NACUA

Spring 2020 CLE Webinar Series

May 6, 2020

Managing Issues on the Continuum of Leave as a Reasonable Accommodation

Contents

NACUA WEBINAR SERIES

Wednesday May 6, 2020

MANAGING ISSUES ON THE CONTINUUM OF LEAVE AS AN ACCOMMODATION

SPEAKER BIOGRAPHIES

Kate Mente became Senior Campus Counsel at UC, San Francisco in June 2014. She serves as the Campus labor and employment law advisor. She also advises on faculty misconduct matters, OFCCP matters, threat management matters, workplace violence restraining orders, pre-litigation settlements, and employment and general liability litigation matters. She previously served as UCSF's Senior Labor and Employee Relations (LER) Advocate for the UCSF Campus and Medical Center. In this role, she represented UCSF in administrative hearings, arbitrations and Public Employment Relations Board (PERB) proceedings. Ms. Mente previously served as an Adjunct Professor at the University of San Francisco, School of Law, Employment Law Clinic and as Associate Counsel for two San Francisco law firms: McGuinn, Hillsman & Palefsky, and McCormac & Associates. Ms. Mente received her Juris Doctorate from the University of San Francisco, School of Law and graduated with a Bachelor of Arts from George Washington University.

Tara O'Connor has been a lawyer for the University of Pittsburgh since October 2017. Prior to working at the University, Tara was Associate General Counsel, and Director of Ethics at the United States Olympic Committee from 2014 to 2017; Corporate Counsel Employment, Labor and Immigration at the Kellogg Company from 2006 to 2014, Vice President and Assistant General Counsel at Goldman Sachs & Co. from 2000 to 2006; Attorney Manager for Standard & Poor's from1998 to 2000; Attorney Consultant for American Express Company, from 1997 to 1998 ; Attorney for IBM Corporation from 1995 to 1997 and a Law Clerk to the Honorable Gary L. Lancaster WDPA from 1993 to 1995.

Karen Petrulakis joined Wellesley College as its first General Counsel in late August 2017. In this position, she is responsible for the overall vision and strategy for the legal affairs of the College. She provides legal advice and counsel to the President, Board of Trustees, and other members of the College community on a broad range of legal matters. Karen previously served in the Office of the General Counsel of the University of California from January 2011 to July 2017, since May 2013 as Chief Deputy General Counsel and Deputy General Counsel for Litigation, a role that included overseeing litigation across the University of California system's ten campuses. Prior to joining the University of California, she was a partner in Crowell & Moring LLP's San Francisco office, where her practice included complex commercial litigation and employment litigation and counseling for corporate clients as well as public entities and universities. Karen currently serves on the NACUA Board of Directors, the NACUA Committee on the Program for Annual Conference, and as Vice Chair of the Committee on Board Operations. Karen also serves on the Steering Committee for the Boston Bar Association's (BBA) College and University Law Section and the Advisory Committee for the BBA's 2020 Higher Education Legal Conference. Karen holds a B.A. in History, with high honors, Phi Beta Kappa, from the University of California, Berkeley and a J.D. from Stanford Law School.

Judy Rosen is the Director of Disability Management Services for the University of California San Francisco (UCSF). Her unit supports provision of temporary and permanent workplace accommodations for the 28,000+ campus and UCSF Health staff, Faculty, Residents and Postdoctoral Scholars with occupational and non-occupational injuries and illness. Her unit also manages the campus workers' compensation program. Judy originally joined UCSF in 2006 as a Senior Disability Analyst supporting the campus. Prior to UCSF, Judy worked as a private vocational rehabilitation counselor in the California workers' compensation system, a vocational expert, and in vocational testing for individuals receiving services through the workers' compensation system, the State Department of Rehabilitation and the Department of Veteran's Affairs. Judy received an M.Ed. in Educational and Counseling Psychology from the University of Missouri-Columbia (1987) and a B. S. in Education from the University of Wisconsin-Madison (1985). Judy is a Senior Professional in Human Resources (SPHR) and a Certified Professional in Disability Management (CPDM).

NACUA WEBINAR SERIES

Wednesday, May 6, 2020

MANAGING ISSUES ON THE CONTINUUM OF LEAVE AS A REASONABLE ACCOMMODATION
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Meredith McMillan, CMP
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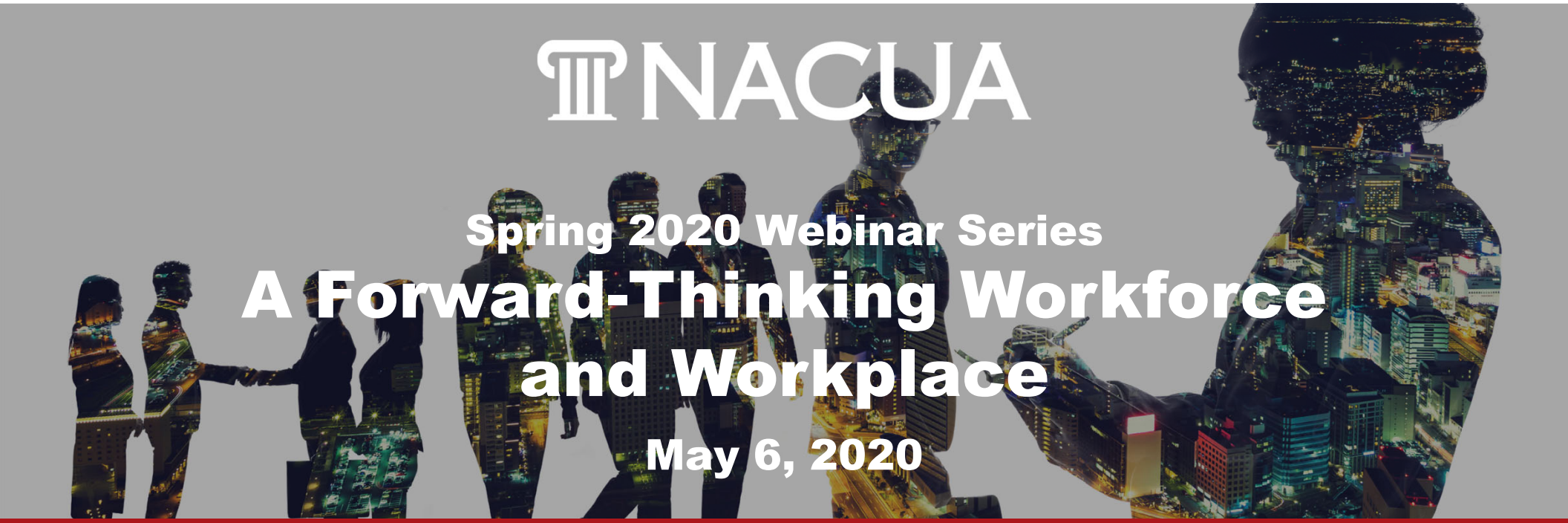

Spring 2020 Webinar Series

A Forward-Thinking Workforce and Workplace

May 6, 2020

Managing Issues on the Continuum of Leave as an Accommodation

Kate Mente, *Moderator*, Senior Campus Counsel, University of California, San Francisco
Tara Harper O'Connor, Associate Legal Counsel, University of Pittsburgh
Karen Jensen Petrulakis, General Counsel, Wellesley College
Judy Rosen, Director, Disability and Leave Administration, University of California, San Francisco

Managing Leaves of Absence Is Challenging

"If the Americans with Disabilities Act (ADA) is a 'swamp of imprecise language,' then leave-of-absence disputes are fought in its murkiest waters."

131 Harv. L. Rev 2463, June 8, 2018

What We Will Address in an Area Rich with Issues:

- Abuse of Leave to Avoid Work and Discipline
- Impact on Staff and Faculty in Assessing Undue Hardship
- Documentation: Permissive and Required
- Managing Faculty and Staff Mental Health Issues
- Factors for Determining if Leave Remains a Reasonable Accommodation

Meet Dr. X

- Dr. X is a junior faculty member in the Chemistry department at the University in Collegetown.

- When Dr. X completed her third year as a faculty member, her Chair issued her a review that was positive in the areas of teaching and service, but documented that Dr. X was lacking in research.

Dr. X Requests Leaves

- After receiving the mixed third year review, Dr. X announced to her Chair that she and her partner were undergoing fertility treatments.

- Dr. X conceived at the beginning of her fourth year as a University faculty member. One month prior to delivery, Dr. X submitted a note to her Chair from her healthcare provider requesting a one-month pregnancy disability leave prior to Dr. X's delivery date. The Chair granted the leave, which was FMLA-protected.

- Following Dr. X's 3rd month of bonding leave, all of which was FMLA-protected, she submitted a note from her healthcare provider requesting additional time off.

Dr. X's Chair Requests Guidance

- The Chair reviewed Dr. X's request and believes that the additional leave would put a strain on the Chemistry department.

