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Leave as a Reasonable Accommodation: What You Need To Know

The EEOC clarifies the requirements for employers when an employee requests an extended leave due to a disability

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The topic of leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) has been a particularly hot topic since the enactment of the ADA Amendments Act of 2008. Notably, the act broadened the definition of “disability” to cover a considerably larger population of employees who could request reasonable accommodations under the ADA.

In the wake of several highly publicized claims against companies that automatically terminated employees upon expiration of the leave period, many employers have looked to the Equal Employment Opportunity Commission (EEOC) for guidance on this issue. In an effort to provide direction to employers, the EEOC held a public hearing and presented testimony from its attorneys

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on the topic of leave as a reasonable accommodation under the ADA. The key points below, gathered from the hearing, can help an employer stay off the EEOC’s radar.

Generally, accommodation requests under the ADA include leaves of absence and flexibility in an employee’s work schedule. Employers, however, often note that an employee’s request for extended leave can cause doubt about the employee’s capacity to perform his or her job. Understandably, this request often overburdens both the company as well as the co-workers tasked with assuming certain of the disabled employee’s responsibilities.

Nonetheless, EEOC representatives testified that inflexible leave policies are unacceptable because they do not require an individualized assessment of the employee’s need for a continuing reasonable accommodation. More specifically, the EEOC expects an employer to modify its no-fault leave policy to accommodate an employee who needs additional leave.

The EEOC has made it clear that inflexible leave policies are not consistent with the ADA. Indeed, automatic termination policies do not satisfy an employer’s obligation to engage in the interactive process. The EEOC requires employers to take affirmative steps to communicate with employees who are approaching the end of their scheduled leaves regarding their intentions and their ability to return to work.

According to the EEOC, employers should discuss the employee’s ability to do his/her job throughout the leave process. This includes inquiring (i) whether the employee will likely be able to return to work and when; (ii) whether the requested leave will allow the employee to return to work immediately after the leave ends; and (iii) whether there are other accommodations that may help the employee return to work in a timely manner.

In short, if an employee requests additional leave beyond what is originally requested, the employer should review the particular circumstances to determine whether continuation of leave constitutes an undue hardship for the employer.

Additionally, while the burden of proving an undue hardship is high, it is not insurmountable. The following are examples of facts which could support an employer’s position that an undue hardship exists:

- When an employee’s absences occur with some frequency over an extended period of time, and often without advance notice;
- When it causes an employer to

be unable to meet its work goals or serve its customers adequately;

- When an employer incurs significant additional costs because other employees need to work overtime or the employer needs to hire temporary workers; and
- Lost sales and deferred projects.

Additionally, the EEOC has acknowledged a difference between indefinite leave (which constitutes an undue hardship) and a situation where an employee cannot provide a fixed return date. Not surprisingly, an employer must engage in the interactive process to determine which set of circumstances is applicable.

For example, if an employee is unable to provide an exact return date, but can provide an approximate date or range of possible dates, the employer should keep in contact with the employee to assess if those dates are realistic. Only through interactive dialogue can an employer practically evaluate whether continued leave constitutes an undue hard-

ship. Significantly, the EEOC made it clear that its decision to commence litigation often hinges on whether the employer is at fault for the breakdown in the interactive process. Therefore, maintaining communication with your employees is a simple way to minimize potential exposure to liability.

Employers should be aware that the EEOC is unlike a regular plaintiff's attorney. Indeed, because the EEOC is an agency, it does not have a strong economic motivation to settle cases early or inexpensively. Perhaps more importantly, the EEOC often will make examples of noncompliant employers. While ADA litigation requires a significant investment of time and money, the EEOC will use all of its resources to combat employment discrimination.

In sum, the EEOC has cracked down on employers and taken the position that inflexible leave policies may violate the ADA. Indeed, a "one size fits all" leave policy will not satisfy the interactive process. Employers must carefully consider how they address leave requests from their employees.

Below are several tips that can help prevent and defend against a claim for violation of the ADA.

- *An "inflexible period" of leave, even if substantial, will not satisfy ADA requirements regarding an employer's duty to reasonably accommodate.*

The appropriate length of leave under the ADA requires an individualized analysis and case-by-case assessment of an employee's situation, even where the employer has a generous fixed leave policy.

Employer's should also consider eliminating statements from their leave and attendance policies stipulating that an employee must be able to return on full capacity, without restrictions, in order to return to work.

- *The interactive process is essential!* Employers should keep in touch with any employee on medical leave.

- *Analyze and document how the requested leave of absence poses an undue hardship.* It is imperative that employers review and document how employee requests for leave pose an undue hardship to their business and operations. ■