

ew EEOC Resource Document Aids Employers in Complying with the ADA When Leave is Requested

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The U.S. Equal Employment Opportunity Commission (EEOC), which enforces Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, as amended, recently released an EEOC resource document titled, *Employer-Provided Leave and the Americans with Disabilities Act*.¹ This resource document does not change any of the rights or obligations under the ADA, but instead addresses common issues surrounding leave as an accommodation under the ADA. In a recent press release, the EEOC indicated that the 2015 fiscal year had the highest number of disability charges, up six percent from the year prior.² The EEOC released this resource document to address the prevalence of employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation and educate employers on the appropriate use of leave as an accommodation.

One specific area of requested leave that leads to the increased number of charges filed is leave that is requested by an employee with a disability under the ADA where the requested leave falls within the employer's leave policies. Under these circumstances, the employer must treat the employee's request the same as it would treat a request for leave unrelated to a disability. For example, if an employer has a policy that provides for five days of paid leave per year and the employee requests one day of leave during that year to accommodate treatment of his disability, the employer must treat this request as one made unrelated to a disability and grant the requested leave. Further, the employee should be paid for the day of leave, as all other employees without a disability would be paid. The employer in this situation is not entitled to ask the employee for a doctor's note or any sort of explanation, if its leave policy does not require such a note.

The EEOC resource document encourages open communication between the employer and the employee who is requesting leave. Once leave is requested as an accommodation, the employer should engage in an "interactive process" to determine whether leave can be granted as a reasonable accommodation without causing undue hardship to the employer. Relevant questions the employer might ask are related to: specific reasons the employee needs leave, whether leave will be intermittent days or a block of time, and when the need for leave will conclude. With this type of interaction, the employer can hope to avoid denying leave in a manner that might discriminate against employees with disabilities.

So what are some other areas employers might find troublesome when considering leave and the ADA? Employers with maximum leave policies must keep in mind that an employee with a disability is entitled to the maximum amount of leave in the same way an employee without a disability is entitled to leave. However, an employer with a maximum leave policy may have to grant leave beyond the maximum amount allowed to provide a reasonable accommodation to the employee with a disability. If the employer fails to provide additional leave time, without showing it will cause undue hardship, the employer is technically discriminating against the employee with a disability for failing to provide a reasonable accommodation.

Similarly, employers with "100% healed" policies will violate the ADA if they require that an employee with a disability be 100 percent healed or recovered (no medical restrictions) before the employee can return to work – if the employee is capable of performing his or her job with or without reasonable accommodations. Employers might intend this policy to be for the safety of their employees, but this policy will violate the ADA unless the employer shows the individual is a "direct threat" to safety as defined in the ADA.

Of course, an employer is not required to provide leave as an accommodation if the employer can show that the leave will cause an undue hardship. Several factors are considered in determining whether leave will impose an undue hardship such as length of leave, frequency of the requested leave, whether there is flexibility with the days which leave is taken, whether the need for leave is unpredictable, impact of the leave on coworkers, and the impact of the leave on the employer's operations and ability to serve customers.

Should you or your organization have any questions about leave issues or interpretation of the ADA, please contact the attorneys in the Heyl Royster Labor and Employment Practice Group.

¹EEOC Resource Document, *Employer-Provided Leave and the Americans with Disabilities Act*, May 9, 2016, <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>

²Press Release, May 9, 2016, EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability, <https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm>