Do you believe that an employee's unpaid medical leave maxes out at 12 weeks under the law? Do you think that an employer's obligation to hold a job open expires then too? Then you don't know Jack.

Jack is a four-year employee of Acme, a mid-size manufacturer. Jack took medical leave under the FMLA after a car accident, and was expected to return after 12 weeks of total rest. His doctor told him and Acme that Jack would then be able to return with some restrictions for four months that did not require him to change jobs. But on week 10, Jack's doctor told him he needed another month of rest. Acme's Human Resources Manager Jill determined that Jack's FMLA leave would expire in two weeks. Acme has a neutral policy that states that any employee who has been continuously absent for more than 12 weeks for any reason will be terminated. Jill concluded that Acme was not required to hold Jack's job open under the FMLA any longer, so she terminated Joe's employment under its policy using her usual form letter. This also terminated his health insurance.

Jill fell victim to one of the most treacherous legal landscapes for employers: leave as an accommodation under the ADA. What Acme failed to consider is that Jack is disabled under the ADA, and his leave was an accommodation for his disability. Therefore, it could only terminate his employment if it determined that giving Jack an additional month off and dealing with his restrictions would be an undue hardship under the ADA. Furthermore, Acme's evaluation of undue hardship had to take Jack's specific circumstances into account. So Acme's neutral policy violated the ADA, because it does not provide for the case-specific, interactive dialogue the ADA requires.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the ADA employment provisions, recently published guidance for employers on this very aspect of the ADA. Now employers like Acme are on firm notice that knee-jerk terminations for extended leave will expose them to potential liability. The ADA requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities. A reasonable accommodation is defined as, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." That includes possibly modifying existing leave policies on a case-by case basis and providing extra leave as needed for a disability, even where an employer does not extend the leave of other employees. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

The point that employers often miss about the ADA's reasonable accommodation obligation is that it requires the employer to change the way it does things to keep the disabled employee in the workplace. Therefore, the employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. This is true regardless of what it does for other employees, even other disabled employees, and regardless of whether the employer

offers leave as an employee benefit, such as an employer who does not have to comply with the FMLA. Nor can an employer penalize an employee for using or requesting leave as a reasonable accommodation, because retaliation for requesting or utilizing a disability accommodation is unlawful retaliation.

Just as it can with all other requests for accommodation, an employer can deny leave when it would impose an undue hardship on its operations or finances. Under the ADA, it is the employee, not the employer, who is required to initiate the request, although if the leave is also FMLA leave the employer has the initial responsibility for offering leave once it knows of an FMLA-qualifying health condition. If the leave is covered by an employer's leave program, FMLA, or a workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot or can no longer be granted under any other program, then an employer must then engage in an "interactive process" with the employee to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship. The interactive process can continue even after an initial request for leave has been granted, particularly if the request did not specify or approximate a return date, or when the employee requires additional leave beyond that which was originally granted.

Employers with maximum leave policies may send a letter to employees who are nearing the end of leave instructing them to return to work by a certain date or face termination or attendance discipline. This likely does not satisfy the interactive requirement of the ADA. The ADA interactive requirement also applies to any third-party providers that may be administering FMLA or short term disability. An employer should continue to communicate directly with the employee about whether the employee is ready to return to work or whether additional leave is necessary. If it is necessary, either a block of time or intermittent leave, the employer must continue the interactive process, which allows it to obtain medical documentation specifying the amount of the additional leave needed, the reasons for the additional leave, and why the initial estimate of a return date proved inaccurate.

An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship, such as whether any restrictions required upon return to work might also become an undue hardship. If an employee returns from a leave of absence with restrictions from his or her doctor, the employer may ask why the restrictions are required and how long they may be needed. If the restrictions are unreasonable, the employer can communicate with the employee and, with the employee’s permission, his doctor to determine if other accommodations will be more workable. There may be more than one way to meet a medical restriction.

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work. That means that if a position is open that the employee

can perform, even with restrictions, then the employer must place the employee in that position.

In many cases, the employer has not done what it must to ensure a disabled person remains actively employed, which is the purpose of the ADA. Jack and Jill must work together before, during, and after his leave to make sure he remains an active member of the workplace, so long as Acme is not unduly burdened by his absence and his return to work.