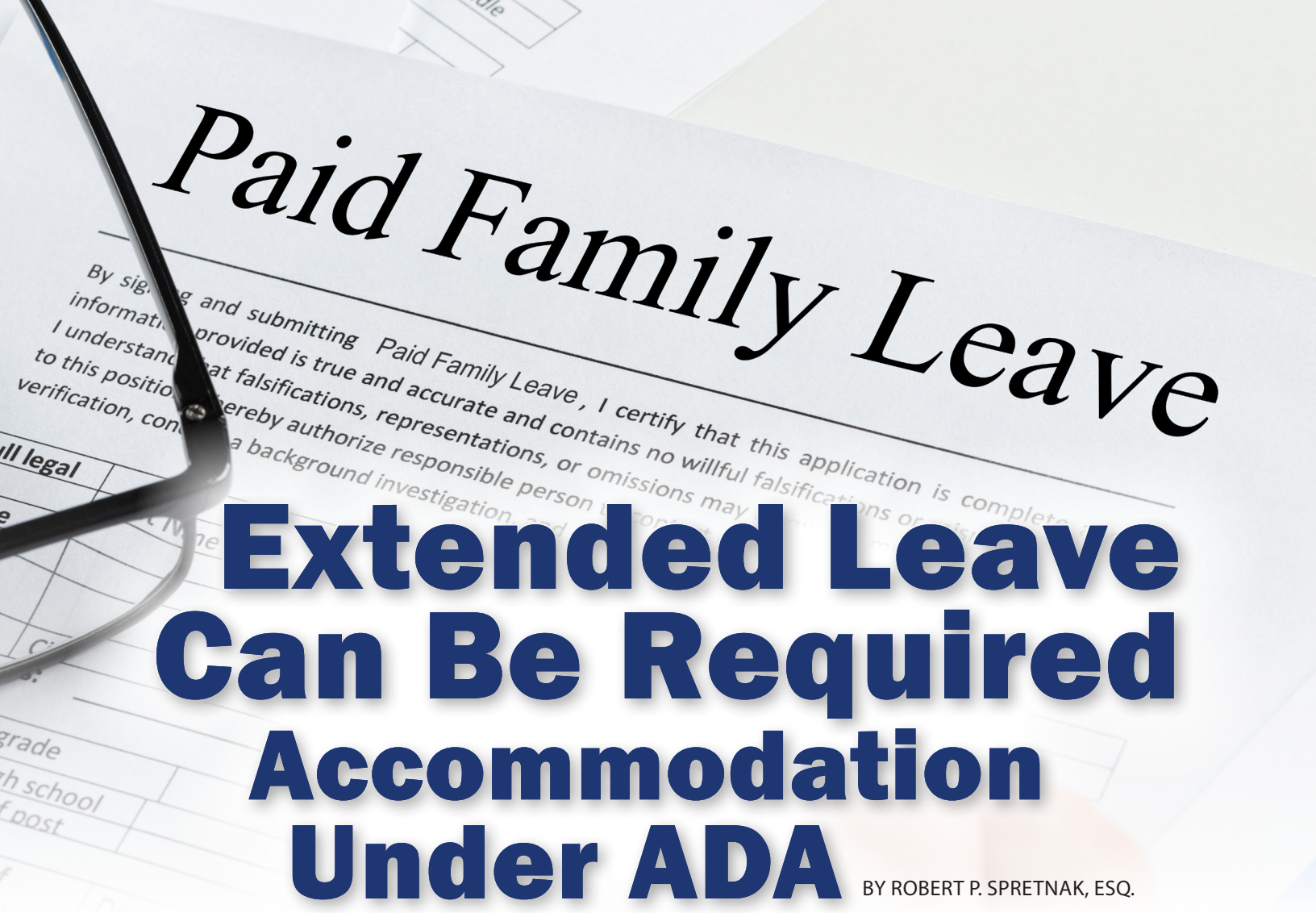

Extended Leave Can Be Required Accommodation Under ADA

BY ROBERT P. SPRETNAK, ESQ.

When certain circumstances are met, an employer may be required by law to offer extended medical leaves of absence to its employees over and above the time mandated by the Family and Medical Leave Act (FMLA). Legally required medical leaves are not limited only to employers and employees who meet the more-narrow legal thresholds contained in the FMLA.

Congress passed the Americans with Disabilities Act of 1990, also known as the ADA, in order to allow individuals with physical or mental disabilities to more fully participate in American society. President George H.W. Bush signed the ADA into law on July 26, 1990. Title I of the ADA protects the right of individuals with physical or mental disabilities to more fully participate in the workforce, handing disabled workers tools necessary to be productive, income-earning, taxpaying members of society.[1]

A few years later, the FMLA became law. On February 5, 1993, it became the first piece of legislation signed into law by then newly inaugurated President Bill Clinton. Interestingly, the FMLA twice had been vetoed by President Clinton's predecessor, who previously signed the ADA into law.[2]

Today, the ADA and the FMLA work as complementary pieces of legislation. The ADA, specifically Title I of the ADA, protects employees who are able to work, if only they had the proper tools to do the job. Just as a carpenter cannot do his or her job without a saw, or a hammer and nails, or a lawyer cannot function without Lexis or Westlaw and word-processing software, so too does the disabled worker need the proper tools. The ADA requires an employer to provide these necessary tools in the form of reasonable accommodations to covered disabilities.[3] The FMLA works hand-in-hand with the ADA to protect employees with physical or mental impairments. The FMLA protects employees who temporarily cannot perform the duties of their job by requiring employers to keep the job open for an employee who temporarily cannot perform the job until such time as the employee is able to return to work.

