

# EMPLOYMENT LAW ALERT

June 2011

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## Attention Must Be Given to Leave of Absence Policies

By: Jeffrey M. Schlossberg



Earlier this month, the Equal Employment Opportunity Commission (EEOC) conducted a hearing on issues surrounding the use of leave as a reasonable accommodation. According to the EEOC, a period of leave for treatment or recovery is often the reasonable accommodation that permits a person with a disability to remain gainfully employed. EEOC Commissioner Victoria Lipnic stated that, "Managing situations where employees need leave for medical conditions is one of the most vexing issues for both employers and employees."

Many employers have policies that permit employees to take leaves of absences for situations involving their own medical conditions. For employers with 50 or more employees, this often is covered by the Family and Medical Leave Act (requiring 12 weeks of unpaid leave in a 12-month period). Employers not covered by FMLA also frequently provide a fixed amount of time for which an employee can be absent due to a medical condition.

But what if the employee needs more than the time permitted by the employer's policy? What if the employee needs more time than the 12 weeks provided by the FMLA? Can an employer direct the employee to return to work because the leave has expired?

It is widely recognized that an inflexible leave policy restricts a potential reasonable accommodation. Making an exception to a company's policy, such as permitting an employee to take more time than provided, is generally viewed as reasonable. Simply stated, it is inadvisable to require an employee to return to work at the conclusion of the time period contained in the employer's policy if the employee can satisfactorily establish that he or she needs a reasonable amount of additional time.

However, it is important to note that an employer is allowed to

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obtain medical documentation supporting the extension. If the medical provider states that additional time is necessary and the duration is reasonable under the circumstances (considering the time sought, position held, impact on operations, etc.), then the time should be granted as an accommodation. However, it is possible that the time stated by the medical provider will be unreasonable (e.g., indefinite), in which case it is likely more acceptable to deny the extension.

The key factor to keep in mind is that these scenarios require an individualized assessment of the facts as presented in each particular circumstance. Further, employers are required to engage in an interactive process to try to work with an employee to arrive at a reasonable accommodation such as an extension of an otherwise fixed period of leave.

With the increased attention being paid to this issue, employers are strongly advised to review the protocol employed when an employee seeks additional time beyond the time stated in the employer's policy. Addressing this issue proactively will go a long way toward avoiding discrimination claims down the road.

If we can be of assistance on this or any other employment law issues, please do not hesitate to contact us.

***HAVE A GREAT SUMMER!  
SEE YOU IN SEPTEMBER!***



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