

## Attendance Modifications and Leave as Reasonable Accommodation

### 1. Must employees with disabilities be granted the same access to an employer's existing leave program as all other employees?

Yes. Employees with disabilities are entitled to whatever forms of leave the employer generally provides to its employees. This means that when an employee with a disability seeks leave under an employer's regular leave policies, she must meet any eligibility requirements for the leave that are imposed on all employees (e.g., only employees who have completed a probation program can be granted advance leave). Similarly, employers must provide employees with disabilities with equal access to programs granting flexible work schedules and modified schedules.

If an employee with a disability needs leave or a modified schedule beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship.

### 2. Does the ADA require employers to modify attendance policies as a reasonable accommodation, absent undue hardship?

Yes. If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship. Modifications may include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times (e.g., allowing an employee to work from 10 a.m. to 6 p.m. rather than the usual 9 a.m. to 5 p.m. schedule required of all other employees), and providing periodic breaks.

**Example:** A manager's starting time is 8 a.m., but due to the serious side effects of medication she takes for her disability she cannot get to work until 9 a.m. The manager's late arrival results in a verbal warning, prompting her to request that she be allowed to arrive at 9 a.m. because of the side effects of medication she takes for her disability. The manager's modified arrival time would not affect customer service or the ability of other employees to do their jobs, and she has no duties that require her to be at work before 9 a.m. The employer approves this request for reasonable accommodation, because the manager's later arrival time would not affect the manager's performance or the operation of the department.

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

Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), 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.

**Example:** An employee works as an event coordinator. She has exhausted her FMLA leave due to a disability and now requests additional intermittent leave as a reasonable accommodation. The employee can never predict when the leave will be needed or exactly how much leave she will need on each occasion, but she always needs from one to three days of leave at a time. The employer initially agrees to her request and the

employee takes 14 days of leave over the next two months. Documentation from the employee's doctor shows that the employee will continue to need similar amounts of intermittent leave for at least the next six months. Event planning requires staff to meet strict deadlines and the employee's sudden absences create significant problems. Given the employee's prognosis of requiring unpredictable intermittent leave, the employer cannot plan work around these absences. The employer has already had to move coworkers around to cover the employee's absences and delay certain work. The on-going, frequent, and unpredictable nature of the absences makes additional leave an undue hardship, and thus the employer is not required to provide it as a reasonable accommodation. If the employer cannot reassign the employee to a vacant position that can accommodate her need for intermittent leave, it is not required to retain her.

#### **4. Do employers have to grant indefinite leave as a reasonable accommodation to employees with disabilities?**

No. Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations. Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return some time between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.

**Example:** An employer grants 12 weeks of medical leave at the request of an employee with a disability. At the end of this period, the employee submits a note from his doctor requesting six additional weeks, which the employer grants. At the conclusion of this period, the employee submits a new note seeking another six weeks of leave, which would bring the employee's total leave to 24 weeks. Although the employer has been able to cope with the extended absence to date, it foresees a more serious impact on its operations if the employee requires more than a few additional weeks of leave. According to documentation from the employee's doctor, there have been complications and the employee is not responding to treatment as expected. The doctor states that the current request for an additional six weeks may not be sufficient and that more leave, maybe up to several months, may be needed. The doctor states that the employee's current condition does not permit a clear answer as to when he will be able to return to work. This information supports a conclusion that the employee's request has become one for indefinite leave. This poses an undue hardship and therefore the employer may deny the request.

#### **5. Does an employer have to grant a reasonable accommodation to an employee with a disability who waited until after attendance problems developed to request it?**

An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation. However, if the employee's infraction does not merit termination but some lesser disciplinary action (e.g., a warning), and the employee then requests reasonable accommodation, the employer must consider the request and determine if it can provide a reasonable accommodation without causing undue hardship.

*Information for this fact sheet is excerpted from guidance prepared by the Equal Employment Opportunity Commission at <https://www.eeoc.gov/facts/performance-conduct.html>.*

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