Employer-Provided Leave and the ADA

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Leave as an Employee Benefit Leave as Reas. Accommodation

- Employee with disability entitled to same paid (or unpaid) leave offered as employee benefit, on same terms, to other similarly-situated employees (no disparate treatment)
- Employee with disability may be entitled to unpaid leave as a reasonable accommodation when employee is not covered by an employer’s leave program, has exhausted leave under such a program, or has exhausted other possible leave options (e.g., FMLA, worker’s compensation)
Request for Leave Because of Medical Condition

- All requests for leave for a medical condition = request for reasonable accommodation
- In many instances, request can be addressed by an employer’s leave program or FMLA or workers’ comp
- If not, employer should engage in an “interactive process.” Information needed depends on the circumstances, but may include:
  - Specific reason(s) employee needs leave
  - Form of leave (block of time or intermittent)
  - When the need for leave will begin and end

- Carefully think about specific information you need and ask questions that will get you that information

Interactive Process

- Employers may request documentation from the employee’s health care provider to:
  - Confirm or explain if the medical condition is a disability, consistent with the ADAAA (if unclear)
  - Help the employer understand the need for leave, the amount and type of leave required, any contingencies that may affect the amount of leave needed, and whether other reasonable accommodations may be effective for the employee to eliminate need for leave or to shorten the period when leave is needed

- Interactive process may need to be reinitiated during the leave period (requested extension) or when employee is about to return to work
Can Employer Choose Leave Over Reasonable Accommodation that Permits Employee to Keep Working?

- Gray area of the law
- EEOC’s view: No, unless reasonable accommodation that permits employee to keep working causes undue hardship
- While employer has right to choose between 2 effective accommodations, accommodation that permits employee to work is effective and leave, almost by definition, is not.

Cannot Penalize Employee for Using Leave as a Reasonable Accommodation.

- Essentially punishing employee for using a reasonable accommodation and therefore renders leave ineffective
- May also lead to allegation of retaliation or disparate treatment (e.g., no negative consequence for use of maternity/paternity leave of similar duration)
- If leave is extensive may need to “prorate” when doing performance evaluations, or delay the evaluation
Requests to Extend Leave/Maximum Leave Policies

- Re-opens interactive process
- Cannot summarily reject request because it is more than what was originally requested or it will exceed a maximum leave policy (reasonable accommodation includes modifying policies)
- Rejection of leave extension requires individualized assessment; facts about the additional leave and its impact on employer operations that show an undue hardship or that the employee is no longer qualified

Maximum Leave Policies: Use of Form Letters to Signal Upcoming End of Leave

- Consider sending (or modifying) such letters to remind employees about the policy but also to invite requests for extensions of leave
- May state that any extensions are up to the employer, will be decided on a case-by-case basis, and best to receive requests well in advance of the end of the leave period to permit employee sufficient time to provide any necessary medical documentation employer may request to evaluate whether to grant an extension
Interactive Process & Return to Work

- Employers should continue to engage in the interactive process as needed, such as when:
  - an employee requests a reasonable accommodation (including reassignment) to return to work, or
  - the employee's doctor imposes work restrictions when the employee returns to work (work restrictions = request for accommodation)

- In particular, employers may ask about:
  - the specific accommodation(s) the employee needs;
  - why the accommodation(s) is/are needed;
  - how long the employee may need the accommodation(s);
  - possible alternative accommodation(s) that might be effective for the employee (including reassignment if employee no longer qualified, with or without accommodation, to stay in current job)

100% Healed Policies

- Cannot require that an employee be 100% healed or have no restrictions in order to return to work

- If employee can safely and adequately perform the essential functions of the position with reasonable accommodation, then employee is qualified to return to her position even if not 100% healed

- Employer response to doctor setting work restrictions: may re-open interactive process
Reassignment

- If employee can return to work but not to current job, ADA requires employers to consider possibility of reassignment
- Looking for equivalent, vacant position that employer intending to fill
- Employee must be qualified for new position (can perform essential functions with or without reasonable accommodation)
- Non-competitive (EEOC view and most courts agree)

Undue Hardship

- Relevant factors in determining if providing leave (or extending leave) would result in undue hardship may include:
  - The amount and/or length of leave needed;
  - The frequency of the leave;
  - Whether there is any flexibility regarding when leave is taken;
  - Whether the need for intermittent leave is predictable;
  - The impact of the employee’s absence on co-workers and ability to get work performed in a timely and appropriate manner;
  - The impact of the employee’s absence on business operations and the employer’s ability to provide timely and effective customer service or otherwise accomplish work objectives.
EEOC’s Reasonable Accommodation & Leave Resources

- Employer-Provided Leave and the Americans with Disabilities Act
  https://www.eeoc.gov/eeoc/publications/ada-leave.cfm

- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
  www.eeoc.gov/policy/docs/accommodation.html
  (See “Leave” under “Types of Reasonable Accommodations”)

EEOC Leave Resources

- The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964
  www.eeoc.gov/policy/docs/fmlaada.html

- Enforcement Guidance on Pregnancy Discrimination and Related Issues
  www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
  (See Section II.B., Reasonable Accommodation)
EEOC Leave Resources

- Enforcement Guidance: Workers’ Compensation and the ADA
  www.eeoc.gov/policy/docs/workcomp.html
  (See “Return to Work Decisions” and “Reasonable Accommodation”)

- The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities
  www.eeoc.gov/facts/performance-conduct.html
  (See “Attendance Issues”)

Contact Information

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