

Question & Answer Summary

October 22, 2009 Webinar

Leaves of Absence Part 2: Latest Developments Under the Federal ADA and California's Disability Leave Laws

On October 22, 2009, Miller Law Group presented the second installment of a two-part webinar on leaves of absence. In Part 2, we examined recent developments under the federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA), discussing the compliance challenges employers face regarding disability leaves and the interplay between the disability laws, family and medical leave laws and workers' compensation. The following are answers to frequently asked questions by webinar attendees.

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Q. DOES GRANTING A LEAVE OF ABSENCE AS A REASONABLE ACCOMMODATION UNDER THE ADA INCLUDE INTERMITTENT LEAVE?

A. Yes, granting an intermittent leave of absence could be a reasonable accommodation under the ADA or the California FEHA, absent undue hardship to the employer. In addition, an employee may be entitled to intermittent leave under federal and state family and medical leave laws.

Q. ARE THERE ANY LENGTH OR HOURS OF SERVICE REQUIREMENTS AN EMPLOYEE MUST FULFILL TO BE ELIGIBLE FOR A LEAVE OR OTHER ACCOMMODATION UNDER THE ADA?

A. No. An employee is protected by the ADA if the employer has 15 or more employees, and California employees are also protected by the FEHA if their employer has five or more employees, regardless of the employee's length of service or hours worked.

Q. IF AN EMPLOYEE REQUESTS A LEAVE AS A REASONABLE ACCOMMODATION BUT A JOB TRANSFER OR OTHER ACCOMMODATION WOULD PERMIT THE EMPLOYEE TO REMAIN ON THE JOB INSTEAD, DOES THE EMPLOYER HAVE TO GRANT THE LEAVE?

A. When an employee requests a leave of absence as a reasonable accommodation, the employer can choose to provide an accommodation that requires the employee to remain on the job instead, provided the employer's proposed accommodation would be effective and eliminate the need for leave. Keep in mind, however, that if the employee requests and is

eligible for a leave of absence under the Family and Medical Leave Act (FMLA) or California Family Rights Act (CFRA), the employer cannot deny a FMLA/CFRA-covered leave.

Q. DOES THE REASONABLE ACCOMMODATION OBLIGATION REQUIRE THE EMPLOYER TO CREATE A JOB IF THERE ARE NO AVAILABLE POSITIONS THAT A DISABLED EMPLOYEE CAN PERFORM?

A. No, the reasonable accommodation obligation does not require an employer to create a new position for a disabled employee – it is sufficient to explore transferring the employee to a vacant position. Vacant means that the position is available when the employee asks for a reasonable accommodation, or the employer knows that the position will become available within a reasonable amount of time.

Q. WHAT ARE AN EMPLOYER'S OBLIGATIONS TO OFFER LIGHT-DUTY JOBS TO AN EMPLOYEE WHO IS DISABLED BY A NON-OCCUPATIONAL INJURY OR ILLNESS?

A. Just as employers are not required under the ADA to create new positions, the ADA also does not require employers to create light-duty positions for non-occupationally disabled employees. This is true even if the employer creates light-duty positions for employees with occupational injuries. On the other hand, if the employer reserves light-duty positions for employees with occupational injuries, the ADA does require the employer to consider reassigning an employee with a disability that is not occupationally related to that position as a reasonable accommodation, if the employee is unable to perform the essential functions of his or her regular job and there is no other effective accommodation available.

Q. WHEN AN EMPLOYEE RETURNS FROM AN ADA LEAVE OF ABSENCE, DOES HE OR SHE HAVE A RIGHT TO BE RETURNED TO THE SAME SHIFT?

A. It depends. Under the ADA, an employee returning from a leave must be reinstated to the *same* position the person held prior to the commencement of the leave, absent undue hardship. Depending on the circumstances, a change in shift – for example, a day shift worker being reinstated to the night shift following a leave – could alter the nature of the job such that it would not be considered the same.

Q. IF AN EMPLOYEE CANNOT RETURN TO WORK AFTER SIX MONTHS OF DISABILITY LEAVE, IS THE EMPLOYER OBLIGATED TO KEEP THE EMPLOYEE “ON THE BOOKS” EVEN THOUGH THE EMPLOYER’S POLICIES OFFER A MAXIMUM OF SIX MONTHS OF LEAVE?

A. It depends. Generally, modifying workplace policies, including leave policies, is a form of reasonable accommodation that employers should explore. Therefore, if an employee with a disability requires additional unpaid leave as a reasonable accommodation, the employer must modify a leave policy that caps the amount of leave in order to provide the employee with additional leave, unless the employer can show that: 1) there is another effective accommodation that would enable the employee to perform the essential functions of the position; or 2) granting additional leave would cause an undue hardship to the employer.

Q. IF A DISABLED EMPLOYEE DOES NOT RETURN TO WORK AT THE END OF A FMLA/CFRA-PROTECTED MEDICAL LEAVE, CAN WE TERMINATE THE EMPLOYEE?

A. It depends. When a disabled employee has exhausted leave under the FMLA/CFRA, the employee could be entitled to additional leave time as a reasonable accommodation. In that case, the employer would run afoul of the disability bias laws by terminating the employee without exploring the need for a longer leave of absence or other reasonable accommodation.

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar and should not be considered legal advice.