LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN SPRING "BREAK" 2017

LEAVE OF ABSENCE: A "BREAK" FROM WORK AS A REASONABLE ACCOMMODATION

With our **workforce living and working longer** - by choice or need - employers and employees face increased health care needs and costs, workers' compensation, disabilities, discrimination, and reasonable accommodations. These can include modifications to the worksite, flexible work arrangements, or a break from work through a **leave of absence**. It is crucial to understand employers' obligations and employees' rights under disability laws and to properly train managers.

Leave of absence is a major area of confusion for workers and employers. The Equal Employment Opportunity Commission (EEOC), which enforces the federal **Americans with Disabilities Act (ADA)**, receives many complaints on this issue alone. Leave as a reasonable accommodation is consistent with the ADA's purpose when it **enables an employee to return to their position following the leave.** Because many employers are not aware of their specific obligations, the **EEOC issued detailed guidance** and examples. This bulletin summarizes for employees and employers the guidance's **key rules and best practices for when and how leave must be granted**.

ADA and REASONABLE ACCOMMODATIONS

The ADA **prohibits discrimination, harassment and retaliation** on the basis of disability in employment and requires that **covered employers (**those with **15 or more employees) provide reasonable accommodations** to applicants and employees with disabilities, unless it would cause the employer undue hardship. A reasonable accommodation is any change in the work environment or in the way things are customarily done to allow an individual with a disability to enjoy equal employment opportunities. Employers are required to engage in an **interactive process** with employees to try to find a mutually agreed accommodation.

Many states and municipalities have similar laws that govern even small companies and to which the guidance could generally apply. Employment disability protections under the **Illinois Human Rights Act** and the **Cook County** and **Chicago Human Rights Ordinances cover employers with 1 or more employee.** The federal Family and Medical Leave Act (FMLA) can also come into play when an employee is disabled. It requires employers with at least 50 employees to provide unpaid leave for serious health conditions. But discussion of FMLA and its interplay with ADA warrants a separate client bulletin in the future. Also, be on the lookout for bulletins on the EEOC's recent guidance memos on mental health conditions and pregnancy accommodations.

EEOC GUIDANCE: KEY RULES AND BEST PRACTICES

MODIFY LEAVE POLICIES. Some employers may not be aware that reasonable accommodations can include modifying existing leave policies and **providing leave for a**

disability, even where an employer does not offer leave to other employees or an employee doesn't qualify for leave. Similarly, an employer may have to **modify policies that otherwise limit the amount of leave** employees can take. For example, maximum leave policies (or **"no fault" leave policies**) limit unplanned absences and subject employees to discipline or termination for exceeding the limit (e.g. 5 unplanned absences during a 12-month period.) While employees with disabilities are not exempt from these policies, the policies may have to be modified as a reasonable accommodation.

NO UNCONDITIONAL DOCTOR'S RELEASE. Policies requiring employees to be completely recovered and **able to work without any restrictions** could be illegal if **restrictions are reasonable accommodations** enabling return to work. Employers also must consider **reassignment** as an option for employees who cannot return to their jobs following leave.

EQUAL ACCESS TO LEAVE. Employees with a disability are entitled to use **leave on the same basis and terms as other individuals** who do not have a disability. Employers should treat a PTO, vacation or sick leave request from an employee for disability-related leave the same as any other leave request unrelated to a disability. If an employer generally grants PTO, vacation or sick leave **without any conditions**, the employer cannot reject an employee's request to use that leave for a reason relating to a disability. By the same token, employers certainly can have policies that require **all** employees to provide a doctor's note or other documentation to substantiate the need for leave.

Example: employee requests vacation leave to have his wheelchair repaired. Employer refuses, and requires the employee to use sick leave. Unless employer requires other non-disabled employees to justify uses for their vacation leave, then the employer **cannot place limits on the uses of vacation leave** for a disabled employee.

An **important rule to remember: <u>the employer's provision of leave under its regular policy does not end an employer's ADA obligation</u>.** An employer must **consider granting additional (unpaid) leave** to a disabled employee unless granting that leave creates an undue hardship for the employer. This can apply to employees who have not accrued or who have used up accrued leave, including extending leave by allowing unpaid leave after paid leave expires.

PROVIDE AN INTERACTIVE PROCESS. In determining **whether an accommodation can be reasonably granted** by an employer, and **which accommodations may be appropriate** the employer and employee must engage in an "interactive process" and discuss potential accommodations. Even the **failure to engage** in this process can be a **violation**.