- The Chair is in your office requesting assistance in determining how to handle her request for additional time off, which would not be FMLA-protected.

Determining Undue Hardship Requires Individualized Analysis of Leave Impact(s)

- Can or should work be done remotely to keep work on track, if employee is able?
- Impact of increased overtime for coworkers
- Availability of funds for temporary workers
- Recruitment challenges or staffing delays related to temporary replacements
- Ability to reduce work expectations/output within the unit
- Impact on coworkers' productivity, workloads, and timely completion of work
- Measurable impact on morale
- Legality and feasibility of exempt staff to cover non-exempt work

Special Considerations Related to Faculty Leaves of Absence

- Can or should classes be taught remotely, if faculty is able?
- Can or should research be conducted remotely, if faculty is able? (Including environmental health and safety considerations.)
- Impact on students' curriculum options and academic requirements
- Ability and funds to recruit adjunct faculty replacement(s)
- Impact on research
- Impact on grant requirements (including if the faculty member has effort reporting requirements)

Managing Dr. X's Extended Leave

- Dr. X returns from work after five months of leave.
- Upon her return, the Chair and Dr. X's colleagues have noticed that Dr. X spends considerably less time in the lab than she did before her leave, and that her availability for office hours has decreased.
- A month after her return to work, Dr. X submits a request for intermittent leave of absence for planned medical treatment.
- The Chair is frustrated and wants to know options.

Assessing Dr. X's Request for Additional Leave

- **Impacts on co-workers**.
  - Have other faculty been asked to cover Dr. X's classes and/or office hours? What have the actual impacts been on these colleagues? Why or why not is this sustainable?
- **Impact on operations**.
  - Have Dr. X's classes been canceled? Can Dr. X's classes be taught remotely, or are there lab requirements that must done in a lab?
  - What is the impact on the students? (E.g., Is a core class no longer available? Is a class that is required for a student to progress impacted? Have there, or will there, be delays in grades being issued, recommendations, or any other factors that impact a student's progression?)
- **Size of the employer**.
  - Are there limited resources of time, budget and/or qualified faculty available in the Chemistry department?
- **Feasibility of holding the position open** during the entire leave period.
  - Review impact on colleagues, students, and feasibility of recruiting qualified adjunct faculty (timeliness, labor market, budget)
- **Additional impacts of requests for extensions of leaves**.
  - Assess if any grants impacted by Dr. X's absence, including meeting obligations to grantor.

Documentation Requests During the Interactive Process

- When an employee requests an accommodation, medical documentation *may* be requested

- The EEOC notes documentation should only be necessary when the disability and need for accommodation are not known or obvious; the amount and type of documentation will vary depending upon the circumstance
  - In most circumstances, the health condition will not be obvious

- Employers cannot ask for documentation unrelated to the request for accommodation, such as the employee's medical record or diagnosis

Sufficiency of Documentation

Documentation is sufficient when:

It substantiates that the individual has a disability as defined under the law, and it describes:

- The nature, severity, and duration of the condition;
- How the condition limits the employee's ability to perform the employee's work functions; and
- If a particular accommodation is requested, why this accommodation is needed.

Distinguishing:
Requested Accommodations
Task Limitations
Functional Limitations

The health care provider may request or recommend a specific ***accommodation***, or identify a ***task limitation*** without advising the employer on the ***functional limitations*** that are hindering the employee in performance of their essential functions. Examples:

Requested Accommodations	Task Limitations	Functional Limitations
Work remotely	Unable to meet with students in Student Affairs Office	Respiratory impairment with exposure to dust and chemicals
Needs scribe	No data entry in medical record system	No more than 15 minutes of fine finger manipulation/hour
Reassign to a private office	Unable to work in an open office environment	Inability to concentrate and control emotions when exposed to office noise

Seeking Clarity on:
Requested Accommodations
Task Limitations
Functional Limitations

The ***requested accommodations*** and/or ***task limitations*** trigger the interactive process so the employer can seek clear documentation on the underlying ***functional limitation(s)*** that require accommodation.

Distinguish ***functional limitations*** from ***requested accommodations*** or ***task limitations.***

Clarity from the employee and/or the health care provider allows assessment on whether requested accommodations are “reasonable”.

Clarification of Documentation

- In response to ***requested accommodations*** and/or ***task limitations***, the employer may seek clarification from the health care provider about the ***functional limitations*** hindering the individual.
    - Examples of functional limitations include: “no keying more than 30 minutes/hour,” “no standing more than 3 hours without a 10 minute seated break,” and “inability to block out sounds and sights which interfere with focusing on tasks”.
- This clarification allows the employer to consider the range of accommodations that may be viable as well as an understanding of what is actually limiting the employee.

Sufficient Documentation to Assess Continued Leave as an Accommodation

Documentation solely extending a leave is insufficient to determine if additional leave is a reasonable accommodation. To assess an additional leave period, the following is needed:

- **Date** health care provider reasonably anticipates the employee will be released to return to work (with or without accommodations), and
- **Work capacity** of employee (e.g., restrictions or functional limitations) on their return to work date.

- If the employee is restricted on the date of return to work, seek:
  - Specific work restrictions
  - Duration of the restrictions
  - Anticipated date the employee will be able to perform the essential job functions with or without accommodation

Documentation without Reasonable Certainty for Return to Work Date

If the health care provider is ***unable to assess with reasonable certainty a return to work date***, or if there is a pattern of requesting leave that impacts the employer's operations (including impact on coworkers, ability to serve customers/patients/clients), the employer can make a fact-specific case-by-case evaluation if an undue hardship results by granting or extending the leave.

What Documentation May the Chair Request from Dr. X?

After receiving tenure, Dr. X works for a year during which time students have submitted complaints about her declining instruction in the classroom. Just as the Chair of the department is about to address Dr. X's performance issues, Dr. X submits a note from her healthcare provider that states she "needs to be off work due to stress". The note does not specify the underlying functional limitations. Dr. X exhausted her FMLA leave, so the Chemistry Department needs to consider if leave is a reasonable accommodation.

- What are first steps to take?
- What path should you take to address complaints about Dr. X's declining instructions?
- What do you do if Dr. X states her declining instruction is related to a health condition?

Mental Health and the ADA

- ADA protects mental impairments that substantially limit a major life activity.
- Examples: major depression, bipolar disorder, panic disorder, obsessive compulsive disorder, PTSD, schizophrenia, personality disorder.
- Does NOT include: current use of illegal drugs, compulsive gambling, pyromania or pedophilia
- “Substantially limits” standard is a relatively low bar under the ADA Amendments Act of 2008

When a Faculty Performance Problem Might Be the Result of a Mental Disability

- **Adult Attention Deficit Disorder**: Disorganized classes, extra-long time to read, grade and return papers, untimely submission of final grades
- **Anxiety Disorder**: Ability to deal with stress, pressure and deadlines associated with classroom teaching
- **Panic Disorder**: Fearful of student questions, getting overwhelmed and having a panic attack
- **Dementia or Other Mental Decline**: Loss of capacity for analysis, memory and communication

Managing Faculty and Staff Mental Health Issues

- **Focus on the performance problem**: Talk with the staff or faculty member about the behavior observed and why it does not meet performance expectations.
- **Beware of a "regarded as" claim**: Speak in a neutral way without making judgments or assumptions about the reason for the performance deficiency.
- **Engage in the interactive process**: Train managers and department chairs to refer all matters into the formal process on your campus.
- **Be prepared with up-to-date job descriptions:** Define the essential functions of the job.

Considerations in Accommodating Faculty Mental Health Issues

- Consider extending the tenure clock as an accommodation.
- Control the dissemination of information regarding the reason for the faculty member's absence to minimize reputational harm and associated legal claims such as defamation and invasion of privacy.
- Consider options such as a negotiated resolution before proceeding with a formal process to strip a long-tenured faculty member of tenure due to mental decline.

Dr. X' Presents with Possible Mental Health Issues

Dr. X's colleagues continue to notice and report ongoing issues with Dr. X's engagement during labs.

Students report to the Chair that Dr. X is not able to engage in rigorous discussions about research or to provide sufficient feedback on papers submitted. Students report that Dr. X appears panicked at times during classes and during one-on-one sessions.

Dr. X's work product related to grant requirements is not meeting expectations and is noticeably less substantial.

Options for the Chair Regarding Dr. X's Possible Mental Health Issues

The Chair asks you how to address concerns about Dr. X's performance and possible mental health issues where Dr. X has not submitted any documentation related to mental health issues.

