OUT, OUT AND AWAY – THE EEOC'S GUIDANCE ON EXTENDING LEAVE AS AN ADA ACCOMMODATION
May 2016

On Monday, May 9, 2016, the Equal Employment Opportunity Commission (EEOC) issued a new resource document entitled "Employer-Provided Leave and the Americans with Disabilities Act." https://www.eeoc.gov/eeoc/publications/adaleave.cfm. Just days later, on Friday, May 13, 2016, the EEOC issued a press release announcing an $8.6 million settlement of its nationwide disability discrimination lawsuit against home improvement company Lowe's, in which the EEOC alleged Lowe's violated the American with Disabilities Act ("ADA") by refusing to grant additional leave to employees as a reasonable accommodation after they exhausted Lowe's 180-day and 240-day maximum leave policies. https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm. While the resource document does not create new law, it provides helpful guidelines and examples for employers navigating the treacherous terrain of assessing employee leave requests under the ADA. The Lowe's-EEOC settlement suggests that now is a good time for employers to take a fresh look at their practices when evaluating leave requests.

The ADA prohibits discrimination by a covered employer (with 15 or more employees) against a qualified individual with a disability and requires employers to provide "reasonable accommodations" to such individuals as needed to perform their jobs or otherwise enjoy equal employment opportunities, unless doing so would create an "undue hardship." ADA reasonable accommodations may include providing a disabled employee leave beyond what is available under an employer's standard leave policy. The key concepts employers should consider when evaluating leave requests under the ADA are that individualized decision-making and case-by-case deviations from set policy are required.

The new resource document emphasizes that when an employee requests leave for a medical condition, the employer should treat this request as a reasonable accommodation request, and begin the interactive process to evaluate what accommodation can be provided. The employer should provide leave available under its policies and consider providing additional *unpaid* leave beyond standard policy if needed. The EEOC recognizes (as have the courts) that additional *paid* leave is not required by the ADA. With the employee's permission, the employer may obtain information from the employee's health care provider regarding: the reason for the need for leave, the amount and type of leave required, and whether reasonable accommodations other than leave might be effective or result in shorter leave.

The resource document notes that employers should not penalize an employee who takes leave as a reasonable accommodation. For example, an employee whose job requires meeting a production quota should have her performance evaluated for the time period including leave against a modified quota rather than the standard one.

The EEOC also suggests that employers who us form letters or third-party administrators to communicate with employees on leave develop a

process to notify human resources when an employee might need additional leave beyond the original return to work date, so as to trigger the interactive process. The resource document emphasizes that an employer's use of a third-party administrator does not insulate the employer from ensuring their leave decisions comply with the ADA. While the EEOC's guidance indicates that ADA requires flexibility with moving target return-to-work dates, it also stresses that *indefinite leave*—when an employee cannot say when or if she will be able to return to work at all—is an undue hardship and thus not a reasonable accommodation.

The EEOC resource document also addresses other accommodation issues related to the termination of leave. The EEOC notes that an employer's enforcement of "100-percent healed" policies—which prohibit an employee's return to work until the employee has no medical restrictions—may violate the ADA by denying employees reasonable accommodations that would enable the employee to end leave sooner. The EEOC also opines that when an employee cannot perform their existing job following a leave, reassignment to a different vacant position for which the employee is qualified may be a reasonable accommodation. The EEOC takes the somewhat controversial position that the employee should be reassigned to a vacant position for which he is qualified *without* having to compete with other applicants. Time will tell whether the courts accept the EEOC's interpretation of the law.

To avoid the EEOC's bad side regarding ADA compliance, employers should:

- Revise maximum leave and 100% healed policies to permit exceptions as needed to reasonable accommodate an employee with a disability;
- Review leave procedures and form correspondence, including those of third-party administrators, to ensure that triggers for individualized review as needed are in place;
- Train supervisors to immediately consult with HR when an employee raises a medical condition or need for medical leave that might require reasonable accommodation;
- Train supervisors and human resource employees that exceptions may be the rule when it comes to disability accommodation.

This article is a summary of recent legal developments and is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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