

# JAN

Job Accommodation Network

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## Accommodation and Compliance Series

### Leave as an Accommodation

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A service of the U.S. Department of Labor's Office of Disability Employment Policy

## Preface

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# JAN'S ACCOMMODATION AND COMPLIANCE SERIES

## Introduction

JAN's Accommodation and Compliance Series is designed to help employers determine effective accommodations and comply with Title I of the Americans with Disabilities Act (ADA). Each publication in the series addresses a specific medical condition and provides information about the condition, ADA information, accommodation ideas, and resources for additional information.

The Accommodation and Compliance Series is a starting point in the accommodation process and may not address every situation. Accommodations should be made on a case by case basis, considering each employee's individual limitations and accommodation needs. Employers are encouraged to contact JAN to discuss specific situations in more detail.

## Information about Leave as an Accommodation

One of the more confusing reasonable accommodation issues that employers have to handle under the ADA is permitting the use of accrued paid leave, or providing unpaid leave, when an employee's disability necessitates it. The concept can be difficult to grasp because it does not align with the idea of providing an accommodation that keeps an employee *on-the-job*. However, the goal in allowing the use of leave time as a reasonable accommodation is to provide job-protected time in order to enable a qualified employee with a disability to manage his or her medical impairment and ultimately remain in the workforce.

Leave may be requested as a reasonable accommodation for a number of disability-related reasons. Some of the most common reasons include:

- To attend medical appointments related to an episodic or chronic medical impairment (e.g., diabetes, bipolar disorder, asthma, etc.)
- To obtain medical treatment (e.g., chemotherapy, physical therapy, surgery, mental health counseling, in-patient substance abuse treatment, dialysis, etc.)
- To recuperate from an illness or surgery, or exacerbation of symptoms associated with an episodic or chronic medical impairment (e.g., flare-up of symptoms associated with multiple sclerosis, intestinal disorder, epilepsy, back condition, major depressive disorder, etc.)

According to the Equal Employment Opportunity Commission (EEOC), leave may also be requested to allow an employee with a disability to participate in training with, or caring for, a service animal; to avoid temporary adverse conditions created by the work

environment that have an impact on the employee's impairment (e.g., construction, cleaning activities, inoperative heating/cooling system or elevator); or to obtain repairs on equipment used by the employee with a disability to perform major life activities, like a wheelchair, prosthetic device, or accessible vehicle.

There are many situations that will require an employer to consider allowing an employee with a disability to use leave as an ADA accommodation, barring undue hardship. For example:

- When there is no other effective accommodation;
- When an employee is not eligible to take leave under the federal Family Medical Leave Act (FMLA), but has a qualifying disability under the ADA;
- When an employee is FMLA eligible, but requires additional time off beyond the twelve-week allowance under that statute; or
- When an employee has exhausted paid vacation and sick leave and requires additional intermittent time off *because* of a qualifying medical impairment.

ADA leave can be administered in various ways, and in conjunction with an employer's leave policies and benefit programs, as well as other federal and state leave laws. Employers should be aware of the interplay between their own policies and state and federal leave laws when exploring leave as an accommodation under the ADA. Below are some examples of ways leave may be administered:

- Allowing the use of accrued, paid vacation or sick leave under the ADA
- Allowing the use of unpaid leave under the ADA and/or the FMLA
- Allowing the use of intermittent leave under the ADA or FMLA
- Providing leave on a reduced work schedule under the ADA or FMLA
- Applying Short or Long-Term Disability (STD/LTD) or leave under an employer's own Medical Leave of Absence policy
- Providing leave under state family medical leave laws (e.g., California Family Rights Act), including state Pregnancy Disability Leave (PDL)

As a practical matter, an employer may want to first determine if an employee is eligible for leave under FMLA, a state leave law, or company leave policy before granting leave as an accommodation under the ADA. Why? Because FMLA, state laws, and company leave policies traditionally include leave entitlements that are more clearly understood.

## **Questions and Answers Related to Leave as an Accommodation**

JAN Consultants respond to a variety of questions related to leave and the ADA. While JAN is not a legal service and does not provide legal assistance or advice, JAN does share guidance provided by the EEOC to assist our customers. Here are some examples of common questions and responses related to leave and the ADA:

### **1. Can an employer apply its “no-fault” leave policy to everyone?**

No. According to the EEOC, if an employee with a disability requires additional unpaid leave as a reasonable accommodation, an employer must modify its "no-fault" leave policy to provide the employee with additional leave. Modifying workplace policies, including leave policies, is a form of reasonable accommodation. However, if an employer can show that 1) there is another effective accommodation that will enable the employee to perform the essential functions of the position (and does not interfere with the employee's ability to address his/her medical needs), or 2) granting additional leave will cause an undue hardship, then the additional leave will not be required (EEOC, 1999).

### **2. Is leave provided as an accommodation required to be paid under the ADA?**

Under the ADA, an employee may be permitted to use their own accrued paid vacation or sick leave, as-needed, or be granted additional unpaid leave as an accommodation. Paid leave beyond that which is provided to similarly-situated employees is not required. EEOC states that an employee with a disability should be permitted to exhaust accrued paid leave before using unpaid leave as an accommodation (EEOC, 1999).

