Revisiting the Bermuda Triangle: ADA, FMLA and Workers' Comp

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Employers must tread carefully when responding to an employee's request to continue a leave of absence. Recent decisions from federal courts around the country remind us that once a leave under a company policy, the Family and Medical Leave Act or state workers' compensation laws has expired, extending that leave for a finite period of time may be a required accommodation under the ADA.

The good news is that employers have greater leeway to require detailed medical documentation before granting extended leaves, and may terminate an employee who fails to provide such documentation.

Tangled Triangle

Although Congress designed them for different purposes, the ADA, the FMLA and state workers' compensation laws often overlap to provide leave entitlements and job protections to employees.

At the most basic level, the ADA and the FMLA aim to protect an employee's job when he or she needs leave or accommodations. Under the FMLA, an employer with 50 or more employees located within a 75-mile radius is required to allow a total of 12 weeks of unpaid leave during any 12-month period to those employees who have worked at least 1,250 hours during the 12 months preceding each requested leave. The FMLA applies to leaves due to (1) the birth, adoption or foster care placement of a child, and (2) a serious health condition of the employee or of a child, spouse or parent of the employee.

Following an FMLA leave, an employee is entitled to be restored to the same job he or she previously held or to an equivalent position. However, employees who exhaust their 12 weeks of FMLA leave stand to lose their entitlement to job restoration even if their employers provide additional non-FMLA leave. Courts have ruled that a contrary result would unduly and unfairly burden employers (*Slentz v. City of Republic, Missouri*, 448 F.3d 1008, 1010 (8th Cir. 2006); *Dogmanits v. Capital Blue Cross*, 413 F. Supp. 2d 452, 461 (E.D. Pa. 2005)).

The ADA applies more extensively, as it covers employers with 15 or more employees and also protects job applicants. It requires reasonable accommodation for an employee's disability, defined as a physical or mental impairment that substantially limits a major life activity (such as working).

The term "reasonable accommodation" refers to those accommodations that "presently, or in the near future, enable the employee to perform the essential functions of his or her job" (*Lara v. State Farm Fire & Cas. Co.*, 121 Fed. Appx. 796 (10th Cir. 2005); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1999) ("presently, or in the immediate future"). Various courts and the Equal Employment Opportunity Commission have concluded that unpaid medical leave for a finite period of time is a reasonable accommodation under the ADA, even as an extension of an existing leave period, if it does not pose an undue hardship on the employer (*e.g., Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638 (1st Cir. 2000); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006); see also 29 C.F.R. pt. 1630, app. at 356, providing that a reasonable accommodation could include "unpaid leave for necessary treatment").

In addition, state workers' compensation laws come into play whenever the disability or leave requirement results from a work-related injury.

At the intersection of these laws, employers are regularly frustrated when employees exhaust all available leave under the company's policy, the FMLA or a leave for a workers' compensation injury, only to request additional time off. More often than not, employees fail to mention that the additional leave is requested as an accommodation under the ADA. To make matters worse, many of these employees have

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a history of chronic absenteeism and refuse to provide proper medical documentation. Employers must not act precipitously, however, as they may face the prospect of a retaliatory discharge or disability discrimination claim if no additional leave is granted and the employee is terminated.

To minimize their liability, it is essential for employers to understand the requirements of the FMLA, the ADA and state workers' compensation laws. It is similarly imperative for companies' policies to provide leave that is consistent with applicable laws and applied evenly across the board to all employees without exception.

When Further Leave Is Desired

When grappling with employees who exhaust their leave and request continued leave, employers should consider the extent to which such accommodation will cause undue hardship on its business operations, analyzing each such situation on its own merits. An employer must consider additional leave only when such leave will enable the employee to perform the essential functions of his or her job in the near future.

The weight of authority in various jurisdictions clearly establishes that the ADA does *not* require an employer to grant an employee an indefinite leave of absence, as such accommodation would impose an undue hardship on the employer (*Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998)).

Therefore, while it is true that the ADA requires as a reasonable accommodation leave in addition to that available under a company policy or required under the FMLA or state workers' compensation laws, employers do not have to consider a request for indefinite leave.

