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Employee Accommodation and Leave: Assessing the Tough Issues

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Introduction

This seminar may also be called “everything you wanted to know about employee accommodation and leave under the ADA and FMLA, but were afraid to ask.”

Over the next 60 minutes, we will discuss the Americans with Disabilities Act (“ADA”), the Family Medical Leave Act (“FMLA”), the concepts of reasonable accommodation, undue hardship, essential function, reinstatement rights, and questions that employers and municipalities need to ask themselves when facing leave related issues.

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Use a System to Analyze Leave Requests

It is important to have a system in place to help navigate leave requests. A system will provide a framework and guidance to help you ask the right questions and guide you to an appropriate conclusion. Since every employee situation is likely to be slightly different, it is important to have a general process that you follow.

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Before Making a Leave Determination, Consider Each of the Following:

- Employee Leave Policies
- FMLA, MFML, and other leave laws
- Discrimination laws
- Other considerations like contracts, workers compensation, short term and long term disability

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The Box

Employer Leave Policies	FMLA , MFML, and State Leave Laws
Discrimination Laws	Contracts, Workers Compensation, Long Term Disability and Short Term Disability

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In general, always start with your own employee leave policies.

- What are your leave policies?
- What type of leave is available and how much of that leave is the employee entitled to?
- What leave has the employee taken up until this point?

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Next, consider the FMLA:

- Are you a covered employer?
- Is this an eligible employee?

Both of these questions are more complex than they may initially appear, and will be discussed in more detail later.

In addition, take the time to consider whether other leave laws apply, such as the Maine Family Medical Leave Act as sometimes an employee's request may implicate more than one leave law.

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Third, even if state or federal statutory leave laws are not in play, it is important to consider discrimination laws.

While an employee may have exhausted all available leave, additional leave may be a “reasonable accommodation” for a disability so it is important not to rush to terminate an employee without considering the ADA and state discrimination laws.

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Finally, remember other issues that will intersect, including union collective bargaining agreement language, workers compensation laws, and long term / short term disability coverage.

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Step 1: Employer Leave Policies

What do your policies say?

The first step in analyzing an employee leave request or absence is looking at the employer's policies. What, if any, employer leave policies are implicated?

In general, common leave policies include:

- Sick time or paid time off (PTO)
- FMLA
- Maine Family Medical Leave
- Vacation
- Personal Leave of Absence
- Personal Leave
- Bereavement Leave
- Military Leave

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QUESTIONS TO ASK

1. How does the employee's request fit into these policies?
2. If any of them are implicated, what does the policy say?
3. How much time may be granted under the policy?
4. Who is eligible for leave under the policy?
5. Does the employee have to meet any threshold requirements before the leave is available to him/her? (I.e., length of service, usage of earned time, etc.)
6. What information does the employee need to provide while on leave?

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QUESTIONS TO ASK (CONT.)

7. Do you expect the employee to provide medical documentation?
8. Does the employee need to adhere to specific call-in procedures during his/her absence?
9. Will the employee need a fitness for duty certification or doctor's note before returning to work?
10. Is the leave paid or unpaid?
11. If unpaid, does the employee qualify for some time of income stream replacement like workers compensation, STD, or LTD?
12. During the leave, is the employee able to continue health insurance?
13. During the leave, does the employee accrue vacation or PTO?

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- If an employer's policies are clear and accurate, then this step should be fairly straightforward and the answers to the questions above should be easily found. If an employer's policies are overly complicated, sparse, unclear, or out of date, this step becomes far more challenging and mistakes are likely to be made.

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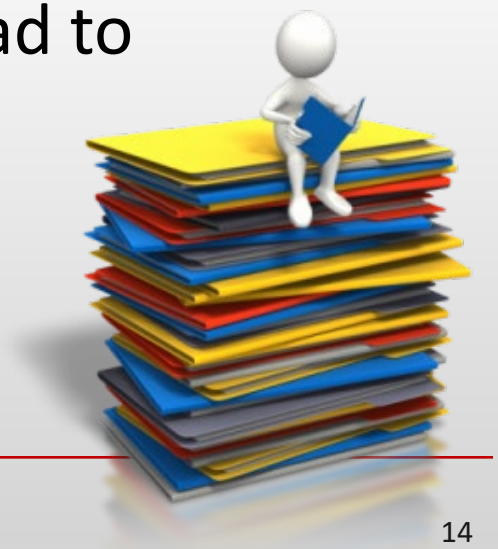
POLICY PITFALLS