- What do you advise Dr. X as to who to engage to aid in the discussion?
- What are the best ways to approach the discussions?
- Advise against "regarding" Dr. X as having a disability absent documentation.
- Possible outcomes to prepare for:
  - Denial of issues
  - Offering campus resources for counseling
  - Request for further leave
  - Request for further documentation from medical provider(s)
  - Ongoing interactive process efforts
  - Managing protections for Dr. X related to reputational harm and privacy

Handling Disruptive or Abusive Conduct

- The ADA does not prevent an employer from disciplining an employee for engaging in aggressive or disruptive conduct, even if the employee claims the behavior resulted from a mental illness.
- If an employee's behavior is found to pose a "direct threat" to the health and safety of self or others in the workplace, the employee is not qualified for the job.
- Consider placing employee exhibiting aggressive or abusive behavior on administrative leave to allow time to investigate and determine next steps.
- Can require documentation that safe to return to workplace.

Use Fitness for Duty Examinations Judiciously

- Employers may only require medical examinations of current employees if they are "job-related and consistent with business necessity."
- Examination should narrowly focus on the employee's ability to perform the essential functions of the job or to work without posing a direct threat.
- Case law focuses on litigating whether the examination met this standard. Courts rarely find a post-employment examination justified ***except*** where there is evidence of a threat of suicide or threat to co-workers.

Elements of a Fitness for Duty Examination Policy

- To better protect against claims of disparate treatment in the application of fitness-for-duty examinations, follow a written policy that contains the following elements:
  - Defining fitness-for-duty.
  - Conditions under which it may be requested.
  - Who bears the cost?
  - Consequences of failure to provide certification.
  - Procedure for authentication and clarification.
  - Employer's right to request recertification.

Is Dr. X's Conduct Abusive or Disruptive?

There was more than one incident reported where Dr. X yelled at a student and was reported to have used an inappropriate tone. A faculty member reports to the Chair that more than once Dr. X's conduct during a lab session became a distraction for other labs, causing safety concerns as well.

- Who should the Chair engage to aid in the discussion with Dr. X as to expectations related to behavioral norms and standards?
- If Dr. X endangers the safety of herself or others, is she a qualified individual with a disability?
- Should the Chair be advised to consider a fitness for duty exam? What factors should be assessed?

Abuse of Medical Leave to Avoid Work or Discipline

- When a request for medical leave is suspected for improper reasons (e.g., pending disciplinary actions or employee has pattern of or propensity to avoid work), check the documentation.

- If the leave is granted, respect the leave but make sure there is understanding about the length of the leave, if there is a request to extend the leave ask for recertification from the medical professional.

Abuse of Medical Leave to Avoid Work or Discipline: Recertification

- In general, the employer may request the employee to provide a recertification no more often than every 30 days and only in connection with an absence by the employee. However, it is critical to check state law (e.g., California is less permissive)
- If a certification indicates that the minimum duration of the serious health condition is more than 30 days, the employer must generally wait until that minimum duration expires before requesting recertification.
- However, in all cases, including cases where the condition is of an indefinite duration, the employer may request a recertification for absences every six months.
- The employer may request a recertification in less than 30 days only if:
  - the employee requests an extension of leave,
  - the circumstances described by the previous certification have changed significantly, or
  - the employer receives information that causes it to doubt the employee's stated reason for the absence or the continuing validity of the existing medical certification.

Abuse of Medical Leave to Avoid Work or Discipline: Recertification

- In general, the employer may ask for the same information in a recertification as that permitted in the original medical certification.
- However, an employer may provide the health care provider with a record of the employee's absences and ask if the serious health condition and need for leave is consistent with the leave pattern.
- The employee is responsible for paying for the cost of a recertification.
- The employer cannot require a second or third opinion for a recertification.
- In most circumstances, the employer must allow the employee at least 15 calendar days to provide the recertification after the employer's request.

Safeguards if Suspected Abuse of Leave

- Recertification, if permissible
- Review job description for “ability to work a regular schedule” as an essential function
- Maintain proper performance management practices; only review the employee related to time at work and do not cite time away from work related to permissible leave in performance reviews
- Keep discipline or investigation process as to performance, behavior, or violation(s) of policy on track

End of Leave Issues that May Arise

- Dr. X's latest leave is approved, but the time granted for her leave is running out.
- Dr. X is ready to return and she submits a note from her health care provider that includes functional limitations for her to return to work which stated: "inability to interact with others, concentration deficits, and difficulty with multi-tasking". What do you advise the Chair in reviewing the document submitted?
- The Chair is not sure she wants Dr. X in the classroom or the lab, but does not articulate the reasons for the prohibitions. What questions do you ask the Chair in order to render advice?
- The Chair asks for a menu of options and the risks associated with each option. What do you ask/offer in response?

Further Interactive Process with Dr. X

- In light of Dr. X's functional limitations, you first seek to review Dr. X's job description, looking to see what requirements are cited.

- Seek clarity from Dr. X or her healthcare provider on Dr. X's functional limitations:
  - "Interacting with others":
    - Does this mean in-person, in groups?
    - What are the limiting factors?
  - "Concentration deficits":
    - Is there a need for a dedicated work area for particular project(s)?
    - Is mitigation of sound needed?
    - Is mitigation of visual distractions needed?
  - Multi-tasking:
    - Can new tools be implemented to mitigate this limitation?
    - Will a resource guide be useful?
    - Can Dr. X complete work in step-wise fashion (e.g., parsing out activities)?

Dr. X's Outcomes

- After the Chair and the disability management team have an interactive meeting with Dr. X, there is a determination that Dr. X cannot perform essential functions of her position with her functional limitations.

- You advise the Chair to discuss next steps for Dr. X: including alternate position(s) and disability retirement.

- If there is an alternate position for Dr. X, the Chair should also address performance issues related to Dr. X's style of communication and compliance with the code of conduct.

Questions?

MANAGING ISSUES ON THE CONTINUUM OF LEAVE AS AN ACCOMMODATION

May 6, 2020

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I. Introduction

> If the Americans with Disabilities Act (ADA) is a "swamp of imprecise language," then leave-of-absence disputes are fought in its murkiest waters.[1]

This paper seeks to address common issues that arise while managing circumstances of an employee on leave as an accommodation, acknowledging that the way forward is not always clear under current statutory and case law, and that each state may have differences in law, practice, and guidelines.

Areas addressed in this paper include abuse of leave as an accommodation; impact on staff and faculty in assessing if leave as an accommodation is or becomes an undue hardship; documentation over the course of leave as an accommodation; managing mental health issues for faculty and staff (including leave), and; factors to consider when determining if leave is or remains a reasonable accommodation.

[1] *Severson v. Heartland Woodcraft, Inc. Seventh Circuit Rules that a Multi-Month Leave of Absence Cannot Be a Reasonable Accommodation.,* 131 Harv. L. Rev. 2463, June 8, 2018 (citing 135 Cong. Rec. 20,707 (1989) (statement of Rep. Shumway) (quoting Editorial, *The Lawyers' Employment Act*, Wall St. J., Sept. 11, 1989, at A18), and Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When is Enough, Enough?*, 62 Clev. St. L. Rev. 437, 452 (2014) ("Neither the Supreme Court nor the appellate courts have provided a formula for determining what accommodations are reasonable. [This] lead[s] to significantly different outcomes for employees seeking leave as an accommodation.").

II. Abuse of Medical Leave as an Accommodation to Avoid Work and Discipline

A. Historical Context of the ADA and FMLA, which Provide Leave Protections

Prior to the 1990s, if an employee or a close family member was sick, and the employee needed to take an extended time away from work the employee could only hope that when they returned to work, they would still have a job. The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) and the Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.) changed the American work force by providing protections to employees when illness happens. See, also Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) that prohibits any program or activity receiving federal finance assistance from excluding otherwise qualified individuals from participation due to disability. (See, 34 C.F.R. 104 et seq.)

The stated goal of the Americans with Disability Act ("ADA") legislation was to prohibit unlawful discrimination based on an individual's disability. The law requires employers, those who provide public housing (including hotels), and public transportation providers to provide reasonable accommodations such that people who have disabilities can work, live and travel with more ease. The ADA was amended in 2008 (ADA Amendments Act of 2008, P.L. 110-325) to provide a broader interpretation of what is covered by the ADA as it was thought by Congress that the judicial interpretation of what was covered by the law had become too narrow since implementation. There are documentation requirements that an employer must follow when an employee reports that they have a disability, or when the employer suspects that an employee has a disability[2]. Employers need to be careful in discussing any employee medical issues with the employee, as well as others who have a need to know this information, due to protections of medical information, genetic information and general confidentiality concerns. This also becomes a concern when discussing performance concerns if the employee also has an accommodation.

In 1993, the ADA was joined by the Family Medical Leave Act ("FMLA") in providing statutory protections to covered employees for unpaid time off to care for their own or a family member's serious illness. The FMLA is also used to provide protection for maternity leave and parental bonding. (29 CFR § 825.120). Recently many states and cities have enacted laws that require some employers to provide paid time off for employees. (*See, e.g.,* Arizona (A.R.S.T. 23, Ch.2, Art. 8.1); California (West's Ann. Cal. Labor Code § 246); Connecticut (C.G.S.A. §§ 31-57r-31-57w;[3] Pittsburgh, PA (Pittsburgh City Code, Chapter 626); San Francisco, CA (San Francisco, Cal., Administrative Code § 12W[4]. These

[2] The documentation requirements are covered in section IV of this paper.

