**ADA Leave Accommodation Article *– Business Insurance***

**Three Tests for ADA Leave Accommodations**

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The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to enable employees with physical or mental disabilities to perform the essential functions of their jobs.

Usually when employers think of an accommodation it’s in the context of ergonomic equipment, work from home, or adjustments to an employee’s work space. Workplace accommodations, however, represent only one type of accommodation; an ADA accommodation can also take the form of a leave of absence.

In the context of the ADA, an absence is a period of time off granted to allow an employee with a disability to return to work (possibly while still needing other accommodations). This absence is on top of any other job protected leave that’s already exhausted.

Penalties can be severe for employers who don’t properly consider leave as an accommodation before terminating an employee who can’t return from work after a job-protected absence. Just look to the EEOC’s last few years of consent decrees, ranging in the millions of dollars for companies with a one-size-fits all policy of terminating employees who can’t return to work after a proscribed period of time. Last year, the EEOC issued long-awaited guidance on leave as an accommodation, which we recommend employer review and compare with their work place policies. In doing so, we ReedGroup also recommends this easy-to follow test and guidance for evaluating leave as an ADA accommodation.

**Three Tests for Leave Accommodations**

Leave administrators need to use repeatable standards for evaluating whether an accommodation would be ADA-compliant. Reed Group uses three simple Accommodation Tests that can be applied to each employee absence during the ADA interactive process.

The three Accommodation Tests are:

1. Is a leave of absence accommodation ***reasonable***? Is the proposed accommodation plausible or feasible?
2. Is a leave of absence accommodation ***effective***? Will the time off enable the employee to return to work and perform the essential functions of the job?
3. Does a leave of absence accommodation impose an ***undue hardship*** on the employer’s business?

By answering each of these Accommodation Test questions, employers can determine if time away from work is appropriate for a disabled employee.

**Accommodation Test one: Is the requested leave of absence a “reasonable” accommodation?**

An employer must engage in the interactive process at the exhaustion of a job-protected absence to determine if additional leave can be offered as a *reasonable* accommodation.

So what is reasonable? According to the EEOC, a reasonable accommodation is simply one that is plausible or appears to be feasible. To determine feasibility, employers must consider a number of factors including the length of the leave, frequency and unpredictability of any intermittent absences and the flexibility of the employee’s scheduled return to work date.

Unfortunately, there are very few solid rules when it comes to determining whether leave is a reasonable accommodation, or for how long a leave may last and still be considered reasonable. For the most part employers have to rely on their own judgment and analysis of each individual circumstance.

Several cases have suggested two guidelines that employers may follow:

1. An employer can expect an employee to provide an estimated return to work date and/or impairment end date. *Return to work* in this case means the resumption of the employee’s essential duties. Without an expected end date, an employer is **not** expected to be able to determine whether the accommodation is reasonable.
2. The leave request must assure an employer that an employee can perform the essential functions of his or her position in the “near future.” Because *near future* is not defined, employers are advised to use the three Accommodation Tests as a guide: that is, will the future return date be reasonable, effective, and not an undue hardship on the employer?

As employers work through this stage of the interactive process, remember that the EEOC considers it reasonable for an employer to modify its employment policies to accommodate an employee’s impairment. This may include modifying “no-fault” or other leave or attendance policies so that an employee is not terminated automatically if he or she cannot return to work after the period of time defined in the employer’s leave policy. In fact, the failure to do so has resulted in multi-million dollar consent decrees.

Now the good news: the EEOC doesn’t expect employers to offer paid leave as a reasonable accommodation. An important point, though, is that an employer cannot discriminate or treat a disabled employee differently than other employees. So if the employer offers paid leave or other benefits during leave to other similar employees, then those same leaves or benefits need to be extended to the disabled employee.

Allowing the employee to use paid leave accrued under plans such as vacation or paid time off during a leave is a reasonable accommodation. If the employee’s accrued paid time off is not sufficient to cover the entire leave requested by the employee, it’s perfectly fine for the remainder of the leave to be unpaid.

**Accommodation Test two:** **Is the leave of absence accommodation “effective”?**

It is not enough for an accommodation to be judged as reasonable; it also must be *effective*. This means that the accommodation must enable the employee to perform the essential functions of his or her job. An employer must decide whether leave is an effective accommodation by considering several factors:

* The nature of the employee’s disability and limitations
* The anticipated duration of the leave
* The employee’s position, including essential and marginal functions
* What purpose the leave will serve to enable employee to return to work to perform his/her essential functions
* The likelihood (not certainty) that the employee will be able to perform his/her essential functions at end of the leave
* The success or failure of past accommodations attempted for the employee
* Other accommodations (such as ergonomic adjustments, schedule changes, work from home, reasonable changes to job descriptions such as avoiding heavy lifting, etc.)

The answers to most of these questions are straightforward but need to be considered as a whole to determine whether or not the accommodation can be considered effective under the ADA.

**Accommodation Test three:** **Does the requested leave impose an undue hardship on the employer or its operations?**

Finally, even if an accommodation is reasonable and effective, the employer does not have to provide that accommodation if it will impose an *undue hardship* on the employer’s business. This is probably the trickiest of the three Accommodation Tests as the answer can be more subjective than the others.

The EEOC defines undue hardship as a “significant difficulty or expense” resulting from a potential accommodation.

Significant *financial*difficulty refers to the cost of providing the accommodation. Significant *operational*difficulty means an accommodation that’s unduly extensive, substantial, disruptive, or would fundamentally alter the nature of the business operation. Employers also have to take into account their own size and ability to absorb the impact of an employee accommodation; other resources available to support an accommodation; and the nature of the duties the employee performs.

No EEOC rules specify how long a leave of absence needs to be before it constitutes an undue hardship. As with the other Accommodation Tests, employers need to review each employee’s situation – and the potential impact of each accommodation option – individually during the interactive process.

When considering whether the leave accommodation is an undue hardship, it’s essential for an employer to collect and document facts and evidence and be specific and systematic it the undue hardship analysis.

Leaves of absence that are erratic, unscheduled, indefinite and/or unpredictable are **not** considered reasonable accommodations!

Also, the EEOC expects employers to consider using third parties and outside resources to support a leave of absence accommodation before declaring an undue hardship. This includes looking for funding from a state or rehabilitation agency to pay for part or all of a requested accommodation, and checking whether there are available tax credits or deductions to cover the cost

**Conclusion**

Employers can find themselves in a difficult spot when it comes to leave accommodations under the ADA. On the one hand, the rules governing leave accommodations are sparse and sometimes confusing. On the other, the EEOC is actively investigating employers who are not in compliance with leave accommodation rules – and the penalties for getting it wrong can be punishing. Our three Accommodation Tests can help employers stay on the right side of the law, but remember: the answers uncovered may be subjective. Work through the process systematically, and always document, document, document.

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