

# JAN

Job Accommodation Network

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## Accommodation and Compliance Series

# Accommodation and Compliance Series: Leave

Job Accommodation Network  
PO Box 6080  
Morgantown, WV 26506-6080  
(800)526-7234 (V)  
(877)781-9403 (TTY)  
[jan@askjan.org](mailto:jan@askjan.org)  
[AskJAN.org](http://AskJAN.org)



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## JAN'S Accommodation and Compliance Series

### Introduction

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 to enable a qualified employee with a disability to manage medical issues and ultimately return to work.

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.

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. It is up to the employer to determine, on a case-by-case basis, what duration of leave is reasonable as an ADA accommodation. This determination must be fact-specific and will often depend on whether a particular duration of leave causes an undue hardship for the employer. Determination of whether providing leave would result in undue hardship may involve consideration of various factors, including the amount and/or length of leave required, the frequency of the leave, whether the need for intermittent leave is predictable or unpredictable, the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner, and the impact on the employer's operations, among other factors.

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

Yes. See:

- [Enforcement Guidance on Applying Performance and Conduct Standards to Employees with Disabilities, question 20](#)
- [Employer-Provided Leave and the Americans with Disabilities Act](#)

## **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. 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. 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](#)).

## **7. 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.

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.

## **8. 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.

## **9. 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](#).

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

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. For more information, see JAN's ENews article, [ADA Leave Beyond FMLA](#).

## **11. 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. 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](#).

## **12. 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, 2015](#)).

**13. 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. For more information, see [Leave as an Ineffective Accommodation](#).

**14. 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.

## Situations and Solutions:

The following situations and solutions are real-life examples of accommodations that were made by JAN customers. Because accommodations are made on a case-by-case basis, these examples may not be effective for every workplace but give you an idea about the types of accommodations that are possible.

### **A construction worker had Huntington's disease related depression.**

He requested ADA leave to get treatment and a reduced work schedule when he returned back to work, he was accommodated with leave and a modified schedule.

### **A customer service rep with Marfan syndrome which resulted in heart issues.**

The employee needed to attend periodic medical appointments, but the appointments were scheduled during their shift at work. The employee requested leave and a flexible schedule as reasonable accommodations, which the employer approved on a temporary basis.

### **A temporary agency provides computer programmers for companies**

Once the programmers are assigned to a company, the company sets their schedules and production standards and provides all necessary equipment and supplies. The temp agency pays the programmers and addresses any issues that come up. One programmer was diagnosed with cancer and needed a flexible schedule, telework, and leave. Because both the temp agency and the company qualified as an employer of the programmer, they worked together to provide the necessary accommodations and to cover the work load when the programmer needed leave.

### **An employment counselor had a kidney stone, which required monitoring from a healthcare provider.**

The employer granted ADA leave as an accommodation so the employee could seek medical treatment. Once recovered, the employee was able to return to work full duty.

### **An automobile parts assembler had hoped to regain strength in his dominant right side following a stroke resulting in hemiparesis.**

He had exhausted FMLA leave and decided to request reassignment. He was placed in a vacant stock clerk position that was less physically demanding. He was also provided a scooter to access the facility and a tablet device was mounted to the handlebars, which allowed him to access purchasing and receiving documents with one hand.

### **An attorney with obesity had to leave the office frequently to go to court and often could not find close parking when she returned to the office**

She had difficulty walking long distances so the employer gave her a reserved parking space close to the worksite.

### **A general laborer for a warehousing company had a shoulder impairment that required surgery.**

He had restrictions in lifting, reaching, pushing and pulling that prevented him from performing essential job duties. He required eight weeks of leave for surgery and

recovery, but only had six weeks of FMLA time available. After his FMLA exhausted, he was allowed two weeks of additional leave as an accommodation under the ADA. When he was ready to return to work, he was placed in a vacant modified duty position for two additional weeks to accommodate remaining restrictions.

**A customer service representative working in a call center was experiencing limitations associated with generalized anxiety disorder and depression.**

He began treatment with a new healthcare provider who adjusted his medications and recommended bi-weekly counseling sessions for one month. He exhausted his accrued paid sick leave but was FMLA eligible. He applied FMLA leave intermittently in order to attend counseling appointments.

**A marketing manager disclosed to her employer that she has alcoholism and would like to seek treatment.**

She would need to attend a 60 day residential program and requested a leave of absence to do this. She was granted job-protected leave under the FMLA for the duration of her treatment.

**An account representative was out of leave due to treatment for Hepatitis C.**

The employee wanted to return to work, but due to side effects of treatment, could not maintain the stamina needed to visit clients. The employer reassigned the employee to another account representative position that did not require travel.