[3] Washington D.C., Maine, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont and Washington also have similar state laws.

[4] Other cities with similar legislation include Santa Monica, CA, Chicago, IL, Cook County, IL, Montgomery County, MD, Duluth, MN, Minneapolis, MN, St. Paul, MN, New York City, NY, Westchester Co., NY, Philadelphia, PA, Pittsburgh, PA, Austin, TX, Seattle, WA, and Tacoma, WA.

paid time-off laws can be used in conjunction with FMLA time to provide workers with pay while they are off from work.

Since the adoption of both the ADA and FMLA, caring for oneself or a family member who has a protracted illness has become easier in that the fear of job loss is lessened. However, as with many laws and policies, there are people who take advantage of both to avoid discipline or job loss due to issues that are not related to the covered health issues.

B. Practical Application of the ADA and FMLA

1. Time Away from Work

The FMLA was designed to allow workers to take time away from work either by full time off from work or through intermittent leave. (29 U.S.C. § 2612). The law provides twelve weeks[5] of time away from work to care for self or designated family members. Covered employees are encouraged to work with their medical professional to determine what type of leave is needed, and how to structure the leave. The Department of Labor provides documentation that the employer is required to provide to employees who are seeking to take a covered leave. As part of the process, the employee requests a leave, the medical provider confirms the basis and need for the leave, and the employee and their employer work out how that leave is implemented with respect to the schedule[6]. Even though employers are cautious around FMLA and ADA issues, it is perfectly reasonable for an employer to ask questions about the functional limitations related to the leave and timing of the leave for non-emergency and non-personal leaves. The law requires that the employer and employee work together so as not to disrupt the leave, as well as proper planning so as not to disrupt work when possible. (29 CFR § 825.301 and 29 CFR § 825.302)

2. Continuous Time Away from Work

Often the covered serious medical condition is such that there is a need to take a continuous leave from work. The employee may have had surgery and needs time to recover. Or the employee may have a need for ongoing treatment that makes it impossible to work. Assuming that it is properly documented, extended leaves are permissible under the FMLA. It becomes a problem when the employee runs out of covered time. The one-week provision renews either on a calendar year or running 12-month basis depending on the employer. Once that time period has run, the employer does not need to maintain the job of the employee on leave, according to a very strict reading of FMLA. However, the courts have made it clear that additional time off can be an acceptable reasonable accommodation under the ADA for an employee with a disability. *See, e.g., Richio v. Miami-Dade County*, 163 F.Supp.2d 1352 (S.D. Fla. 2001); *Fernandez v. Windmill Distrib. Co.*, 159 F.Supp.3d 351 (S.D.N.Y. 2016); *Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1136 (9th Cir.

[5] 480 hours of leave assuming a 40-hour work week. If the work week is less than 40 hours the amount of time for intermittent leave is correspondingly less (29 CFR § 825.200 and 29 CFR § 825.205(b))
[6] This is assuming a non-emergency leave.

2001)*; García–Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 649–50 (1st Cir.2000)*; Cehrs v. Nw. Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 781–83 (6th Cir.1998)*; Haschmann v. Time Warner Entm't Co.,* 151 F.3d 591, 601 (7th Cir.1998)*; see also,* 29 C.F.R. pt. 1630, app. at 356 (providing that a reasonable accommodation could include "unpaid leave for necessary treatment"). But, also, *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996) and *Pond v. Michelin N. Am., Inc.,* 183 F.3d 592 (7th Cir. 1999) (finding that the ADA does not require creation of extended leave status to accommodate employees). The employee taking the leave should have worked with their employer to schedule a return to work date. (e.g., 29 CFR § 825.303 and 29 CFR § 825.311). See also, *Bacon v. Hennepin Cty. Med. Ctr.,* 550 F.3d 711 (8th Cir. 2008). If the leave was for the employee's own serious health condition, they should also know they may face a fitness for duty test when returning to work. (29 CFR § 825.312) But sometimes it is impossible to return to work when originally planned. The employer must engage in the ADA reasonable accommodation process to see if there is an accommodation that can be made to either bring the employee back to work, or if time off would be helpful. 29 CFR § 1630.2(o)(3). See also, *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35 (3d Cir. 2018), *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296 (3d Cir. 1999), *Miller v. Coca-Cola Refreshments USA, Inc.,* 2018 WL 1456502 (W.D. Pa. 2018).

In the past few years, courts have found that time away from work is a reasonable accommodation *See, e.g., Richio v. Miami-Dade County*, 163 F.Supp.2d 1352 (S.D. Fla. 2001); *Fernandez v. Windmill Distrib. Co.*, 159 F.Supp.3d 351 (S.D.N.Y. 2016); *Humphrey v. Mem'l Hosps. Ass'n,* 239 F.3d 1128, 1136 (9th Cir.2001)*; García–Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 649–50 (1st Cir.2000)*; Cehrs v. Nw. Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 781–83 (6th Cir.1998)*; Haschmann v. Time Warner Entm't Co.,* 151 F.3d 591, 601 (7th Cir.1998)*; see also,* 29 C.F.R. pt. 1630, app. at 356 (providing that a reasonable accommodation could include "unpaid leave for necessary treatment"). The problem arises when an employee is unable (or unwilling) to return to work for a significant time, well past the time when the FMLA 12 weeks has passed. Most often this is due to a serious medical condition that is not resolved.

C. Abuse of Leave

However, there are some cases when an individual refuse to return to work to avoid work, or for fear of discipline. Resolving this issue takes time and patience for employers. Managers of employees who have been out of work for months have valid concerns; they may have had to hire a temp to cover the work, completion of work may be delayed, or they may have had co-workers take on additional work resulting in unplanned over-time or impact on morale. Managing a workplace where someone is out is hard (see section III below), and it is even harder when it is not clear when and if the employee is going to return to work. Courts are beginning to set some restrictions on the length of a leave as a reasonable accommodation. *Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017), *Maat v. County of Ottawa,* 657 Fed.Appx. 404 (6th Cir. 2016).

1. Intermittent FMLA Leave

An employee may present with documentation that shows that the employee has a need to take time off from work to deal with his or her own, or a family member's, serious health condition. The FMLA provides for unpaid time away from work on an intermittent manner. The employee can work part time or create a schedule of regular time away from work for medical appointments. (29 CFR § 825.202).

It is important that an employer document the need for time away in such a way that it is clear what the worker's schedule will be. The employer should gather as much information as appropriate from the employee or their medical professional to determine when the employee may need to be away from work. *Diamond v. Hospice of Fla. Keys, Inc.,* 677 F. App'x 586 (11th Cir. 2017). The more information the employer has about the anticipated time away from work the better when trying to determine if an employee is using FMLA time away from the office to avoid work or disciplinary action.

It is often the case in an intermittent leave situation that the employee may need to be away from work due to a flair-up of their condition. Some conditions can cause am employee to have to leave work in the middle of the day or make it impossible for the employee to work overtime. Dependent on what the certification says, these absences are covered. (29 CFR § 825.202)[7]. It is reasonable if there is a change in frequency of time off and leave beyond

[7]29 CFR § 825.202:

(b) Medical necessity. For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. See §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic

what is on the medical certification, to ask for a recertification based on changed circumstances. (29 CFR § 825.308 and 29 CFR § 825.313).

D. Appropriate Safeguards if Suspected Abuse of Medical Leave

Sadly, some employees use medical leave as an attempt to avoid work or discipline at work. They take more time off than medically necessary. They may sense that they are about to be let go so they go off on a medical leave. There are a few actions that a responsible employer can do.

1. Recertification

When asking for recertification based on an increase of absences, or more time away from work than originally requested it is very helpful to provide the job description to the medical professional, to provide them an attendance record and to ask if the frequency of the absences is in keeping with the covered condition. In addition, the employer should ask if there is an accommodation for the employee to assist them in being able to work their regular schedule.

2. Job Descriptions

It is important to include the ability to work a regular schedule as an essential function for the job in every job description. There are a few cases where including this language helped the employer defeat a disability discrimination lawsuit. See, e.g., *Francis v. Wyckoff Heights Med. Ctr.,* 177 F.Supp. 3d 754 (E.D. N.Y 2016), *Doak v. Johnson,* 798 F.3d 1096 (D.C. Cir. 2015), *Nartey-Nolan v. Siemens Med. Sols. USA, Inc*., 91 F.Supp. 3d 770 (E.D. N.C. 2015).

3. Performance Management

Proper performance management is always important, even more so if the employee being managed has taken time off from work. What is most important is that the employee is only reviewed for the time they were at work. The fact that they took leave or have an

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serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. See §§ 825.113 and 825.127.

