



When Is Employee Leave A Reasonable Accommodation?

LATEST EEOC PUBLICATION PREACHES FLEXIBILITY

Insights

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Five years ago, faced with mounting frustration of employers of all sizes in their efforts to comply with the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission (EEOC) announced that it would provide much-needed guidance on the complex issue of leave as a reasonable accommodation for employees with disabilities. The long wait is finally over.

On May 9, 2016, the EEOC published “*Employer-Provided Leave and the Americans with Disabilities Act*.” The publication notes that disability discrimination charges reached an all-time high in 2015, and a “troubling trend” has developed: employment policies that deny or restrict leave as a reasonable accommodation for employees with disabilities.

Here, after a brief summary of the underlying issue addressed in the publication, we provide important takeaways for employers. The overarching theme: flexibility.

The Primary Issue: Leave As A Reasonable Accommodation

The ADA requires, among other things, that employers provide “reasonable accommodations” to employees with disabilities if doing so will allow the employees to perform their essential job functions. An exception exists if the accommodation would cause the employer “undue hardship.”

For many years, the EEOC has reminded employers who are covered by the ADA (those with 15 or more employees) that granting an unpaid leave of absence, or granting additional time off above and beyond that available under the Family and Medical Leave Act (FMLA) or the employer’s leave policies, may be a “reasonable accommodation that the employer should consider granting.”

Key Takeaways For Employers

This obligation has left employers with many questions, including “how much leave is enough, or too much?” The new resource document provides many answers and several real-life examples of issues employers are facing, but fails to give concrete guidance on how to determine whether leave for a definite, yet lengthy, period is unreasonable. Here are some of the more important lessons you can learn from the publication.

You may have to provide leave even if the employee is not otherwise entitled to it.

The resource reminds employers that even if employees are not eligible for FMLA leave (for

example, the employee does not yet meet the FMLA's eligibility requirements, has already exhausted FMLA leave, or works in a location with fewer than 50 employees within a 75-mile radius), they may nonetheless be entitled to leave under the ADA regardless of length of employment. ADA accommodation obligations apply on day one of employment for covered employers, regardless of the hours an employee has worked.

You may request medical information.

Employers often feel constrained in communicating with employees about their need for leave, and therefore may attempt to make accommodation decisions without adequate information. The resource document clarifies that you may request information from the employee or the employee's health care provider in order to better understand the employee's need for leave and expected date of return.

Undue hardships are (apparently) not dead.

The term "undue hardship," referring to a defense to providing a reasonable accommodation, is mentioned more than 30 times in the resource, indicating that it is in the forefront of the EEOC's mind. That's good news, as court decisions have left many believing this defense was all but futile.

The EEOC reiterates some pointers for employers shared by Commissioner Chai Feldblum at a 2014 workplace conference. One important notion is that you may, and should, take into account leave an employee has already taken (even if protected by the FMLA) in determining whether additional leave will create an undue hardship for you.

In other words, you should start assessing undue hardship as early as day one of an employee's leave. Also, the EEOC states in the resource that indefinite leave constitutes a per se undue hardship, and is therefore *never* required as a reasonable accommodation.

You may communicate with workers during leave.

Again, employers often express concern about communicating with employees during leave for fear of an "interference" claim. The EEOC's new resource clarifies that when an employee's return-to-work date has changed, or the employee has failed to provide a specific return-to-work date, you may request additional information from the employee or the health care provider.

Where an employee has a fixed return date, the EEOC provides that you may reach out to the employee "to check on the employee's progress." You can also inquire about the need for additional leave requests or about the likelihood that the employee will be able to return to work if you grant the additional leave request.

Take caution if you use third-party leave administrators.

Many employers believe they are not responsible for decisions about administering leave if they have outsourced their leave administration to a third party. The EEOC emphasizes that you are responsible for ensuring that the administrator's communications with your workers, including by form letters, comply with the ADA.

Specifically, the EEOC reminds you that such communications must advise employees that unpaid leave may be available as a reasonable accommodation after other leave such as FMLA is exhausted. Overall, the EEOC publication states that lines of communication between all involved in leave decisions should be open to ensure consistency and ADA compliance.

“Maximum leave” and “100% healed” policies may need to be modified.

For years, the EEOC has been criticizing inflexible policies that, in the agency’s view, work against employees with disabilities. Yet, as recent headlines make clear, some employers still enforce these types of policies. For example, policies that fall short of ADA compliance in the EEOC’s view include “no fault” attendance policies that count every absence the same regardless of reason, and “100% healed” policies that require employees to certify that they have zero restrictions before returning to work from leave.

The EEOC wants “employers to change the way things are customarily done.” Although the EEOC states that maximum leave policies are not per se unlawful, the agency says that they should include language to clarify that you will consider requests for additional leave as a reasonable accommodation for employees who have a disability.

Don’t Forget Other Accommodations

The EEOC publication goes beyond discussing leave as a reasonable accommodation. It also reminds employers that you need not necessarily grant employees the accommodation of their choice, and may consider alternative accommodations to leave if they are more feasible, less burdensome, or more likely to keep the employee at work.

The resource document also provides one final warning. Many employers are unaware that the ADA obligates you to consider reassigning the employee to a new job as an accommodation when all else, including extended leave, fails to allow the employee to remain in his or her current job. The new job must be vacant (now or in the reasonably foreseeable future) and the employee must be qualified for the position.

Although some federal courts disagree, the EEOC’s position is that if reassignment is the only remaining accommodation, you *must* place the employee in a vacant position for which he or she is qualified without requiring the employee to compete with other applicants (unless doing so would violate a uniformly applied seniority system).

In Sum: Flexibility Is Key

To sum it up, the EEOC’s latest publication reminds all employers that flexibility is key when it comes to considering and granting accommodations, especially when it comes to leave from work. You should take the time to review your current practices and policies to ensure that you stay on the EEOC’s good side when it comes to complying with the ADA.

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