

Labor & Employment Law Alert: EEOC Issues Guidance on Employees with Disabilities Seeking Leave

On May 9, 2016, the federal Equal Employment Opportunity Commission (EEOC) issued a new resource document that addresses leave requests as accommodations for employees with disabilities under the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations. The guidance can be found at: <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

Noting that disability-based charge filings reached an all-time high in 2015, the EEOC consolidated existing guidance on the ADA. It also reiterated that the EEOC regulations currently state that reasonable accommodations may require an employer to grant leave, including unpaid leave that exceeds the employer's normal leave allowances. In particular, the guidance contains discussions of the interactive process, maximum leave policies, "100% healed" policies, and reassignment, and also provides examples.

Highlights of the new EEOC guidance are as follows:

1. **Equal access under leave policies.** Employees with disabilities must be provided access to leave on the same basis as all other similarly-situated employees. However, employers can have policies that require all employees to provide documentation to substantiate the need for leave. For example: an employee with a disability asks to take six days of paid sick leave. The employer has a policy requiring a doctor's note for any sick leave over three days that explains why leave is needed. The employee must therefore provide the requested documentation.
2. **Leave as an accommodation.** An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation, if needed, as long as providing such leave does not create an undue hardship for the employer. This is the case even when:
 - * the employer does not offer leave as an employee benefit;
 - * the employee is not eligible for leave under the employer's policy; or
 - * the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a worker's compensation program, or the federal Family and Medical Leave Act (FMLA) or similar state or local laws).

Paid leave beyond what an employer provides as part of its paid leave policies is not required. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances. Penalizing an employee for use of leave as an accommodation may also raise a disparate

treatment issue if the employer grants similar amounts of leave to non-disabled employees but does not penalize them.

- 3. Communication after a leave request.** As a general rule, the individual with a disability — who has the most knowledge about the need for accommodation — must inform the employer that an accommodation is needed. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for an accommodation under the ADA. Such requests can be addressed by implementing the employer’s leave programs, such as FMLA leave. If, however, the leave cannot be granted under any other policy or program, the employer should promptly engage in an “interactive process” with the employee — a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

An employer may obtain information from the employee’s health care provider (with the employee’s permission) to confirm, clarify, or elaborate on information the employee has provided. Moreover, an employee requesting leave as an accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as quickly as possible.

- 4. Maximum leave policies.** Although employers are allowed to have leave policies that establish the maximum amount of leave they will provide or permit, an employer may have to grant leave beyond that amount as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship.

Many employers, especially larger ones and those with generous maximum leave policies, rely on “form letters” to communicate with employees who are nearing the end of a leave provided under an employer’s leave program. These letters frequently instruct an employee to return to work by a certain date or face termination or other discipline. The EEOC suggests employers modify such letters to let employees know that if they need additional unpaid leave as a disability accommodation, they should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing an undue hardship.

- 5. 100% healed policies.** Employees on leave for a disability may request an accommodation in order to return to work. The request may be made by the employee directly or in a doctor’s note releasing the employee to return to work with certain restrictions.

According to the EEOC, an employer will violate the ADA if it requires an employee with a disability to have no medical restrictions — that is, to be “100% healed” or recovered — if the employee can perform his or her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship.

- 6. Interactive process and return to work.** 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, and it may explore with the employee and the employee’s doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor’s recommended limitations.
- 7. Reassignment.** In some situations, the requested accommodation will be reassignment to a new job,

because the disability prevents the employee from performing one or more essential functions of the current job even with an accommodation, or because any accommodation in the current job would result in an undue hardship. The EEOC takes the position that if reassignment is required, an employer must place the employee in a vacant position for which he or she is qualified, without requiring the employee to compete with other applicants for open positions. Reassignment does not include promotion and, generally, an employer does not have to place someone in a vacant position as an accommodation when another employee is entitled to the position under a uniformly applied seniority system or union contract.

8. **Indefinite leave.** If an employee cannot say whether or when he or she will be able to return to work at all, such a request for indefinite leave will constitute an undue hardship. Accordingly, the employer does not have to provide such an accommodation.

In sum, some employers may not be aware that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as an accommodation. Employer policies that require employees on extended leave to be 100% healed or able to work without restrictions may deny some employees reasonable accommodations that would otherwise enable them to return to work.

Lastly, employers are reminded that reassignment may be an accommodation option for employees with disabilities who cannot return to their jobs following leave.

It should be noted that the New York State Division of Human Rights, which enforces the New York Human Rights Law (HRL), often takes the lead of the EEOC. The HRL covers both small and large employers.

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