AMERICANS WITH DISABILITIES ACT TRAINING SESSION B (ADDITIONAL SEGMENT FOR MANAGERS AND SUPERVISORS)

INFORMATION PROVIDED BY THE US EEOC

Introduction

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.

A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.[3] As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.

The EEOC continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

This document seeks to provide general information to employers and employees regarding when and how leave must be granted for reasons related to an employee's disability in order to promote voluntary compliance with the ADA. It is consistent with the EEOC's regulations enforcing Title I of the ADA, as well as the EEOC's 2002 Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (a link to the Guidance appears at the end of this document).

EQUAL ACCESS TO LEAVE

Equal Access to Leave Under an Employer's Leave Policy

Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees. Many employers offer leave -- paid and unpaid -- as an employee benefit. Some employers provide a certain number of paid leave days for employees to use as they wish. Others provide a certain number of paid leave days designated as annual leave, sick leave, or "personal days."

If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Example 1: An employer provides four days of paid sick leave each year to all employees and does not set any conditions for its use. An employee who has not used any sick leave this year requests to use three days of paid sick leave because of symptoms she is experiencing due to major depression[4] which, she says, has flared up due to several particularly stressful months at work. The employee's supervisor says that she must provide a note from a psychiatrist if she wants the leave because "otherwise everybody who's having a little stress at work is going to tell me they are depressed and want time off." The employer's sick leave policy does not require any documentation, and requests for sick leave are routinely granted based on an employee's statement that he or she needs leave. The supervisor's action violates the ADA because the employee is being subjected to different conditions for use of sick leave than employees without her disability.

Example 2: An employer permits employees to use paid annual leave for any purpose and does not require that they explain how they intend to use it. An employee with a disability requests one day of annual leave and mentions to her supervisor that she is using it to have repairs made to her wheelchair. Even though he has never denied other employees annual leave based on their reason for using it, the supervisor responds, "That's what sick leave is for," and requires her to designate the time off as sick leave. This violates the ADA, since the employer has denied the employee's use of annual leave due to her disability.

Employers are entitled to have policies that require all employees to provide a doctor's note or other documentation to substantiate the need for leave.

Example 3: An employee with a disability asks to take six days of paid sick leave. The employer has a policy requiring a doctor's note for any sick leave over three days that explains why leave is needed. The employee must provide the requested documentation.

GRANTING LEAVE AS A REASONABLE ACCOMMODATION

The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave. As noted above, requests for leave related to disability can often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities access to those policies on equal terms as similarly situated individuals. That is not the end of an employer's obligation under the ADA though. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. (See below for a discussion of undue hardship.) That is the case even when:

- the employer does not offer leave as an employee benefit;
- the employee is not eligible for leave under the employer's policy; or
- the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances.[5]

RESPONDING TO A REQUEST FOR ACCOMMODATION

When potentially disabled applicant or employee approach you with accommodation requests, they set in motion the ADA's "interactive process."

The first thing to do is alert HR. You should begin laying a paper trail now to show a good-faith effort to comply with the law.

Employers don't have to go along with every accommodation request. Requests are unreasonable if they cause the organization an "undue hardship," meaning it's too difficult or too expensive to provide.

RECORDKEEPING

Any information related to the accommodation is strictly confidential.

Do not retain any medical information in the personnel file.

This includes any records, notes from doctors, or anything related to an accommodation under ADA (or an FMLA request).

This information must be kept in a separate location with restricted access.

All medical records are confidential

PROHIBITED QUESTIONS

Don't ask these questions – stick to job-related questions

- Don't ask questions about obvious disabilities.
- Don't ask general questions about disabilities or any medical condition.
- Don't ask about the existence, nature or severity of a disability.
- Don't ask about a prognosis or diagnosis or history of how they became disabled.

- Don’t delve into details about limitations in performing major life activities.
- Don’t ask about prescription drugs.
- Don’t ask about mental health.
- Don’t ask about drug use or alcohol use.
- Don’t ask about worker’s compensation or injuries.
- Don't ask anyone else something you couldn't ask an applicant directly.
- Don’t ask about “sick days” they took.

SEGMENT ON MANAGING AN EMPLOYEE WITH A DISABILITY

THE INFORMATON THAT FOLLOWS IS PROVIDED BY THE US EEOC

Managing A Current Employee Under ADA

As we have discussed, the ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities” (for example, seeing, hearing, walking, speaking, learning, breathing, etc.). It also says that a record of such impairment, or being regarded has having such an impairment” also makes them a “qualified individual with a disability.”

