

**EEOC Issues New Resource Regarding  
Leave as a Reasonable Accommodation**

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On May 9, 2016, citing a “troubling trend” gleaned from the surge in disability charges that it has received in recent years, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued [a new resource document](#) (“Resource”) to reinforce employers’ obligations potentially to provide leave as a reasonable accommodation to employees with disabilities under the Americans with Disabilities Act (“ADA”). In sum, this new publication reflects—in one document—the EEOC’s previously articulated positions regarding its view of leave as a potential accommodation under the ADA. In most instances, unpaid leave may be a reasonable accommodation that must be granted to individuals with disabilities, provided that doing so does not constitute an undue hardship for the employer.

While the Resource does not break new ground (indeed, employers that have long waited for the EEOC to provide a definitive indication of how much leave must be granted as a reasonable accommodation will be disappointed), it does underscore the EEOC’s position on one of the most prevalent and problematic reasonable accommodations issues. To that end, it is helpful to remain aware of the EEOC’s view of various aspects of the issue of leave as a reasonable accommodation.

**Granting Leave as an Accommodation**

Reiterating that reasonable accommodations under the ADA often require employers to modify the way they usually do things, the Resource provides that unpaid leave as a reasonable accommodation is consistent with the ADA’s purpose when it enables the employee to return to work following the period of leave and does not create an undue hardship for the employer. Such leave can be required following the exhaustion of Family and Medical Leave Act (“FMLA”) leave and even if the employee is otherwise ineligible for FMLA leave or leave under the employer’s own policies (e.g., the employee is relatively new and hasn’t worked a substantial number of hours). Of course, paid leave beyond that provided under the terms of an employer’s paid leave policy is not required as an accommodation.

## **Considering Leave as an Accommodation via the Interactive Process**

If an employee requests leave as an accommodation, the Resource explains that the employer should, as with other requests for accommodations, engage the employee (and his or her doctor, as appropriate) in the interactive process. During the interactive process, the employee and the employer exchange information so that the employer can make an appropriate individualized inquiry into the reasonableness of the requested accommodation based upon the specific facts and circumstances in play for the specific employee at the time. Under the ADA, the employer is entitled to explore issues including (i) the specific reason that the employee needs leave; (ii) whether the leave will be continuous or intermittent; (iii) whether another accommodation might be available other than leave that would allow the employee to work; and, if not, (iv) when the need for leave will end.

### **Problematic Policies**

The Resource highlights the following two employer policies that—if mishandled—the EEOC indicated will violate the ADA: (i) maximum leave policies and (ii) 100% healed policies.

#### *Maximum Leave Policies (aka “No Fault” Leave Policies)*

Although employers are allowed to have leave policies that establish the maximum amount of leave that an employer will permit, they may have to grant leave beyond this amount as an accommodation for an employee with a disability, provided that doing so does not create an undue hardship. For example, an employer may have to grant more leave than that offered under the FMLA or allow an employee to exceed the number of absences normally permitted in a defined period of time under the employer’s policy.

With this in mind, the Resource cautions employers about the use of “form letters” to communicate with employees about leave. Such letters should not simply set forth the maximum leave policy. Instead, it should contain language indicating that, if an employee requires additional unpaid leave as a reasonable accommodation for a disability, the employee must notify the employer as soon as possible. Similarly, employers should be sure that, if multiple parties play a role in the leave administration process (e.g., human resources and benefits personnel or a third-party service), the leave administration process is appropriately coordinated so that the right to a reasonable accommodation is clearly communicated to the employee.

#### *100% Healed Policies*

The Resource makes it clear that an employer will also violate the ADA if it has a policy requiring an employee with a disability to have no medical restrictions—i.e., to be “100%” healed or recovered—even if the employee can nevertheless perform his or her job with or without reasonable accommodation, unless the employer can show that providing the necessary accommodation would cause an undue hardship. Similarly, an employer will violate the ADA if it refuses to allow employees to return to work under the theory that their medical restrictions pose a safety risk, unless the employer can prove that allowing them to return poses a “direct threat” (i.e., a significant risk of substantial

harm to self or to others that cannot be sufficiently mitigated with a reasonable accommodation).

## **Undue Hardship**

When determining whether providing leave would result in an undue hardship for an employer, the employer may consider the following:

- the amount and/or length of the leave,
- the frequency of the leave,
- whether there is any flexibility with respect to the days on which leave is taken,
- whether the need for intermittent leave on specific days is predictable or unpredictable,
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner, and
- the impact on the employer's operations and its ability to serve customers or clients appropriately and in a timely manner (which can take into account the size of the employer).

### *Indefinite Leave*

The Resource provides that "indefinite leave"—defined as leave where the employee cannot say whether he or she will be able to return to work at all—constitutes an undue hardship and, therefore, does not have to be provided as a reasonable accommodation under the ADA. The EEOC stresses, however, that requests for leave that provide approximate dates or ranges of dates for a return to work are not requests for indefinite leave. Additionally, the Resource indicates that modifying an initial return-to-work date does not automatically constitute a request for indefinite leave. This does not foreclose the possibility that, in a specific situation, such request might pose an undue hardship, but it is not automatic.

## **Equal Access to Leave Under an Employer's Leave Policy**

Separate and apart from its discussion of leave as a potential reasonable accommodation, the Resource also reconfirms that an employer cannot discriminate in its application of other leave policies on the basis of an employee's disability. Employees with disabilities must be provided with access to leave on the same basis as all other similarly situated employees.

For example, if an employer's sick leave policy ordinarily does not require medical documentation, the employer cannot require such documentation from an employee who reveals that he or she requires sick leave for treatment of a mental disability. Employers remain free to have policies that require all employees to provide a doctor's note or other documentation to substantiate the need for leave.

## What Employers Should Do Now

While the EEOC's Resource may not break new ground, it is a useful tool for employers that are struggling with the issue of leave as a reasonable accommodation, providing helpful guidance. To that end, employers should do the following:

- Remain aware that, in many instances, you may have to grant some period of unpaid leave, above and beyond that offered under the FMLA or your own leave policies, as a reasonable accommodation under the ADA. However, in doing so, keep in mind that:
  - particularly when it comes to issues involving leave as an accommodation, courts often adopt more employer-friendly positions than the EEOC does (e.g., how much unpaid leave must be granted or when a request for leave should be considered "indefinite"), and
  - some local and/or state laws may impose greater obligations on employers (e.g., in New York City, even requests for indefinite leave must be granted unless the employer can establish that doing so would constitute an undue hardship).
- Review existing leave and return-to-work policies, and remove any absolute language that precludes the possibility of leave as a reasonable accommodation or an employee being able to return to work with an accommodation at less than full health.
- Coordinate internal processes for managing employee leave to ensure that an appropriate process that conveys a unified, permissible message is in place.
- Consider consulting with counsel when assessing an employee's request for leave as an accommodation.

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