

Leave as a disability accommodation: Are your policies compliant?

The EEOC has sued Princeton Hospital, alleging that its leave-of-absence policy violates the federal Americans with Disabilities Act Amendments Act (ADAAA). The hospital requires employees to return to work within seven days after their FMLA leave expires, regardless of whether they are disabled.

The suit alleges that the hospital refused to allow additional leave as an accommodation in violation of the law. If you have a similar policy, you may want to consider revising it now.

According to the FMLA, employees with serious health conditions are entitled to take 12 weeks of unpaid leave, with a guarantee right to return to their jobs. However, when the employee has a health condition that may also be a disability under the ADA, that may not be enough.

Leave as an accommodation?

Under the ADAAA, a person has a disability when a physical or mental impairment substantially limits a major life activity. That's true even when the health condition is sporadic or in remission.

However, temporary health conditions such as broken limbs, elective surgeries and surgical procedures from which the individual will fully recover are not considered disabilities.

Employers must accommodate disabilities in a way that allows an employee to perform the essential functions of the job. That generally means the employer must provide some assistive device (such as an ergonomic chair), change the employee's schedule (for example, with flexible or reduced hours) or even allow the employee to telecommute or transfer to an open position, if doing so would allow the disabled employee to complete all essential job tasks.

Allowing the employee to take a defined leave of absence may also be a reasonable accommodation if, at the end of the leave, the disabled employee will be able to resume work and perform essential job functions.

'Inflexible policies illegal'

The EEOC lawsuit contends that Princeton Hospital's FMLA policy violates the law because, after an employee's FMLA leave of absence ended, it didn't give any consideration to whether the employee was entitled to additional leave as a reasonable accommodation. The EEOC considers this type of blanket requirement—be ready to return to work after your FMLA leave ends, at full capacity—a violation of the ADAAA.

An EEOC lawyer said, "This lawsuit sends a message to employers that inflexible leave policies which ignore reasonable accommodations that will make it possible to get employees back on the job are illegal."

What employers should do

Each time an employee seeks additional leave at the end of his or her FMLA leave, look at the situation carefully. It is legally impermissible to have a blanket policy refusing such leave extensions. Companies must evaluate each situation to determine whether the serious health condition that compelled the employee to seek leave is actually an ADAAA disability. If so, a leave extension as an accommodation may be required.

The duration of that leave extension will depend on the particular circumstances. The size of your company, the nature of the employee's job, the number of employees available to take on those responsibilities and the length of the leave requested are all factors you should consider.

Should your company revise its leave-of-absence policy as a result of this EEOC lawsuit?

You don't have to grant indefinite leaves of absence

Indefinite leave requests are never considered "reasonable" accommodations under the ADA. However, if a doctor indicates an indefinite leave is needed, seek more information before discharging the employee.

Inform the employee that an indefinite leave request is unreasonable, and that he or she should ask the doctor for a more definite leave period. Tell the employee that if he or she can't propose a leave of some definite length, you can deny the leave or fill the position.

That way, the employee can discuss options with the physician and make well-reasoned choices before being terminated.

Remember, this accommodation issue arises only when an employee seeks leave for his or her own serious health condition, and that condition is also considered a disability. There are other reasons that an employee might seek FMLA leave that would not involve the ADAAA at all—for example for the birth of a child or to care for a sick child or parent.

Your company policy should indicate that employees should discuss it with HR if they feel they need any accommodation in addition to FMLA leave. That way, the burden is on the employee to seek additional leave. Then, when he or she does, you can engage in a dialogue to make sure that a leave extension is both warranted and required.

Dena B. Calo, Esq., of Genova, Burns & Giantomasi's Newark and Camden offices, is director of the firm's Human Resource Practices Group.

She can be reached at (973) 535-7135 or dcalo@genovaburns.com.