



## Episode 60: “Untangling the Web of Leave Issues Under ADA, FMLA, and Related Laws, Part 2,” With Scott Rogoff

Speakers: Ari Kwiatkowski and Scott Rogoff, Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hi, everyone. Welcome to episode 60. This is “Untangling the Web of Leave Issues Under ADA, FMLA, and Related Laws, Part 2.” I am very happy to welcome Scott Rogoff back to the podcast—Scott was on last week. We went through a few of these issues, and we’re going to pick up today with the ADA. So Scott, welcome back.

**[Scott Rogoff]:** Thanks, Ari. Good to be here.

**[Ari]:** So Scott and I were chatting offline about whether or not he wanted to or had interest in sharing a fun fact about himself. And he has another good fun fact, even though he says he’s “not that interesting.” So, Scott, I’ll turn it over to you so you could share.

**[Scott]:** Thanks. Thanks. Ari, well, yeah, like I said, I think it’s more of an annoying fun fact, but I have this incredible knowledge and love for pop culture, movies and TV shows, and music. And there is a small handful of movies that I know just about every line to the dialog. So if you’re watching these movies with me, I really have to bite my tongue to not blurt them out. So a little annoying.

**[Ari]:** I mean, I don’t know if it’s annoying, but then you have to tell us what the movies are.

**[Scott]:** Well, no, I think I won’t and then you got to take your chances. But it’s “The Godfather,” which I’ve seen so many times, “Airplane,” “Caddyshack,” and my favorite movie of all time (that not a lot of people know about), “Joe Versus the Volcano,” which was an early Tom Hanks and Meg Ryan movie, and “Top Gun,” the original Top Gun...

**[Ari]:** Classic...

**[Scott]:** Just about every line to all of those movies. So if they come on the television at home, nobody, at least in my family, will watch them with me. We have guests. I really have to bite my tongue. Otherwise I make it quite unenjoyable for everybody. It’s about me. I have a great time.

**[Ari]:** So any plans to memorize the lines from “Top Gun: Maverick”?

**[Scott]:** I got to watch it a lot more. I liked it a lot. But no, these are movies that I’ve probably seen 100 times.

**[Ari]:** Yes. And classics. I feel...I don’t know that we can classify “Top Gun: Maverick” as ...

**[Scott]:** Well, we’ll see. But “Top Gun” in high school, that was terrific and something that all the guys wanted to be. Tom Cruise.

**[Ari]:** Well, thanks for sharing, Scott. I think our listeners are getting a real picture into your ...

**[Scott]:** Great, great.

**[Ari]:** But anyway, so let's dig in. I think let's pick up and talk about some ADA-related issues, because I think last week we touched on, you know, some paid sick leave issues, FMLA issues. I think...let's focus this week's episode on issues under the ADA. So as we know, you know, there are a whole host of conditions, etc. that can be covered by the ADA. Let's assume for purposes of this discussion that, you know, an employee has a qualifying disability. I think it would be helpful for us to kind of talk about unpaid leave as a reasonable accommodation and how an employer can show that that may not be reasonable, or it would cause an undue burden. But in any event, I thought we could start maybe with telling our listeners about a scenario, you and I basically talked with a client about maybe a week or two ago. So maybe if you want to kind of explain that and run it.

**[Scott]:** Sure, sure. All right. So we were... had we had a client that needed some advice on really how long to hold a job open. And the gist of it was they had an employee who had taken FMLA leave and had exhausted all of the FMLA, plus they had exhausted whatever paid sick leave, they'd exhausted whatever leave the employer had under their own policy. They had exhausted their vacation time. They... you name it, they had exhausted it. And within this same year period, about a month later, after all these leaves, exhausted, they said, well, I'm going out again. I have to have another surgery and I'm going to need some more time. So the client's first reaction is, as a lot of us would be sorry, you're out. I mean, the law, the laws require us to give you these various leave, to give them all to you. I can't help you. And when they got to us, Ari, as you recall, we had to kind of go through some of these scenarios because it wasn't quite that simple. All right. Ari, you're out. And the issue that we had to explore was: would allowing this person unpaid leave, because, again, they don't have any paid leave available, would that be a reasonable accommodation under the ADA and also the ADA of course is, the Americans Disabilities Act which is a federal law, but the New York State Human Rights Law also covers disability. We had to do that analysis too. They hadn't really thought about it.