Usually the individual with a disability - who has the most knowledge about the need for reasonable accommodation - informs the employer that an accommodation is needed. When an employee requests leave (or additional leave) for a medical condition, the employer **first looks to its own leave policies, if any, or legally-mandated leave** such as FMLA or similar state or local leave. *

* Chicago and Cook County employers must begin providing **paid sick leave**, even to part-time and short-term employees, when the **Chicago and Cook County Paid Sick Leave Ordinances** become effective on **July 1, 2017**. Employees will earn 1 hour for every 40 hours worked, with a cap of 40 hours (5 days) a year. Leave can be taken for one's own or a family member's illness, injury, or medical care, and other listed reasons. Meanwhile, the 2017 **Illinois Employee Sick Leave Act** requires employers to allow employees with personal sick leave benefits for their own illness, injury or medical appointment (paid or unpaid), to use accrued benefits to care for their children and other family members.

If leave cannot be granted under any other program, then an employer should promptly engage in an **"interactive process"** and treat the request as one for a reasonable accommodation under applicable law.

OBTAIN MEDICAL INFORMATION. The information required by the employer (usually from the doctor) will focus on these issues:

- the specific **reason(s) the employee needs leave** (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy)
- whether the leave will be a **block of time** (for example, three weeks or four months), or **intermittent** (for example, one day per week, six days per month, occasional days throughout the year), and
- when the need for leave will **end**.

CONTINUE COMMUNICATIONS. The interactive process **may continue even after an initial request** for leave has been granted, particularly if the employee's request did not specify a specific return date, or when the employee requires extension of the leave. However, an employer that has granted leave with a **fixed return date may not ask the employee to provide periodic updates**.

An employer and employee should continue to communicate about whether the employee is ready to return to work or whether additional leave is necessary. The employee may contact a supervisor or HR to provide updates about the employee's ability to return to work (with or without reasonable accommodation) or about any need for additional leave.

If an employee requests additional leave - a block of time or intermittent - beyond a maximum leave policy, the **interactive process is appropriate again.** An employer may also request relevant information to assist in determining whether the requested extension will result in an **undue hardship**. If an employer claims an employee with medical restrictions poses a safety risk, it must also show a "**direct threat**" (i.e. "significant risk of substantial harm" to self or to others.) If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

DISCUSS RETURN TO WORK. If an employee returns from a leave of absence with doctor's restrictions, the employer **may ask why the restrictions are required and how long they may be needed**, and it may explore with the employee and his doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor's recommended limitations. Sometimes there may be more than one way to meet a medical restriction.

CONSIDER REASSIGNMENT. Where the requested reasonable accommodation is reassignment to a new job - because the disability **prevents the employee from performing the job's essential functions** even with a reasonable accommodation or because any accommodation would result in **undue hardship – reassignment must be considered**.

The EEOC mandates that if reassignment is required, an employer **must place the employee in a vacant position for which he is qualified, without requiring the employee to compete** with

other applicants for open positions. But reassignment does not include promotion nor apply when another employee is entitled to the position under a uniformly-applied seniority system.

ASSESS UNDUE HARDSHIP. In some situations, based on the medical information and accommodation details, an employer may consider whether leave would cause an undue hardship and if so, deny it. It is often **difficult to prove**, must be evaluated on a **case-by-case** basis, and depends on factors including:

- the **amount and type** of leave or additional leave required (e.g. "indefinite leave" is an undue hardship.)
- the **frequency** of intermittent leave
- whether there is **flexibility** regarding which days leave is taken (for example, could treatment normally provided on a Monday occur on a different day of the week)
- whether the need for intermittent leave is **predictable or unpredictable**
- **impact of the absence on coworkers** and whether specific **job duties are being performed** in an appropriate and timely manner, and
- **impact on employer's operations** and ability to serve clients (considering, for example, the size of the employer)

While a reasonable accommodation of leave generally includes the right to return to the employee's original position, an employer may show that **holding open the job will cause an undue hardship**. In that case, it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

CONCLUSION

Employers should carefully review and update their reasonable accommodations and leave policies. Managers and human resources staff should be trained on the employer's obligations, including communicating with employees and doctors, confidentiality, engaging in the interactive process, and providing reasonable accommodations that don't cause the employer undue hardship.

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