



# NACUA NOTES

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## TOPIC:

**Extended Leave as an Accommodation Under the ADA**

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## INTRODUCTION:

This NACUANOTE addresses a common conundrum faced by colleges and universities—how to handle an employee who is on disability leave, has exhausted available leave under the Family Medical Leave Act (FMLA) and any additional leave pursuant to the employer’s policies, and then requests additional leave as an accommodation under the Americans with Disabilities Act (ADA). Courts, the Equal Employment Opportunity Commission (EEOC), and employers continue to debate whether, and how, such extended leave should constitute a reasonable accommodation under the ADA. This NACUANOTE provides a summary of both regulatory guidance and federal case law on this issue. Additionally, it offers practical advice for legal and human resource professionals faced with an employee who is requesting extended leave as an accommodation. It is important to note that many state antidiscrimination laws also address accommodation for disability and leave, so readers should also consider state and local laws in this area before taking any employment action.

## DISCUSSION:

### I. What Does the EEOC Say?

Current EEOC guidance instructs employers that “the only statutory limitation on an employer’s obligation to provide ‘reasonable accommodation’ is that no such change or modification is

required if it would cause ‘undue hardship’ to the employer.”<sup>[2]</sup> Undue hardship occurs not only when accommodations cause financial difficulty for the employer, but also when those accommodations are unduly extensive, substantial, or disruptive or would fundamentally alter the employer’s business.<sup>[3]</sup> Moreover, “under the ADA, an employee who needs leave related to his/her disability [beyond that provided under the FMLA or employer policies] is entitled to such leave if there is **no other effective accommodation** and the leave will not cause undue hardship.”<sup>[4]</sup> It is critical to remember that an employer must allow the employee to return to the same or an equivalent position as long as the employee can still perform the essential functions of the position with or without reasonable accommodation.<sup>[5]</sup>

Accordingly, the EEOC recommends considering the following factors to assess undue hardship:

- The amount and length of leave (e.g., a four month period, 6 days of leave intermittently for a month, indefinite leave);
- Frequency of leave requested (e.g., every Thursday, three days a week);
- Flexibility in the days leave is taken;
- Predictability about days leave is taken; and
- Impact on ability to get work done in a timely way (e.g., contract specific completion date).<sup>[6]</sup>

The EEOC does note that “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.”<sup>[7]</sup>

As discussed below, courts do not agree on how best to apply the EEOC’s undue hardship standard with respect to leave as an accommodation. The undue hardship analysis is even more challenging in the faculty context, given that faculty are often permitted long periods of leave for various reasons. Course releases, semester or year-long periods of leave to conduct intensive research, or leave to serve as visiting scholars at other institutions may make long periods of leave manageable. In addition, faculty often do not earn paid leave, and collegiality invites a tradition of “covering” for other faculty who are on leave. The following discussion of federal case law sheds light on how best to approach leave as an accommodation, including in the faculty context.

## **II. How Have Courts Addressed Leave as an Accommodation?**

Federal appellate courts as well as state courts vary in how they address leave as an accommodation and therefore, it is important to follow the precedent in the employer’s jurisdiction. As an initial matter, numerous federal appellate courts have held that indefinite leave of an unknown duration is not a reasonable accommodation as a matter of law.<sup>[8]</sup> This conclusion is aligned with a number of federal circuits that have held that the consistent ability to report to work is an essential function of many jobs.<sup>[9]</sup> Thus, to the extent that employees (including faculty) are requesting indefinite leave of an unknown duration as a disability accommodation, employers are not required to provide such leave. While the courts agree with the EEOC that an employee need not be provided indefinite leave as a reasonable accommodation, the courts do not necessarily agree with the EEOC that a defined extended leave beyond what is required by the FMLA may be a reasonable accommodation under the ADA.<sup>[10]</sup>

In addition, courts have rejected employee requests for leave that have a specific end date but are for periods deemed excessive. The rationale for some of these holdings is that “[a] leave request must assure an employer that an employee can perform the essential functions of her position in the ‘near future.’”<sup>[11]</sup> For example, the Eighth and Tenth Circuits have concluded that a six-month leave of absence is simply too long to be a reasonable accommodation.<sup>[12]</sup>

