

**EMPLOYEE BENEFITS**

# How Long is Too Long? Leave as An Accommodation

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In a common scenario experienced by employers, an employee is approved for leave, exhausts that leave and requests additional leave. Now what?

Employers often question how much leave is the “right” amount of leave when it comes to evaluating employee entitlements under the Americans with Disabilities Act Amendment Act (ADAAA). This is not an easy question to answer. In fact, the Equal Employment Opportunity Commission (EEOC) states that a policy that specifies a maximum amount of leave (e.g., 12 months), may be considered an inflexible leave policy, which is unlawful under the Americans with Disabilities Act (ADA) if exceptions are not made for reasonable accommodation purposes.<sup>1</sup>

Each request for accommodation, including leave, should be evaluated on its merits and circumstances under the ADA through the interactive process. The intent of the ADA is to permit employees with disabilities to enjoy the same rights and privileges to employment as fully abled employees. If leave is an accommodation that permits this then it should be considered. Employers should also be mindful that the Pregnant Worker’s Fairness Act (PWFA) emphasizes providing at-work accommodations, as opposed to placing an employee on a leave of absence. There are several directives tied to requesting supporting documentation that must be accounted for, many of which differ from how

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ADA is generally processed. As such, it may be beneficial to focus stakeholder education on ways to bring employees back to work and/or keep them at work versus placing them on leave as their accommodation, especially when the PWFA may apply.



However, an employer does not have to provide paid leave or indefinite leave in situations where it is unknown when (or if) an employee returns to work, as that might constitute an undue hardship. The EEOC has been clear that long-term medical leave should qualify as a reasonable accommodation when the following are true:

- The leave has a defined duration
- The leave is requested in advance
- The leave is likely to permit the employee to return to work and perform the essential functions of their job<sup>2</sup>

Conducting a case-by-case analysis and engaging in the interactive process to discuss the parameters and expectations of any medical leave are still the best ways to evaluate an employee's medical leave request. Fortunately, the steps necessary to complete this kind of analysis and interactive process are easily defined and repeatable.

Unfortunately, ADA requests are often complex and unique. Therefore, a key factor to successfully managing accommodations is through a defined organizational approach within a written ADA policy, clearly outlining an organization's responsibilities and requirements under the ADA. Other internal-facing documents (such as process guides stating stakeholder roles and responsibilities) should be created and maintained with ongoing training to help individuals remain current on the process. Leader training should also be provided on a defined and regular cadence so leaders, who are often the first individuals that employees talk with about an accommodation request, are reminded of the process and where to direct employees.

As part of this exercise, employers should consider how they approach the subject of leave as an accommodation. A few considerations are outlined below.

- **Consider when the formal evaluation of leave as an accommodation begins:** Does it begin with the employee's initial request for a leave of absence (under any program)? Does that leave of absence eventually turn into an accommodation request? It is important to consider whether policies or mandates, such as company medical leave, short-term disability (STD), state and federal Family and Medical Leave Act (FMLA) and other job-protected leaves are included during this time frame. In doing so, the employer has established a consistent baseline for evaluating durations tied to leave as an accommodation.
- **Consider additional leave as an accommodation upon exhaustion of FMLA and/or other job-protected leaves or for those not yet eligible:** This is an important aspect of the EEOC's guidance. An employer must provide unpaid leave to an employee, absent undue hardship, even if the employee is not eligible for a company leave policy or has exhausted a company leave policy or other mandated leave. This could be especially impactful if the organization has a large number of employees who do not qualify for FMLA based on their hours worked and/or have not worked for the organization for at least one year.
- **Consider additional leave as an accommodation prior to the end of STD benefits, which are typically not job-protected:** Organizations should evaluate how these individuals are tracked and/or managed when there is not another specific leave entitlement that applies (e.g., tracking "leave as an accommodation" as a separate leave policy that runs concurrent to a STD claim).
- **Consider additional leave as an accommodation at the end of STD benefits:** Some employees may transition into long-term disability (LTD), but others may not be eligible if they are not considered disabled under the LTD program or may not have elected LTD benefits.