(c) Birth or placement. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the expectant mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. See § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. See also § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

(d) Qualifying exigency. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

accommodation is not material to their performance. (See, See EEOC, *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities* (last modified December 20, 2017), available at https://www.eeoc.gov/facts/performance-conduct.html.) The work done while they were on the job is what needs to be managed. Sometimes an employee may blame poor performance on a disability, and this is the first that the employer has heard of the need for an accommodation. In such a case the employer is not required to: tolerate or excuse the poor performance; withhold disciplinary action (including termination) warranted by the poor performance; raise a performance rating; or give an evaluation that does not reflect the employee's actual performance. The important thing to remember is that performance evaluations are handled in such a way that all employees are receiving factual, actionable information about their performance that allows them to do their jobs to the best of their ability.

4. Keeping Discipline, or Investigation Processes as to Performance, Behavior, or Violations of Policy, on Track

It is not uncommon that an employee will submit documentation for leave related to a known or new disability when an employer notifies the employee of an investigatory meeting – or when an employee suspects an investigatory or disciplinary event is imminent. While an employee's absence may delay an investigatory process, the employer should keep the process on track by continuing with an investigation process or drafting and finalizing disciplinary actions while an employee is on leave as an accommodation.

In addition, and with input from legal counsel to assess and minimize risk of liability as to retaliation and disability discrimination claims, among others, the employer should consider concurrent performance management throughout the interactive process, and for a period of time after accommodations have been requested and provided. Careful attention should be paid to documented, objective, and quantified performance issues, as well as comparators with similarly situated employees, and the employer's consistent historical actions in addressing similar performance issues.

In anticipation of claims of discrimination or retaliation, advise your client to maintain all documents related to the discipline or investigation, in particular those documents that memorialize actions or discussions prior to the employer receiving notice of the leave.

III. Impact on Staff and Faculty in Assessing Undue Hardship Related to Leave as a Reasonable Accommodation

An employer may also consider the impact on staff and faculty in assessing whether granting or extending leave as an accommodation results in an undue hardship.

A. Is Granting or Extending Leave an Undue Hardship?

The EEOC, which enforces the ADA, recognizes that impacts on coworkers, timeliness of work, impact on operations, and the ability to serve customers/clients advises are valid considerations when assessing if granting or extending leave is a reasonable accommodation (see, EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2019), https://www.eeoc.gov/eeoc/publications/ada-leave.cfm, May 19, 2016) (emphasis added):

> When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship. If it would, the employer does not have to grant the leave. Determination of whether providing leave would result in undue hardship may involve consideration of the following:
>
> - the amount and/or length of leave required (for example, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);
> - the frequency of the leave (for example, three days per week, three days per month, every Thursday);
> - whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
> - whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);
> - ***the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and***
> - ***the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.***

In many instances an employee (or the employee's doctor) can provide a definitive date on which the employee can return to work (for example, October 1). In some instances, only an approximate date (for example, "sometime during the end of September" or "around October 1") or range of dates (for example, between September 1 and September 30) can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified in

light of changed circumstances, such as where an employee's recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, ***but instead must be evaluated on a case-by-case basis*** (emphasis added). ***However, indefinite leave -- meaning that an employee cannot say whether or when she will be able to return to work at all - will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation***.

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may take into account leave already taken -- whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.

> **Example 17:** An employee has exhausted her FMLA leave but requires 15 additional days of leave due to her disability. In determining whether an undue hardship exists, the employer may consider the impact of the 12 weeks of FMLA leave already granted ***and the additional impact on the employer's operations*** in granting three more weeks of leave.
>
> **Example 18:** An employee has exhausted both his FMLA leave and the additional eight weeks of leave available under the employer's leave program but requires another four weeks of leave due to his disability. In determining whether an undue hardship exists, the employer may consider the impact of the 20 weeks of leave already granted ***and the additional impact on the employer's operations*** in granting four more weeks of leave.
>
> **Example 19:** An employer not covered by the FMLA initially grants an employee intermittent leave for a disability. After six months, the employer realizes that the employee is using far more leave than expected and asks for medical documentation to explain the additional use of leave and the outlook for the next six months. The documentation reveals that the employee could need as much leave in the coming six months as he already used. ***As a result of the increased number of absences, the employer has had to postpone meetings necessary to complete a project for one of the employer's clients, in turn causing delays in meeting the client's needs. In addition, the employer has had to reallocate some of the employee's job duties, resulting both in increased workloads and changes in work priorities for coworkers that are interfering with meeting the needs of other clients.*** Based on this information, the employer determines that additional intermittent leave as described in the doctor's letter would be an undue hardship.

When determining if a leave, even one requested under FMLA as these examples show an employer should consider all of the items that could and do impact the business.

Leave as a reasonable accommodation includes the right to return to the employee's original position.[8] However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

> **Example 20:** An employer is not covered under the FMLA. An employee with a disability requires 16 weeks of leave as a reasonable accommodation. ***The employer determines that it can grant the request and hold open the job. However, due to unforeseen circumstances that arise after seven weeks of leave, the employer determines that it would be an undue hardship to continue holding the job open. The job is filled within three weeks by promoting a qualified employee.*** Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly vacant position as a reasonable accommodation.

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[8] See, EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002):

Does an employer have to hold open an employee's job as a reasonable accommodation?

Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship. [See *Schmidt v. Safeway Inc*., 864 F. Supp. 991, 996-97, 3 AD Cas. (BNA) 1141, 1145-46 (D. Or. 1994); *Corbett v. National Products Co.*, 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).]

If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position. [See EEOC, *Enforcement Guidance: Workers' Compensation and the ADA* at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996) [hereinafter Workers' Compensation and the ADA]. See also pp. 37-45, infra, for information on reassignment as a reasonable accommodation.]

Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

B. Analyzing Undue Hardship as It Affects Staff, Faculty, and Business

In looking at factors that may impact other staff and faculty and result in an undue hardship, an employer must make an individualized assessment. The following are some critical factors to assess and document:

Objectively analyze considerations related to impact of staff leave:

- Can work be done remotely to keep work on track, if employee is able?
- Impact of increased overtime for other staff (see, e.g., Fair Labor Standards Act (29 U.S.C. sec. 207 (Maximum Hours)) and state and local wage and hour laws)
- Delays in completion of unit's overall and individual colleagues' work
- Availability of funds for temporary workers
- Substantiated recruitment challenges or staffing delays related to temporary replacements
- Ability to reduce work expectations/output within the unit
- Feasibility of redistributing absent employee's work (see overtime impacts); ability of other staff to absorb work impact on coworkers' productivity
- Measurable impact on morale
- Legality and feasibility of exempt staff to cover non-exempt work[9]

Objectively analyze consideration related to impact of faculty leave:

- Can classes be taught remotely, if faculty is able?
- Can research be conducted remotely, if faculty is able?
- Impact if loss of class(es)
- Impact on students' curriculum options and requirements
- Ability and funds to recruit adjunct faculty replacement
- Impact on research
- Impact on grant requirements (including if the faculty member has effort reporting requirements)

C. Actions and Documentation When Managing Leave and Its Impact on Faculty and Staff

It is important to have clear understanding with employees regarding how work will continue while on leave, circumstances of communication while on leave, who will perform work functions during the leave, communication with and management of employees who are covering work for the duration of leave, and the documentation thereof.

- If possible, prior to the employee going on leave, have the employee and his/her supervisor triage those duties which must be covered, which may be covered, and those which do not need to be covered. Inquire if there are (limited) circumstances when the employee on leave may be contacted while on leave – or not. If there are such

[9] See, e.g., *Colburn v Dept. of Corrections*, 939 A.2 716 (2008).

circumstances, document the agreed method of contact with the employee and monitor the frequency of contact.

- If the employee whose duties need covering goes on leave unexpectedly, have the supervisor review the employee's job description to triage the duties that need coverage.
- Document the coverage of each of the duties of the individual on leave, including identifying which faculty or staff members will be covering which duties.
- Manage request for time off during leave coverage thoughtfully; avoid adverse consequences for staff or faculty impacted by leave coverage.
- Consider flexible approaches for impacted staff and faculty coverage including flexible hours, working remotely, etc.
- Consider job growth opportunities among faculty and staff impacted by coverage, including development of new skills.
- Be transparent with impacted staff or faculty members as to duration and scope of coverage; monitor the impact routinely. Direct staff to appropriate supervisors for feedback on impact throughout the course of the leave. Respond in a meaningful way to the feedback.
- Assess the impact on each staff or faculty member covering any duties, including wage and hour implications.
- Clearly communicate the assignments and any related reporting shifts to staff and faculty who are impacted.
- Consider budgetary and labor market issues around replacements via temporary workers or adjunct faculty for essential tasks.
- Prepare for transitions of workloads upon the employee's return to work.
- Monitor impact on staff and faculty through the leave process and when considering extensions of leave.

