

Unpaid Leave and Compliance With the ADA

By Lisa Lamm Bachman

As disability discrimination charges continue to be filed with the Equal Employment Opportunity Commission (EEOC), it is apparent that some employers may be unaware of the EEOC's position relative to unpaid leave and Title I of the Americans with Disabilities Act (ADA). In an effort to promote voluntary compliance with the ADA, the EEOC recently issued a new resource document highlighting an employer's obligation to consider providing unpaid leave as a reasonable accommodation.

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Consequently, some employers may need to revise leave policies requiring employees on extended leave to be 100 percent healed or able to return to work without restrictions. Likewise, employers may also need to modify policies that limit the amount of time that an employee can take when an employee needs additional unpaid leave as a reasonable accommodation.

While an employer may deny unpaid leave as a reasonable accommodation upon a showing of an undue hardship, an employer may avoid liability for an ADA violation by revising problematic leave policies and considering the possibility of providing unpaid leave as a reasonable accommodation.

What should the employer do when the employee requests leave as an accommodation? The employer should determine whether leave is available through the employer's leave program, Family and Medical Leave Act (FMLA) or a similar state or local law, or the workers' compensation program. If leave is unavailable under such programs, then the employer should engage in the interactive process with the employee to obtain information about providing un-

paid leave as a reasonable accommodation. Such information includes, the reason the employee needs to take leave, the duration of the leave (i.e., a block of time or intermittent leave) and the anticipated end date for such leave.

What can an employer consider before granting an employee's request for unpaid leave? When considering any employee request for unpaid leave as a reasonable accommodation, employers may consider whether such leave will result in undue hardship to the company. Such factors include the amount of leave required, the frequency of the leave, whether there is any flexibility in terms of which days can be taken as leave, the impact of the employee's absence on coworkers and whether certain duties are being performed under a contract with a specific completion date and the impact on the company's ability to serve its customers or clients and overall operations.

Why provide unpaid leave as a reasonable accommodation if the employee has already taken leave pursuant to the FMLA? The ADA requires an employer to consider providing unpaid leave in addition to FMLA leave

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because a disabled person may need extra leave and the EEOC does not excuse an employer's compliance with the ADA just because it provided the maximum FMLA leave. In cases where additional un-

paid leave is requested, the employer may consider whether other reasonable accommodations may allow the employee to return to work sooner than the employee anticipated, so long as the alternative accommodations are consistent with the employee's medical needs.

Does the ADA require granting unpaid leave to a new hire or an employee who hasn't worked long enough to be eligible for leave under the employer's leave policy? If an undue hardship is absent, the ADA requires an employer to consider providing unpaid leave as a reasonable accommodation even in cases where an employee recently commenced employment and/or is otherwise ineligible for leave under the employer's leave policy.

If the employer's business depends on regular employee attendance, is there a risk of violating the ADA with a policy that limits the amount of unplanned absences? Generally, an employee with a disability

would not be considered exempt from this type of leave policy. However, an employer may need to consider modifying the leave policy as a reasonable accommodation if the unplanned absences resulted from the employee's disability.

What steps should an employer take to ensure compliance with the ADA? Conduct a review of current company policies applicable to leave requests and revise to allow for unpaid leave for disabled employees. Update internal procedures so that managers and supervisors respond appropriately to a request for unpaid leave resulting from an employee's disability. Since each case is unique, consider consulting with outside counsel when determining whether unpaid leave is appropriate and feasible under the circumstances.

To view the EEOC's resource document issued May 9, 2016 in its entirety, please visit: <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>

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