Managing an employee with a disability is the same as managing all staff, and what is critical is respect, confidentiality, and working with the internal expert to determine appropriate accommodations.

First, let’s look at elements to have in place to ensure that the ground has been laid for fair treatment of all employees, with job analysis, job descriptions, performance expectations, accountability, and reasonable accommodations.

Job Analysis

Job analysis is an important first step. Many employers do not have well documented processes to determine the essential functions of the job. According to the US Equal Employment Opportunity Commission (EEOC), “Most jobs require that employees perform both essential functions and marginal functions. The ‘essential functions’ are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important.” The Americans with Disabilities Act (ADA) applies the test that essential functions are “job-related and consistent with business necessity.”

Job analysis would include how often a specific function was performed, particularly the physical dimensions of the job, activities such as sitting, standing, reaching, Also lifting how many pounds how frequently. Etc. Without a thorough analysis of the job (tasks included, results expected, tools and equipment used, environmental factors, etc.) it is harder to make the case that your expectations are job related.

Job Descriptions

The ADA does not require written job descriptions, but a well-drafted job description is very important for many reasons. The job description should detail the essential functions, as well as the education, experience, technical, interpersonal, and language skills needed for the job. The job description should cover essential functions, as well as functions that are performed occasionally (marginal functions). This is important to determine if any person is qualified for the job, but is also helpful for any discussion about reasonable accommodations, any certainly any worker's comp or return to work considerations.

The job description should detail other elements such as reporting structure, details about exempt or non-exempt, working hours, location, pay grade and other details. Technical skills should detail any tools and equipment operated, and the physical dimensions should detail the work environment, and any physical or mental demands. The job description should make it perfectly clear the type of work, specific activities, and demands of the job. Any job description should be confirmed with incumbents and supervisors to ensure that the functions are current and accurately reflect the requirements of the job.

Performance Standards and Accountability

Any employee should be clear on quality and quantity of work, behavioral standards, goals and objectives, and how performance will be tracked and monitored so everyone is clear on performance standards. This usually takes place in the annual review to recalibrate goals and align individual and team goals to departmental and organizational goals.

Managers should expect the same level of performance for all employees regardless of disability status. Constructive feedback is essential in all managerial relationships. All employees in the same or similar positions should be held accountable for the same behavioral expectation and performance standards.

Make sure those get clearly communicated to all employees and that all managers are consistently holding people accountable for them.

If an employee is not meeting one of your expectations managers and supervisors should be quick to engage in coaching, training, counseling, corrective action. This is true of managing all direct reports.

Go back over the performance standards and ask “is there a reason why you are not meeting these expectations?” Have an open dialogue about the challenges they are facing and what you can do to support them; for example, with training, tools, or support? These are standard discussions you would have with any staff member who is not performing to standard.

UNKNOWN DISABILITIES

Many employees with disabilities may not want the employer to know about their condition and may be hesitant to come forward with the information that they have been diagnosed with a disability due to embarrassment or fear of losing job security, or simply not wanting to be labelled as a person with a disability. Or perhaps, the employee is not aware that their rights may be covered by a law, particularly if their condition is depression or another mental illness.

The issue may come up when performance is impacted. Simply ask: “Is there something we can do to help you?” this simple question will let you know if the employee has medical issues that might be impacting their performance, attendance, or behavior. Referring the employee to an EAP (if you have one) can be a good resource as well for support and confidential information.

If they respond with details, mention that you are not inquiring into the specifics but you do want to assist them. Suggest that you get HR involved, who likely has some expertise in managing reasonable accommodations, leaves of absence and other issues related to ADA.

INTERACTIVE PROCESS

Recall that the ADA requires an “interactive process” to determine the best accommodation, and that process is best handled by an HR person or other expert that can discuss the employee confidentially and interact with the health care provider to determine the best accommodation.

Employers, by way of HR or other designated personnel, may ask for medical certification, but the employer is not required to get or pay for the diagnosis for a disability. The medical examination should provide insight into the essential functions of the job and whether the employee is able to perform those essential functions of his or her job, and if the employee can perform the work in a safe manner.

REASSIGNING MARGINAL (OCCASIONAL) TASKS

Essential functions are those job duties that an employee must be able to perform, with or without reasonable accommodation. Those should be stated in the job description.