Common policy pitfalls that confuse employers when they are trying to answer an employee's leave question include the following:

- Policies on the books may be illegal. The policies may not have been updated to reflect changes in the law.
- Policies can be fragmented. You should not have to look in several different places to answer a question about leave. If you do, it is likely that the policies are fragmented. Fragmentation can lead to inconsistencies in policies and procedures.



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POLICY PITFALLS (cont.)

- Policies may conflict with collective bargaining agreements or individual employment agreements. Large employers may be juggling a large number of contracts and agreements and it is important to review them to identify discrepancies.
- Granting exceptions to policies. If you find yourself routinely granting exceptions, that may be an indicator that your policies are not doing what you need them to do and should be reviewed. Moreover, when you grant exceptions you are, by definition, treating someone differently.

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STEP 2: Family and Medical Leave Act, Maine Family Medical Leave, and other state leaves

- After you have considered your own leave policies and how they apply to a specific situation, the next step in the analysis is to consider requirements under the FMLA.
- Generally speaking, the FMLA provides employees with 12 weeks of unpaid, job protected leave in a 12-month period for eligible employees of a covered employer who need to take leave for: (i) their own serious health condition; (ii) to care for a family member with a serious health condition; (iii) for the birth or adoption of a child; (iv) for certain qualifying exigencies relating to the military service; or (v) to care for a covered service member who has been injured during active duty. 29 C.F.R. §825.100

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WHO IS A COVERED EMPLOYER?

- Only those employers who are covered by the FMLA are required to provide FMLA leave to eligible employees. As such, the first question that needs to be answered is whether or not you are a "covered employer." The FMLA applies to employers that employ 50 or more employees for 20 or more work weeks of the current or previous calendar year. 29 C.F.R. §825.104.

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IS THE EMPLOYEE ELIGIBLE?
"THE RULE OF TWELVES"

- An employee must have been employed for 12 months (non-consecutive) for a covered employer. 29 C.F.R. §825.110(a)(1) and (b).
- The employee must have worked at least 1,250 hours during the 12 months immediately preceding the leave. 29 C.F.R. §825.110(a)(2).
- The employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. 29 C.F.R. §825.110(a)(3).

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REASONS FOR FMLA LEAVE:
Is it an FMLA-qualifying reason?

- Eligible employees of eligible employers are entitled to FMLA leave for one or more of the following events:
  - The birth of a child and to care for the newborn child;
  - The placement with the employee of a child for adoption or foster care;
  - To care for the employee's spouse, son, daughter, or parent with a serious health condition;
  - The occurrence of a serious health condition that makes the employee unable to perform the functions of his or her job;
  - A qualifying exigency arising out of the fact that an employee's spouse, son, daughter, or parent is a member of the armed forces and is on active duty or has been notified of an impending call or order to active duty; or
  - The serious injury or illness of a covered service member of the armed forces who is the employee's spouse, son, daughter, parent, or next of kin. See 29 C.F.R. §825.112(a).

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EMPLOYER NOTICE REQUIREMENTS

It is required and also good practice to provide notice to your employees about their FMLA entitlements. See generally, 29 C.F.R. §825.300.

- Employers are required to post information regarding the FMLA in areas that are accessible to employees.
- The Department of Labor provides free posters to all employers.
- Include FMLA information in your policies, procedures, and handbooks.

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Is a designation of leave as FMLA "optional"?

- If an employee is eligible for FMLA and requests leave for an FMLA qualifying reason, the employer generally has the right to designate the leave as FMLA leave unless its policies constrain it in some other way. 29 C.F.R. §825.300(d); 29 C.F.R. §825.301.
- If an employee asks to "save" his/her FMLA leave until after his/her paid sick leave or vacation has been exhausted, the answer should be "no".
- The employer should have a policy indicating that any available leave will run concurrently with FMLA leave. 29 C.F.R. §825.207(b). For instance, if an employee is out of work and collecting workers compensation benefits for a work related injury, assuming that the injury meets the definition of "serious medical condition," that workers compensation leave should also run concurrently with FMLA leave.

