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ATTORNEYS & COUNSELORS

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

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*Special Guest:*

EEOC Commissioner

Chai Feldblum



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# Today's Speakers



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Partner

**FRANCZEKRADELET**  
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Chai Feldblum

EEOC Commissioner



# About Franczek Radelet

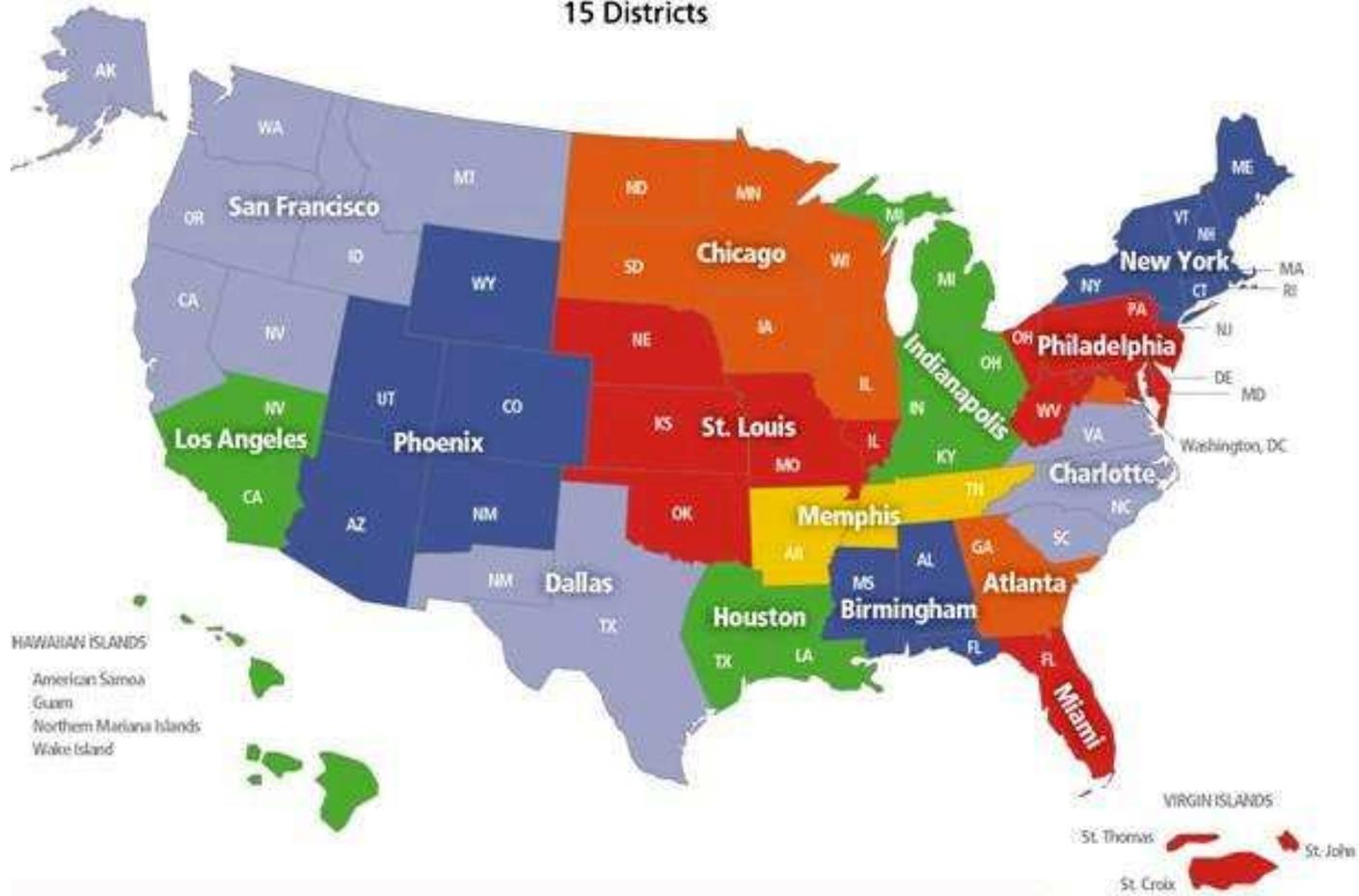
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## Jeff Nowak

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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
- Use Q&A box for any questions during the program
-  Tweet questions to #ADAwebinar



# 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

# History

- 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?

