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

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 (for example, four months, three days per week, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);
- the frequency of the leave (for example, three days per week, three days per month, every Thursday);
- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
- 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 coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the em-

ployer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant over-time costs);

- 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 (for example, "sometime during the end of September" or "around October 1") or range of dates (for example, between September 1 and September 30) 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. However, 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 so 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.

Example: An employer not covered by the FMLA initially grants an employee intermittent leave for a disability. After six months, the employer realizes that the employee is using far more leave than expected and asks for medical documentation to explain the additional use of leave and the outlook for the next six months. The documentation reveals that the employee could need as much leave in the coming six months as he already used. As a result of the increased number of absences, the employer has had to postpone meetings necessary to complete a project for one of the employer's clients, in turn causing delays in meeting the client's needs. In addition, the employer has had to reallocate some of the employee's job duties, resulting both in increased workloads and changes in work priorities for coworkers that are interfering with meeting the needs of other clients. Based on this information, the employer determines that additional intermittent leave as described in the doctor's letter would be an undue hardship.

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.

Example: An employer is not covered under the FMLA. An employee with a disability requires 16 weeks of leave as a reasonable accommodation. The employer determines that it can grant the request and hold open the job. However, due to unforeseen circumstances that arise after seven weeks of leave, the employer determines that it would be an undue hardship to continue holding

the job open. The job is filled within three weeks by promoting a qualified employee. Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly-vacant position as a reasonable accommodation.

What This Means for Counties

For more information, please contact CTSI at 303-861-0507.

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>