How Much Leave Is Too Much

Great uncertainty arises when employers attempt to determine what constitutes a "finite" period of time under the ADA. The statutory provisions and regulations do not define what is a finite or an indefinite period of time. Furthermore, the courts have been hesitant to specify a maximum length of time for a leave to be considered a reasonable accommodation. It all depends on the circumstances.

The only guidance provided by recent federal court decisions is that a finite leave is that which is needed to enable an employee to perform his or her essential job functions "in the near future." (*Dogmanits,* 413 F. Supp. 2d at 462). Therefore, employers are left with limited guidance because most courts have not held any exact number as the set standard that demarcates a reasonable from an unreasonable accommodation. (But see *Boykin v. ATC/VANCOM of Colo., L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001), holding that six months is beyond a reasonable amount of time; *Kalskett v. Larson Mfg. Co. of Iowa*, 145 F. Supp. 2d 961, 981 (N.D. Ia. 2001), holding that seven months constitutes an excessive amount of time in which to require an employer to retain a disabled employee on unpaid leave; *Dockery v. North Shore Med. Ctr.*, 909 F. Supp. 1550, 1560 (S.D. Fla. 1995), holding that "as a matter of law, an employer is not required to grant a one-year leave of absence, and such an accommodation is, on its face, unreasonable".)

The employee may not have to ask for a precise amount of time for the leave request to be considered finite. In a recent case, a worker who had exhausted all his available leave asked for "a couple weeks" more in which to consult a doctor, and the court ruled that this stated a finite period of time (*Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006)).

Medical Information

Once an employee's leave has expired, an employer must consider granting continued leave only if such leave is for a finite period of time *and* supported by medical documentation. Therefore, employers can request medical documentation that provides the reason for the extended leave and the duration of the impairment.

The U.S. Court of Appeals for the 10th Circuit held that without knowing how long the impairment will probably last, an employer cannot determine whether the employee will be able to perform the essential functions of his or her job in the near future, thereby invoking the "reasonable accommodation" rule (*Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996)).

Similarly, U.S. district courts have granted summary judgment to employers when employees fail to tell them the expected duration of their impairment or, at least, a date when they could return to work. In such cases, district courts have ruled that an extended leave of absence is unreasonable (*Brown v. Unified School Dist. No. 500,* 368 F. Supp. 2d 1250, 1258 (D. Kan. 2005); *Stamey v. NYP Holdings, Inc.*, 358 F. Supp. 2d 317, 326–7 (S.D.N.Y. 2005); *Dogmanits*, 413 F. Supp. 2d at 461).

However, a recent case cautions employers to carefully consider all the information available before making a termination decision, rather than persistently requesting the medical documentation that sets a specific duration of the impairment or of the leave. In *Graves v. Finch Pruyn & Co.* (457 F.3d 181 (2d Cir. 2006), see the *ADA Compliance Guide* newsletter, Sept. 2006, p. 8), the employee simply asked for "more time" to get a doctor's appoint-

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ment and informed his employer that it would take a "couple weeks" to learn of his chances of rehabilitation. Based on such broad information, the U.S. Court of Appeals for the 2nd Circuit held that the lower court erred in rejecting the employee's ADA claim on the basis that the requested leave was indefinite because the employer had additional information at its disposal.

Suggestions for Employers

As a review of federal court decisions of the last two years reveals, there is no bright line for determining when an employer should grant extended leave for an employee who has exhausted his or her leave and asks for more. However, if employers follow certain guidelines listed in the box below before making a final decision regarding extended leave, they will more likely be in compliance with leave laws.

Employer Guidelines for Leave Decisions

- Always remember that an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer.
- Establish a written policy regarding the process of requesting leave, the medical documentation required, the maximum leave allowed and the consequences of failing to abide by the established policy.
- Communicate and administer the established policy uniformly and in a nondiscriminatory manner, without making exceptions.
- Consider obligations under the FMLA, the ADA and state workers' compensation laws before making a decision regarding an employee's request for extended leave as an accommodation.
- Provide the employee with as much leave as allowed under the applicable laws.
- Do not make a decision based on one unanswered request by the employee for medical documentation, but instead provide the employee with a written notice of the consequences of failing to respond within a clear timeframe.
- Document all reasons supporting a decision to decline leave or a leave extension as an accommodation to an employee.
- Be prepared to show, with verifiable proof, that offering an employee an extended leave of absence would be an undue hardship if that is the reason for the denial of leave.