

### Remember, Exhaustion of FMLA Leave is (Still) Not the End of the Road!

Employers must remember that an employee's exhaustion of his or her Family and Medical Leave Act ("FMLA") entitlement is not necessarily the "end of the road" for that worker.

Consider the following scenario: An employee is out of work on approved FMLA leave for a properly-certified "serious health condition." Since taking leave, the employee's condition has not improved and she has remained out of work for a substantial period of time. The employee repeatedly submits notes from her doctor, advising that she is totally unable to work and extending her expected return to work date. The employee eventually exhausts all of her available FMLA leave and all other leave benefits, but cannot yet return to work.

What to do now? First and foremost, remember that your compliance obligations as an employer may not end there!

The Americans with Disabilities Act ("ADA") may require the employer in this scenario to engage in an interactive process with the employee regarding her health condition and how that condition may impact performance of her essential job functions. Depending on what information was contained in the prior FMLA medical certification, it may also be necessary for the employer to request additional documentation regarding the employee's impairment and her corresponding work limitations. In turn, the ADA may require the employer to provide a reasonable accommodation to the worker.

And employers must also remember that an additional period of unpaid recuperative leave may constitute such a reasonable accommodation!

In a notable [decision](#), the Seventh Circuit Court of Appeals recently held that – in the particular facts of the case presented – a multi-month leave of absence did not constitute a "reasonable accommodation" under the ADA. However, it remains unclear whether or not other courts will uniformly adopt this analysis, and, regardless, state and local human rights laws may impose different and more onerous requirements. Further, the facts of your case may lead to a different result.

In sum, employers must proceed cautiously in the above scenario, by analyzing the particular facts, and, when necessary, by engaging in an interactive process with the employee and considering whether there is a reasonable accommodation that must be provided. When dealing with this potentially risky and always challenging scenario, an error in judgment can be costly!

If you have any questions about this Information Memo, please contact [Andrew D. Bobrek](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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