**A retail sales associate with diabetes developed complications that affected the functioning of her kidneys.**

She required hemodialysis three times a week. Hemodialysis requires adhering to a fixed schedule. The employee requested a transfer to a store closer to the dialysis center as an accommodation under the ADA, and applied leave under the FMLA, when needed, to receive dialysis.

**A social worker who developed severe preeclampsia during the last trimester of her pregnancy was placed on modified bed rest by her healthcare provider.**

This prevented her from working on-site. She was able to perform some of the essential duties of her position by working at home. The employee was permitted to work at home part-time, as an accommodation under the ADA. She applied leave on a reduced leave schedule under the FMLA for the remaining hours she was unable to work, until the delivery of the baby.

**An applicant discloses that she has Crohn's Disease and will need a day of intermittent leave regularly to seek medical treatments.**

She has infusions that help her manage the effects of her condition that are taken every 6 to 8 weeks. The employer requests the schedule for these infusion appointments and agrees to alter her schedule as an accommodation to work around these scheduled appointments.

**An employee voluntarily admitted herself to a hospital inpatient unit due to severe depression.**

Her mother called the employer to let them know what had happened and to tell them

her return date was uncertain at that time. The employer provided leave under the ADA for the employee and requested her mother to keep them informed about the employee's progress and possible return to work date.

**A production assembly line worker had symptoms of frequent urination and diabetic neuropathy in his legs.**

The employee could not leave his work area except during scheduled breaks. Accommodation included the use anti-fatigue mat, sit/stand/lean stool, and an in-house paging system to notify the supervisor that a replacement is needed while the employee takes a restroom break.

**An employee with borderline personality disorder works as a hairstylist in a beauty salon.**

At times, she becomes very upset and leaves work abruptly. The supervisor meets with her regarding these occurrences and the employee discloses her disability and explains that because of her work schedule, she has been unable to attend therapy and psychiatrist appointments, which has resulted in an exacerbation of her symptoms. The employer suggests providing her a consistent schedule, allowing her to keep the early part of the day open for her therapist and doctor appointments. The employer also agrees to allow the employee to take two additional unpaid breaks per shift. The accommodations result in the employee getting the treatment she needs, allowing her to continue working successfully in her position.

**An employer, trying to accommodate an employee returning to work after a leave, had questions about the stress of required travel that escalated the employee's depression and anxiety.**

The employer was advised to continue on in the interactive process to discover what specifically about the travel was stressful so they could determine accommodations for those identified issues. Examples of questions to ask could include what particularly about the travel causes the stress that heightens the depression, such as the length of the travel, the distance, the planning process, or even specific modes of travel and/or locations.

**An employee with vertigo occasionally cannot make it into work due to her severe flare ups.**

The employer has been allowing the employee to use paid sick leave during these occasions, but the employee requested that some other form of accommodation be reviewed to help her so that she may not need to use her sick leave on these occasions. After exploring the options, the employer allows the individual to work from home on these days as an accommodation.

**An electrician with essential tremor, who regularly worked outdoors, noticed that symptoms were worse during the hot summer months and cold winter months.**

The employer provided a battery operated fan and warming clothing but the accommodations were not effective. As a next step the employee was provided with leave on days were temperatures were extreme and they began to look at options for reassignment to a position that did not require working outdoors.

**An employee with sarcoidosis has been having problems when needing to leave her workstation to use the copier due to her legs swelling when they are not elevated.**

The employer provides the individual with a small copy machine for her workstation desk as an accommodation.

**An employee with a bladder condition requested leave in order to go to doctors' appointments.**

The employer offered a modified schedule instead, so that the employee could make up the time missed without needing to use accrued leave.

**An employee with gastroesophageal reflux disease (GERD) requested leave in order to go to doctors' appointments.**

The employer offered a modified schedule instead, so that the employee could make up the time missed without needing to use accrued leave.

**An employee was recently diagnosed with thyroid cancer and is having trouble with attendance due to the fatigue limitations associated with the chemotherapy.**

The employee is running low on paid sick leave. The employer allowed the individual to work from home to enable the individual to work more easily as well as providing additional unpaid leave as an accommodation on days when the individual simply cannot work.

**A truck driver who used a service animal requested that his dog be left in his truck during maintenance and cleaning, meetings, and the completion of paperwork.**

Rather than leave the dog in the truck, the employer offered to purchase a dog kennel so the dog could stay safely in the office when needed.