The First Circuit reached the same conclusion regarding a request for a year-long leave. In *Echevarria v. AstraZeneca Pharmaceutical LP*, the employee conceded that she was unable to work at the time of her termination, but she contended that a 12-month leave of absence would have enabled her to return to work and was therefore required as a reasonable accommodation.<sup>[13]</sup> Emphasizing that whether a particular accommodation is reasonable will depend upon the facts known to the employer *at the time*, the First Circuit expressed skepticism about whether the employer had reason to believe that an additional year of leave would likely enable the employee to recover sufficiently to return to work. Critically, the court went on to conclude that regardless of what the employer did or did not understand, the employee’s request for an additional 12 months of leave was unreasonable as a matter of law. The court noted that the “sheer length” of the employee’s request for extended leave, when considered alongside her prior five-month leave, “jumps off the page,” and concluded that the leave request simply was not “facially reasonable.”<sup>[14]</sup>

In rejecting excessively long or undetermined leaves, some courts have indicated that individuals seeking such leave need not be accommodated because they are not “otherwise qualified” for their jobs under the ADA.<sup>[15]</sup> The ADA protects individuals with disabilities who are *otherwise qualified*, with or without accommodation, to perform the essential functions of their jobs.<sup>[16]</sup> As one court noted, “[i]t perhaps goes without saying that an employee who isn’t capable of working for so long isn’t an employee capable of performing a job’s essential functions—and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation.”<sup>[17]</sup> By that logic, employees requiring lengthy or indefinite leaves are not entitled to accommodation because the individuals are no longer protected by the ADA.

In 2017, the Seventh Circuit took a particularly strong position on this point in two cases, beginning with *Severson v. Heartland Woodcraft, Inc.* The court stated in *Severson* that “a long-term leave of absence cannot be a reasonable accommodation.”<sup>[18]</sup> The plaintiff had taken his full 12 weeks of FMLA leave, and while on leave, he informed his employer that he would require surgery and requested an extension of his medical leave for two or three more months.<sup>[19]</sup> The employer responded that the plaintiff’s employment would expire along with his FMLA leave if he failed to return to work, although he would be welcome to reapply in the future.<sup>[20]</sup> The plaintiff argued that the requested extended leave was a reasonable accommodation and sued for disability discrimination.<sup>[21]</sup> In its *amicus* brief, the EEOC argued that long-term medical leave should be considered a reasonable accommodation if it is of a fixed duration, is requested in advance, and is likely to enable the employee to perform his or her essential job functions upon return to the workplace.<sup>[22]</sup>

The Seventh Circuit rejected the extended leave approach advocated by the plaintiff and the EEOC, reasoning that it would transform the ADA into an “open-ended extension of the FMLA.”<sup>[23]</sup> “If the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a ‘qualified individual’ as that term is defined in the ADA . . . . Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”<sup>[24]</sup> The *Severson* court further expressed that a multi-month extension was unreasonable, stating:

Intermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule . . . . But a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes a person from the class protected by the ADA.<sup>[25]</sup>

The holding in *Severson* is the strongest rejection of the EEOC’s guidance on leave as an accommodation and the undue hardship rule. The court rejected the notion that an employer must provide an extended leave as an accommodation unless it imposes an undue hardship.<sup>[26]</sup> “The question of undue hardship is a second-tier inquiry under the statute; that is, the hardship exception does not come into play absent a determination that a reasonable accommodation was available.”<sup>[27]</sup>

Shortly after *Severson*, the Seventh Circuit reiterated its position in *Golden v. Indianapolis Housing Agency*.<sup>[28]</sup> The plaintiff, a 15-year employee, requested and exhausted FMLA leave following a breast cancer diagnosis and surgery. Her employer granted her an additional four weeks of unpaid medical leave but required that she return to work on a specified date thereafter. The night before her scheduled return, she requested a further, unspecified leave of absence, alluding to the employer’s general unpaid leave policy, which permitted leave of up to six months when no other type of leave applied. The employer rejected that request (perhaps due to its untimeliness—the court noted that the policy required two weeks’ notice before requesting leave and that plaintiff’s request was “last-minute”). The Seventh Circuit affirmed judgment for the employer, finding that the request for six months’ leave, in addition to the leave provided under the FMLA, removed the plaintiff from the class of individuals protected by the ADA.<sup>[29]</sup> The court found the “qualified individual” requirement to be “fatal” to the plaintiff’s case.<sup>[30]</sup>

