

EEOC Issues New Publication on Leave as Accommodation Under ADA

May 16, 2016

On May 9, 2016 the Equal Employment Opportunity Commission (EEOC) issued a new resource document regarding employer-provided leaves of absence as an accommodation under the Americans with Disabilities Act (ADA). The new publication “creates no new agency policy”, but reiterates, with examples, the EEOC’s longstanding position that leaves of absence, including intermittent days, must be granted as an accommodation unless doing so constitutes an undue hardship.

The EEOC has provided a list of factors to be considered in determining whether leave would cause an undue hardship; employers should consider: (a) the amount of leave required; (b) the frequency of leave; (c) whether there is flexibility regarding the days on which leave is taken; (d) whether the leave will be intermittent and unpredictable; (e) the impact of the leave on coworkers and on whether the specific job duties can be performed timely and appropriately during the leave; and (f) the impact on the employer’s operations and its ability to serve customers/clients appropriately and timely (considering the size of the employer).

According to the EEOC, an employer may be required to grant leave and excuse absences even if the employer does not provide leave to anyone else or the employee is not eligible for or has exhausted leave under existing policies. Therefore, while an employer can have policies that set a maximum amount of time off, exceptions to those policies must be made and leave must be extended for employees with disabilities unless doing so would cause an undue hardship. It is the EEOC’s position that intermittent leave, such as absences exceeding an attendance policy, will not automatically create an undue hardship. However, the EEOC does agree that indefinite leave – “meaning that an employer cannot say whether or when she will be able to return to work at all” – will constitute an undue hardship.

In addition to restating its long-standing position regarding leaves of absence generally, and providing specific factors which should be considered in evaluating whether there is undue hardship, the EEOC has identified certain practices which it will find to violate the ADA. For example:

- Employers cannot ask for documentation to support the need for leave if documentation is not requested from all employees taking sick leave or other comparable leaves of absence.
- An employee who is granted leave as a reasonable accommodation must be returned to his/her original position upon conclusion of the leave, even if the employee is not entitled to such job protection under the Family and Medical Leave Act.
- A blanket policy requiring an employee to be “100% healed” with no restrictions before returning to work will violate the ADA. Each situation must be assessed individually.
- Failure to consider reassignment if an employee cannot return to the original position may violate the ADA.

The EEOC also provided additional guidance regarding the interactive process, stating that the process is not required where leave can be granted under another policy or program (e.g., workers’ compensation program or FMLA), but is otherwise required. The interactive process should focus on the reason(s) for the leave, whether it will be in one block of

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time or intermittent, and when it will end. The employer may contact the employee's health care provider (with the employee's permission) to get more information or to confirm what the employee has provided. The employee must ensure the requested information is provided "as quickly as possible." The employer can ask for more information if the employee requests an extension or needs an accommodation in order to return to work due to medical restrictions.

WHAT THIS MEANS FOR EMPLOYERS

The EEOC's publication of this resource document shows that the agency sees leave under the ADA as an issue of importance and one in which employers have previously claimed ignorance or confusion. The EEOC will now expect employers to be familiar with their obligations and will not accept lack of knowledge as an excuse for violations. Perhaps most helpful is the EEOC's articulation of factors to be considered when evaluating undue hardship in the leave context. However, some of the EEOC's views – including the general premise that these cases are always evaluated in the context of undue hardship, rather than whether an employee can perform the essential functions of the job or whether leave is a reasonable accommodation in a specific circumstance – have not been followed by courts addressing the issue of leave, and an employer's obligations under the ADA depend largely on the particular facts and circumstances at issue. Therefore, employers should consult with their counsel or any Miller Canfield employment and labor attorney whenever an employee requests time off that could be covered by the ADA.

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