

ADAAA'S TWIST ON ADMINISTRATION OF EMPLOYMENT PRACTICES

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Most experienced human resources (HR) professionals know and follow an old adage when applying policies and making employment decisions: Follow established company policies consistently. For decades, this fundamental practice has helped ensure fairness and avoid potential legal problems.

However, a recent string of actions by the U.S. Equal Employment Opportunity Commission (EEOC) illustrates how and why HR professionals must change the way they approach issues involving employees who may be disabled. In these cases, consistently following a policy without performing an individualized assessment of the circumstances will likely lead to significant legal problems. In fact, making well-reasoned policy exceptions may often be the only way to avoid such liability.

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of an applicant or employee's disability. It also requires employers to provide a "reasonable accommodation" when doing so would enable a disabled person to perform the essential functions of the job in question.

In 2008, Congress passed the ADA Amendments Act (ADAAA), confirming its intent that this law should be applied in a manner to favor broad coverage of individuals. Congress took this step because it observed that courts were rejecting too many ADA claims because the employees did not qualify as "disabled" under the law. Under the revised statute and regulations, focus has shifted away from determining "who is disabled," now looking more closely at

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whether an employer illegally discriminated or denied a reasonable accommodation. The results of these analyses have nearly turned some traditional HR practices upside down.

For example, many employers have traditionally allowed employees additional leave after they've exhausted Family and Medical Leave Act leave. However, most also limited such additional leave to one, three or six months, though such leave would not be "job protected." If the employee was able to resume work during the extension, his return would be subject to the company's employment needs at the time. If the employee was still unable to return to work after exhausting the additional leave, the employee would be terminated, no questions asked, but eligible for rehire

Today it is clear that for a disabled employee, consistently enforcing this policy would almost certainly violate the ADA. Instead of strictly enforcing the policy, employers must conduct individualized assessments of employees' circumstances to determine whether another leave extension would constitute a reasonable accommodation that would enable return to performing the essential functions of the applicable job.

Going forward, this represents an important new adage for HR professionals when dealing with the ADA: Sometimes, a policy exception is the only reasonable option.

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