But the protections provided by the FMLA are limited. Only employers with 50 or more employees within a 75-mile radius of the employer's workplace need offer medical leave under the FMLA.[4] The maximum amount of leave time an employer must provide is limited to 12 weeks a year.[5] Only employees who have been with an employer for more than one year are covered.[6] Those employees must have worked more than 1,250 hours in the preceding one-year time period,[7] basically an average of 24 hours per week. So part-time or temporary workers are left in the lurch.

But for employees whose need for medical leave is related to a covered disability under the ADA, an employer may be legally obligated to offer medical leave beyond what is required under the FMLA. An employer may be required to provide more than just 12 weeks of leave to an employee whose medical needs are related to a physical or mental impairment that rises to the level of a covered disability. An employer may be required to offer medical leave even if it does not have the requisite number of employees within the required radius.[8] An employer may be required to offer medical leave to a part-time employee or a highly compensated executive.[9]

The purpose of the ADA is to allow an employee to work. The FMLA protects employees who cannot work, at least temporarily. So how can the ADA also protect employees who cannot work? Isn't the ADA about protecting employees on the job? Wouldn't the ADA be usurping territory ceded to the FMLA? Wouldn't the ADA be thwarting the more narrowly tailored FMLA by granting FMLA-type leave rights to a class of employees specifically left out from under the protections of the FMLA umbrella by an act of Congress?

No. Requiring extended leave as a potential accommodation to a physical, mental or emotional disability is fully consistent with the mission of the ADA.

The philosophical, legal and moral basis for requiring employers to offer extended leave as a reasonable accommodation to a covered disability can be found right in the text of the ADA: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[10] "Employment" means more than just performing the assigned tasks of the job on any one particular day. "Employment" means having a job, even a career, and being able to support one's self and one's family.

"Discriminate" means "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant."[11] The term "reasonable accommodation" includes "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[12]

Under the law, "an unpaid leave of absence can be a reasonable accommodation under the ADA."[13] This includes leave to be taken on an intermittent basis.[14] It also includes leave to be taken for securing medical treatment.[15] It includes temporary leave necessary for an employee to continue in his or her job and career.

> "Under the law, an unpaid leave of absence can be a reasonable accomodation under the ADA."

However, an employee's right to an extended medical leave of absence, as a reasonable accommodation to a covered disability, is not without constraints.

First, the leave must be related to a disability. Cancer treatments often qualify as a course of medical treatment that would require an employee to offer extended medical leave. An extended leave request related to a stress or anxiety disorder would also qualify. Acute conditions, such as illness, or medical conditions of family members that trigger the protections of the FMLA, may not invoke the right to extended leave under the ADA.

Second, extended leave time must be for a set, defined interval. An employer is not required to offer an open-ended leave. If a treating physician believes that an additional 60 or 90 days over and above the FMLA mandate is necessary for full recovery for cervical or lumbar spine surgery, an employer is likely required to provide the additional leave. A simple note stating "he's not yet ready to return" will never be enough to meet the legal requirements.

Third, as with all requests for accommodations under the ADA, the defined interval of extended leave must be "reasonable" under the circumstances. Sixty days almost certainly would qualify as "reasonable." One whole year, while set and defined, likely would fail the test of reasonableness.

Fourth, the request for extended leave must be based on the recommendation of the treating healthcare professional, whether that professional is treating the person physically, mentally or emotionally. An employer need not accept the word of an employee.

However, the law is clear that if an employee's use of medical leave time is related to a disability, the FMLA alone does not provide a safe harbor to allow an employer to terminate an employee from his or her job if that employee needs more time off than the 12 weeks allotted by the FMLA.

Extended leave, to allow an employee to continue to do his or her job in the future, can be a reasonable accommodation to allow an employee with a disability to continue in his or her job and career.

ENDNOTES:

1. 42 U.S.C. §§ 12111-12117.
2. https://clintonwhitehouse5.archives.gov/WH/Accomplishments/eightyears-02.html.
3. 42 U.S.C. § 12112(b)(5).
4. 29 U.S.C. § 2611(2)(B)(ii).
5. 29 U.S.C. § 2612(a)(1).
6. 29 U.S.C. § 2611(2)(A)(ii).
7. 29 U.S.C. § 2611(2)(A)(i).
8. However, an employer still must have more than 15 employees for this to be required. According to 42 U.S.C. § 12111(5)(A): "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year[.]"

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9. An employer may not be required to restore "a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed" to the position held prior to the taking of a medically related leave of absence. 29 U.S.C. § 2614(b)(2). In order to lawfully deny a highly compensated employee restoration to his or her position, two conditions must be met. First, "such denial" must be "necessary to prevent substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A), Second, "the employer" must notify "the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur[.]" 29 U.S.C. § 2614(b)(1)(B). In other words, the highly compensated must be given advance warning that restoration to his or her position will not happen if that employee takes a medical leave of absence.
10. 42 U.S.C. § 12112(a).
11. 42 U.S.C. § 12112(b)(5)(B).
12. 42 U.S.C. § 12111(9); *see also Bragdon v. Abbott*, 524 U.S. 624, 633, 118 S. Ct. 2196, 2202, 141 L. Ed. 2d 540 (1998).
13. *See, e.g., Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185 (2d Cir. 2006).
14. *See, e.g., Jefferson v. Time Warner Cable*, 2012 U.S. Dist. LEXIS 200252, *6, 2012 WL 12887692 (C.D. Cal. July 23, 2012).
15. *Humphrey v. Mem'l Hospitals Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001).

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