According to the EEOC, factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,
- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- the degree of expertise or skill required to perform the function.

Other considerations are:

- the actual work experience of present or past employees in the job,
- the time spent performing a function,
- the consequences of not requiring that an employee perform a function, and
- the terms of a collective bargaining agreement.

Marginal job functions are those that are not the primary reason a position exists. Modification and/or removal of marginal functions from a position is an example of a reasonable accommodation. So it is important to delineate essential and marginal (or occasional) functions since it's not usually required that you strip out an essential function as an accommodation, but assigning a marginal function may be an appropriate accommodation.

POSSIBLE ACCOMMODATIONS

An accommodation also might be special assistive devices, a change in schedule, time off for treatments, or other changes in work arrangements.

Here are some examples of reasonable accommodations:

Equipment and tools: Software for speech recognition, special glasses, tools and equipment all assist employees in doing their jobs and can be very useful. automatic page turners, book holders, and adapted pencil grips, adaptive switches and utensils, screen readers, and screen enlargement application

Scheduling changes: allowing an extended period of unpaid leave to recover from a medical procedure, permitting a later start time to accommodate an employee's medical treatments, providing rest periods throughout the day to accommodate an employee's disability.

Mobility aids: wheelchairs, scooters, walkers, canes, crutches, prosthetic devices, and orthotic devices. Note that in some cases an employer would not be required to pay for equipment used outside of the job but would need to allow the use of the equipment. Again, it depends.

Other accommodations would include installing a ramp to make a workplace wheelchair-accessible, modifying a restroom so a worker with disabilities can use it, Changing the layout of cubicles to provide enough room for a wheelchair to pass, Providing a raised or adjustable desk. Many of these architectural and structural accommodations are required for accessibility into the place of work.

Changing the rules to allow an employee to bring a service animal to work.

Adjusting the policy surrounding flexible work schedules or working from home.

The Job Accommodation Network if a wonderful resource for insight on various disabilities and possible accommodations.

UNDUE HARDSHIP

The ADA's requirement is for employers to make reasonable accommodations unless the accommodation would cause an "undue hardship" on the employer. This could be in terms of the organization's financial resources, the burden on other employees, the size of the organization, past examples of accommodation, or other considerations.

PERFORMANCE REVIEWS

Like evaluations for all employees, managers should be clear and constructive with feedback. People should be evaluated on pre-determined performance standards. The evaluation should never mention the employee's disability or condition due to confidentiality issues. The evaluation is part of the regular personnel records and information relating to any medical situation, leave of absence, medical diagnosis or prognosis, prescriptions, or reasonable accommodations should not make its way onto the formal evaluation form. And realize that the employee's job may have been altered due to reassignment of marginal functions, so their performance should be based on those adjusted standards. Regarding any disciplinary action, as a manager you may be hesitant to subject a disabled employee from coaching, counseling, or corrective action. Remember that the ADA does not protect people with disabilities from being disciplined; it only protects them from being discriminated against because of their disability. The law only requires that the discipline needs to be job-related and consistently applied.

CONFIDENTIALITY

All information relating to the employee's medical diagnosis, prognosis, doctors' notes or prescription is considered confidential. These documents should not be kept in the manager or supervisor's files. Rather, a separate medical file should be created, and the file must be kept separate from other personnel records, meaning in a separate drawer, file cabinet, or room, with security precautions taken to ensure the safe keeping of medical records. The same goes for any verbal disclosure of medical information. While it might be nice to share a medical concern of a co-worker with staff, any and all verbal disclosure of the aforementioned medical information would be equally as problematic. By the way, this is true about most medical leaves of absence, accommodations, and other details. If a person asks why their co-worker has a certain piece of equipment, a shift change, is not required to stand for the entire shift, or receives some other accommodation, simply respond that you are not at liberty to discuss any information relating to an employee's work arrangements.

SUMMARY

The intent of the ADA is to protect people from discrimination due to their disability, not to give them unfair advantage because of their disability. The intention is to make the workplace

available to everyone and put everyone on a level field in terms of being hired and the fair application of the terms and conditions of employment.

Remember, good management of all employee requires consistency and fairness. All employees need clear expectations and fair performance standards, open dialogue about their performance, and constructive feedback that is supportive and helps everyone meets their goals and objectives. Keeping these tenants in mind will result in a more equitable and inclusive workplace for everyone.

