EEOC: When Is Leave a Reasonable ADA Accommodation?

By Jeff Nowak, © Franczek Radelet P.C. 5/12/2016

For years, employers across America have been clamoring for guidance from the Equal Employment Opportunity Commission (EEOC) about how they should manage an employee's request for extended or intermittent leave from work and how much leave is considered as a reasonable accommodation under the Americans with Disabilities Act (ADA). Recently, employers received an answer.

Well, kind of.

On May 9, the EEOC issued a resource document—Employer-Provided Leave and the Americans with Disabilities Act (https://www.eeoc.gov/eeoc/publications/ada-leave.cfm)—that addresses "the prevalence of employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation," which the agency contends "serve as systemic barriers to the employment of workers with disabilities."

Noting the "troubling trend (https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm)" in charges of discrimination that allege violations of the ADA (up 6 percent from last year), the EEOC believes this resource document "explains to employers and employees in a clear and practical way how to approach requests for leave as a reasonable accommodation so that employees can manage their health and employers can meet their business needs."

Although the resource document was developed by EEOC staff and approved by EEOC Chairwoman Jenny Yang (https://www.eeoc.gov/eeoc/yang.cfm), it is not voted on by the entire Commission and technically does not carry the weight of official guidance issued by the agency. Still, this resource still should guide employer decision-making when considering leave as an ADA reasonable accommodation.

Key Points

The resource covers six main topics, but here are the key points:

Equal access to leave under an employer's paid leave policies.
According to the EEOC, if an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing paid leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability. For example, if an employer requires a doctor's note to support a leave request made by a nondisabled individual, it can require the same for a leave request made by a disabled employee. However, if the employer generally places no conditions on the use of paid leave, it cannot require a disabled employee to jump through hoops to obtain the same paid leave.

One of the examples provided by EEOC is instructive:

> An employer provides four days of paid sick leave each year to all employees and does not set any conditions for its use. An employee who has not used any sick leave this year requests to use three days of paid sick leave because of symptoms she is experiencing due to major depression which, she says, has flared up due to several particularly stressful months at work. The employee's supervisor says that she must provide a note from a psychiatrist if she wants the leave because "otherwise everybody who's having a little stress at work is going to tell me they are depressed and want time off." The employer's sick leave policy does not require any documentation, and requests for sick leave are routinely granted based on an employee's statement that he or she needs leave. The supervisor's action violates the ADA because the employee is being subjected to different conditions for use of sick leave than employees without her disability. (Example 1)

Unpaid leave must be considered as a reasonable accommodation.
Where an employee's paid leave has run out, or where the employer maintains no paid leave policy, an employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if: 1) the employee requires it; and 2) it does not create an undue hardship for the employer (see my analysis below on how employers establish undue hardship).

Another EEOC example is illustrative:

> An employer's leave policy does not cover employees until they have worked for six months. An employee who has worked for only three months requires four weeks of leave for treatment for a disability. Although the employee is ineligible for leave under the employer's leave policy, the employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship. (Example 5)

All requests for leave must be treated as a request for a reasonable accommodation.
Yes, you read that correctly. If the EEOC ever was ambiguous on this point before, it's cleared it up now—each time an employee requests leave from the job because of a medical condition, the request must be analyzed through the lens of FMLA *and* ADA.

This concept is hardly earth-shattering, and it makes sense. Where an employee needs leave from work because of a serious medical condition, any good employer should use it as an opportunity to engage in the interactive process to determine how we can best address the employee's situation in an effort to keep them engaged and at work. A leave of absence is only one tool to help us accomplish our goal in maintaining a productive and healthy workforce.

Use "automatic termination" provisions at your own risk.
In this resource, the EEOC again strongly counsels against policies that call for termination of employment after the employee has been absent for a certain period of time (e.g., 3 mos., 6 mos., etc.), since these policies do not sufficiently meet the employer's obligation to engage in the ADA's interactive process and to determine whether a reasonable accommodation is necessary.

At a minimum, attendance policies must incorporate a case-by-case assessment of the individual employee's situation and an employer's duty as to reasonable accommodation. I provide more guidance on this below.

