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Leaves of Absence Current Focus of EEOC's New ADA Accommodation Guidance: Love It or Leave It

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It is a rare employer that has not fielded employee requests for time off to address a health concern. The requests can come in many shapes and sizes: weeks or months of leave, a few days of leave, sporadic days off here and there, taking certain hours off each day, rest breaks throughout the day, or any combination thereof. Indeed, many larger employers receive these requests monthly or even weekly; some employ designated staff or even an entire department to help respond appropriately. With the ADA, FMLA, workers' comp, employer policies, operational concerns, past practices, and other considerations all in play, the rules can be tricky, and solutions not always clear.

Last month, the ***U.S. Equal Employment Opportunity Commission (EEOC)*** weighed in with its "Employer-Provided Leave and the Americans with Disabilities Act" guidance (Guidance), which focuses on leaves of absences as a reasonable accommodation under the ***Americans with Disabilities Act (ADA)***. The Guidance includes discussion and examples intended to illustrate what the EEOC believes would be required of an employer in certain situations in order to comply with its obligations to reasonably accommodate.

The EEOC's message to employers is clear: leave requests should be liberally considered and granted if needed to accommodated a disability, except where undue hardship can be shown. This is true even where the employer does not offer leave as an employee benefit, or the employee is not eligible under the employer's leave policies, or where the employee has exhausted any allotted leave under employer policies or state or federal leave laws. In short, if a disabled employee needs leave, employers should try and make it work.

The Guidance does, however, highlight circumstances where employers may lawfully deny leave requests, or require more information from employees prior to granting a request, without running afoul of their accommodation obligations.

Key areas discussed in the Guidance include:

- **Equal access under employer policies.** Where an employee requests leave under a general leave policy permitting leave for any reason, the employer may not impose additional requirements on an employee taking leave for medical reasons than it would an employee who wants leave for other reasons. For example, an employer should not request medical documentation to support a medical leave under such a policy if it does not request documentation supporting other types of leave. However, the employer could require medical documentation if the policy requires all employees to provide documentation to support the leave request.

- **Undue hardship.** The Guidance reiterates the familiar (but difficult to apply) concept that a request for leave does not need to be granted if it would pose an undue hardship on the employer. Determination of undue hardship may include:

    - the length of leave (*i.e.*, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, indefinite leave, or leave

without a specified end date);

- the frequency of the leave (for example, three days per week, three days per month, every Thursday);
- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
- predictability of dates of intermittent leave (for example, the specific day that an employee will need leave because of a seizure is unpredictable; intermittent leave for scheduled doctors' appointments is predictable);
- the impact of the employee's absence on co-workers and performance of specific job duties (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and
- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner (taking into account, for example, the size of the employer).

- **Approximate or** modified return work dates. Where an approximate date is provided for an employee's return to work (*i.e.*, "end of September" or "around October 1"), or range of dates is provided (*i.e.*, between September 1 and September 30), it should be evaluated on a case-by-case basis to determine if granting the leave would constitute an undue hardship. The same applies when a projected return date needs to be modified in light of changed circumstances, such as where an employee's recovery from surgery takes longer than expected.

- **Holding the employee's position open**. When an employer grants leave as a reasonable accommodation it generally requires the employer to return the employee to his or her original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work. For example, if during an employee's leave her position must be filled due to unforeseen operational needs, the employer should consider what other vacant positions would be suitable to offer the employee to return to after leave.

- **Extensions of leave.** Employers may take into account leave already taken – whether under workers' compensation, FMLA (or state or local leave law), employer policies, or leave provided as a reasonable accommodation — when determining if a request for additional leave poses undue hardship. For example, if an employee has exhausted FMLA leave and requires 15 more days of leave due to her disability, the employer may consider the impact of the 12 weeks of FMLA leave already granted and the additional impact on the

employer's operations in granting three more weeks of leave. As another example, if an employee has exhausted both FMLA leave plus an additional eight weeks of leave available under the employer's policies, but requires another four weeks of leave due to his disability, the employer may consider the impact of the 20 weeks of leave already granted and the additional impact on the employer's operations in granting four more weeks of leave.

- **Maximum Leave Policies.** The Guidance makes clear that employers may need to make exceptions under a maximum leave policy (*i.e.*, leave for employees capped at a certain number of weeks per year) if needed to reasonably accommodate a disability. In addition, the Guidance suggests that communications to employees who are approaching the end of a maximum leave period should incorporate the concept that exceptions may be granted in certain circumstances if necessary to reasonably accommodate a disability.

- **Requests for supplemental medical documentation.** As part of the interactive process, an employer may request supplemental medical documentation from an employee in certain circumstances, such as where the employee requests leave beyond that originally granted, or where the original leave request had only an estimated or uncertain return to work date. For example, if an employee is granted three months of leave and requests an additional 30 days of leave near the end of the three months, the employer could request medical documentation supporting the need for the 30 additional days and the likelihood that the employee will be able to return to work, with or without reasonable accommodation, if the extension is granted. However, where the employer has granted leave with a fixed return date, requests for supplemental medical documentation supporting that leave is not permitted.

- **Communications with employee during leave.** It is acceptable for an employer to check on the employee's progress and intent to return to work at the end of the specified leave. For example, in the case of an employee out on three months of leave after surgery, the employer could phone the employee to ask how the employee is doing and whether there is anything the employee needs from the employer to help the employee recover and return to work, and a week before the end of the leave, the employer could again reach out to the employee to ask whether the employee is able to return to work at the end of leave and if any additional accommodations are required.

- **Paid leave.** Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy.

- **Indefinite leave.** The Guidance affirms that reasonable accommodation does not require an employer to grant leave where the employee cannot say when or whether he or she will be able to return to work (indefinite leave or leave with uncertain end date).

The Guidance can be found here. As an additional resource on reasonable accommodation and undue hardship, see the EEOC's previously published Revised Enforcement Guidance, "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act."