SEGMENT ON THE INTERACTIVE PROCESS

Americans with Disabilities Act – The Interactive Process

Information in this segment is provided by the US Equal Employment Opportunity Commission

ADA Interactive Process

There is an ADA interactive process that will help in determining the appropriate reasonable accommodate to cater to the individual with a disability. This interactive process involves both the employer and employee to communicate properly and in good faith to explore any accommodation request options that can be done.

Employers that engage in the interactive process should move forward with integrity to really listen to the employee needs and employee requests. Similarly, the applicant or employee with disability shall also act in good faith to comply with the interactive process and their requested accommodation.

Steps to Comply with the ADA Interactive Process

As the two parties engage in the interactive process, there are important steps to be followed.

Below, we will outline the important information about the steps in the ADA interactive process for your quick reference.

Step 1: Recognize the Accommodation Request.

The employee must indicate that they are having a problem in relation to their medical condition. It is given that this condition or disability is a hindrance to the employee to perform the essential functions of their job. Any notice about the employee s disability shall be received with no discrimination or prejudice in the workplace.

Afterwards the employer can make considerations. The employer must now discern whether that is a request for a (reasonable) accommodation.

Employee's request for a reasonable accommodation in the workplace may include the following:

- The employee needing to take time off, but is not eligible under the Family and Medical Leave Act of 1993 (FMLA).
- The employee has exhausted their FMLA leave but needs more time off.
- The employee used medical reasoning to explain absences or professional shortcomings (ex: unable to focus due to medication, physically exhausted, and similar symptoms).

Step 2: Gather Pertinent Information.

The employee is required to provide documentation about their (covered) disability and any limitations from their healthcare provider. This step is essential for both parties to gauge if the job is appropriate for the employee, and if there is any need for requested accommodation.

Meanwhile, the employer must specify the exact information they need from their employee's healthcare provider and most importantly, they should review the employee's essential job functions. Analyzing the job description alongside the employee's disability is crucial as it will help the employer determine if the job functions will be affected in any way by the employee's disability and/or limitations. Of course, employers may respectfully request further information if needed, such as employment history. They are also welcome to ask or make requests for other documentation related but not limited to the individual's employment.

Step 3: Explore Accommodation Options and Choose One Accommodation as per the Employee s Request.

Employers must look into the request for accommodation made in the past. This may require some time and research to look into previous cases.

Employers may require the employee and their healthcare provider to submit accommodation suggestions or further medical information. This will help in finalizing the effective accommodations to be made – ideally, one that would allow the employee to perform the essential functions of the job without discrimination because of their disability.

To ensure that proper accommodations would be made, the employers may need to conduct an undue hardship analysis. This analysis must be based on an individualized assessment of the current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense (on the part of the employer). Below are some considerations the employer may look into:

- nature and cost of the accommodation needed
- overall financial and human resources of the employer and the facility in which they belong
- size, type, and location of the facility
- type of operation (including structure and functions), geographical data, administrative or fiscal relationship of the facility to the employer

- impact of the accommodation on the facility's operations

At this point, if more than one effective reasonable accommodation applies, then the employer may choose the accommodation with this one exception – which is to put the employee on leave. If there is another choice of possible accommodations that would enable the individual to work and perform the functions of the job, then the employer cannot require that the individual will go on leave.

Note: If the employee has FMLA available, generally they are allowed to choose to take leave rather than accept transfer to another job.

Common Mistakes in the Interactive Process of the ADA

The employer or supervisor is mandated by law to engage in this interactive process before determining whether an effective accommodation is available. Deciding on this reasonable accommodation the employer can provide is an extensive back-and-forth discussion among the important parties.

Refusing to engage in these discussions or showing any discrimination may be taken against them as it is a violation of the ADA. For example, below are some common mistakes that a supervisor can make if they fail to administer the interactive process in good faith.

- Uncertainty and resistance. Sometimes, the interactive process should be started as soon as the employee expresses any difficulty about the position in relation to their disability. Should their supervisor dismiss any claims or requests for accommodations – a clear violation of ADA and even labor code guidelines – employees with disabilities may experience further discrimination. So it is very important to be cooperative from the start.

More Common Mistakes

- Inadequate training. The employer may not be well-equipped to administer the interactive process or even receive the accommodation request. It is not necessarily their fault but it may pose a hindrance to the interactive process. To address this, they may work closely with HR.