**[Ari]:** Right. And I think in that scenario, basically the client, as you mentioned, the initial inclination was to meet with the employee and just say, hey, you know, we can't accommodate it. When you are able to work again, please reapply and we'll consider your application. But Scott, can you talk a little bit about some of the things that an employer should look at or will have to prove in the unfortunate event, you know, an employee files a charge or a lawsuit to show that the accommodation isn't reasonable and that it would cause an undue burden on the employer.

**[Scott]:** Sure. And, of course, you know, the way the question is posed, Ari, begs the question almost that the employer has their mind made up. So before we even get to that point, the way it is, you recall you and I talked to the point about this is we don't want to get overly technical and legalese and these podcast, but you have to use a term of art and it's two terms. It's called "the interactive process." Yes, these are buzzwords. And what Ari and I and those in our Labor & Employment group do. So the interactive process basically means that when the employer has notice of an employee's disabling condition and the employee asks for a reasonable accommodation, whether it's unpaid time, whether it's a new chair because their back hurts or whether, remember, this all started with the typewriters, right? And the person says, I have carpal tunnel in my hands, but if you get me an ergonomic keyboard, I'll be able to do my job...

**[Ari]:** Right.

**[Scott]:** So that's the gist of it. So when the employer has knowledge and becomes aware that there's a need for an accommodation, you have to sit down with the employee, figuratively or literally, and say, okay, I get it. You've asked for an accommodation, let's talk about it, because, hey, that might work. So let's say into something, something as simple as, you know, I saw out in the hall collecting dust this chair that I think

would be great for me and I think it would help my back you might go, okay, fine. Right. Whereas, no, I went on a... online and this chair is going to be \$3,500. Right? And you're a small company, maybe it's not... but it all starts with engaging in an interactive process. I can't stress how critical this is because even if you know, I'm going to jump to the end, even if you will get to the end result, that there is no accommodation or what the employee's asking doesn't work. If you don't have documentary records showing that you had a sit-down with the employee to talk about these things, you're going to lose, right? Because you can't show you engaged in the interactive process. And also the employee has to engage in the interactive. So I'm sure, Ari, we'll get to this in a minute or two. But we've had cases where the employee says this is the accommodation I need and I'm not discussing it. And the employer has all these wonderful ideas and the employee goes, nope, nope, nope, nope. We're not doing that. Not doing that. Well, guess what? The employee has failed to engage in the interactive process. In order to be successful in those situations, arguing it's a two-way street. So if the employee says no, no, no, and doesn't listen, you're going to have a defense for that too.

**[Ari]:** Yep. Yep. And that actually came up for me with a client maybe about a month or so ago where an employee was just like, this is the only thing that I want, period. Right. All right. Well, it's a two-way street, right? The interactive process, it requires participation on both sides.

**[Scott]:** Absolutely. So. And then. So now let's say you go through that process. Okay. And we'll go back to the scenario, Ari, that you and I had. Yeah. So there really wasn't an alternative other than unpaid leave because this person was going to have an operation. They were going to have a fairly lengthy recovery. So we couldn't even think of work from home because they were this person was going to be so drugged up on pain medication. There really wasn't anything they could do. So we did engage in the interactive process. They came to the conclusion that there really isn't anything else that we could offer right. Now, the employer says to us, well, my goodness, how long do I have to keep this open? Well, this is a pretty important position with our company and yeah, I can give some unpaid leave for a little while, but I certainly can't do it long-term. So right now we get into is it an undue burden on the employer to grant this particular accommodation. And you and I remember, Ari, we grilled this client and they were right.