IV. Permissive and Required Documentation that Employers May Request from Employees Requesting Leave as an Accommodation

A. Documentation Related to Establishing a Disability

1. Employer's Obligation to Provide Accommodations (Including Leave) Triggered by Known Disability

Under the Americans with Disabilities Act, employers are obligated to make reasonable accommodation only to physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual

with a disability provide documentation of the need for accommodation. 29 C.F.R. § 1630.9

Interpretative guidelines to 29 C.F.R. § 1630.9 of the regulations -- which also addresses reasonable accommodations -- indicate that the employer's duty to engage in this "flexible, interactive process" is triggered when the employee requests a reasonable accommodation. Neither the regulations nor the interpretative guidelines require that a disabled employee always provide medical documentation of an employee's limitations, although the employer may require an employee to provide documentation of her need for an accommodation if the need is not obvious.

2. When the Disability and/or Need for Accommodation Is Not Obvious, an Employer May Ask for Sufficient Documentation about Employee's Functional Limitations

During "the interactive process, an employer may request and require that the employee provide sufficient medical documentation." See, *Gilreath v. Cumberland Cty. Bd. of Educ*., No, 5:11-CV-627-BR, 2014 U.S. Dist. LEXIS 105904, 2014 WL 3779090, at *8 (E.D.N.C. July 31, 2014)

Such medical documentation allows the employer to determine the precise nature and extent of the employee's restriction due to a disability under the ADA and to assess potential reasonable accommodations. See, *Williams v. Revco Disc. Drug Ctrs*., 552 Flap's 919, 922 (11th Cir. 2014).

Per the EEOC guidelines (EEOC Order 205.001, Appendix B, Attachment 4, § a (5)), under the ADA, medical records may only be requested as to the need for accommodation and not for a specific diagnosis. An employee or applicant is not required to provide documentation to establish disability, and the EEOC encourages an employer to provide minor accommodations without documentation.

Many disabilities and health conditions are not obvious. When the presence of a disability is not obvious, an employer may request "*reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation*" (Title 2, § 11069, the California Code of Regulations). Documentation may be secured by furnishing a form to the employee/applicant, to submit to their health care provider or if the employee/applicant signs a release of information, the documentation request may be submitted directed from the employer to the health care provider. Most employees/applicants will not allow you to confer directly with their health care provider. Along this line, developing templates to document actions as part of this process will assist in securing necessary information.

3. Employee's Failure to Provide Documentation

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation. See, e.g., *Templeton v. Neodata Servs., Inc*., No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996); *McAlpin v. National Semiconductor Corp*., 921 F. Supp. 1518, 1525, 5 AD Cas. (BNA) 1047, 1052 (N.D. Tex. 1996).

B. Documentation Related to Leave as a Requested Accommodation

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability and that the disability necessitates a reasonable accommodation. Employers must determine if the medical documentation provided upon request is sufficient.

> "Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed."

EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 27, 2000). https://www.eeoc.gov/policy/docs/guidance-inquiries.html

V. Practical Suggestions for Managing Faculty and Staff Mental Health Issues, Including Leave as an Accommodation

A. Mental Health and the ADA

It is well-settled that the Americans with Disabilities Act (ADA) defines disability to include not only physical impairments but also mental impairments that substantially limit a major life activity. 42 U.S.C.A. Section 12102(2). "Examples of 'emotional or mental illness[es]' include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders." EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997). The current use of illegal drugs, compulsive gambling, pyromania, and pedophilia are specifically excluded from the protections of the ADA.

Under the ADA Amendments Act of 2008 and recent case law, the standard for determining that an employee has a mental impairment that "substantially limits" major life activities and falls within ADA protection is easily met. *See e.g., Williams v. Tarrant Cty. Coll. Dist.,* 717 Fed. Appx. 440 (5th Cir. 2018) (panic attack at work related to PTSD met the "relatively low bar" in the Act); and *Hostettler v. Coll. of Wooster*, 895 F.3d 844,

854 (6th Cir. 2018) (severe anxiety and postpartum depression with only episodic symptoms met standard).

Employee mental illness can be particularly challenging for employers to address because it is typically not obvious or directly observable but instead manifests in behaviors and conduct in the workplace. Employers must balance the need to consistently apply standards for performance and workplace conduct with the need to provide reasonable accommodation of mental disabilities. The complexity is even greater when issues of mental health or mental decline arise in the context of a tenured faculty member of a higher education institution.

B. Handling Performance Deficiencies that May Be Related to a Disability

1. When a Performance Problem Might Be the Result of a Mental Disability

Setting aside for the moment misconduct such as aggressive or abusive behavior, there are many possible scenarios where the staff or faculty member may not meet performance expectations due to a mental disability. Examples in the context of faculty include:

> For example, a faculty member experiencing a speech impairment [e.g., resulting from a stroke] may be difficult for students to understand in class, and result in a great deal of student dissatisfaction. A faculty member's Adult Attention Deficit Disorder may give rise to disorganized classes, extra-long time to read, grade, and return papers, and untimely submission of final grades (again resulting in a great deal of student dissatisfaction and complaints). Another faculty member's mental health disorder may impact the faculty member's ability to deal with the stress, pressure and deadlines associated with classroom teaching or the faculty member being fearful of student questions, especially from the best students, with student questions having the potential for overwhelming the faculty member and producing a panic attack.

Martha Hartle Munsch and Scott L. Warner, "Faculty and the ADA: Thorny Issues Relating to Faculty Disabilities and Their Impact in and Out of the Classroom" (NACUA Annual Conference Paper, June 25-28, 2017) (*see generally* this conference paper for more detailed analysis regarding faculty disabilities).

Another example would be a faculty member who is experiencing mental deterioration or decline resulting from conditions or disabilities related to advanced age (such as Alzheimer's disease or dementia) and no longer has the same capacity for analysis, memory and communication that is essential to teaching and research at an institution of higher education.

When these situations arise, employers should speak with the staff or faculty member about the behavior that has been observed and why it does not meet performance expectations. To avoid a claim that the employee has been "regarded as" disabled, which can give rise

to a discrimination claim, it is important to speak in a neutral way without making judgments or assumptions about the reason for the performance deficiency. It is preferable if the staff or faculty member herself discloses the mental health issue or requests reasonable accommodation. As one of my co-panelists, Judy Rosen, Director of Disability Leave Administration at the University of California, San Francisco, has advised in training managers, "You can always ask, 'Are you OK? The reason I am asking is because you missed [work] last week and you have been overheard sobbing in your office."

2. Engaging in the Interactive Process

The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless it would be an undue hardship to do so. 42 U.S.C.A. Section 12112(b)(5). When a staff or faculty member makes a request for reasonable accommodation, the employer is obligated to engage in an interactive process to identify reasonable accommodations that would enable the employee to perform the essential functions of their position. 29 C.F.R. Section 1630.2(o)(3).

It is recommended that once the supervisor, manager or department chair receives information that is sufficient to trigger the interactive process, the matter should be referred into the formal process managed by the office on campus with expertise in accessibility and accommodations. This is true for faculty as well as staff accommodation requests. On many campuses, academic personnel issues are managed separately from human resources matters for administrative staff. However, to ensure proper management of the interactive process, including focusing on functional limitations and maintaining privacy of health information, and to ensure consistency in the process, faculty accommodations should be overseen by the same office as staff. "Although some faculty may see these processes as specific to staff and instead seek to 'negotiate' deals with their supervisors, these informal 'accommodations' may create real problems for a school." Mary O'Brien, Tara H. O'Connor, Lili Palacios-Baldwin, "A Lifecycle of Faculty FMLA, ADA and Workers' Compensation Claims" (NACUA Annual Conference Paper, 2019). The accessibility resources office on campus can also make sure that the handling is consistent with campus policies and any collective bargaining agreement that may be applicable. (Section IV of this conference paper discusses in more detail the documentation that may be requested as part of this interactive process.)

While employers are required by the ADA to engage in the interactive process in good faith, there are limits to what the employer is required to do. The employer is not required to accept the employee's proposed accommodation but need only provide a "reasonable" or effective accommodation. *See Hoppe v. Lewis Univ.,* 692 F.3d 833, 840 (7th Cir. 2012) (citing *Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000). The employer also need not remove the essential functions of the job nor create a new job for the staff or faculty member.

In this regard, employers are advised to maintain up-to-date job descriptions tailored to individual positions that accurately specify the essential functions to add clarity to the

accommodation analysis. In the absence of job descriptions for faculty members, other evidence of the essential functions might include written criteria for reappointment, promotion or tenure reviews, and relevant provisions of faculty handbooks or legislation. Employers must also be mindful of past practice and consistency in assessing the reasonableness of proposed accommodations and the level of tolerance of types of performance deficiencies.

3. Challenges Specific to Faculty

Faculty with mental or physical impairments present some unique issues. When this occurs early in a faculty member's career, for instance, tenure track faculty may request extensions of the tenure clock as an accommodation of a disability. Although there is a dearth of reported cases addressing this situation, this could well be determined to be a reasonable accommodation, particularly if a faculty member takes an extended leave of absence due to a disability.

