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Employment Law

EEOC Guidance on Leave as an Accommodation Answers ADA Questions

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For those familiar with this column, it comes as no surprise that the most predominant topic over the years has been the Americans With Disabilities Act (ADA). It really has become our favorite topic to write about. In fact, our very first article in The Legal in 2009 was titled "Ushering in a New Era under the ADA Amendments Act."

Since the ADA was enacted in 1990, there have been a number of decisions that have shaped the legal landscape. Some good and some not so good. In the last month, however, the U.S. Equal Employment Opportunity Commission has provided some much needed guidance that addresses the rights of employees with disabilities who seek leave as a reasonable accommodation under the ADA. The document is titled "Employer-Provided Leave and the Americans with Disabilities Act." This may just be the long-awaited guidance that employers have been clamoring for.

When Congress initially passed the ADA, it did so "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Since its passage in 1990, however, lack of clarity has been one of the biggest impediments to its consistent enforcement. Prior to the ADA Amendments Act in 2008 (ADAAA), there were a number of Supreme Court opinions that narrowly construed the definition of "disability" under the act. As a result, employers in large numbers chose litigation over voluntary compliance, and with the help of the federal courts, successfully precluded scores of people with chronic conditions such as cancer, diabetes and epilepsy from claiming any protection from the ADA. People with chronic conditions fared badly under the old ADA particularly where medical leave was sought as a reasonable accommodation. This was even the case when their employers admittedly discriminated against them on the basis of their conditions, because their disabilities did not qualify them for statutory coverage.

In 2008, Congress, by way of the ADAAA, overturned a number of Supreme Court precedents that it believed had inappropriately constricted the act's coverage and "reinstated the ADA's broad scope of protection." Congress refocused the inquiry away from who was covered "to whether entities covered by the ADA have complied with their obligations."

Although courts are in general agreement that the term "accommodation" includes medical leave, people seeking time off to receive treatment for their conditions or to recover from serious injuries have encountered numerous barriers to accessing such leave. For many of these individuals, access to medical leave is essential to their ability to maintain their employment. Courts grappling with when leave is reasonable and if so, how much, have littered the landscape with widely divergent decisions that create uncertainty as to an employer's obligations and have spawned litigation as to whether an employer must provide the leave even when to do so would not create a hardship at all.

The EEOC's new resource document finally provides employers with helpful guidance in this area. The last time the EEOC issued an enforcement guidance addressing leave as a reasonable accommodation was in October 2002. The new policy takes a page from Congress' playbook from the ADAAA amendment process. Although it breaks no new legal ground, it simplifies the inquiry and refocuses attention on the overall mission of voluntary compliance. The basic premise of the guidance is that employers must provide unpaid leave unless they can show that doing so would create an undue hardship. The guidance goes on to address many of the issues that have prevented employees from securing medical leave both in the workplace and in the courts. Likewise, it identifies common employer mistakes and pitfalls that frequently lead to litigation. The guidance, like the ADA itself, focuses directly on the interactive process and the concept of individualized inquiry on which it is based. This process involves an interactive dialogue and good-faith communication between the parties that are designed to identify what is reasonable in any given case.

The following are some basic principles the guidance provides to employers faced with requests for medical leave. First, look to the employer's general leave policies. If the employee's request falls within the scope of those policies and the employee is eligible for such leave, leave should be granted on that basis just as it would be if the person did not need leave for a disability-related reason. The employee with a disability may not be provided less leave than the policy provides and they cannot be required to do anything to qualify for the leave that other people would not be required to do. Second, if the employee has requested leave that would not be allowed under the employer's regular leave policy because, for instance: (1) employer does not offer leave as a benefit at all; (2) the employee is not eligible for leave under employer's general leave policy; or (3) employee has exhausted leave under regular policy, the employer must provide the leave unless to do so would create an undue burden. In these cases, the employer's own policies provide the starting point, not the culmination, of the process. In other words, the EEOC clarifies that "your request for leave does not fall within our policy" will generally not be a good defense. The term "accommodation" means doing things differently than the way things are customarily done and "just saying no" does not constitute an interactive process. Undue hardship is not something that can be defined by policy, but is a case-by-case determination based on the facts and circumstances of the particular case.

Third, employers should review their policies and ensure that they are consistent with the ADA's reasonable accommodation requirements. Requiring an employee to demonstrate that they can return to work only with a medical certification that they can do so "full duty" and with "no restrictions" will run afoul of the law if the individual can perform their own job or another open position either with or without accommodation. Once the medical leave is over, the individual may qualify for another type of accommodation, such as reassignment to a vacant position. The EEOC

adopts the reasoning of a number of federal courts that have stated that reassignment in the accommodation process cannot be denied by way of requiring the employee to compete for the position.

Finally, the EEOC weighs in in an employee-friendly way in the most hotly contested issue involving medical leave, whether a request for leave is definite, and therefore reasonable under the ADA, or "indefinite" and therefore, by definition, unreasonable and not cognizable under the ADA at all. The courts have created a great deal of confusion in this area by confusing the accommodation issue with the qualification analysis, which ordinarily assumes that attendance is an essential function of the job. Some courts have allowed employers to define leave requests as indefinite by way of their own policies or have sua sponte construed the request as indefinite on its face without requiring any showing whatsoever of undue hardship.

By placing this topic under the heading "Undue Hardship," the EEOC reinforces its overall central point, that "an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances." By implication, at least, where there is no undue hardship, leave must be granted. Labeling a leave request as "indefinite" does not provide a free pass around the interactive process. This does not mean that employers must keep an employee on a leave of absence in perpetuity when she or he "cannot say whether or when she [or he] will be able to return to work at all" but the analysis of hardship in any given case will depend on the circumstances.

The EEOC recognizes that there is a significant legal difference between a request for leave of approximate duration and one for indefinite leave, and acknowledges the reality facing many people with disabilities who need medical leave, "that in some instances, only an approximate date or a range of dates can be provided." Likewise, "projected return-to-work dates may need to be modified in light of changed circumstances, such as where an employee's recovery from surgery takes longer than expected." The employer and employee should continue to communicate in these cases about whether the employee is ready to return to work or whether additional leave is necessary.

Again, the new EEOC guidance does not break new ground and mostly resembles the current legal landscape. Employers would be well served to pay close attention to the mandates and useful examples contained therein. After all, the EEOC could not have made it much simpler to follow the rules. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries. Lorrie McKinley is a partner in the law firm of McKinley & Ryan in West Chester. She litigates and lectures frequently on topics involving civil rights litigation and employment, disability, and special education law.

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