**[Ari]:** This was like bad cop, bad cop.

**[Scott]:** Exactly. And it and again, I started by saying, I don't know your industry the way you know it, but let me ask the question, what's the big deal?

**[Ari]:** Right.

**[Scott]:** Why can't you give her more time would educate me because I'm going to have to educate a judge or an ALJ or another lawyer. I can't just say it's too burdensome. And then we went in detail. What would your workplace look like if there was a vacancy in there? And then to their credit, they did a great job. Oh my gosh, production would fall off. We already have people covering jobs are complaining they work too hard.

**[Ari]:** It's cost prohibitive to bring in an outside person a temporary basis. Right.

**[Scott]:** Right. And I think at the end of the day, they did a nice job persuading you and I, Ari, that, wow, this really does look like an undue burden. Now, the thing you've got to be careful of, especially for larger employers, if you're going to argue it's an undue burden, the courts and the administrative law judge, they're going to look at your financial situation. So if you're a billion-dollar company or a several billion-dollar...

**[Ari]:** That's going to be tough for company.

**[Scott]:** It's going to be tough because they don't know your industry and they're going to say, so go hire somebody else for the time being. Right. It's not cost-prohibitive. You know, you can show you got it in your coffers, you can afford this. So you've got to make other arguments. So another exception to that is I see this

a lot in housing discrimination cases. I know, Ari, you and I both do housing discrimination defense as well. So a tenant wants an accommodation and they want you to knock out ten walls on various levels. If the... you know, if in this case the housing provider can prove that that would fundamentally alter the building and employment context, it would fundamentally alter the business, then you don't have to do it. Again these are tough standards. I mean, if you're going to rely on undue burden, you really should seek counsel. They're hard. I'm not saying it's impossible, but they're pretty hard to show undue burden. The larger the employer is.

**[Ari]:** Right. Because I think the EEOC, the division, the administrative agencies, at least I know, you know, there's those certain factors they've identified that they look at, which is like size of the employer, composition of the current workforce, financial viability of granting the accommodation, things like that. So I think it might be a scenario honestly, where the smaller the business, the more likely it may be. As you pointed out, if you're a multimillion-dollar company, it's kind of tough, just depending on what exactly the request for the accommodation is.

**[Scott]:** Yeah, it's going to be tough on the monetary standpoint, right. That's going to be almost a concession. Yeah. We could argue they can afford it, but sometimes you can't. I mean, I've got some manufacturing clients who that and their workforce is staffed by highly specialized people. Whether it's quality assurance or whether it's, you know, skilled trades, whatever it is, it's not like you can just grab somebody off the street for the unforeseeable future. I mean, and at least been successful in the past arguing, no, I know. It seems like, oh, what's the big deal for one person? But this person is so key to our organization. We can't be without them for that long. And by the time we train somebody to come in here, right, they'll be back. So. So these are things that you really want to have a heart-to-heart and be prepared for tough questions. Because, you know, especially from your attorneys. We're the ones that are have to defend this. So we need to know ourselves whether we think it's going to fly.

**[Ari]:** Right? Yep. And I've had this issue come up a bunch, just, you know, clients understandably terminating people because they have requested additional leaves when the other forms of leave have been exhausted. And, you know, you kind of have to show that when that person was out, how the work was divvied up, right? I had a client who, you know, they're in the healthcare space and they're always shorthanded, so they always have a job posting up. Right. So when that person went out, they basically were already hiring. They're always hiring. You know, they're always short-staffed. So it's tough in that type of scenario to show that it was an undue burden, because sometimes that work is going to new hires, depending on the industry.