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FMLA FORMS

- Notice of eligibility and rights and responsibilities (Form WH-381);
- This notice must be provided to the employee within 5 days of when the employer became aware of the potential need for FMLA leave.
- This form formalizes your determination as to whether or not the employee is an eligible employee, and if they are, whether or not the purpose for which the leave is requested qualifies as FMLA protected leave.

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CERTIFICATION OF HEALTH CONDITIONS (Forms WH-382 or WH-380-E)

- Employers should give the employees a certification form to be completed by the health care provider.
- The employer should carefully review the form and thoroughly complete the employer portion of the form before giving it to the employee.
- The employer should attach the employee's job description to the certification form.
- It is the responsibility of the employee to have their health care provider complete the form within 15 days.

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CERTIFICATION OF HEALTH CONDITIONS (cont.)

- Employees are required to provide a complete and sufficient certification to the employer, if the employer requires it.
- An employer may seek clarification or authentication of the information from the employee or health care provider.
- An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense.

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DESIGNATION NOTICE (Form WH-382)

- It is the employer's right and responsibility to designate leave, paid or unpaid, as FMLA qualifying.
- Once the employer has acquired knowledge that an employee is requesting or taking leave for an FMLA qualifying event, the employer must promptly (within 5 business days absent extenuating circumstances) notify the employee that the leave is designated and will be counted as FMLA leave.

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FITNESS FOR DUTY CERTIFICATION

- An employer may require an employee who is out for his/her own serious health condition to provide a "Fitness for Duty Certification" prior to returning to work, however, the employer must inform the employee of this requirement at the time of the designation. 29 C.F.R. §825.300(d)(3).
- If the employer requires that the Fitness for Duty Certification addresses the employee's ability to perform the essential functions of his/her position, the employer must also inform the employee of the requirement in the designation notice, and include a list of the employee's essential job functions.
- The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after leave has commenced.

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RETROACTIVE NOTICE

- If an employer fails to designate an employee's leave as FMLA qualifying within the required timeframe, an employer may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the employer's failure does not harm the employee.
- If the failure to timely designate leave causes the employee to suffer harm, the employer may be found liable for all related damages. 29 C.F.R. §825.300(e); 29 C.F.R. §825.301(d).
- The regulations allow employers and employees to agree that leave be retroactively designated as FMLA leave.

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INTERMITTENT LEAVE

- Leave does *not* need to be used in one continuous block.
- The FMLA recognizes that in some instances, most commonly related to chronic illness or conditions that tend to flare, employees may need to take leave on an intermittent basis.
- Another form of intermittent leave is a reduced work schedule. 29 C.F.R. §825.202(a)-(b).
- Generally, intermittent leave or reduced schedule leave are only required when *medically necessary*.
- Employees must provide notice of their desire to take leave on an intermittent basis.
- For intermittent leave that is foreseeable, employees must generally provide 30 days notice of their desire to take leave.

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INTERMITTENT LEAVE (cont.)

- An employee who fails to explain the reasons for the requested leave, or fraudulently obtains leave, may be denied leave and lose the legally protected benefits of job restoration and maintenance of health benefits. 29 C.F.R. §825.301(b); 29 C.F.R. §825.302(d); 29 C.F.R. §825.216(d), (e).
- With respect to limiting potential abuse, leave may be denied or delayed if employees fail to comply with the employer's usual notice and procedural requirements for requesting leave. 29 C.F.R. §825.302(d).
- If an employee is taking FMLA leave on an intermittent or reduced basis, employers are allowed to compensate salary-exempt employees for only those hours worked. The FMLA amended the FLSA to allow employers to prorate the wages of salary-exempt employees qualifying for intermittent FMLA leave without losing the employee's exemption from the overtime provisions of the FLSA. See 29 C.F.R. §825.206.

