

Can an Employee Be Eligible for Medical Leave Even if FMLA and PTO Leave Aren't Available?



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When employers think of “medical leave,” most minds understandably jump to the Family Medical Leave Act (FMLA) or time off that employees may be entitled to under company-provided policies (sick leave, vacation, paid time off (PTO), etc.). But those sources of leave are not necessarily the end of the road, and employees may be entitled to an unpaid leave of absence under the Americans with Disabilities Act (ADA) even if they have exhausted or are not otherwise eligible for FMLA or company-provided leave.

In some ways, the concept of leave as a reasonable accommodation is a bit oxymoronic, as we usually think of accommodations as some change to help employees perform their job — not something that keeps them away from work. Yet under certain circumstances, time off from work may indeed be a reasonable accommodation under the ADA. That may be particularly true in the iron and steel industries, where many jobs require hands-on, safety-sensitive work.

Courts that have permitted a leave of absence as a reasonable accommodation under the ADA have generally reasoned that granting time off now would enable the employee to perform their essential job functions in the near future. Following that logic, a leave of absence may be a reasonable accommodation where it is finite and will be reasonably likely to

enable the employee to return to work relatively soon.

Unfortunately for employers, what is “finite” and “relatively soon” is not well-defined. The contours of ADA leave are nowhere near as precise as the relatively black-and-white leave banks available under the FMLA and company policy.

In other words, there is no clear length of time that employers must allow employees to take off as a reasonable accommodation, which can make managing the leave process especially difficult and unpredictable for managers and human resource professionals. As with all other accommodation requests under the ADA, each situation is circumstance specific.

On the one hand, a request for indefinite or open-ended leave is not a request for reasonable accommodation, particularly where the employee presents no evidence of the expected duration of the impairment or no indication of a favorable prognosis. Thus, an employee who cannot say when, if ever, he or she would be able to return to work is likely not entitled to leave under the ADA.

On the other hand, the more evidence an employee gives the employer indicating that he or she will be able to return to work in the near future, the more likely a court is to find that the requested leave is a reasonable accommodation. In *Shannon v. City of Philadelphia*, for example, the court refused an employer’s request to dismiss a

lawsuit based on its failure to provide its employee with a three-month leave of absence under the ADA, explaining:

“In this case, Shannon requested an additional three months of unpaid leave for medical treatment following 12 weeks of FMLA leave. Shannon’s physician was ‘hopeful’ that Shannon’s symptoms would ‘resolve entirely’ within a year and he opined that she would be ‘fully fit’ to return to work in three to six months. Viewing the evidence in a light most favorable to Shannon, the court finds that a reasonable jury could conclude that Shannon’s request for an additional three months of unpaid leave for medical treatment was a reasonable accommodation.”

In another case, *Bernhard v. Brown & Brown of Lehigh Valley Inc.*, the employee was diagnosed with life-threatening neck and throat cancer. After his FMLA leave expired, the employee emailed his supervisor and HR director stating that he would be “unable to return to work for at least three more months,” that “[i]f all goes well, the doctor said he would clear me to return to work by the beginning of January 2007,” and that he would be “on long-term disability for a minimum of three

months starting 9 October 2006 to January 2007.” A few days later, the employer requested additional information from the physician and received a certification that the employee was “recovering slowly,” but would likely require an additional three months to recover. After that, the employer terminated the employee. Given this background, the court disagreed with the employer’s argument that the employee had requested an indefinite leave and set the case for trial.

In short, and unfortunately, determining whether an employee is eligible for leave under the ADA often presents a challenging situation for employers as the law does not yet provide clear line-drawing guidance. Fortunately, leaves are administered just like other forms of accommodations in that employers are permitted to request — and employees are required to provide — medical information to support the request, determine its probable duration, as well as other accommodations that might also help the employee perform their job’s essential functions. ♦

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