**A service worker was having difficulty maintaining a full workday due to fatigue.**

The individual was accommodated with periodic rest breaks away from the workstation, a flexible work schedule, flexible use of leave time, parking close to the work-site, and periodic work from home.

**An applicant for a data entry position has sickle cell anemia and discloses that it causes her to have episodes of considerable pain.**

The employer agrees to make adjustments to her schedule to allow for flexibility when needed as well as provide some intermittent leave time for more extreme episodes should the individual be hired for the position.

**An accountant with spasmodic dysphonia needed time off periodically to travel out of state in order to get specialized medical treatment to manage his condition.**

He also experienced a breathy voice quality that limited his ability to speak loudly for several days after each treatment. The employer granted periodic leave and provided equipment to amplify his voice on the telephone as needed.

**A school psychologist with chronic fatigue syndrome was having difficulty working at full production.**

She was allowed to schedule appointments in the morning, which gave her uninterrupted time in the afternoon to complete paperwork. She was also allowed to schedule several short rest breaks throughout the day and use of sick leave as needed.

**A special education teacher with agoraphobia had been off on leave for a school year.**

With her psychiatrist's help, she determined that she could return to work if the school was within a five-mile radius of her home – the distance she and her doctor considered safe for her to travel. There were actually six schools within that area. She asked for an accommodation of being placed in one of those particular schools when a special education position came open. The teacher was actually given the choice of two schools right off as the district knew those particular jobs were going to be open for the next year. She accepted the offer on the elementary position, since she felt most comfortable with that age group.

**A long-term employee returned to work after an extended leave for in-patient mental health treatment.**

In her absence, her supervisor had been promoted and she had been reassigned to a new position. As an accommodation to help the employee transition back into working, her new supervisor agreed to meet with her weekly to discuss performance expectations and determine if accommodations/strategies needed to be implemented in order to help her fully perform her new tasks. It was also agreed to include the previous supervisor in some of those meetings if his involvement would be effective.

**A new employee had only worked for a manufacturing company for four months and had not accrued paid leave at the time that symptoms of Guillain-Barré Syndrome developed.**

The employer provided unpaid leave as an accommodation and were able to hold the employees' position open for when they were able to return to work.

**A middle school teacher with chronic depression asks for the accommodation of leave one afternoon a week for a sixteen-week period so she can attend an intensive out-patient therapy program recommended by her mental health practitioner.**

The physician feels this treatment is necessary to prevent a depressive episode requiring further leave. Her employer finds no hardship in providing her with a substitute for those sixteen afternoons and provides the requested accommodation.

**A human resources manager at a large university had recently been diagnosed with early-onset Alzheimer's disease.**

The diagnosis came as no surprise to the employee, as he had been struggling for some time with working the long hours involved in managing the tasks. He found that he needed progressively more time to complete tasks and that the same tasks were becoming increasingly more complex. His inability to perform the essential functions of the position prompted him to ask for an accommodation. He requested leave under the ADA so that he could contact his EAP and determine what benefits were available to him.

**A human resource representative had migraines several times a month, which prevented her from working.**

As an accommodation, the employer provided unpaid flexible leave after all of her paid leave was exhausted.

**A kindergarten aide with claustrophobia requested the accommodation of leaving the classroom door to the outside open.**

The school district denied that request due to a new district-wide security plan recently put into place. The new addition for the kindergarten classes was an atrium-like setting, and since the area around the classrooms into the atrium was secure, the agreed upon accommodation was to leave the classroom door into the atrium open.

**A journalist had difficulty recovering from shingles.**

She was experiencing chronic migraines and depression from six weeks of shingles, which manifested around her right eye. Her employer granted her extended leave to work on her recovery.

**A dental office hired a receptionist with a vision impairment to work in the front office.**

The new employee had acquired a service animal, but did not yet have accrued vacation time that could be used for service animal training. The employer allowed the receptionist to take unpaid leave to attend service animal training.

**A guidance counselor for a large high school experienced severe bouts of irritable bowel syndrome, depression, and fatigue as a result of fibromyalgia.**

He experienced difficulty in opening the heavy doors to the entrance of the school and had to make frequent trips to the bathroom. The individual's employer complained that he was spending too much of his time away from his office and therefore was not available for students. The employer moved the employee's office to a location closer to the faculty restroom, added an automatic entry system to the main doors, and allowed flexible leave time so the employee could keep appointments with his therapist.

**A factory worker with Hepatitis C, receiving treatment for six months, was experiencing flu like symptoms with extreme fatigue.**

The employer provided a modified schedule so that the employee could attend doctor's visits and also leave when symptoms were exacerbated.

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