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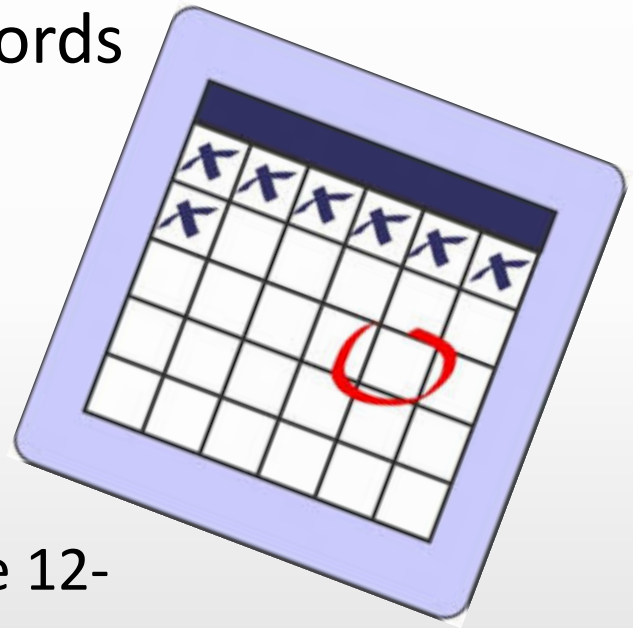
TRACKING FMLA LEAVE: How is it calculated?

- It is critical for the employer to maintain accurate records of the leave that is actually taken by their employee.
- The first step is to determine how much leave is potentially available. In order to determine this, the employer must know:
  1. How the employer calculates the 12-month period for calculating FMLA leave; and
  2. How much FMLA leave the employee has taken during the 12-month period.
  3. The employer should calculate how much time is left, as well as the date when any remaining leave time (if used all at once) would expire.



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REINSTATEMENT/JOB RIGHTS

- One of the cornerstones of the FMLA is the premise that an employee will not automatically lose his/her job when faced with a significant health crisis.
- When an employee returns from FMLA leave, he or she must be returned to the job that was left or "an equivalent job with equivalent pay, benefits, and other terms and conditions of employment." 29 C.F.R. §825.214.
- An employee's entitlement to reinstatement prevails even if he or she has been replaced, or if the position has been restructured to accommodate the employee's absence.

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REINSTATEMENT/JOB RIGHTS (cont.)

Narrow Exception

- An employee has no right to reinstatement under the FMLA if the employee is unable to perform the essential functions of the position because of a physical or mental condition, including the continuation of a serious health condition.
- This does not mean, however, that the employer's obligations with respect to such an employee end. Instead, the employer must be aware of their obligations under the ADA as well as the Maine Workers' Compensation Act.

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REINSTATEMENT/JOB RIGHTS (cont.)

- The employer must maintain group health insurance as though the employee had been continuously employed during the FMLA period. 29 C.F.R. §825.210.
- The employee continues to be responsible for making any individual contributions that were his or her responsibility.
- An employee on FMLA leave will need to make special arrangements for paying the individual portion of the premium when no paycheck is being issued.
- An employer cannot "interfere with, restrain, or deny the exercise of or the attempt to exercise any right" under the FMLA. 29 C.F.R. §825.220(a).

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REINSTATEMENT/JOB RIGHTS (cont.)

- An employer is prohibited from any type of discrimination or retaliation against an employee for exercising his or her rights under the FMLA, opposing any practice of the employer that violates the FMLA, or being involved in any proceeding related to the FMLA.
- Violation of these rights can include penalties such as front pay, back pay, benefits, attorney's fees, and liquidated (i.e., double) damages.

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CONSIDER THE APPLICATION OF OTHER STATE LEAVE LAWS

Maine employers should consider the following:

- Maine Family Medical Leave ("MFML") (26 M.R.S.A. §843) – although there are many similarities between the FMLA and the MFML, there are important distinctions of which to be aware.
- Employers must apply whichever is more beneficial to the employee so it is important to understand the parameters of Maine law.

