Business Better (Season 2, Episode 1): Employee Leave Requests: ADA Considerations During COVID-19

Speakers: Melissa Costello, Tara Humma, and Karli Lubin

Steve Burkhart:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, Steve Burkhart. After a long career at global consumer products company, BIC, where I served as vice president of administration, general counsel and secretary, I'm now of council in the litigation department at Ballard Spahr, a law firm with clients across industries and throughout the country.

Steve Burkhart:

Today's episode features a discussion of how employers should handle leaves and request for leave due to COVID-19 and long COVID under the FMLA, Family Medical Leave Act, and ADA, Americans With Disabilities Act. Participating in this discussion are Melissa Costello, of counsel in Ballard's Phoenix office, Tara Humma, an associate in Ballard's New Jersey office, and Karli Lubin, an associate in Ballard's Philadelphia office. Melissa, Tara, and Karli all focus on representing employers in labor and employment litigation and investigations and counseling them on employment policies and practices.

Steve Burkhart:

Now, let's turn the episode over to Melissa Costello to kick off the discussion with Tara and Karli.

Melissa Costello:

Tara and Karli, thanks so much for joining me today. We are going to be talking about the Americans With Disabilities Act and the Family and Medical Leave Act and the interaction between those, and as a lot of people are dealing with right now, I know in your practices and mine and employers around the country, the considerations with regard to those federal laws with respect to COVID.

Melissa Costello:

Before we get started into the details, just some very brief background. The Americans With Disabilities Act, also called the ADA, prohibits and employers from discriminating against a qualified individual with disability, with regard to hiring, firing other employment decisions. It requires employers to make reasonable accommodations to the known physical or mental disabilities of otherwise qualified individuals, unless doing so would impose an undue burden on the company or the employee would pose a direct threat to the employee or others.

Melissa Costello:

This has become a very big consideration with regard to COVID. Similarly, the Family and Medical Leave Act has been a big topic in the news. It's a federal law that grants eligible employees up to 12 weeks of unpaid leave a year for their own or a family member's serious health condition, or to care for a new child. The interplay of the FMLA with the ADA and all of the COVID considerations are something that employers are facing on a daily basis, so we're going to get into that topic.

Melissa Costello:

Before we start hitting hard on COVID, I want to ask, if an employee needs leave, medical leave, what should employers be considering?

Tara Humma:

Thanks, Melissa. As Melissa said, the two main topics today are the ADA and FMLA. If an employee needs leave for a reason covered by the FMLA, that is the first thing that an employer should consider, whether the employee is entitled to leave under the FMLA and whether the employer is covered by the FMLA. Not all employers are covered by the FMLA, it depends on the employer's size, the location of the employer's employees. Also, not all employees of covered employers will be eligible for FMLA. For instance, if an employee hasn't worked the requisite at number of hours, they may not be covered by the FMLA.

Tara Humma:

The second thing for an employer to consider is that if an employee needs leave for a disability that does not qualify as a serious health condition under the FMLA, or if they're not eligible for FMLA, the employer should go through the interactive process to determine whether leave is a reasonable accommodation under the ADA.

Tara Humma:

I did also want to mention that employers should consider their own leave policies as well. Some employers who either are not covered by the FMLA, or sometimes even if they are covered by the FMLA, they may put policies in place for certain types of either paid or unpaid leave, including medical leave. Employers should consider the interplay of the FMLA, the ADA, and then their own leave policies when an employee has a need for a leave.

Melissa Costello:

Thanks so much, Tara, that's a really great point. In addition to the employer policies, one thing we're not going to be getting into in this podcast are all of the various state laws that may come into play. Certain states have, and many states have, unpaid or paid sick leave requirements that would be another thing to consider in addition to employer policies.

Melissa Costello:

Let's say an employer either is not covered by the FMLA because they don't have the requisite number of employees, or let's say an employee exhausts their FMLA leave and still cannot return to work. What next?

Karli Lubin:

To the extent an employee exhausts their FMLA entitlement and is still not ready to return to work, the employer should, like Tara said, consider their own leave policies, but also consider whether that health condition qualifies as a disability under the ADA. The FMLA is a floor, it's not a ceiling. When employees exhaust their FMLA leave, they might also be entitled to additional leave as an accommodation under the ADA. When you've reached that exhaustion point, employers should go through the interactive process to determine whether additional leave would be reasonable under the ADA.