### **3. What duration of leave is required under the ADA?**

Unlike the FMLA, the ADA does not require an employer to provide leave for a specified duration of time. Thus, it is up to an employer's discretion to determine how much leave is reasonable as an accommodation. This determination must be fact-specific and will often depend on whether a particular amount of leave time imposes an undue hardship on the employer.

An employer should conduct a case-by-case assessment to determine what is reasonable, just like with any other accommodation. This is where it's important to not simply apply a no-fault leave policy. Under the ADA, an employer must be willing to allow an exception to a fixed leave policy as a reasonable accommodation, barring undue hardship. Employers should document how an employee's leave impacts business operations. If providing additional leave poses an undue hardship, an employer should be prepared to demonstrate why.

#### **4. Does the EEOC provide any information about how to determine undue hardship related to leave?**

In its Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, the EEOC offers a number of factors to be considered in determining whether an accommodation imposes an undue hardship. Regarding leave as an accommodation, an employer will often need to look at the impact the employee's absence has had/will have on the operation of the business. The most useful undue hardship factors to consider in evaluating leave as an accommodation are those provided by the EEOC related to attendance issues – factors that put a strain on the employer's operations, such as:

- An inability to ensure a sufficient number of employees to accomplish the work required;
- A failure to meet work goals or to serve customers/clients adequately;
- A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; or
- Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

For more information, see q. 20 in the EEOC's Enforcement Guidance on Applying Performance and Conduct Standards to Employees with Disabilities.

It is suggested that employers make an effort to document the impact employees' absences have on operations. Not from a morale perspective, but rather from an operational perspective. For example, how was the employee's work completed while s/he was absent? Were production goals met? Was overtime paid to other employees to complete the work? Was the employer unable to provide a service to its customers? Employers might want to keep a confidential log of this type of information to make a fact-specific judgment of undue hardship, if necessary.

#### **5. Can leave be intermittent?**

Yes. Intermittent leave often involves allowing the use of unscheduled, accrued paid leave or unpaid leave, as-needed, due to a qualifying medical impairment. Granting this type of accommodation will typically also require a modification to an employer's attendance policy to excuse absences permitted as an ADA accommodation. An employer may determine the number of absences that will be considered reasonable and may request medical documentation that includes an estimation of the number of absences that may be anticipated due to the medical impairment. Note, if employees without disabilities are permitted to use their accrued paid leave intermittently, at-will, then employees with disabilities should not be treated differently. Also, FMLA may apply in situations where intermittent leave is required.

## **6. May an employer require documentation each time an employee with a disability uses intermittent unpaid leave as an accommodation?**

This question is commonly asked when an employer suspects that an employee is abusing intermittent leave as an accommodation. Under the ADA, an employer can require that an employee provide documentation that each use of intermittent leave, as a reasonable accommodation, was required by the disability, but that may not always mean the employee must see his medical provider each time there is an absence. While there are impairments that may necessitate unexpected, intermittent leave, not all situations will require an individual to visit a medical provider. For example, a person with epilepsy may need intermittent leave because of a seizure, but will not likely need to visit a medical provider after every seizure. Thus, a medical provider could still provide a note confirming that the individual has had a seizure, simply because it's in the nature of the condition, without a medical examination.

When intermittent leave is needed as an accommodation under the ADA, an employer may find it useful to seek clarification from the medical provider about why the accommodation is necessary, for what duration of time, and the anticipated frequency of the need for intermittent leave. This will enable the employer to learn about the current state of the impairment and whether the employee's absences (past, present, or future) are in-line with what the medical provider expects. This information will also assist the employer in addressing the reasonableness of intermittent leave as an accommodation.

## **7. Does the ADA require that employers exempt an employee with a disability from time and attendance requirements?**

The best answer to this question can be found in q. 20 in the EEOC's Enforcement Guidance on Applying Performance and Conduct Standards to Employees with Disabilities. EEOC states, "...employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice..." (EEOC, 2008).

## **8. Does an employer have to hold open an employee's job while using leave as a reasonable accommodation under the ADA?**

Yes, otherwise the accommodation of leave will not be effective. The ADA requires that the employer hold the employee's position open while on leave, unless it can show that an undue hardship will result. Upon returning to work, an employee must be permitted to return to the same position, if the employee is still qualified and able to perform essential job functions. This is where a fact-specific assessment will be necessary to determine how long the position can be held before hardship results.

Courts have held varying opinions regarding the amount of time that is reasonable for holding a position open; anywhere from several months, to six months, to one year. According to the EEOC, if it is an undue hardship to hold an employee's position while

the employee is on leave, then the employer must consider reassigning the employee (absent undue hardship) to an equivalent, *vacant* position for which s/he is qualified, for the duration of the leave period. The employee would then return to *that* position when ready to return to work. For more detailed information, see questions 18 and 21 in EEOC's Reasonable Accommodation and Undue Hardship guidance.

