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**EEOC's New Resource on Leave as an
ADA Reasonable Accommodation**

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Today's Speakers


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About Franczek Radelet

- National labor and employment practice
- Counsel and represent employers exclusively in all aspects of labor and employment law
- With 50+ attorneys, one of the largest, single-office labor and employment boutiques in the country


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Welcome

- Link to a feedback survey made available after webinar
- For SHRM, HRCI and CLE credit please complete the feedback survey
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Agenda

- History – Where Have We Been?
- What is an EEOC *Technical Assistance Resource*?
- Overview of the EEOC's New Resource on Leave as a Reasonable Accommodation
- Case Scenarios
- Questions

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History www.franczek.com

- **June 2011:** Commission held hearing on use of leave as reasonable accommodation
 - Expert testimony: employee and employer perspectives
 - Differed on employer/employee obligations, but agreed on need for EEOC guidance
- What Did EEOC Learn from this Meeting?
- What Alternatives Have Been Considered?

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What is an EEOC *Technical Resource Document*? www.franczek.com

- Document developed by EEOC staff
- Approved by EEOC Chairwoman Jenny Yang
- Not voted on by the entire Commission and technically does not carry the weight of official guidance
- Yet, critical in guiding employer decision-making when considering leave as an ADA reasonable accommodation

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***EEOC's New Resource on
Leave as a Reasonable Accommodation***

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Key Aspects

- Access to Leave under an Employer's Paid Leave Policies must be *Equal*
- Unpaid Leave must be Considered as a Reasonable Accommodation
- Utilize "Automatic termination" and "100% Healed" Practices at Your Own Risk
- Reassignment to a Vacant Position
- Employer can obtain Reasonable Medical Information
- Indefinite leave ≠ Reasonable Accommodation
- Considerations for undue hardship

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Paid/Unpaid Leave

Paid Leave Policy
Treat Employees the same
Conditions *can* apply if evenly applied

↓

Unpaid Leave
Employer Does not Offer Leave Benefit
Not eligible for leave under employer's policy
Exhausted leave under FMLA/WC/state law

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Unpaid Leave as Reasonable Accommodation: Is There a Limit?

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Unpaid Leave as Reasonable Accommodation

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- EEOC Position: Employer must consider providing unpaid leave if:
 - The employee requires it because of a disability, and
 - It does not create an undue hardship for the employer
- Examples:
 - Four weeks of unpaid leave to attend treatment (Example 6)
 - Exceptions to timing of when leave policies take effect (Examples 5 & 6)

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Extended Leave Beyond FMLA

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- John, one of your accounting specialists, suffers from depression and fibromyalgia
- Based on his conditions, John instructed by HCP to refrain from "stressful" activities and to take extended leave
- Several months leading up to leave: keying errors, coding errors, payments to the wrong vendors
- Manager: John is "just not himself"
- Takes multiple periods of STD and exhausts FMLA leave within 5 months
- When FMLA leave expired, he submitted updated STD documents supporting continued need for leave – no specifics

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Extended Leave Beyond FMLA

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- The Company forgets about John for a month (while he remains on leave), at which point HR reviews his absences
- Thereafter, you receive a series of doctor's notes:
 - Update 1: "Unable to work. Adjusting his medication. Appointment in one mo."
 - Update 2: "Under my care. Still suffering from acute depression. Follow up in 5 weeks."
 - Update 3: "Adjusting medications for apnea, depression. Cannot work. Appointment in 4 weeks."
- Rhonda, John's boss, wants to fill John's position, since we don't know his RTW date. Can the employer do it?

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Initial Thoughts

- Don't wait to start the interactive process!
 - Missed opportunities here
 - Apparent performance issues
 - "Just not himself"
- Stay in Contact
 - Particularly if RTW is unclear
 - If RTW is clear, employer can check on employee's progress (*EEOC Resource: employee cannot be required to provide periodic updates*)
 - Correspond as FMLA is nearing an end

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Correspondence to Employee

- At FMLA Week 10, phone call with follow-up correspondence:
 - FMLA leave will be exhausted as of [date]
 - Based on current information, we anticipate that you will return to work on [date]
 - We want to help you in any way we reasonably can
 - If you are not able to return to work by [date], please contact me. If you believe you could return to work, but may need assistance, or if there is any other information about your return to work that you wish to call to our attention, please contact me as soon as possible
 - Before returning to work, you will be required to provide a return-to-work certification from your health care provider confirming that you are able to perform the essential duties of your position with or without a reasonable accommodation
- Reminder about TPAs

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What are Employer's Options?