Reassignment to a vacant position.
The EEOC uses this resource as a reminder that an employer has an obligation under the ADA to reassign an employee if their disability "prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship." Deemed by the courts as the "accommodation of last resort," reassignment still must be considered if all else fails.

Undue hardship still a nebulous beast to figure out.
The EEOC offers guidance and some additional criteria to consider when determining whether a possible accommodation causes an undue hardship (which the employer then does not need to implement), but as we might expect, the resource document does not necessarily provide any enlightenment as to what point requests for intermittent leave or repeated extensions of leave actually pose an undue hardship.

In determining undue hardship, EEOC states that employer may consider the following:

- The amount and/or length of leave required (for example, 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, leave required indefinitely, or leave without a specified or estimated 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);
- Whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);

- The impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (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, which takes into account, for example, the size of the employer.

Insights for Employers

This new resource doesn't necessarily clear up the particularly troublesome issues for employers. And as my friend, Dan Schwartz, points out (http://www.ctemploymentlawblog.com/2016/05/articles/eeoc-releases-guidance-on-employer-provided-leave-under-ada/#.VzHjBkVnE2k.twitter), the resource does nothing to address abuse of leave or whether an employer can finally say "enough leave is enough."

That said, there are plenty of really good, practical takeaways for employers in this new EEOC resource:

1. Employers can obtain critical medical information from the employee's health care provider to help make decisions on leave requests.

EEOC outlines for employers the information we can obtain from the employee's health care provider (with the employee's permission) before making a decision on an employee's leave request:

- The specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy);

- Whether the leave will be a block of time (for example, three weeks or four months), or intermittent (for example, one day per week, six days per month, occasional days throughout the year); and

- When the need for leave will end.

Additionally, EEOC makes clear that employers may specifically ask the health care provider to respond to questions drafted by the employer and designed to enable the employer to understand: 1) the need for leave; 2) the amount and type of leave required; and 3) whether reasonable accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave).

2. If an employee asks for an extension of ADA leave, employers can obtain even more information.

According to EEOC, if an employee requests additional leave that will exceed an employer's maximum leave policy or is continuous in nature, the employer should again engage in an interactive process, including obtaining from the health care provider:

- Medical documentation specifying the amount of the additional leave needed;

- The reasons for the additional leave;
- Why the initial estimate of a return date proved inaccurate; and
- Information the employer considers relevant in determining whether the requested extension will result in an undue hardship

3. Engaging the employee in the ADA's interactive process is essential.
Communicate during FMLA leave…after FMLA leave ends…and at all times before and in between.

When considering whether to deny leave or terminate an employee after he or she has asked for the second or third extension of leave (particularly when FMLA has already expired), I advise compiling a detailed report of all communications with the employee regarding issues such as:

- The employee's ability to perform his/her job.
- Whether the employee likely will be able to return to work (and when).
- Whether the requested leave will allow the employee to return to work immediately after the leave ends or very soon thereafter.
- Whether there are other accommodations to help the employee return to work in a timely manner.
- Whether the employer has received any feedback from the employee's physician about the above issues.

The EEOC's decision to initiate litigation against an employer often hinges on whether the employer is to blame for the breakdown in the interactive process. To minimize your exposure to liability, keep communicating with your employees! The interactive process is essential.

4. Edit your "automatic termination" provisions NOW.
To the EEOC's credit, the resource confirms that a policy providing for a maximum period of leave is not per se unlawful. However, the EEOC makes clear that such a policy must include—and I agree—language informing the employee that, if he/she needs additional unpaid leave as a reasonable accommodation because of a serious health condition, the employee should request it as soon as possible so that the employer may consider whether it can grant an extension.

Employers also should edit any correspondence used during the FMLA and other leave processes to incorporate the above language. Your employment counsel should have these at the ready for you.

5. Requiring employees to return to work "without restrictions" or to be "100 percent healed" is unlawful.

All too often, I come across my clients' policies or practices that require an employee to return to work only after they are 100 percent healed or without restrictions. Here's my periodic reminder to employers: STOP! Enforcing these types of policies or requiring documentation that employees can return to work "without restrictions" takes on a tremendous amount of risk. Far too much risk, in my opinion. And as the EEOC clarifies in this resource document, this practice is unlawful. Therefore, employers must re-evaluate these practices and implement policies that provide for individualized assessments of an employee's ability to return to work with or without a reasonable accommodation under the ADA.