Soon after the Seventh Circuit’s decision in *Severson*, the Eleventh Circuit also held that an employee is not entitled to leave under the ADA unless it would permit the employee to return “in the present or in the immediate future.”<sup>[31]</sup> Midway through an employee’s 12-week FMLA leave due to a shoulder injury at work, the employee’s doctors determined that surgery would be required; however, the surgery was delayed for reasons over which the employee had no control. A few weeks before exhausting three months of post-FMLA leave provided per the employer’s policies, the employee’s surgeon predicted that he was “likely” to be able to return to work with no restrictions in six weeks. After the exhaustion of his employer-provided leave, the employee provided a note from his surgeon predicting a possible return in a month, with work-related limitations. After he failed to meet a demand that he produce a more definitive return-to-work note, the employer terminated him, citing the “substantial hardship” caused by the employee’s inability to perform essential job functions.<sup>[32]</sup> Noting that the employee indisputably could not work at the time of his termination and that there was only “a possibility, but no certainty, that [he] could return to work [within a month],” the court concluded that he was not a “qualified individual with a disability,” and that he had failed to show that additional leave would have enabled him to perform his job’s essential functions “presently or in the immediate future.”<sup>[33]</sup>

Notably, district courts outside the Seventh Circuit have declined to adopt the position that longer-term leave can never be a reasonable accommodation. Instead courts have continued to rely on prior precedent’s application of the undue hardship standard, even for long-term leave requests (such as six months).<sup>[34]</sup> Similarly, the EEOC stands in opposition to the Seventh

Circuit regarding inflexible or no-fault leave policies to preclude extended leave as an accommodation. According to the EEOC, these policies violate the ADA because an employer must modify its policy as a reasonable accommodation to provide an employee with additional leave unless: (1) there is another effective accommodation that would enable the employee to perform the essential functions of the position; or (2) granting additional leave would cause an undue hardship.<sup>[35]</sup> Thus, employers with inflexible leave policies may face a risk of litigation by the EEOC, although the success and assessment of such claims may vary by jurisdiction.<sup>[36]</sup>

### III. Practical Advice

In light of the EEOC's guidance and recent case law, how should colleges and universities approach employee requests for additional or extended leave as an accommodation? Recognizing that each inquiry is fact specific, the following list provides practical advice for attorneys advising higher education institutions:

1. Examine the institution's policies regarding leave as *an accommodation* to determine if they are compliant with applicable law. Remember, leave for an indefinite period is never required. Accordingly, institutions should consider making an explicit policy statement that indefinite leave will not be provided and requiring that any request for leave beyond FMLA leave as an accommodation must be of a specific period, after which the employee will be able to return to work. The policy should reiterate the institution's commitment to the interactive process while recognizing that such leave may not be available where it will cause an undue hardship to the institution. Making this requirement explicit in policy may help institutions avoid any argument that indefinite leave is anticipated or available, while also complying with the guidance from the EEOC. It also ensures equitable application of policies to all employees.<sup>[37]</sup>
2. Use the interactive process to document, if applicable, the distinction between leave as an accommodation and sabbatical, research, or leave for a visiting professorship.
3. Institutions in the Seventh Circuit should consider whether they wish to adopt the standards set forth in *Severson* that "a long-term leave of absence cannot be a reasonable accommodation."<sup>[38]</sup> If so, the institutions may wish to consider adoption of a limit on the duration of leave as an accommodation, such as the two-week period contemplated in *Severson*. However, there is risk associated with such a position, as the holding in *Severson* has not been endorsed by the U.S. Supreme Court, is contrary to EEOC guidance, and may not be looked upon favorably by the EEOC.
4. Design a process to ensure the institution can "obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship."<sup>[39]</sup> When leave is requested as a reasonable accommodation under the ADA, the institution is obligated to engage in the "interactive process" with the requesting employee to determine what reasonable accommodations are needed. Such a process will include a checklist for required documentation to support the requested accommodation, timelines for written communication from a neutral office (i.e., not the direct supervisor) prior to an employee's anticipated return from a leave of absence, a deadline for the employee's response, and a written follow-up if no response or an ambiguous response is provided. Furthermore, it is critical that the institution track the amount of leave that is being authorized throughout this process and establish, at the

outset of the additional leave period (i.e., after FMLA leave has been exhausted), a definitive return-to-work date. If the employee fails to return to work by that date, additional leave will constitute an undue hardship. Consistent documentation and clear communication demonstrates the institution's commitment to employee well-being and the interactive process.