Mental health issues arising mid-career require sensitive handling to protect the faculty member from reputational harm, for example, if a leave of absence is provided as an accommodation. As noted in a previous NACUA Annual Conference paper, "Another aspect to be managed is controlling the dissemination of information regarding the reason for the faculty member's absence from class and from campus--to minimize reputational harm and the risk of legal claims in connection therewith, such as defamation, invasion of privacy, and false light invasion of privacy." Munsch and Warner, NACUA Annual Conference Paper, 2017.

Mental decline in the later years of an experienced tenured faculty member at the end of a respected career that results in debilitating performance issues raises similar concerns of reputation and privacy. "The 2012 AAUP Report (at p. 7) suggests that '[t]o protect the dignity of faculty members unable to fulfill their professional responsibilities, institutions are well advised to seek negotiated resolutions." Munsch and Warner, NACUA Annual Conference Paper, 2017 (citing Report entitled *"Accommodating Faculty Members Who Have Disabilities,"* prepared by a sub-committee of the AAUP's Committee A on Academic Freedom and Tenure (2012)). Thus, before proceeding with a formal process to strip a long-tenured faculty member of tenure or proceeding with medical separation, the institution may wish to explore a negotiated separation. Of course, as noted above, it is essential that any such negotiated resolution be closely coordinated with the formal disability/accessibility office at the campus to ensure consistency in the treatment of similarly situated faculty.

C. Handling Disruptive or Abusive Conduct

1. All Employees May Be Held to the Same Conduct/Behavior Standards

Mental illness may be the underlying cause of workplace conduct that violates accepted norms of behavior. The resulting behavior can range from using crude or abusive language

to disrupting meetings with colleagues to violent outbursts in the workplace. The ADA does not prevent an employer from disciplining an employee for engaging in this type of aggressive or disruptive conduct, even if the employee claims that a disability is the reason for the inappropriate behavior: "[I]f an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act." *Palmer v. Circuit Court of Cook County,* 117 F.3d 351, 352 (7th Cir. 1997).

2. Not a Qualified Individual with a Disability if Endanger the Safety of Self or Others

Indeed, if an employee's behavior is found to pose a "direct threat" to the health and safety of self or others in the workplace, the employee is not qualified for the job. To be considered "otherwise qualified," a person with a disability must be able to perform the essential functions of the job without endangering the health and safety of themselves or others. *See e.g., Sch. Bd. of Nassau County v. Arline,* 480 U.S. 273, 276 (1987). As Judge Posner explained in affirming summary judgment for the employer in a case in which a mentally ill employee was fired for threatening to kill another employee: "The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge--in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone." *Palmer,* 117 F.3d at 352.

Courts have applied this analysis to reject discrimination claims arising in higher education. For example, in *Davis v. West Carolina Univ.,* the court rejected a faculty member's claim that he was denied tenure based on his depression, finding instead that the tenure denial was based on misconduct including threats he made against individuals involved in the tenure process. 695 Fed. Appx. 686, 688 (4th Cir. 2017).

3. Assessment of Whether "Qualified" Can Include Fitness for Duty Examinations

When a staff or faculty member exhibits abusive or aggressive behavior, it may be necessary to place the employee on administrative leave to allow time to investigate the misconduct and determine appropriate sanctions or next steps. In limited circumstances, it may be warranted for the employer to require that the staff or faculty member submit to a fitness-for-duty examination before returning to work rather than relying solely on medical documentation provided by the employee.

As a general rule, an employer may only require medical examinations of current employees if they are job-related and consistent with business necessity. 42 U.S.C. Section 12112(d)(4)(A); 29 C.F.R. Section 1630.14(c). Under the EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997), this requirement that the medical examination be "job-related and consistent with business necessity" is met if the employer has a "reasonable belief, based on objective evidence" that "(1) the employee's ability to perform essential job functions will be impaired by a

medical condition; or (2) an employee will pose a direct threat due to a medical condition." The fitness-for-duty examination should be narrowly limited: "In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat." *Id.*

Employers should exercise caution in utilizing fitness-for-duty examinations to assess whether an employee who has exhibited behaviors suggestive of mental illness remains qualified to perform the essential functions of the job or poses a direct threat to herself or others. These examinations are fraught with potential liability. The most litigated question is whether the examination was in fact "job-related and consistent with business necessity." Although the official guidance is framed in the disjunctive, permitting examinations outside the context of a direct threat, a survey of the case law found that courts rarely find a post-employment examination justified except where there is sufficient proof of a threat of suicide or threats to coworkers. "*Psychological Testing of Employee or Job Applicant as Violation of Americans with Disabilities Act or Rehabilitation Act*," 24 A.L.R. Fed. 3d Art. 1 at Section 2. This survey of case law also found that in cases following the ADA Amendments Act of 2008, courts "have often concluded that a job applicant or employee who was referred for evaluation, with or without being placed on leave pending the result or who refused to submit to the test had sufficiently stated that he was regarded as disabled." *Id.*

To better protect against claims of disparate treatment in the application of fitness-for-duty examinations, employers, including higher education institutions, should explicitly address fitness-for-duty certifications in their policies. Elements of a fitness-for-duty policy include:

A. Defining fitness-for-duty.

B. Conditions under which it may be requested.

C. Who bears the cost?

D. Consequences of failure to provide certification.

E. Procedure for authentication and clarification.

F. Employer's right to request recertification.

John Albrecht, "Faculty Fitness for Duty Evaluations Under the ADA and FMLA" (NACUA Annual Conference Paper).

Consistent with the institution's policies, however, fitness-for-duty examinations may be a necessary step to take, particularly where there is a need to assess whether or not an employee's mental impairment presents a direct threat in the workplace. Courts have supported employer's decisions in these circumstances, including in the higher education context. For example, a jury verdict in favor of the University of San Francisco was upheld

in a case brought by a tenured professor challenging the university's decision to terminate his employment when he refused to participate in a fitness-for-duty examination. *Kao v. University of San Francisco,* 229 Cal. App. 4th 437 (2014). The court held: "The jury heard testimony that Kao frightened school administrators and that his behavior cast a pall of 'fear and confusion' over the math department. The jury could reasonably find that it was vital to the university's business to obtain an independent assessment of his fitness for duty. *Id.* at 452. Similarly, the Fourth Circuit affirmed summary judgment for the employer in another case brought by a full professor terminated for professional misconduct, incompetence and insubordination where the professor had refused to undergo a mental health evaluation. *Coursey v. University of Maryland Eastern Shore,* 577 Fed. Appx. 167 (4th Cir. 2014). The court reasoned:

> Dr. Coursey's position as a full Professor at UMES required that he instruct, supervise, and interact with students and faculty in a professional and non-threatening manner. Given the plethora of complaints about Coursey's violent outbursts, erratic and inappropriate behavior, as well as his disregard for UMES policies, UMES has shown that it had valid concerns about Coursey's ability to perform his duties.

Id. at 173. In short, employers continually balance the need to consistently apply standards for performance and workplace conduct to all employees with the need to provide reasonable accommodation of mental disabilities. Where the balance tips in favor of stronger action by the employer to address the conduct is when a staff member exhibits behavior that potentially endangers the health and safety of the employee herself or her coworkers.

VI. Factors to Consider When Determining if Leave Is or Remains a Reasonable Accommodation

Sometimes the 12 weeks of FMLA time is not enough to resolve medical issues. It is incumbent on the employer to institute the ADA interactive process to see if more time off can be a reasonable accommodation.

There are many papers regarding this topic in the NACUA brief banks (see below for references). This section of the paper addresses recent legal authority and agency guidance on making the determination of whether granting or extending leave is a reasonable accommodation.

A. Assessing Duration of Leave as a Reasonable Accommodation

Employers may not apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time and

undue hardship cannot be based solely on the existence of a no-fault leave policy.[10] However, neither the EEOC Guidance, nor statute nor case law, resolve the issue of what duration of leave is reasonable. This must be assessed on a case-by-case basis.[11]

Courts are beginning to grapple with the issue of defining the amount of time off as a reasonable accommodation. In *Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017) (*Severson v. Heartland Woodcraft*, Inc., U.S., No. 17-01001, certiorari denied 4/2/18), the court held that Severson's request for further leave of two to three months, following his 12-month FMLA leave, resulted in a finding that he was not a qualified individual entitled to ADA protections. The court reasoned that, while additional time off may be reasonable, it is also expected that at some point the employee is able to work which if the job description is drafted correctly, is an essential function of most jobs. The Severson court ultimately found that, while the ADA may require brief periods of medical leave, such as days or even weeks, multiple month long periods of leave are not required under the ADA, as the law's function is not to serve as medical leave statute – stating that "…not working is not a means to perform the job's essential functions…". *Severson*, 872 F.3d at 481, citing *Byrne v. Avon Prods., Inc*., 328 F.3d 379, 381 (7th Cir. 2003). The Supreme Court denied review (*Severson v. Heartland Woodcraft*, Inc., U.S., No. 17-01001, certiorari denied 4/2/18). See also, *Samper v. Providence St. Vincent Medical Center*, United States Court of Appeals, Ninth Circuit. April 11, 2012 675 F.3d 1233 2012 WL 1194141.)