- Complicating the process. When the employee comes forward with their needs and requests, the supervisor should first look for a quick, simple, and easy solution to use. Oftentimes there is a quick fix that can address their concerns if the supervisor is willing to allow it. But if there is none, then the formal ADA process may be started in close coordination with the employee and HR.

- Sharing or requesting too much information. Supervisors may be mistaken in disclosing medical information to co-workers or other parties not involved in the interactive process. They should be careful to keep everything confidential. Likewise, they should only focus on information they can use to determine the disability and the need for accommodation.

Summary

The interactive process as required by the ADA sounds complicated, but it does not have to be. ADA was designed to prohibit discrimination against the individual with a disability so their co-workers should honor this and follow through.

For further information about the interactive process, you may visit the ADA website https://www.ada.gov/.

SEGMENT ON LEAVE AS A REASONABLE ACCOMMODATION

Employer-Provided Leave and the Americans with Disabilities Act

Information in this segment is provided by the U.S. Equal Employment Opportunity Commission (EEOC)

Introduction

The EEOC continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

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Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees. Many employers offer leave -- paid and unpaid -- as an employee benefit. Some employers provide a certain number of paid leave days for employees to use as they wish. Others provide a certain number of paid leave days designated as annual leave, sick leave, or "personal days."

If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Employers are entitled to have policies that require **all** employees to provide a doctor's note or other documentation to substantiate the need for leave.

Granting Leave as a Reasonable Accommodation

The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave. As noted above, requests for leave related to disability can often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities access to those policies on equal terms as similarly situated individuals. That is not the end of an employer's obligation under the ADA though. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. (See below for a discussion of undue hardship.) That is the case even when:

- the employer does not offer leave as an employee benefit;
- the employee is not eligible for leave under the employer's policy; or
- the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances.[5]

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An employer may not penalize an employee for using leave as a reasonable accommodation. Doing so would be a violation of the ADA because it would render the leave an ineffective accommodation; it also may constitute retaliation for use of a reasonable accommodation.[6]

Communication after an Employee Requests Leave

As a general rule, the individual with a disability - who has the most knowledge about the need for reasonable accommodation - must inform the employer that an accommodation is needed. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. However, if the request for leave can be addressed by an employer's leave program, the FMLA (or a similar state or local law), or the workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot be granted under any other program, then an

employer should promptly engage in an **"interactive process"** with the employee -- a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

The information required by the employer will vary from one employee to another. Sometimes the disability may be obvious; in other situations the employer may need additional information to confirm that the condition is a disability under the ADA. However, most of the focus will be on the following 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.

Depending on the information the employee provides, the employer should consider whether the leave would cause an undue hardship (see below).

An employer may obtain information from the employee's health care provider (with the employee's permission) to confirm or to elaborate on information that the employee has provided. Employers may also ask the health care provider to respond to questions designed to enable the employer to understand the need for leave, the amount and type of leave required, and whether reasonable accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave). Information from the health care provider may also assist the employer in determining whether the leave would pose an undue hardship. An employee requesting leave as a reasonable accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as quickly as possible.

Communication During Leave and Prior to Return to Work

The interactive process may continue even after an initial request for leave has been granted, particularly if the employee's request did not specify an exact or fairly specific return date, or when the employee requires additional leave beyond that which was originally granted.

However, an employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, although it may reach out to an employee on extended leave to check on the employee's progress.

Maximum Leave Policies

The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship.

Types of Maximum Leave Policies

Maximum leave policies (sometimes referred to as "no fault" leave policies) take many different forms. A common policy, especially for entities covered by the FMLA, is a flat limit of 12 weeks for both extended and intermittent leave. Other varieties exist though. Some maximum leave policies have caps much higher than 12 weeks. Others, particularly those not covered by the FMLA, set lower overall caps. Employers also frequently implement policies that limit unplanned absences. For example, a policy might permit employees to have no more than five unplanned absences during a 12-month period, after which they will be subject to progressive discipline or termination.

Employees with disabilities are not exempt from these policies as a general rule. However, such policies may have to be modified as a reasonable accommodation for absences related to a disability, unless the employer can show that doing so would cause undue hardship.

