not offer paid or unpaid leaves. This means that, from the EEOC's point of view, even after FMLA and similar state leaves of absence have been exhausted, an employer may not discharge the employee without first considering additional leave as a reasonable accommodation under the ADA.

In recent years, the EEOC has aggressively prosecuted employers for their use of inflexible maximum leave policies. For example, in 2012, the EEOC settled a lawsuit against Interstate Distributor Company for $4.85 million, based on the nationwide trucking firm's alleged enforcement of a maximum leave policy limiting the amount of health-related leave an employee could take.[12] More recently, in May 2016, the EEOC obtained an $8.6 million settlement from home improvement retailer Lowe's Companies based on allegations that Lowe's terminated employees whose medical leaves of absence exceeded the company's 180-day or 240-day maximum leave policy.[13]

How Long is Too Long?

The EEOC has not specified any outer limit to leave available as a reasonable accommodation under the ADA. In practice, the EEOC has taken the position that employers may not automatically cap disability-related leave under the ADA. This is the case even long after an employee has exhausted all available FMLA leave, as evidenced, for example, by the EEOC's $3.2 million settlement with Supervalu in 2011 based on allegations that the food retailing company enforced a policy of terminating employees who could not return to work after a full year of disability leave.[14] The EEOC

6 42 U.S.C. §§ 12101, 12112 (2012).

7 *Id.* § 12112.

8 U.S. Equal Emp't Opportunity Comm'n, Employer-Provided Leave and the Americans with Disabilities Act 4 (2016), https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf.

9 *Id.* at 4–5.

10 *Id.*

11 *Id.* at 2–3.

12 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Interstate Distributor Company to Pay Nearly $5 Million to Settle EEOC Disability Suit (Nov. 9, 2012), https://www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm.

13 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Lowe's to Pay $8.6 Million to Settle EEOC Disability Discrimination Suit (May 13, 2016), https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm.

14 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Supervalu/Jewel-Osco to Pay $3.2 Million under Consent Decree for Disability Bias (Jan. 5, 2011), https://www.eeoc.gov/

has stated, however, that "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 [to the employer], and so does not have to be provided as a reasonable accommodation."[15]

In determining whether leave would impose an undue hardship, a number of factors should be considered, including the length of the leave; the frequency of the leave; the flexibility of the leave dates; if the request is for intermittent leave, whether the time off needed occurs on a predictable schedule; the impact of the employee's absence on coworkers; whether specific job duties are being performed in an appropriate and timely manner; and the impact on the employer's operations and ability to serve customers/clients in a timely manner, which takes into account the size of the employer.[16] Thus, a small employer is more likely able to show that the leave will impact its operations due to having fewer employees and more limited resources. If an employee has already taken leave, the employer is permitted to consider the impact of leave already taken in determining whether additional leave would create an undue hardship.[17] According to the EEOC, an employer cannot claim undue hardship based on the negative effect an accommodation would have on the morale of other employees, but it may claim undue hardship when the accommodation sought would be "unduly disruptive" to other employees' ability to do their jobs.

Conclusion

Employers and the legal practitioners that counsel them should be mindful that the EEOC does not see the FMLA's 12-week leave provision as the "hard stop" Congress legislated. This is particularly significant because the EEOC is actively targeting employers that continue to enforce maximum leave policies and deny leave without first considering extending the leave period as an accommodation under the ADA.

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eeoc/newsroom/release/1-5-11a.cfm.

[15] U.S. Equal Emp't Opportunity Comm'n, Employer-Provided Leave and the Americans with Disabilities Act 10 (2016), https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf.

[16] *See id.* at 9.

[17] *See id.* at 10.