5. Request that the employee provide: (1) the specific reason(s) for the leave request; (2) whether the leave must be a continuous block of time or intermittent (for example, one day per week, occasional days throughout the year); (3) when the need for leave will end; and (4) permission for the employer to gather additional information from the healthcare provider.[\[40\]](#) The institution may wish to add these requirements to its policy to make it clear what information is required for a request for extended leave. When thereafter consulting with the employee's provider, ask additional questions to confirm the information provided by the employee in response to the above, as well as to assess whether there are other accommodations that may also be effective and/or reduce the amount of leave needed. Moreover, this inquiry can inform the undue hardship analysis.[\[41\]](#) The interactive process requires the parties to engage in an open and candid discussion regarding "issues of physical or mental limitation and to seek to devise reasonable accommodations. The process requires current and complete medical information and bilateral, good-faith communications."[\[42\]](#) An employee's failure to engage in the interactive process or provide necessary medical information as part of that process may absolve the institution of any obligation to accommodate.[\[43\]](#)
6. Institutions should assess whether the employee can be available for a modified work schedule and/or whether a telework arrangement might be feasible, if the institution has an existing telework policy, and such arrangements could meet business needs as part of an accommodation. The institution should revise its existing policy or establish a new policy regarding telework arrangements as an accommodation and ensure that it is applied equitably and is not abused. In addition, the institution should ensure that schedule adjustments and modified work arrangements do not constitute "make-work" and are available based on job duties.
7. Institutions should continue the interactive process after granting leave—"particularly if the employee's request did not specify an exact or fairly specific return date, or when the employee requires additional leave beyond that which was originally granted."[\[44\]](#) If an employee seeks to modify a projected return date, maintain an engaged interactive process to determine if the additional leave will result in an undue hardship.[\[45\]](#) If the employee cannot provide a definitive return date, the request has become a request for indefinite leave, which need not be provided.
8. Institutions should consider the use of a series of form letters to ensure that policies are being applied equitably to all employees, gathering the relevant information for the initial inquiry from employees, and checking in to prepare for an employee's return to work. Employees may seek to return to work with other reasonable accommodations and continue to communicate occasionally while on leave to demonstrate an institution's commitment to the interactive process.[\[46\]](#) It also ensures consistency while engaging in the fact-specific individualized assessment required by the ADA.
9. Finally, institutions should keep track of decisions to grant leave as an accommodation, including when and why the leave was granted as an accommodation. This will help

ensure that the institution is applying policies and procedures consistently and avoid claims that such decisions are being made in a discriminatory manner.

## CONCLUSION:

This NACUANOTE provided a summary of both regulatory guidance and federal case law on a common conundrum faced by colleges and universities—how to handle an employee who is on disability leave, has exhausted available leave under the Family Medical Leave Act (FMLA) and then requests additional leave as an accommodation under the Americans with Disabilities Act (ADA). Courts, the Equal Employment Opportunity Commission (EEOC), and employers continue to debate whether, and how, such extended leave fits into a reasonable accommodation framework under the ADA. Federal appellate courts as well as state courts vary in how they address leave as an accommodation, and practitioners are reminded to follow the precedent in the employer’s jurisdiction. Many state antidiscrimination laws also address accommodation for disability and leave, so readers should also consider state and local laws in this area before taking any employment action. Application of the practical advice outlined above will differ in every situation, but using these steps should assure consistency and mitigate the risk of a misstep.

## RESOURCES:

Rachel Periera, Kathleen M. McElroy, and Jacqueline Weisman, [“ADA & FMLA Update: Lessons Learned.”](#) (NACUA Annual Conference 2018).

Janine P. DuMontelle, Ellen M. Babbitt, Amy Schmidt Jones & Vee Leonard, [“The Bermuda Triangle: How Do the Requirements of FMLA, ADA/Section 504 and Worker’s Compensation Intersect?”](#) (NACUA Annual Conference 2016).

## END NOTES:

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[2] U.S. Equal Emp. Opportunity Comm’n, [“Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act”](#) (Oct. 17, 2002).