- If leave – or additional leave – is requested, employer must treat it as a request for a reasonable accommodation
- Start with the employee:
 - *EEOC Resource:*
 - Reason for leave?
 - Block of time or intermittent?
 - When will leave period end?

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But What if Employee's Information Not Enough?

Two Options

1. Contact HCP to "elaborate" on information provided by the employee (with employee's permission)
2. Employer can ask the HCP to respond to questions to help you understand the employee's need for leave (and employee required to work with HCP to obtain responses "as quickly as possible")

EEOC Resource ("Communication after an Employee Requests Leave")

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But What Questions?

Request information responding to the following:

1. Basic facts regarding the impairment (no diagnosis!)
2. The activities that the impairment limits (and the extent to which)
3. How impairment affects employee's ability to perform essential job functions and what job functions
4. Whether doctor can identify any accommodations that would help the employee perform job functions
5. If leave is necessary, what is the expected date upon which the employee can perform essential job functions?

EEOC Guidance: Reasonable Accommodation & Undue Hardship Under the ADA (Q. 6)

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Extension Requests

- If additional leave is requested (before or after maximum is reached), an employer also can request that the employee's HCP respond to the following:
 1. What amount of additional leave needed?
 2. Why is additional leave necessary?
 3. Why did the initial estimate prove inaccurate?
- *EEOC Resource: May also request relevant information to determine undue hardship*

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Undue Hardship Considerations

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- *EEOC Resource:* In assessing undue hardship, an employer may consider:
 - The amount and/or length of leave required
 - The frequency of the leave
 - Whether there is any flexibility with respect to the days on which leave is taken
 - Whether the need for intermittent leave on specific dates is predictable or unpredictable
 - The impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner
 - 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

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The "Impact" and "Ability to Serve"...

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- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive client service & increased client dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees
- Increased stress on overburdened co-workers
- Lower morale that results in demonstrably lower productivity (*Be careful!*)

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EEOC Position on Indefinite Leave

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- Employers have no obligation to provide leave of *indefinite* duration
- *EEOC Resource:*

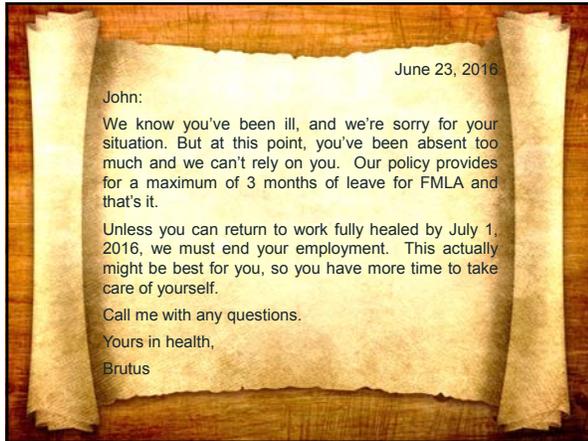
"Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so it does not have to be provided as a reasonable accommodation."

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Back to John . . .

- Let's assume that John was able to return upon expiration of FMLA leave
- Over the next 3 months, he's absent 14 days:
 - March: 3 for depression, 2 non-descript
 - April: 2 for fibromyalgia, 2 non-descript
 - May: 4 for depression/FM, 1 non-descript
- John's interim boss, Brutus, is tired of John's continued absences, and has prepared a draft letter for Legal/HR review . . .

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Full Duty/100% Healed Policies

- Return to "full duty" or else...
 - "Risk of a [100% healed] policy is even greater, if not absolute." *Powers v. USF Holland* (7th Cir. 2011)
 - ADA requires individualized assessment
 - Determine whether reasonable accommodation available
 - Remove automatic termination and "full duty" provisions

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Maximum Leave Policies

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- *EEOC Resource*: Employer can maintain leave policies with “maximum” amount of leave, but may have to grant leave beyond this amount as accommodation unless undue hardship
- Employer’s practices must incorporate case-by-case assessment and employer’s duty for reasonable accommodation
- The fact that additional leave exceeds what is provided under FMLA is not, in itself, sufficient to show undue hardship

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Regular, Reliable Attendance

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- Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer’s operations
- At what point does an employee’s pattern of absences become “frequent, unpredictable” requests for leave?

The ADA: Applying Performance And Conduct Standards To Employees With Disabilities (Q. 21)

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Okay...Now Let’s Try Something Else

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- Reassignment
 - Considered a reasonable accommodation?
 - Do you need to create a position?
 - Vacant and equivalent
 - Lower-level vacancies
 - Modify seniority CBA provisions for John?
 - Does he need to be the *most* qualified?
 - Interview issues
 - What do other managers need to know?
 - Document!

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