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CONSIDER THE APPLICATION OF OTHER STATE LEAVE LAWS

Some of the key differences between FMLA and MFML include:

a. 10 weeks unpaid in a two-year period;
b. One year of employment, although there is no minimum amount of time worked necessary during that year;
c. Family includes domestic partners, and in some limited situations, siblings;
d. Leave is not available for foster care placement and is only available for the adoption of children 16 years old or younger;
e. Organ donation is covered;

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CONSIDER THE APPLICATION OF OTHER STATE LEAVE LAWS (cont.)

f. Military-serious health condition and death;

g. No legal requirement to continue paying for health insurance but employee may continue the benefit at his or her own expense;

h. Family sick leave-care of immediate family (26 M.R.S.A. §636);

i. Victims of violence leave (26 M.R.S.A. §850); and

j. Caregivers/public health emergency leave (26 M.R.S.A. §875).

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STEP 3: THE AMERICANS WITH DISABILITIES ACT AND OTHER DISCRIMINATION LAWS

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STEP 3: THE AMERICANS WITH DISABILITIES ACT AND OTHER DISCRIMINATION LAWS

- You have now successfully navigated the intricacies of your own leave policies, practices and procedures.
- You have filled out all of the myriad FMLA forms and your employee isn't eligible, the circumstances are not covered by FMLA, or the employee has exhausted all of his/her FMLA leave.
- You have considered other state leave laws.
- You are done, right? The employee is not able to return to work or is unable to do the job. Can you let them go?
- Answer: not yet. There are other issues to consider before you make that decision. The first is to consider discrimination laws.

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THE ADA OF 1990 IS A FEDERAL ANTI-DISCRIMINATION STATUTE

- The Americans with Disabilities Act of 1990 ("ADA") is a federal anti-discrimination statute that prohibits discrimination against disabled individuals in private employment, state and local government employment, public accommodations.
- Title I of the Act prohibits discrimination against any qualified individual with a disability because of that individual's disability in regard to job application procedures; the hiring, advancement, or discharge of employees, compensations, job training, and other terms, conditions, and privileges of employment.
- Employers subject to the ADA include towns and municipalities.

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AMERICANS WITH DISABILITIES ACT (cont.)

- In 2008, President Bush signed the ADA Amendments Act ("ADAAA") into law. The ADAAA overruled certain case law arising under the ADA and altered some standards that have been developed prior to its enactment.
- A primary effect of the ADAAA, is that an employer's current focus must be less on whether or not an individual is disabled and more on whether or not the employer can reasonably accommodate the employee's disability.
- The ADA requires employers to provide qualified individuals with disabilities with reasonable accommodations in order to perform the essential functions of their position.

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REASONABLE ACCOMMODATIONS

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REASONABLE ACCOMMODATIONS

There are 3 general categories of reasonable accommodation:

1. Changes to the job application process so that a qualified applicant with a disability can be considered from a job.
2. Modifications to the work environment, including how a job is performed, so that a qualified individual with a disability can perform the job.
3. Changes so that an employee with a disability can enjoy equal benefits and privileges of employment.

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PERFORMING A REASONABLE ACCOMMODATION ANALYSIS

1. Obtain accurate documentation of the disability.
2. Assess and identify the essential functions of the job.
3. Determine whether or not a reasonable accommodation is reasonable.
4. Engage in a discussion (interactive process) with the employee regarding the employee's limitations, his/her job duties, as well as potential accommodations
5. Make a good faith effort and demonstrate a willingness to engage in a meaningful interactive process with the employee to avoid potential discrimination allegations.
6. If, as an employer, you do not believe that you can reasonably accommodate the employee, you must be able to show (i) that no reasonable accommodation exists; or (ii) that the proposed accommodation would cause an "undue hardship"
7. Reasonableness is a general inquiry while undue hardship is a case specific one.

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UNDUE HARDSHIP

- Employers should exercise extreme caution before relying on this defense.
- The undue hardship standard is high.
- Undue hardship means significant difficult or expense in providing the accommodation.
- The analysis focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business.
- There are limited circumstances in which a modified schedule, a leave, or the extension of a leave would cause undue hardship to an employer, as defined under the ADA.
- The Maine Human Rights Act also prohibits discrimination and provides for reasonable accommodations.

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UNDUE HARDSHIP (cont.)

It is worth noting that the Maine Human Rights Commission's regulations include additional factors to consider, such as an employer's efforts to spread costs out over time and the extent to which the costs of a proposed accommodation could have been covered if the employer had cut costs in other areas.

