

## FOCUS ON EEOC

### EEOC Issues Guidance on the Use of Leave as a Reasonable Accommodation Under the ADA

The Americans with Disabilities Act (ADA) has required employers to provide reasonable accommodations to disabled employees since its passage in 1990. Although the ADA is now more than 25 years old, many employers still struggle with the question: When is an extended leave of absence considered a reasonable accommodation? The answer seems simple – an extended leave of absence is a reasonable accommodation that must be offered to a disabled employee unless the leave would impose an undue hardship on an employer’s operations or finances. On May 9, 2016, however, the EEOC issued a Resource Document addressing employer-provided leave, noting that it “continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA.”<sup>1</sup>

Employer confusion may arise from the interplay of the ADA with other regulations affecting employee leave, including the Family and Medical Leave Act (FMLA) and state workers’ compensation laws. The FMLA guarantees sick or injured employees 12 weeks of unpaid medical leave, but “[e]mployees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated ‘12 month period’ no longer have FMLA protections of leave or job restoration.”<sup>2</sup> In other cases, a disabled employee may not be eligible for FMLA leave and an employer may not offer leave as an employee benefit. The EEOC’s Resource Document clarifies that even in situations where a disabled employee is not eligible for medical leave under an existing law or policy, an employer must still engage in the “interactive process” to determine whether it can provide leave as a reasonable accommodation without causing an undue hardship.

Much of the EEOC’s Resource Document focuses on the interactive process that an employer must initiate under the ADA as soon as a disabled employee requests a reasonable accommodation. The new Resource Document sets forth the following guidance:

- 1 Equal Employment Opportunity Commission: Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016), <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.
- 2 Department of Labor, Wage and Hour Division (WHD): The Family and Medical Leave Act, <https://www.dol.gov/whd/regs/compliance/1421.htm>.

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# NATIONAL EMPLOYMENT PERSPECTIVE

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- The interactive process requires a case-by-case analysis of the employer and employee's needs. Therefore, employers should reconsider any "maximum leave" policies, which automatically discipline employees after a set amount of leave has been taken. Employers with maximum leave policies must consider granting exceptions to such policies as a reasonable accommodation.
- An employer may continue the interactive process while an employee is taking leave, particularly when the employee has not specified a return date. However, when an employer grants leave with a specific return date, the employer cannot ask the employee to provide "periodic updates" – though it can contact the employee before the leave ends to ask whether the employee will be able to return to work at the end of the leave and if any additional accommodations are required.
- An employer cannot require an employee to be "100% healed or recovered" before returning from medical leave. An employee is entitled to request reasonable accommodations to return to work, even after taking leave.
- An employer may request permission to seek information from an employee's health care provider to confirm the employee's request for leave or other accommodations, including accommodations needed to return to work after leave.

Employers should keep in mind that Resource Documents are developed by EEOC staff members and approved by the EEOC's Chair; they are not official EEOC guidance. Regardless, the EEOC's recent Resource Document emphasizes the EEOC's current interpretation of the ADA and leave as a reasonable accommodation. Ultimately, the Resource Document clarifies that employers are entitled to validate an employee's request for leave by obtaining medical documentation. But it also reminds employers that requests for leave should always be discussed through an interactive process and that employers should avoid any one-size-fits-all policies related to leave and accommodation.