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Legal Update

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WHEN IS EXTENDED LEAVE UNREASONABLE UNDER THE ADA?

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Many employers may be aware of the requirement under the Americans with Disabilities Act (ADA) to provide employees with disabilities with a reasonable accommodation so that they can perform their jobs. Some, however, may assume that requests for lengthy leaves of absences do not qualify as "reasonable." Other employers may assume that employees who have exhausted their leave under the Family Medical Leave Act (FMLA) are not entitled to further time off. As a consequence, some employers set rigid policies capping the number of days an employee may be on leave or absent before his or her employment automatically terminates.

Courts interpreting the ADA, however, have repeatedly held that an extended unpaid leave can be a "reasonable accommodation" for an employee with a disability, particularly where the employee is receiving treatment for a condition and is expected to eventually recover. An accommodation is not considered reasonable if it creates an "undue hardship" for an employer, but not all extended leaves are presumed to impose such a hardship. Instead, courts will examine factors, including the nature of the employee's job responsibilities, the number of employees in similar roles, the availability of temporary employees or contractors to fill the void, and the number of job vacancies the employer typically has unfilled at the employee's position.

Accordingly, while the absence of one of three highly specialized executives might be considered an undue hardship, the absence of one of 30 factory workers may be viewed differently, particularly if the factory has been able to operate successfully with one or more vacancies in the past. Employers seeking to terminate the employment of an employee requesting an extended leave should make sure they can document an undue hardship – *e.g.*, significantly reduced productivity or the need for coworkers to work excessive overtime hours. Even if an employer can document that an employee's requested leave would create an undue hardship, the ADA may require the employer to engage in a dialog with the employee regarding potential alternative accommodations before terminating the employee's employment.

One particularly difficult situation arises where an employee is unable to provide an expected date for return from a leave, or an employee provides a date but then repeatedly requests that the leave be extended. Although indefinite leaves are not generally considered reasonable accommodations – after all, the purpose of an accommodation is to allow the employee to work – courts have been sympathetic to employees who simply cannot provide a precise estimate of when they will adequately recover from an ailment or procedure so that they can resume work.

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Thus, even where an employee cannot provide a precise return date, courts will often conduct a fact-specific analysis of whether the proposed leave causes an undue hardship for the employer. Certainly, this can lead to abuses by employees who "string along" their leave by continually adjusting their return dates. Employers can and should ask employees to provide documentation from their doctors but should exercise caution in making the decision to "cut the cord." Moreover, employers should avoid "fixed-leave" policies even if the employer routinely makes exceptions to such policies – simply having the policy on the books may come back to haunt the employer in a lawsuit or administrative proceeding.

Particularly in light of the uncertainty regarding when a leave becomes indefinite and/or unreasonable, employers would be wise to consult with counsel before denying an employee's request for leave and before separating an employee who has failed to return from a leave on the expected return date. Although employees' extended leaves can put employers in a difficult spot, creative solutions can often be found that may help employers avoid liability without sacrificing much productivity.

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