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[10] See, EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002) (https://www.eeoc.gov/policy/docs/accommodation.html):

> Question 17: May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?
> No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

(Citing, 50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See *US Airways, Inc. v. Barnett*, 535 U.S., 122 S. Ct. 1516, 1521 (2002). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

[11] See, *US Airways, Inc. v. Barnett*, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

Soon after *Severson*, the Seventh Circuit court in *Golden v. Indianapolis Housing* Agency, No. 17-1359 (7th Cir. October 17, 2017), found that "[a]n employee who needs long-term medical leave…is not a 'qualified individual' under the ADA." In *Golden,* a 15-year employee suffering from breast cancer sought additional leave after she had exhausted her FMLA leave, as well as an additional four weeks of leave offered by her employer. The employer denied the request and terminated her employment when she was unable to return to work. The court sided with the employer, holding that an additional six months of leave was not required and that a multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA. The Seventh Circuit ruled that it was bound by its own precedent in *Severson,* in which it held that "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement." The Court held that "while [it] sympathize[d] with Golden's plight," "a request for six months of medical leave in addition to the twelve weeks required by the FMLA removes an employee from the protected class under the ADA and the Rehabilitation Act."

In a concurring opinion, Circuit Judge Rovner joined in the judgment of her colleagues, however found a *per se* rule which would exclude an employee from seeking a multi-month leave of absence regardless of a showing of hardship to the employer to be "nonsensical." The Supreme Court denied cert in this matter as well (*Golden v. Indianapolis Housing Agency*, 138 S.Ct. 1446 (2018)).

Since *Golden,* two district courts have addressed the ruling. In *EEOC v. S&C Electric (U.S.D.C., N. Dist. Ill., Eastern Division (4/10/18) Case No. 17-c-6753)*[12] and *EEOC v. Midwest Gaming and Entertainment*, *LLC DBA Rivers Casino*, (*U.S.D.C., N. Dist. Ill., Eastern Division (5/25/18)* Case No. 17-cv-6811,*[13]* the U.S. District Court for the

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[12] In *S&C Electric*, the 52-year employee had been diagnosed with cancer and thereafter a fractured hip, which required the plaintiff to undergo surgery and physical therapy, he was placed on a 12-month, long-term disability leave which was scheduled to end on August 29, 2015. On August 15, 2015, the plaintiff contacted defendant seeking to return to work and provided a note from his doctor authorizing him to return to work with no restrictions. Defendant instead suggested that plaintiff retire. When the plaintiff refused to do so, defendant terminated his employment. The plaintiff then filed suit claiming that the termination of his employment violated the ADA. The court noted that, unlike the plaintiff in *Severson*, the plaintiff in *S&C Electric* was "ready, willing and able to return to his position without any accommodation," and was ultimately fired not because he *could not* work, but rather, because he *could.* While the court left open the possibility that the defendant could have possibly terminated the plaintiff while he was on leave without violating the ADA, the defendant's decision to terminate his employment when he requested to return to work was sufficient for the plaintiff to withstand a motion to dismiss for failure to state a claim, notwithstanding *Severson*.

[13] In *Midwest Gaming*, plaintiff was diagnosed with cancer resulting in medical leave through January 2016. When plaintiff was due to return to work, he requested a reasonable accommodation in the form of additional medical leave so that he could undergo surgical treatment for his cancer. The employer refused to grant the request and terminated his employment. The court opined that, "The Seventh Circuit has long held that determining whether an accommodation is 'reasonable is a fact-intensive inquiry. *See, e.g., A.H. by Holzmueller v. Ill. High Sch. Ass'n,* 881 F.3d 587, 594 (7th Cir. 2018) ("Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties." (citation omitted)); *Dadian v. Vill. of Wilmette,* 269 F.3d 831, 838 (7th Cir. 2001) ("Whether a requested accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by

Northern District of Illinois held, respectively, (1) that employers can't retroactively apply *Severson* to a leave already granted if the employee is ready to return; and (2) that courts still must apply a fact-specific inquiry, considering the total record.

B. Options to Consider for an Employee's Return to Work Following Leave

1. Returning and Employee to Work with Restrictions; Clarifying a Provider's Recommended Accommodation as Distinct from Functional Limitations through the Interactive Process

An employee can be released to return to work but with restrictions. The EEOC provides guidance on how to handle such situations. In general, the employer does not have to create a new job for the returning employee, but they can offer the employee a different position that meets their restrictions as an ADA accommodation. (See, https://www.eeoc.gov/policy/docs/accommodation.html#reassignment.)

When assigning a new position there are factors that an employer needs to consider. It is important to understand the level of the job, the salary if it changes, the way the employer handles other employees without disabilities if they want to change positions.

As part of the return to work process, it is not atypical for an employee to submit to the employer a note from a healthcare provider recommending a particular accommodation (e.g., "needs to telecommute"), or requesting elimination of a job task (e.g., "no teaching"). The employer should use this requested accommodation as a jumping off point in the interactive process and these types of requested accommodation generally provide no information regarding the employee's functional limitations hindering the employee from performing the employee's essential job functions. The EEOC notes "If an employee returns from a leave of absence with restrictions from his or her doctor, the employer may ask why the restrictions are required and how long they may be needed, and it may explore with the employee and his doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor's recommended limitations. In some

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balancing the cost to the defendant and the benefit to the plaintiff."). The Court does not read *Severson* to overrule this long-standing principle, either explicitly or implicitly, and indeed, the Seventh Circuit reaffirmed this principle after *Severson. See A.H.,* 881 F.3d at 594. Additionally, *Severson* was decided on a fully developed record, and, although the court found the lengthy leave request made by the plaintiff unreasonable, the court recognized that a leave of absence can be a reasonable accommodation "in some circumstances." *Severson,* 872 F.3d at 481.

According to a press release issued from the EEOC on March 5, 2019, Midwest Gaming settled the matter with the EEOC for $60,000.00 and a two-year consent decree. https://www.eeoc.gov/eeoc/newsroom/release/03-05-19.cfm

situations, there may be more than one way to meet a medical restriction." (See, https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.) By requesting the employee's functional limitations the employer will gain a clearer understanding of why the recommended accommodation, or task limitation, may have been recommended and the employer is able to understand the underlying functional limitation(s), and more effectively engage with the employee in the interactive process to evaluate the range of accommodations that may be viable and appropriate.

2. Intermittent Leave as an Accommodation

If the employee has remaining FMLA time, or if their disability is covered by the ADA, they can also work out a return to work schedule that includes a reduced schedule with such time being covered by the FMLA. See, *Reeder v. County of Wayne*, E.D. Michigan, 177 F.Supp.3d 1059 (2016).

3. Fitness for Duty Exam

Section IV of this paper provides information with respect to what documentation can be requested when an employee to takes leave. Within the documentation of a fitness for duty certification is required the notice granting the FMLA leave must also include the information that fitness for duty certification will be needed. (See, 29 CFR §825.300(d).) With respect to such documentation it is important if asking an employee for a fitness for duty that you follow the same procedure for all similarly situated employees. As per the regulations:

> An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. 29 CFR §825.312(a) Fitness-for-duty Certification.

It is a best practice to let the employee know when they are taking their leave that a fitness for duty certification is expected when they return to work if that is your organizations practice.

> An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by §825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these

requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in §825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required. 29 CFR §312(b)

Also it is important to note that "if the employer has provided the required notice (*see* §825.300(e)) the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated." *See also* 29 CFR§825.213(a)(3).

What is most important is that the employer is consistent in how they treat end of leave employees. This paper does not discuss short or long term disability and how that can factor into leaves as it is beyond the scope, however, one thing that employers should avoid is automatic termination based on end of leave, end of disability payments or any other time period that does not allow for independent analysis of the situation.

VII. Resources on the Internet

EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2019). EEOC Publications
https://www.eeoc.gov/eeoc/publications/ada-leave.cfm

EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002)
https://www.eeoc.gov/policy/docs/accommodation.html

EEOC, *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities* (last modified December 20, 2017)
https://www.eeoc.gov/facts/performance-conduct.html

EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 27, 2000).
https://www.eeoc.gov/policy/docs/guidance-inquiries.html

Job Accommodation Network (JAN)
https://askjan.org/

Job Accommodation Network (JAN) ADA Leave Beyond FMLA (ENews: Volume 12, Issue 3, Third Quarter, 2014)

https://askjan.org/articles/ADA-Leave-Beyond-FMLA.cfm