Melissa Costello:

It sounds this could become somewhat of a case-by-case analysis, and probably should be. Is there a limit or guideline for how long an employer needs to allow an employee to remain on leave?

Tara Humma:

As Karli said, the 12 weeks of FMLA leave for a covered individual is a floor, not a ceiling. Once you get into the ADA, there is no obligation to grant an open-ended period of leave. Indefinite leave is not a reasonable accommodation under the ADA, and courts generally find that leave is a reasonable accommodation under the ADA when there's evidence that the leave is temporary and will allow the employee to return to work, usually in the foreseeable future.

Tara Humma:

An example would be that an employee needs, for instance, one week of leave after exhausting their FMLA leave and can return to work after that one additional week. Normally, this would likely not be a situation that causes an undue hardship for the employer. There could be exceptions, obviously, and this provides a finite time when the employee will return to work.

Tara Humma:

The EEOC's guidance states, again, that an indefinite leave, meaning that an employee cannot say whether or when he or she will be able to return to work at all, will constitute an undue hardship, and so an employer does not have to provide an indefinite leave as a reasonable accommodation.

Karli Lubin:

Right, and there's a lot of situations where employees continually request finite extensions of their leave, and then you have to get into the area where when is a certain amount of leave no longer reasonable. Where an employee continually requests more leave and more leave without being able to return to work, courts generally hold that it becomes an undue burden on the employer.

Karli Lubin:

For example, there's a Third Circuit case from 1999 that's still frequently cited, where an employee requested unpaid leave from October until the end of November. When the employee didn't return at the end of November, they requested additional leave through December 30th, and then again through January 4th. At that point, the employer terminated the employee's employment. The Third Circuit affirmed the district court's determination that continued leave poses an undue burden in that circumstance.

Karli Lubin:

However, courts have been reluctant to place a specific time limit on reasonableness of leave where a definite period is requested. There's no magic number, like three months or six months or a year, that automatically makes a request for leave unreasonable. An example of this is in 2018, an Oregon district court declined to hold that an employee's request of one year of leave to treat and recover from cancer was per se unreasonable, explaining that established Ninth Circuit law holds that an extended unpaid medical leave may be reasonable if it doesn't pose an undue hardship on the employer. At that point, where a definite period is requested, the employer has to go through the process of examining whether it poses an undue hardship.

Melissa Costello:

You just mentioned that there's no magic number as far as how many days of leave might constitute an undue hardship. Now, especially as we're dealing with so many employees around the country who are dealing with things like long COVID and we don't know how long they're going to be out and they might be extending and extending and re-extending their leaves, what are the factors, and at what points can employers argue that the length of leave or the extended leave would pose an undue hardship?

Tara Humma:

Thanks, Melissa. As we just touched on, generally an indefinite leave would be considered an undue hardship. Short of open-ended or indefinite leave though, employers should consider a number of factors on a case-by-case basis when considering employee requests for leave and even the continued request for leave. Those factors are the amount and/or length of leave requested, the frequency of the leave, whether there's any flexibility with respect to the days on which the leave is taken, whether the need for intermittent leave on specific dates is predictable or unpredictable, and that factor applies particularly to intermittent leave, the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner, and then the impact on the employer's operations and its ability to serve customers or clients appropriately and in a timely manner, which takes into account the size of the employer. For instance, a small employer

may not be able to continue on doing business efficiently and servicing its customers if an employee is continuously out on leave or requesting additional leaves one after another.

Tara Humma:

I think the key here is that there's going to be, like you said, Melissa, case-by-case determination. Even if a request seems to ask for an open-ended or indefinite leave, employers are going to have to engage in the interactive process to be comfortable with making that type of determination, and then, again, considering the different factors and going into whether a request for leave poses an undue hardship.

Karli Lubin:

Right, and another consideration employers can take into account is the cumulative impact of leave. Like we've discussed, if an employee exhausts their FMLA leave an additional number of weeks under the employer's established leave plan and still requires another several weeks of leave, employers can consider the impact of the weeks under the FMLA and their own plan in conjunction with the additional requested leave in determining whether it poses an undue hardship.