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EXTENDED LEAVE AS A REASONABLE ACCOMMODATION

A. LENGTH OF LEAVE: HOW MUCH TIME IS "REASONABLE?"

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- The most requested reasonable accommodation under the ADA is for unpaid leave.
- Most courts have held that unpaid leave is an appropriate reasonable accommodation for an individual who expects to return to work after recovering from an illness or getting treatment for a disability.
- The EEOC also takes the position that unpaid leave can be a reasonable accommodation.
- The First Circuit Court of Appeals has agreed with this position and found that temporary leave for the doctor of an employee to "design an effective treatment program" was a possible accommodation. *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998).

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- Courts have been unwilling to provide clear guide posts, and the decisions do not provide a clear analysis as to how much time would be reasonable.
- It is unclear whether a court will analyze whether the amount of time away from work creates an “undue hardship” on the employer and therefore is not appropriate. Or, whether a court will look at the amount of time and determine that the employee, him or herself, is no longer “qualified” and therefore, not entitled to such leave.
- The courts have found that leaves of various lengths, depending on the circumstances of each particular case, are reasonable.

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HOW MUCH UNPAID LEAVE IS AN INDIVIDUAL ENTITLED TO AS A REASONABLE ACCOMMODATION?

- In one First Circuit case, the court held that a limited 4-week addition of leave might be reasonable, even after the Plaintiff was given 52 weeks of leave without pay. *See Ralph v. Lucent Technologies*, 135 F.3d 166, 172 (1st Cir. 1998).
- In another case, the First Circuit held that 5 months beyond the employer's one-year job hold policy was reasonable, for a total of 17 months leave. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 648 (1st Cir. 2000).

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HOW MUCH UNPAID LEAVE IS AN INDIVIDUAL ENTITLED TO AS A REASONABLE ACCOMMODATION?

- In *Delgado-Echevarria v. AstraZeneca Pharmaceuticals, LP*, 856 F.3d 119, 130 (1st Cir. 2017), the court held that an employee's request for 12 additional months of unpaid leave after she had taken 5 months was not reasonable because "the sheer length of delay…jumps off the page."
- The Tenth Circuit has held that an employee is only entitled to leave as a reasonable accommodation if they can perform the job in the "near future". *Robert v. Board of County Commissioners of Brown County*, 691 F.3d 1211 (10th Cir. 2012).
- The Tenth Circuit has also held that an employer "almost never" needs to give more than 6 months of leave. *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014).

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HOW MUCH UNPAID LEAVE IS AN INDIVIDUAL ENTITLED TO AS A REASONABLE ACCOMMODATION?

- The Seventh Circuit has ruled that any long-term unpaid leave is not a reasonable accommodation because an employee who needs such leave, is, by definition, not a qualified individual under the ADA. *See Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), cert. denied, 138 S.Ct.1441(Mem.)(2018).
- In *Severson*, the Seventh Circuit denied a request for a two-month leave extension, followed by 12 weeks of FMLA. The Court reasoned that a "reasonable accommodation" makes it possible for an employee to perform the essential functions of their job, and a long term leave of absence cannot be a reasonable accommodation as a matter of law. The Court wrote, "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."

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INDEFINITE LEAVE IS NOT A REASONABLE ACCOMMODATION

- While it is unclear how much unpaid leave an employee is entitled to as a reasonable accommodation, whether a few days, a few months, or a year, it would appear that an employee's request for indefinite leave is not a reasonable accommodation.
- The First Circuit has held that an employer is not required to grant indefinite leave while waiting for an uncertain recovery. *See Henry v. United Bank,* 686 F.3d 50, 60 (1st Cir. 2012).

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LEAVE IN EXCESS OF FMLA OR COMPANY POLICIES

- A recurring theme in ADA leave cases is when an employer provides FMLA leave to its employee and then terminates the employee at the end of the leave, without considering extended leave as a reasonable accommodation. This practice is risky and will not only likely result in litigation, but could likely lead to an expensive result for the employer.
- Federal courts have frequently concluded that extended periods of leave that exceed an employer's regular policy and FMLA entitlements may be a reasonable accommodation.
- The EEOC guidance is clear that an employer should consider providing extended leave unless it imposes and undue hardship.