Communication Issues for Employers with Maximum Leave Policies

Many employers, especially larger ones and those with generous maximum leave policies, may rely on "form letters" to communicate with employees who are nearing the end of leave provided under an employer's leave program. These letters frequently instruct an employee to return to work by a certain date or face termination or other discipline. Employers who use such form letters may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship. If an employer relies on a third party provider to handle lengthy leave programs, including short- and long-term disability leave programs, it should ensure that any automatic form letters generated by these providers comply with the employer's obligations under the ADA.

Employers who handle requests under their regular leave policy separately from requests for leave as a reasonable accommodation should ensure that those responsible communicate with one another to avoid mishandling a request for accommodation. For example, an employer may hire a contractor to handle its long-term disability program, but have its human resources department handle all requests for leave as a reasonable accommodation. The employer should ensure that the contractor is instructed to forward to the human resources department, in a timely manner, any requests for additional leave beyond the maximum period granted under the long-term disability program, and to refrain from terminating the employee until the

human resources department has the opportunity to engage in an interactive process. The human resources department should contact the employee as soon as possible to explain that it will be handling the request for additional leave as a reasonable accommodation, and that all further communication from the employee on this issue should be directed to that department.

An employer and employee should continue to communicate about whether the employee is ready to return to work or whether additional leave is necessary. For example, the employee may contact a supervisor, human resources official, or anyone else designated by the employer to handle the leave 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 that will exceed an employer's maximum leave policy (whether the leave is a block of time or intermittent), the employer may engage in an interactive process as described above, including obtaining medical documentation specifying the amount of the additional leave needed, the reasons for the additional leave, and why the initial estimate of a return date proved inaccurate. An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship.

Return to Work and Reasonable Accommodation (Including Reassignment)

Employees on leave for a disability may request reasonable accommodation in order to return to work. The request may be made by the employee, or it may be made in a doctor's note releasing the employee to return to work with certain restrictions.

100% Healed Policies: An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be "100%" healed or recovered -- if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship.[7] Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "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.

Issues Related to the Interactive Process and Return to Work

If an employee returns from a leave of absence with restrictions from his or her doctor, 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. In some situations, there may be more than one way to meet a medical restriction.

If necessary, an employer should initiate the interactive process upon receiving a request for reasonable accommodation from an employee on leave for a disability who wants to return to work (or after receiving a doctor's note outlining work restrictions). Some issues that may need to be explored include:

- the specific accommodation(s) an employee requires;
- the reason an accommodation or work restriction is needed (that is, the limitations that prevent an employee from returning to work without reasonable accommodation);
- the length of time an employee will need the reasonable accommodation;
- possible alternative accommodations that might effectively meet the employee's disability-related needs; and
- whether any of the accommodations would cause an undue hardship.

Summary

Work with your HR team to ensure you are properly providing leaves as a reasonable accommodation for an employee's disability.

SEGMENT ON ANTI-RETALIATION

Information in this segment is provided by the US EEOC.

RETALIATION

1. What is retaliation?

Retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws. Asserting EEO rights is called "protected activity."

Sometimes there is retaliation before any "protected activity" occurs. For example, an employment policy itself could be unlawful if it discourages the exercise of EEO rights.

2. What must someone show to prove a legal claim of retaliation?

In a case alleging that an employer took a materially adverse action because of protected activity, legal proof of retaliation requires evidence that:

- An individual engaged in prior protected activity;
- The employer took a materially adverse action; and
- Retaliation *caused* the employer's action.

3. What type of EEO activity by an applicant or employee is protected from retaliation?

Generally, "protected activity" is either participating in an EEO process or reasonably opposing conduct made unlawful by an EEO law.

4. What does it mean to "participate in an EEO process"?

An employer must not retaliate against an individual for "participating" in an EEO process. This means that an employer cannot punish an applicant or employee for filing an EEO complaint, serving as a witness, or participating in any other way in an EEO matter, even if the underlying discrimination allegation is unsuccessful or untimely. EEOC's view is that this extends to participation in an employer's internal EEO complaint process, even if a charge of discrimination has not yet been filed with the EEOC.

Participation in the EEO process is protected whether or not the EEO allegation is based on a reasonable, good faith belief that a violation occurred. This does not mean that falsehoods or bad faith are without consequence. An employer is free to bring these to light in the EEO matter, where it may rightly affect the outcome. But it is unlawful retaliation for an employer to take matters into its own hands and impose consequences for participating in an EEO matter.

