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## Employer-Provided Leave and the Americans with Disabilities Act (Part 2 of 4)

### Communication after an Employee Requests Leave

When an employee requests leave for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. 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.

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:

- the specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, or physical therapy);
- whether the leave will be a block of time/intermittent;
- 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 employee consent) 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 the employer's questions as part of the interactive process and work with the health care provider to obtain medical documentation as quickly as possible.

### Communication During Leave and Prior to Return 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, when the employee requires additional leave beyond that which was originally 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 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. 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, such 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.

## What This Means for Counties

For more information, please contact CTSI at 303-861-0507. “Undue hardship” will be explained in the final part of this series.

U.S. Equal Employment Opportunity Commission. (5/9/2016). *Employer-Provided Leave and the Americans with Disabilities Act* [Press release]. Retrieved from <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>