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LEAVE IN EXCESS OF FMLA OR COMPANY POLICIES (cont.)

- In *Delgado-Echevarria v. AstraZeneca Pharmaceuticals, LP*, the First Circuit held that a request for a 12 month leave following a 5 month medical leave of absence was unreasonable as a matter of law and the request was not "factually reasonable." However, the Court did not overrule previously decided First Circuit Opinions holding that extended leave may be a reasonable accommodation in some cases.
- The First Circuit has repeatedly stated, however, that a leave of absence or a leave extension can constitute a reasonable accommodation under the ADA "in some circumstances."

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PRACTICE TIP

- Employers who utilize form letters or standardized communications for employees who are nearing the end of a designated leave period may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer can consider whether it can grant an extension without causing undue hardship.
- Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite.

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PRACTICE TIP

- In *Willingham v. Town of Stonington*, 847 F.Supp.2d. 164, 188 (D. Me. 2012), the Court found the request for leave “until we found out exactly what the situation would be” was not necessarily indefinite, and could have referred to employees' next doctor visit or next scheduled treatment, both of which were proximate.

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PRACTICE TIP

- Before denying a request for leave, an employer should evaluate the request and consider any effective alternatives to leave. Participation in the interactive process may bring to light other, non leave accommodations that would shorten, or fully eliminate the need for leave.
- Alternatives to leave may include a modified, part-time schedule, gradual return to work, or telecommuting.
- If, after considering all options, there are no reasonable accommodations that will allow an employee to return to their job, an employer should consider reassignment as a reasonable accommodation.
- Reassignment means an employee would be reassigned to a job that is currently vacant or will become vacant in the near future.

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Carnicella v. Mercy Hospital, 168 A.3d 768 (2017)

- In *Carnicella,* the employee was a part-time nurse at Mercy Hospital who, after working for two years, was diagnosed with a serious medical condition that required surgery on her left arm.
- The employee started with a 10-week leave under Maine's Family Medical Leave Act, followed by three additional requests for extended, temporary leave over the course of 8 months since the left arm did not heal as expected.
- The last request for extended leave from the PCP estimated she would be able to return to work by June 1, 2014.
- Mercy Hospital terminated Ms. Carnicella from her position in March 2014, three months prior to her estimated return to work date.

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Carnicella v. Mercy Hospital, 168 A.3d 768 (2017)

- *Carnicella* filed suit thereafter alleging that Mercy failed to provide her with reasonable accommodation.
- The Law Court concluded that Ms. Carnicella could not prove that she was qualified because, as of her termination in March 2014, she had not been cleared for work by her medical provider.
- The Law Court cited to several federal court decisions from the Sixth and Fifth Circuits to support its conclusion that *Carnicella* was not qualified because she had not established that she had been cleared to work by her medical provider.

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Carnicella v. Mercy Hospital, 168 A.3d 768 (2017)

- The Law Court wrote: "The only accommodation that Carnicella arguably requested was additional leave. However, this accommodation was unreasonable as a matter of law."
- The Law Court cited the MHRA as providing a defense to discharging an employee who cannot perform her duties, it renders additional leave an unreasonable accommodation.

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PRACTICE TIP

- It is important to note that the *Carnicella* case was decided only under the Maine Human Rights Act, and not under the Americans with Disabilities Act. The only claim that *Carnicella* made in that case was that Mercy Hospital violated the Maine Human Rights Act. Although the Law Court cited to several federal court decisions from the Sixth and Fifth Circuits, the result in *Carnicella* would likely have been different had the matter been decided by a Judge or Magistrate in the United States District Court for the District of Maine.
- Do not assume that a terminated employee will only bring a claim under the Maine Human Rights Act and not under the Americans With Disabilities Act

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CONCLUSION

- Employee leave situation can be complicated.
- A preventative approach is the most effective and completing the following steps on a regular basis may help prevent unpleasant and potentially costly challenges of individual leave decisions:
    - Know the FMLA
    - Audit your policies regularly
    - Train and retrain your supervisors about the law and policies and what they can and cannot say to employees
    - Finally, do not hesitate to obtain advice when you need it.

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Questions?

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