# What is an EEOC *Technical Resource Document*?

- 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

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

# 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  $\neq$  Reasonable Accommodation
- Considerations for undue hardship

# 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

*Unpaid Leave as Reasonable  
Accommodation: Is There a Limit?*

# Unpaid Leave as Reasonable Accommodation

- 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)

# Extended Leave Beyond FMLA

- 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

# Extended Leave Beyond FMLA

- 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?

# 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

# 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

# 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?

# 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”)

# 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)*

# 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

# Undue Hardship Considerations

- *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

# The “Impact” and “Ability to Serve” ...

- 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!*)

# EEOC Position on Indefinite Leave

- 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.”*

# 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 . . .

June 23, 2016

John:

We know you've been ill, and we're sorry for your situation. But at this point, you've been absent too much and we can't rely on you. Our policy provides for a maximum of 3 months of leave for FMLA and that's it.

Unless you can return to work fully healed by July 1, 2016, we must end your employment. This actually might be best for you, so you have more time to take care of yourself.

Call me with any questions.

Yours in health,

Brutus

# 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* (7<sup>th</sup> Cir. 2011)
  - ADA requires individualized assessment
  - Determine whether reasonable accommodation available
  - Remove automatic termination and “full duty” provisions

# Maximum Leave Policies

- *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

# Regular, Reliable Attendance

- 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)*

# Okay...Now Let's Try Something Else

- 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!

# FMLA Insights

Guidance & Solutions for Employers

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## Note to Self: Posting My Beach Vacation Photos on Facebook During FMLA Leave is Not a Good Idea

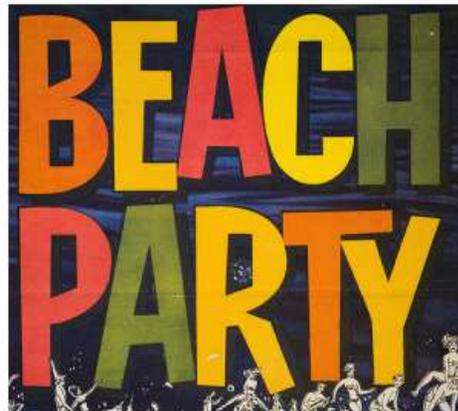
By [Jeff Nowak](#) on February 24, 2016  
Posted in [Abuse of FMLA leave](#), [Court Decisions](#)

I always love a good social media FMLA smack down. It's even better when the employer handles the situation in textbook fashion. Today's installment offers both, while also providing a road map for employers when investigating suspected FMLA abuse.

Let me share the story of Rodney.

Rodney was the activity director for Accentia Health, a local long-term care facility, and in that role, he was responsible for overseeing a staff which decorated the facility for holidays and events, and oversaw outings, parties and recreation for patients. Not a bad gig, if you can find it.

Rodney also had a bum shoulder. He took 12 weeks of FMLA leave for shoulder surgery and recovery, but he still was not able to return to work. For good measure, his doctor recommended one more month off work, and Accentia happily obliged. They called the additional month a "non-FMLA" leave of absence. As the story goes, during the final days of FMLA leave and during the month of his "non-FMLA" leave, Rodney took multiple trips to Busch Gardens in Florida and to the island of St. Martin, posting photos of his escapades on social media along the way. Rodney's treasure trove of Facebook photos consisted of his favorite Busch Garden holiday decorations, and photos and updates about his trip to St. Martin, including some photos of him on the beach, posing by a boat wreck, and swimming in the ocean — all at the very time he should have been recuperating.



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### About Jeff Nowak

Jeff Nowak is co-chair of the labor and employment practice at Franczek Radelet, where he represents employers in all aspects of employment law. His clients praise him as a trusted business partner who is acutely aware of their business goals and the impact employment decisions have on their operations. A staunch advocate and effective litigator for his clients, Jeff also isn't afraid to be candid with clients where compliance issues or litigation must be resolved to meet business objectives. He is a nationally-recognized leader in the FMLA and ADA, and his passion for the FMLA shows through on this blog.

### Connect with Jeff



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