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Are There Limits to Unpaid Leave as a Reasonable Accommodation?

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September, 2014

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The concept of employers providing reasonable accommodations to disabled employees is a key part of the Americans with Disabilities Act (ADA) and is generally understood by employers. What many employers do not fully appreciate is that unpaid leave is considered a reasonable accommodation. Courts have explained that leave is considered a reasonable accommodation when the leave will enable an employee to perform the essential job functions in the near future.

Employers must remember that decisions regarding any reasonable accommodation, including leave, must be made after engaging in a dialogue with the employee and taking into consideration an employee's individual needs. Thus, while requests for indefinite leave have routinely been considered unreasonable, leave requests that give an approximate date of return have routinely been found to be reasonable unless the employer can demonstrate undue hardship. If the requested period of leave turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request is essentially for leave of indefinite duration.

Additionally, the ADA requires that requests for additional periods of leave, beyond what is required by the Family and Medical Leave Act (FMLA), be evaluated on an individual basis. This means that while an employee may have no right to continued employment under the FMLA for failing to return to work after the end of an FMLA leave, the employee's rights under the ADA may still require the employer to provide an additional period of leave.

Finally, the EEOC vigilantly pursues employers that set maximum leave policies, no matter how reasonable the maximum period may be. Recently, a federal judge refused to dismiss a case brought by the EEOC against UPS. EEOC v. UPS, Inc., 2014 U.S. Dist. LEXIS 17187 (N.D.Ill. Feb. 11, 2014). In that case, the EEOC challenged UPS' policy of terminating employees who could not return to work after 12 months of leave as discriminatory. UPS defended the policy as an "attendance policy" that is permissible under the ADA, since attendance is an essential job function for any employee. The court agreed with the EEOC that this policy can give rise to liability under the ADA.

Thus, under the ADA, employers cannot by policy or work rule place an outside limit on leave (regardless of how long) and must modify leave policies to provide disabled employees with additional leave, unless the employer can show that granting additional leave would cause an undue hardship.

About the Author: Michael D. Kristofco is Chair of Wisler Pearlstine's Employment and Labor practice group. Mr. Kristofco's practice involves the representation of employers in personnel matters and the representation of school districts, private companies and individuals in litigation involving employment disputes, discrimination claims, commercial disputes, and claims involving estate and trust administration. He can be reached at mkristofco@wispearl.com.

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