**9. Is an employer required to maintain health insurance benefits during an extended leave under the ADA?**

According to the EEOC, an employer must continue an employee's health insurance benefits during the leave period only if it does so for other employees in a similar leave status. See q. 21 in EEOC's Reasonable Accommodation and Undue Hardship guidance.

**10. Should an employer modify its attendance policy when leave is provided as a reasonable accommodation?**

Granting an employee time off from work as a reasonable accommodation may involve modifying leave or attendance procedures or policies. It's difficult to provide leave as an accommodation (intermittent or extended) without modifying an attendance policy. Thus, these two types of accommodations generally go hand-in-hand. For more information about modifying a policy as an accommodation under the ADA, see q. 24 in EEOC's Reasonable Accommodation and Undue Hardship guidance and q. 19 in EEOC's Applying Performance and Conduct Standards.

**11. Is an employer required to grant an ADA leave extension after FMLA has expired?**

Employers frequently ask about their obligation to consider extending an employee's leave of absence as a reasonable accommodation under ADA. This can result after an employee exhausts twelve weeks of FMLA leave and still cannot return to work. In some situations, an employer may have an obligation under the ADA to consider extending an unpaid leave of absence as a reasonable accommodation. This requires an interactive process to determine – on a case-by-case basis – if the employee has an ADA-qualifying disability, and if it is possible to provide extended leave without it posing an undue hardship on business operations.

Under the ADA, there is no specified amount of leave time that is required to be granted and so it is up to an employer's discretion to determine how much leave is reasonable as an accommodation. For example, an extension of two weeks beyond the expired twelve may not have a grave impact on business operations. However, three months may. Again, employers should review and document how an employee's leave impacts business operations and whether continuing leave poses an undue hardship. If continuing the leave poses a hardship, an employer should be prepared to demonstrate why. For more information, see JAN's ENews article, [ADA Leave Beyond FMLA](#).

**12. Does an employer have to grant indefinite leave as a reasonable accommodation?**

According to the EEOC, although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration because granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations. Also, repeated extensions of leave can become a request for indefinite leave. Employers are encouraged to request an anticipated date of return, even if it is not an absolute return date. Having an anticipated date of return will help the employer make a determination regarding the amount of leave that will be reasonable. For more information see q. 21 in EEOC's Applying Performance and Conduct Standards and q. 44 in EEOC's Reasonable Accommodation and Undue Hardship.

**13. Can an employer force an employee to work with accommodations instead of taking leave as an accommodation? Is the answer the same under the FMLA?**

**ADA** – According to the EEOC, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. See q. 20 in EEOC's Reasonable Accommodation and Undue Hardship.

**FMLA** –The FMLA regulations state, "If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave" (DOL, 2013).

**14. Can an employer force an employee to take leave instead of providing accommodations that would enable the employee to work?**

No, not if there is an effective reasonable accommodation that will enable the individual to perform essential job functions. Leave is considered a lesser form of reasonable accommodation when an employee can be effectively accommodated to continue working. Under most circumstances, accommodations are intended to keep an individual on-the-job.

**15. When an employee requests an accommodation, can an employer force the employee to take leave until the interactive process is complete?**

*In general*, no. In most situations, an employee should be permitted to continue working during the interactive process, perhaps with temporary accommodations in place until the process is complete. *However*, when there is a direct threat, the employee cannot safely perform job functions, the employee cannot perform essential functions until an accommodation is provided, or while an employer awaits medical documentation regarding whether an employee is able to continue performing job functions safely, *then*

an employee may be placed on leave. These are very limited circumstances in which the employee may be placed on leave during the interactive process. To minimize the amount of leave used, there should be no unnecessary delays in completing the interactive process,.

For more information or if you have questions related to leave and the ADA, please contact JAN to speak with a Consultant, or visit AskJAN.org. Also, the Reed Group published an informative whitepaper related to leave issues and the ADA. See [Today's Multi-Million Dollar Question: When Must An Employer Provide Leave as an ADA Reasonable Accommodation?](#)

## Resources

### **Job Accommodation Network**

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The Job Accommodation Network (JAN) is a free consulting service that provides information about job accommodations, the Americans with Disabilities Act (ADA), and the employability of people with disabilities.

### **Office of Disability Employment Policy**

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The Office of Disability Employment Policy (ODEP) is an agency within the U.S. Department of Labor. ODEP provides national leadership to increase employment opportunities for adults and youth with disabilities while striving to eliminate barriers to employment.

## References

- Equal Employment Opportunity Commission. (2008). *Enforcement guidance on applying performance and conduct standards to employees with disabilities*. Retrieved January 15, 2015, from <http://www.eeoc.gov/facts/performance-conduct.html>
- Equal Employment Opportunity Commission. (2002). *Enforcement guidance on reasonable accommodation and undue hardship under the Americans with Disabilities Act*. Retrieved January 15, 2015, from <http://www.eeoc.gov/policy/docs/accommodation.html>
- Family and Medical Leave Act, 29 C.F.R. § 825.100 (2015).

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