**[Scott]:** Yeah, Yeah. And I would suggest to employers, you know, press a little bit when you see a doctor's note that says, you know, Johnny's under my care and he's out of work for six weeks, okay, this ain't think gym class, right? You know, I'm not going swimming today because, because my hair looks good and I don't want to get it wet. This is not high school. So that... and that goes back to the interactive process. And it's perfectly permissible in that scenario to go back to Johnny and or the doctor and say, okay, look, I'm not prying. I don't want to know what the disability is. I don't need to know anything. Remember, we can't ask general health related, right? But we ask questions about your ability, the employee's ability to do their job. So I often counsel employers to take those notes and go, okay, I got it. Can you tell me why you can't do anything for six weeks? Anything. I mean, could you do nothing for one week during your recovery? And then maybe we ease you back, you work part-time, or you work from home, or we find projects you can do at your leisure. Remember, interactive process, hello, right? So now we do all of this because I don't know about you, Ari, but in my practice, I've seen far too often employers say, well, they got a note from the doctor and the doctor says no work for six weeks or until next appointment or whenever that may be. Right. And I really suggest we politely make some inquiries and say, just tell me what about your condition whatever it is, I don't want to know what it is, but why can't you do something between now

and six weeks? And very often you'll get a revised opinion and the doctor will go, Oh, well, I didn't really understand enough about their job duties. Now I do you. So tell you what, the first two weeks. Nothing. After that. Yeah, light duty sounds good.

**[Ari]:** Light duty, right. Remote work.

**[Scott]:** What I wrote. Exactly. Yeah. So? So don't be afraid to push back a little bit if you get those kind of doctor's notes.

**[Ari]:** Yeah, I think that's a great point to make because I think, too, understandably, some employers are a little bit hesitant to push back like, oh, I can't you know, I can't ask about the condition.

**[Scott]:** The doctor's note is like the steel curtain. Well.

**[Ari]:** Exactly.

**[Scott]:** Yeah, because. No, not true.

**[Ari]:** Right.

**[Scott]:** You can ask follow-up questions.

**[Ari]:** Right? Sure. So, Scott, I think this was a great summary of, you know, what an employer should really do when an employee requests leave, or when they've exhausted leave, they're requesting additional leave under the statutes we've discussed. And I you know, I think this would be very helpful for a number of our listeners/clients. Before we break for the day, any as I said last episode, last words of wisdom or anything, maybe we didn't cover.

**[Scott]:** No, other than what you what you just summed up, Ari, I mean, you got to take these things on a case-by-case basis and you may not be happy. And do employees from time to time take advantage? You bet? No doubt about it. But we want to... as an employer, you want to be careful before you deny a request outright. You want to be careful before you make disciplinary actions. Oh, we maybe we should mention this really quickly, which is Governor Hochul's executive order, remember, which now says employer is who had a, you know, point system for absences. Those are highly under scrutiny. So employers watching this podcast, if you have a policy that says if you are absent X times within a certain time period, this is the progressive discipline. Those are not legal anymore because arguably they can have an excused absence. So you could say something like employees who have unexcused absences, that's okay, but you want to check your policy. So really, your point was so well taken, Ari, to when you become aware of the need for absences or if someone had already taken one before, you have a knee-jerk reaction to it. Talk to someone who specializes in this. Talk to your counsel because there's a lot of pitfalls or that you don't do the right job.

**[Ari]:** Absolutely. Well, hopefully we've addressed those pitfalls and untangle the web of issues that come up under employee leave laws. So thanks again, Scott. Really appreciate you being here.

**[Scott]:** My pleasure. I got to go watch some more movies.

**[Ari]:** Yes, "Top Gun: Maverick," and to our listeners, our next episode, we're going to talk about artificial intelligence in the hiring process. I think it'll be really interesting. The EEOC has issued some updated guidance on it, so tune in. You definitely won't want to miss it. Thanks, Scott.

**[Scott]:** Thanks. Take care.

**[Ari]:** The Labor & Employment Podcast is available on [barclaydamon.com](http://barclaydamon.com), YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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