[3] Courts routinely reject accommodation cases where the requested accommodation would require hiring another employee to do part of the disabled employee’s essential functions. See *White v. York Intern. Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (stating that an employer need not “create a new position to accommodate the disabled worker.”); *Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1997) (stating that “the law does not require an employer to transfer from the disabled employee any of the essential functions of his job.”); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999) (“The ADA does not require an employer to relieve an employee of any essential functions of his or her

job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so.”); *Gratz v. Office of Chief Judges of 12th, 18th, 19th & 22nd Judicial Circuits*, 601 F.3d 674 (7th Cir. 2010) (“An employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee.”); *Kazmiwski v. Bonafide Safe & Lock, Inc.*, 223 F.Supp.3d 838, 853 (E.D. Wis. 2016) (holding that where the employer determined that the employee’s coworkers could not absorb his work without disrupting operations, the employees requested accommodation imposed an undue hardship).

[4] U.S. Equal Emp. Opportunity Comm’n, “[Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#)” (Oct. 17, 2001) (emphasis added).

[5] *Id.*

[6] U.S. EQUAL EMP. OPPORTUNITY COMM’N, [EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT](#), 9 (May 9, 2016).

[7] *Id.* at 10.

[8] See *Robert v. Bd. of Cty. Comm’rs of Brown Cty., Kan.*, 691 F.3d 1211, 1218–19 (10th Cir. 2012) (holding that because defendant “did not have a reasonable estimate of when [plaintiff employee] would be able to resume all essential functions of her employment[,] . . . the only potential accommodation that would allow [her] to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law”); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000) (“The duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee’s position open indefinitely while the employee attempts to recover . . . .”); *Jarrell v. Hospital for Special Care*, 626 F. App’x 308 (2d Cir. 2015) (non-precedential) (need for “at least another 14 weeks” of leave is essentially indeterminate and, therefore, unreasonable); *Silva v. City of Hidalgo, Tex.*, 575 F. App’x 419 (5th Cir. 2014) (non-precedential) (holding that it would be unreasonable for employer to have to wait “at least one to two more months” beyond FMLA exhaustion for employee to return to work); *Larson v. United Nat’l Foods West, Inc.*, 518 F. App’x 589 (9th Cir. 2013) (non-precedential) (indefinite – and at least 6-month-long – leave to permit driver to fulfill alcoholism treatment obligations so that he might eventually be physically qualified under the DOT regulations is not a reasonable accommodation); *Santandreu v. Miami Dade Cty.*, 513 F. App’x 92 (11th Cir. 2013) (non-precedential) (because employee granted 15 months of leave that had been extended 4 times “was unable to show that he would be able to perform the essential functions of the job anytime in the reasonably immediate future, his request for additional leave was not a request for a reasonable accommodation.”).

[9] The Eighth Circuit’s decision in *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537 (8th Cir. 2018) aligns with several other recent decisions from the Second Circuit (*Vitti v. Macy’s Inc.*, 2018 WL 6721091, No. 17-3493 (2d Cir. Dec. 21, 2018)), the Fifth Circuit (*Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017)) and the Ninth Circuit (*Ogden v. Public Utility District No. 2 of Grant Cty.*, 722 Fed. App’x 707 (9th Cir. 2018)), which all held that individuals who are unable to regularly attend work are not qualified individuals with disabilities for purposes of the ADA.

[10] Compare *Echevarria v. Astra Zeneca Pharm., LP*, 856 F.3d 119 (1st Cir. 2017) (holding that an employee’s request for an additional twelve months of leave was not a reasonable accommodation); *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017) (holding that a multi-month leave of absence was not a reasonable accommodation and stating that “[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement.”); *Golden v. Indianapolis Hous. Agency*, 698 F. App’x 835, 837 (7th Cir. 2017) (an employee who requires a multi-month period of medical leave is not a “qualified individual” under the ADA or the Rehabilitation Act) with *Estep v. Forever 21 Retail, Inc.*, No. 3:16-cv-02214, at 17–18 (D. Or. Nov. 13, 2018) (“[T]he Court declines to follow the Seventh Circuit’s holding in *Severson*. Established Ninth Circuit law holds that ‘an extended unpaid medical leave may be a reasonable accommodation if it does not pose an undue hardship on the employer.’”) (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)).