5. What does it mean to "oppose" conduct made unlawful by an EEO law?

Employers must not retaliate against an individual for "opposing" a perceived unlawful EEO practice. This means that an employer must not punish an applicant or employee for *communicating opposition to a perceived EEO violation*. For example, it is unlawful to retaliate against an applicant or employee for:

- complaining or threatening to complain about alleged discrimination against oneself or others;
- providing information in an employer's internal investigation of an EEO matter;
- refusing to obey an order reasonably believed to be discriminatory;
- advising an employer on EEO compliance;
- resisting sexual advances or intervening to protect others;
- passive resistance (allowing others to express opposition);
- requesting reasonable accommodation for disability or religion;
- complaining to management about EEO-related compensation disparities; or
- talking to coworkers to gather information or evidence in support of a potential EEO claim.

Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as

long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.

The protection for opposition is limited to those individuals who act with a reasonable good faith belief that the conduct opposed is unlawful or could become unlawful if repeated. In the EEOC's view, it can be reasonable to complain about behavior that is not yet legally harassment (i.e., even if the mistreatment has not yet become severe or pervasive). It is also reasonable for an employee to believe that conduct violates the EEO laws if the EEOC has adopted that interpretation, even if some courts disagree with the EEOC on the issue.

Opposition also must be conducted in a reasonable manner. For example, threats of violence, or badgering a subordinate employee to give a witness statement, are not protected opposition.

6. Who is protected from retaliation?

The protections against retaliation apply to all employees of any employer, employment agency, or labor organization covered by the EEO laws. This includes applicants, current employees (full-time, part-time, probationary, seasonal, and temporary), and former employees. For example, a supervisor cannot refuse to hire an applicant because of his EEO complaint against a prior employer, or give a false negative job reference to punish a former employee for making an EEO complaint.

These protections apply regardless of an applicant or employee's citizenship or work authorization status, because the EEO laws protect applicants and employees regardless of citizenship or work authorization. For example, assume an employer suspects a worker is undocumented but does not attempt to verify her authorization to work as required by the immigration laws. If the worker raises an EEO complaint, such as sexual harassment or national origin discrimination, and the employer then threatens to expose the worker's immigration status as punishment for complaining about EEO violations, the employer would violate the ban on retaliation.

7. Anti-Retaliation Advice and Individualized Support for Employees, Managers, and Supervisors

An automatic part of an employer's response and investigation following EEO allegations should be to provide information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it. As part of this debriefing, managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.

- Provide tips for avoiding actual or perceived retaliation, as well as access to a resource individual for advice and counsel on managing the situation. This may occur as part of

the standard debriefing of a manager, supervisor, or witness immediately following an allegation having been made, ensuring that those alleged to have discriminated receive prompt advice from a human resources, EEO, or other designated manager or specialist, both to air any concerns or resentments about the situation and to assist with strategies for avoiding actual or perceived retaliation going forward.

8. Proactive Follow-Up

Employers may wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation, and to provide guidance. This provides an opportunity to identify issues before they fester, and to reassure employees and witnesses of the employer's commitment to protect against retaliation. It also provides an opportunity to give ongoing support and advice to those managers and supervisors who may be named in discrimination matters that are pending over a long period of time prior to reaching a final resolution.

9. What are examples of evidence that may support the employer's assertion that it was not motivated by retaliation?

Even if protected activity and a materially adverse action occurred, evidence of any of the following facts, alone or in combination, may undermine a claimant's ability to prove it was caused by retaliation. For example:

- The employer was not, in fact, aware of the protected activity.
- There was a legitimate non-retaliatory motive for the challenged action, that the employer can demonstrate, such as:
    - poor performance;
    - inadequate qualifications for position sought;
    - qualifications, application, or interview performance inferior to the selectee;
    - negative job references (provided they set forth legitimate reasons for not hiring or promoting an individual);
    - misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and
    - reduction in force or other downsizing.
- Similarly-situated applicants or employees who did not engage in protected activity were similarly treated.
- Where the "but-for" causation standard applies, there is evidence that the challenged adverse action would have occurred anyway, despite the existence of a retaliatory motive.

10. What is "interference" with disability rights under the ADA?

The ADA prohibits not only retaliation but also "interference" with statutory rights. Interference is broader than retaliation. Under the ADA's interference provision, it is unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights. Some employer acts may be both retaliation and interference, or may overlap with unlawful denial of accommodation. Examples of interference include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

Summary

Avoid retaliation by following the guidelines in this presentation.