When determining the right amount of time for leave under the ADA, it's important to include a case-by-case evaluation, an essential building block of the ADA.

## Questions to help determine how much leave to provide as an accommodation:

- What is the likely duration that would allow an employee to return to work?
- What amount of leave has been provided under FMLA, STD, company medical leave, etc.?
- How much additional leave is the employee requesting?
- Has the employee's healthcare provider indicated if and how additional leave will help the employee return to work? For example, an additional number of weeks for additional treatment and/or a recovery period.

After considering these questions, it may feel more attainable to define an appropriate duration of leave under the ADA, as an organizational approach and guidepost, not a mandate, that can adapt to individual circumstances. Engage legal counsel in these discussions, particularly after a period of leave has already been provided and the employee is asking for additional time. In some cases, employers may find it difficult to demonstrate undue hardship (due to prior leave approval) when the intent is to decline an extension of leave, so legal should be involved before any decisions are made.

Additionally, ensuring that both HR and the employee's direct supervisor are present in these ongoing discussions will help to better understand the impacts of a continued absence on the business and may also lead to the development of creative solutions. Consider the following approaches to render timely decisions and keep the process on track:

- Define this duration (e.g., 12 months), then stipulate legal must be engaged in any further evaluation of leave under the ADA. There are always outliers to the best-laid plans and complex accommodations, and decisions should be calibrated with legal on a regular basis to ensure alignment.
- Consider approving an additional period of leave, (e.g., 30 days) and then reevaluate success with the employee through an interactive discussion. If the employee is still unable to return to work and requests additional leave, gather supplemental documentation from the treating provider as to how additional leave would allow the employee to return to work at the end of the newly requested period, how sure they are of that estimate and why the initial estimate for leave was inaccurate. If the treating provider indicates that the recovery period is unclear, or that there is uncertainty as to the return date, then leave may no longer be considered a reasonable accommodation.





## Case Study

### Examine how an employer implemented and re-evaluated their approach to leave as an accommodation

A retail employer provided leave as an accommodation for one year, with the option to extend the leave 60 additional days. They took a conservative approach to leave as an accommodation, focused on ensuring compliance with the ADA, while allowing as much time as possible for the employee to recover. If the request was for a continuous leave of absence, the absence vendor would approve the request, as long as the duration of the leave was supported by the employee's medical documentation. In most cases, the leave was approved for the full year, plus 60 days.

The employer began to see an increased volume of these leaves and felt more leave was provided than was necessary for an individual employee, due to the lack of individualized assessment within the first year. Upon analyzing the historical data, the employer discovered that many of the leaves were approved for individuals with no capacity to return to work, even within the permitted timeframe.

Subsequently, the employer implemented a process change and began leveraging the absence vendor for individualized assessments of the employee's circumstances. This process allowed for a reasonable period of leave for recovery, with a defined check-in at the end of that period to assess the employee's healing progress, potential for return to work or approval of an additional period of leave when necessary. This practice was further supported by calibration with legal to evaluate the need for additional leave after one year. It aligned with the spirit and intent of the ADA, providing disabled individuals with reasonable accommodations, including a reasonable amount of leave that allows the employee to return to work, to give them the chance to access the same employment opportunities as those without disabilities.

Inherently, the ADA regulations preclude a one-size-fits-all approach to leave as an accommodation. In other words, there is no "right" amount of time. However, there are opportunities for employers to streamline their policies to managing leave as an accommodation and recognize efficiencies tied to this process while ensuring compliance.

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<sup>1</sup> *Equal Employment Opportunity Commission. Employer-Provided Leave and the Americans with Disabilities Act. May 9, 2016.*

<sup>2</sup> *Job Accommodation Network. Long-Term Leave and the ADA After Severson.*

#### DMEC-Related Resources:

[\*The ROI of Shifting the Curve Toward Optimum Durations\*](#)

[\*Building a Return-to-Work Program Microcredential Course\*](#)

[\*Adjusting Mental Health Accommodations Can Make a Meaningful Difference for Employees\*](#)



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