

LEAVE AS A REASONABLE ACCOMMODATION – WHAT EMPLOYERS SHOULD KNOW ABOUT RECENT EEOC GUIDANCE

*Elizabeth A. Bailey, Esq.
Sheehan Phinney
Published: Union Leader, August 27, 2016*

Recently, the U.S. Equal Employment Opportunity Commission (EEOC) issued a helpful resource document about employer-provided leave as a reasonable accommodation under the Americans with Disabilities Act (“ADA”).

To put this in context, an employer covered by the ADA must not discriminate against a qualified individual on the basis of disability. For ADA purposes, a qualified individual is a person who “with or without reasonable accommodation” can perform the essential functions of the job. If a qualified individual needs reasonable accommodation to perform the job, the employer’s failure to provide it is a form of discrimination under the ADA, unless the employer can demonstrate that the accommodation would pose an undue hardship.

Not surprisingly, all of these concepts are defined by the ADA and corresponding regulations. The ADA envisions that the employer and the employee should engage in an individualized and interactive process when an employee is in need of a reasonable accommodation. A reasonable accommodation for employees can take on many forms, including a modification or adjustment to the work environment. What many employers miss, as they try to enforce leave and attendance policies, is that an unpaid leave of absence (or an extension of leave) may in itself be a reasonable accommodation.

The EEOC’s resource materials clarify the following:

- A disabled employee must have the access to leave on the same basis as other similarly-situated employees. If an employee requests leave for a disability, and the leave falls under the employer’s existing leave policy, the employer must treat the employee who requested the leave the same as another employee who requests leave for a reason that is not related to disability.
- Leave as a reasonable accommodation may enable the employee to return to work following the leave, and this outcome is consistent with the ADA’s purpose.
- An employer must consider providing *unpaid* leave to a disabled employee as a reasonable accommodation, if the employee requires it to be able to return to work and perform the essential functions of the job, assuming to do so does not create an undue hardship for the employer. The EEOC noted that this is so even when: the employer does not offer unpaid leave as an employee benefit; the employee is ineligible for leave under the employer’s policy; or the employee has exhausted the leave the employer does provide as a benefit (including leave

exhausted under a workers' compensation program or under the Family Medical Leave Act).

- The ADA does NOT require an employer to provide additional *paid* leave beyond what the employer already provides as part of the employer's paid leave policy.
- An employer can deny a request for leave when the employer can demonstrate that providing leave as an accommodation would impose an "undue hardship" under the ADA. The undue hardship standard is exacting, and requires more than mere inconvenience or some minor additional expense.
- The employer and the employee should engage in the interactive process when the employee requests leave as a reasonable accommodation. This means that they may need to share relevant information about the feasibility of providing the leave without causing an undue hardship. Again, this is an individualized discussion, but if a disability is not obvious and the employer needs additional information, the focus may be on issues concerning the reasons why the employee needs leave, whether the leave will be in a block of time, and when the need for the leave will conclude.
- With the employee's permission, the employer may obtain limited information from the employee's health care provider for the narrow purpose of confirming or elaborating on the information the employee provided. Employers should carefully ensure that any such limited communications with the health care provider are appropriately tailored and compliant with the ADA and the Genetic Information Discrimination Act ("GINA").
- The employer and the employee can continue the interactive process after leave has been granted, including when the employee's initial request for leave did not have a specific return date or when the employee later needs leave beyond what was initially granted. If the employee has provided a specific return date, the EEOC notes that the employer may not ask the employee for periodic updates before the due date (although the employer can reach out to the employee during an extended leave to check on the employee's progress).
- Employers are allowed to have leave policies which establish the maximum amount of leave an employee may normally take. *However*, the EEOC notes that the employer may need to make an exception to such policies and grant additional leave as a reasonable accommodation, unless the employer demonstrates that to do so would cause undue hardship.
- Such "maximum leave" policies can take on different forms, such as a policy which has caps or which limits unplanned absences. Although disabled employees are generally not exempt from such policies, the EEOC notes that the employer may need to modify such policies as a reasonable accommodation for

absences which are related to a disability, unless the employer can demonstrated that doing so causes undue hardship.

- The EEOC counsels that employers who rely on form letters to communicate to employees who are nearing the end of leave may wish to modify such form letters. Specifically, the EEOC suggests a modification which informs that if the employee needs additional *unpaid* leave as a reasonable accommodation, the employee should make such a request as soon as possible so the employer may consider whether the employer can grant the extension without undue hardship to the employer.
- The EEOC also counsels about ADA prohibitions and best practices in coordinating the employee's return to work, including if the employee needs to return to work with some restrictions.

Reasonable accommodation requests should be an individualized interaction between an employer and an employee, focusing on both of their respective needs. Employers should bear in mind that a leave of absence may be one type of a reasonable accommodation they must consider.