When Must Employers Provide Leave Under the ADA?

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Many employees are entitled to take time off under federal and state family and medical leave laws. Employers should remember, though, that workers who run out of leave—or who aren't covered by such laws—may be eligible for leave as a reasonable accommodation under the Americans with Disabilities Act (ADA).

Whenever an employee requests leave, the employer needs to consider eligibility under the Family and Medical Leave Act (FMLA), the ADA and state laws. "Sometimes these laws intersect, and sometimes they are very separate," noted Stephanie Rawitt, an attorney with Clark Hill in Philadelphia.

Case law and Equal Employment Opportunity Commission (EEOC) guidance make clear that employers must provide leave if it is an appropriate accommodation under the ADA. The ADA "requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation ... unless the employer can show that doing so will cause an undue hardship," according to the EEOC.

In what circumstances might additional leave be granted? And how much leave is "reasonable" under the ADA? Here's what employment law attorneys had to say.

What Is 'Reasonable'?

There are a number of reasons that an employee may need to take leave as an ADA accommodation, Rawitt said. Perhaps the employer isn't covered by the FMLA or the employee doesn't yet qualify for—or has exhausted—FMLA leave.

The ADA doesn't define the term "reasonable accommodation." "Rather, the determination of how much leave should be granted as a reasonable accommodation must occur on a case-by-case basis through an interactive dialogue with the employee, which is known as the interactive process," explained Susan Hiser, an attorney with Fisher Phillips in Detroit.

The amount of leave provided must give employees an opportunity to heal to the point where they can perform comparably to a similarly situated employee without a disability, she said.

A reasonable accommodation under the ADA is meant to enable the worker to perform the essential functions of the job, and current case law doesn't support indefinite leave. "If employees don't know when they are coming back, that's not necessarily reasonable," Rawitt said.

However, extended leaves could be considered reasonable if they don't pose an undue hardship for the employer. In assessing whether to grant an employee multiple leave extensions, Hiser suggested that employers consider the following questions:

- How much time off has the employee already taken?
- How many extensions has the employee already received?
- Is the employee's condition improving?
- Has a doctor provided an estimated recovery time?
- Has the employee explained the reason for any changes in the estimated recovery time?

Casey Kurtz, an attorney with Littler in Pittsburgh, said the analysis should include a review of the relevant medical facts, the availability of accommodations other than leave, and the impact or potential hardship the employee's absence will have on the employer's operations.

Check State Laws

Employers should also be aware of state and local laws that might come into play. Rawitt noted that employers in Philadelphia must check for compliance with the Pennsylvania Human Relations Act and the Philadelphia Fair Practices Ordinance.

State and local laws may mirror federal law in some ways but also may provide additional employee protections or cover smaller businesses. For example, although the ADA covers employers with at least 15 employees, the California Fair Employment and Housing Act covers businesses with five or more employees.

"Federal law sets the floor, and a state or locality can always require more of employers," Rawitt said.

Common Mistakes to Avoid

Employers should recognize that additional leave may be available under the ADA, even when FMLA leave is exhausted. Rawitt said it's generally a good practice to check in with workers before their anticipated returning-to-work date, as they may need additional accommodations to perform the essential functions of the job.

"Employers don't always engage in the interactive process appropriately," she noted.

Kurtz explained that a key initial step for employers is to make sure they obtain the medical information needed to make an informed decision about the employee's need for an accommodation. Common mistakes he sees employers make include:

- Denying leave while failing to explore alternative accommodations in the interactive process.
- Failing to comply with the law in the applicable jurisdiction and setting a specific time beyond which an employee's medical need to be absent will not be accommodated.
- Concluding prematurely—and without sufficient medical evidence—that an employee's need for leave has become indefinite (such as in situations where an employee's doctor predicts a return-to-work date but later extends the leave without explaining the reason for the extension).

"Don't assume that there is a one-size-fits-all answer," Hiser said. Many questions must be addressed through the interactive process, and the answers will likely be different for each employee.

Another common mistake is thinking that the employee's requested accommodation is the only accommodation that needs to be considered, she noted. An employer is required to make reasonable accommodations that will enable the employee to perform the job, not to make the employee's desired accommodation or even to make the best accommodation available.

"So, other options should also be considered," Hiser said. For instance, if an employee requests leave as an accommodation because he or she cannot sit or stand long enough to do his or her job, providing the employee with a sit-stand workstation could be deemed reasonable and may eliminate the need for a leave of absence altogether.

Employers should develop and follow consistent policies and maintain accurate and thorough records when addressing accommodation requests, Rawitt said. Although requests need to be evaluated on a case-by-case basis, consistent practices will help employers avoid "failure to accommodate" and discrimination claims.