6. Approach the undue hardship analysis carefully.

In an earlier post, I highlighted a presentation I gave with EEOC Commissioner Chai Feldblum that analyzes the approach employers should take when determining whether a leave request poses an undue hardship. In that post (http://www.fmlainsights.com/eeoc-commissioner-gives-insight-into-handling-employee-leaves-of-absence-after-fmla-is-exhausted/), I offer a number of criteria you should consider when making this determination. I encourage you to use these in conjunction with the suggestions now offered by EEOC.

One more thing about undue hardship: As EEOC previously has acknowledged in a separate guidance (https://www.eeoc.gov/facts/performance-conduct.html), a request for indefinite leave—meaning that an employee cannot say whether or when he/she will be able to return to work at all—will always be considered an undue hardship and, as the EEOC puts it, the request "does not have to be provided as a reasonable accommodation."

Jeff Nowak (http://www.franczek.com/attorneys-42.html) *is a partner and co-chair of the labor and employment practice at law firm Franczek Radelet P.C.* (http://www.franczek.com/) *and author of the FMLA Insights blog* (http://www.fmlainsights.com/eeoc-issues-new-resource-document-addressing-leave-as-a-reasonable-accommodation-under-the-ada-whats-the-impact-on-employers/)*, where this article originally appeared.*

Related SHRM Articles:

DOL Issues New FMLA Poster, Publishes Employers' Guide (/hrdisciplines/benefits/articles/pages/new-fmla-poster.aspx), *SHRM Online* Benefits, May 2016

Inform Leave-Taking Employees About Benefits (/legalissues/federalresources/pages/inform-benefits-leave.aspx), *SHRM Online* Legal Issues, May 2016

How Do Snow Days Affect FMLA Leave? (/hrdisciplines/benefits/Articles/Pages/FMLA-snow-days.aspx), *SHRM Online* Benefits, January 2016

DOL Publishes New FMLA Forms—Good Through May 2018 (/hrdisciplines/benefits/articles/pages/fmla-forms-expire-2018.aspx), *SHRM Online* Benefits, May 2015

Don't Be Tripped Up by Light Duty Obligations under the FMLA and ADA (/hrdisciplines/benefits/articles/pages/light-duty-fmla-ada.aspx), *SHRM Online* Benefits, October 2014

Related Resources:

EEOC Weighs In on Leave as a Reasonable Accommodation (http://www.littler.com/publication-press/publication/eeoc-weighs-leave-reasonable-accommodation), Littler, May 2016

EEOC Issues New Guidance on Leave of Absence and ADA Accommodations (http://www.mcafeetaft.com/eeoc-issues-new-guidance-on-leave-of-absence-and-ada-accommodations), McAfee & Taft, May 2016

EEOC Releases New Guidance on Unpaid Leave as a Reasonable Accommodation Under the ADA (http://www.lawandtheworkplace.com/2016/05/eeoc-releases-new-guidance-on-unpaid-leave-as-a-reasonable-accommodation-under-the-ada/), Proskauer Rose, May 2016

Quick Links:

SHRM Online Benefits Topics & Strategy (/hrdisciplines/benefits/pages/default.aspx)

RELATED CONTENT

EEOC: When Is Leave a Reasonable ADA Accommodation? (/hrdisciplines/benefits/Articles/Pages/EEOC-leave-reasonable-accommodation.aspx)

Regulatory Update (/Advocacy/GovernmentAffairsNews/HRIssuesUpdatee-Newsletter/Pages/091115_3.aspx)

DOL Releases New FMLA Model Forms and Notice Poster (/hrdisciplines/benefits/Articles/Pages/FMLA-Model-Forms-Poster-2013.aspx)

'Friday-Monday Leave Act' Turns 20 (/LegalIssues/FederalResources/Pages/FMLA-intermittent-leave.aspx)

DOL Issues New Family, Medical Leave Changes (/Publications/HRNews/Pages/FamilyMedicalLeaveChanges.aspx)