Karli Lubin:

Particularly right now, employers should consider the impact of an accommodation in the context of business operations during the pandemic. The EEOC updated its guidance to reflect that the undue hardship might be significantly different now when considered against the backdrop of major changes to business operations. What once might have been a reasonable accommodation might no longer be reasonable, particularly if the business has experienced a sudden loss of income. That doesn't mean accommodation requests can be rejected outright, but it does allow employers to consider constraints of the pandemic in determining reasonableness.

Melissa Costello:

I think that's such a great point and allows employers to really think about each case on a case-by-case basis and not just rely on what they might consider precedent in the past, it might be different now. Thank you.

Melissa Costello:

Now, let's talk about now and COVID-19 and what employers are facing. First, do employers need to accommodate employees under the Americans With Disabilities Act if those employees have COVID-19 symptoms?

Karli Lubin:

As with most things, it depends. The standard case of COVID would probably not constitute a disability under the ADA, it would not require reasonable accommodation. Although, it could qualify as a serious health condition under the FMLA, depending on the severity of the illness. Long COVID, however, which we're still learning about, might qualify as a disability, particularly if it substantially limits a major life activity like a person's respiratory, gastrointestinal, or brain function for a significant period of time after the initial infection. That's all to say that it could qualify as a disability under the ADA and employers would need to conduct an individualized assessment to determine whether a person's long COVID or any of its symptoms would substantially limit a major life activity and qualify as a disability under the ADA.

Melissa Costello:

Thanks, Karli. Tara, have you seen whether the courts have waited on this question?

Tara Humma:

We've seen some decisions in some cases coming out on this us, we've seen some filed. With regard to decisions, the few that we've seen have been mostly courts and judges deciding motions to dismiss because it's so early with regard to litigation and

the timeline for how litigation proceeds. One Eastern District of Pennsylvania court has denied an employer's motion to dismiss the employee's claim that firing her on the day she disclosed she was positive for COVID-19 constituted disability discrimination. Instead, the court found that the employee had sufficiently alleged that the employer regarded her as having a disability of COVID. The court held that the employer had failed to establish that COVID is transitory and minor, and the court cited the longterm effects of COVID, which can cause high death rates and hospitalization, and that's what the court relied upon on denying the motion to dismiss and permitting the claim to at least proceed through discovery,

Karli Lubin:

Right, and we've also seen decisions at the motion-to-dismiss phase going the other way and holding that plaintiffs do have to allege sufficient symptoms to show a disability. In a Middle District of Georgia case in May 2021, the court held the plaintiff failed to allege a disability where the only allegation was a positive COVID-19 diagnosis. There, the complaint alleged generally that COVID can substantially limit major life activities, but didn't allege that the plaintiff himself was limited. Instead, it simply stated that he missed several days of work due to an employer-imposed quarantine. The court noted that an intricate description of the plaintiff's condition wasn't necessary, but some symptoms showing that the plaintiff was physically or mentally unable to work was necessary. Just because the company followed public health guidance in sending the plaintiff home to quarantine didn't mean it regarded him as disabled. The court stated that to hold otherwise would mean that every person in the United States who was, or may be, sent home due to COVID-19 symptoms would be disabled for the purposes of the ADA and that every such employer would be potentially liable, so the court easily rejected that conclusion.

Melissa Costello:

Tara, Karli, that was really interesting, super informative. What I got from what you said is that employers really need to be taking particular note when an employee requests leave, or really any other accommodation, under the ADA due to lingering COVID-19 symptoms. Employers are going to need to evaluate each request on a case-by-case basis. We can also, it sounds like, expect that cases will be being decided regularly that might change how employers want to evaluate accommodation requests and leave requests.

Melissa Costello:

I know that we've all been advising our clients similarly, that the most conservative approach at this point is to treat impairing long COVID symptoms as a disability under the Americans with Disability Act and going through the interactive process every single time to determine whether a reasonable accommodation exists that would allow an employee to perform the essential functions of their job.

Melissa Costello:

Tara and Karli, again, thank you so much for sharing your knowledge today. It was very interesting and look forward to watching developments with you.

Steve Burkhart:

Thanks again to Melissa Costello, Tara Humma, and Karli Lubin. Make sure to visit our website, www.ballardspahr.com, where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned for new episodes coming soon. Thank you for listening.