[11] *Robert*, 691 F.3d at 1218 (quoting *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000)).

[12] See *id.*; *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003).

[13] *Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119 (1st Cir. 2017).

[14] *Id.* at 130.

[15] *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017); *Moss v. Harris County Constable, Precinct One*, 851 F.3d 413, 418 (5th Cir. 2017) (holding that, with respect to employee who was terminated during his extended leave of approximately 8 months after expiration of FMLA leave, “Moss was medically incapable of performing his duties as a deputy constable at the time of his termination and thus was not a qualified individual under the ADA, unless some reasonable accommodation can be identified that would have enabled him to perform the job.”); *Hwang v. Kan. State Univ.*, 753 F.3d 1159 (10th Cir. 2014); *Peyton v. Fred’s Stores of Ark., Inc.*, 561 F.3d 900 (8th Cir. 2009).

[16] U.S. Equal Emp. Opportunity Comm’n, “[The ADA: Your Employment Rights as an Individual with a Disability](#)” (last visited Dec. 16, 2019).

[17] *Hwang*, 753 F.3d at 1161–62 (“After all, reasonable accommodations . . . are all about enabling employees to work, not to not work.”).

[18] *Severson*, 872 F.3d at 481.

[19] *Id.* at 479.

[20] *Id.* at 479-80.

[21] *Id.* at 480.

[22] *Id.* at 482.

[23] *Id.*

[24] *Id.* at 481.

[25] *Id.* (quotations omitted).

[26] *Id.* at 480 n.1 (citing 42 U.S.C. § 12112(b)(5)(A)).

[27] *Id.*

[28] *Golden v. Indianapolis Hous. Agency*, 698 F.App’x 835 (7th Cir. 2017).

[29] *Id.* at 837.

[30] *Id.*

[31] *Billups v. Emerald Coast Utilities Auth.*, 714 F. App’x 929, 935 (11th Cir. 2017) (quoting *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003)).

[32] *Id.* at 933.

[33] *Id.* at 935–36.

[34] See, e.g., *Estep v. Forever 21 Retail, Inc.*, No. 3:16-cv-02214, at 17–18 (D. Or. Nov. 13, 2018) (“the Court declines to follow the Seventh Circuit’s holding in *Severson*. Established Ninth Circuit law holds that ‘an extended unpaid medical leave may be a reasonable accommodation if it does not pose an undue hardship on the employer.’”) (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)).

[35] EMPLOYER-PROVIDED LEAVE, *supra* note 6; “Enforcement Guidance,” *supra* note 2.

[36] See, e.g., *Equal Emp. Opportunity Comm’n v. United Parcel Serv., Inc.*, No. 1:09-cv-05291 (N.D. Ill.) (filed Aug. 27, 2009 and concluded by consent decree in 2017, resulting in injunctive relief and payments of more than \$1.7 million to claimants).

[37] Consistently applying the policy is essential to being able to defend it. See, e.g., *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233 (N.J. 2005) (upholding a facially neutral policy capping leaves at 26 weeks as non-discriminatory in a notably pro-employee state (NJ) because the employer applied it to men as well as the pregnant woman plaintiff).

[38] *Severson*, 872 F.3d at 481.

[39] EMPLOYER-PROVIDED LEAVE, *supra* note 6 at 4.

[40] U.S. DEPARTMENT OF LABOR, [FACT SHEET # 28G: CERTIFICATION OF A SERIOUS HEALTH CONDITION UNDER THE FAMILY AND MEDICAL LEAVE ACT](#) (February 2013). The Department of Labor offers FMLA certification forms to Employers to use, and proposed a revision of these forms on August 5, 2019. Use of DOL provided forms avoids an employer asking for additional or inappropriate information. If certification is complete and sufficient, all an employer may do is authenticate the information or seek clarification regarding the form. Employers may also seek a second and third certification, at an employer’s expense.

[41] EMPLOYER-PROVIDED LEAVE, *supra* note 6 at 4.

[42] *Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 490 (E.D.N.C. 2015).

[43] *Maubach v. City of Fairfax*, No. 1:17-cv-921 (E.D. Va. April 30, 2018).

[44] EMPLOYER-PROVIDED LEAVE, *supra* note 6 at 5.

[45] *Id.* at 10.

[46] *Id.* at 8.

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