

When is Additional Leave a Reasonable Accommodation to an Employee's Disability?

Q How should an employer respond when an employee exhausts other leave entitlements and then claims that, because of a disability, even more leave is needed before returning?

David C. Henderson: The Equal Employment Opportunity Commission (EEOC) recently addressed that question by making four points. First, access to leave can never be discriminatory. Second, the employer must consider leave as a reasonable accommodation without regard to other leave policies. Third, additional leave doesn't have to be provided as a reasonable accommodation when it would cause undue hardship. Finally, the employer should use an "interactive process" to determine whether additional leave can be provided without undue hardship.

Q What are the implications to considering leave as a reasonable accommodation without regard to other leave policies?

DCH: The implications are manifold. If a request for disability-related leave doesn't fall under an existing policy, the employer still must consider allowing it. Second, the employer must consider allowing leave as a reasonable accommodation if the employee has exhausted leave available under other policies or non-Americans with Disability Act (ADA) laws. Third, the employer likewise must consider leave as a reasonable accommodation even if the employer otherwise doesn't offer leave as an employee benefit.

Q What are some factors that can determine whether undue hardship for employers would result?

DCH: An employer never has to provide an accommodation that causes undue hardship, but no fixed, universally-applicable criteria for determining undue hardship are in place. The EEOC recommends that employers consider factors such as these to determine whether undue hardship would result: amount and/or length of leave required; frequency of the leave; whether there is flexibility with the days of the leave; whether the dates of any intermittent leave are predictable; the impact of the employee's absence on co-workers and on whether specific job duties would be performed appropriately; and the impact on the employer's operations and ability to serve customers/clients (taking into account the employer's size).

Q How does an "interactive process" work to determine if reasonable accommodation will cause undue hardship?

DCH: An "interactive process" is a dialogue between the employer and the employee and/or his health care providers to obtain information about the feasibility of reasonable accommodation. As in many other circumstances, the "interactive process" should be used whenever leave is requested as an accommodation but otherwise is unavailable to the employee. Circumstances may require that the "interactive process" inquire into the preliminary issue of whether the employee's condition is a disability within the meaning of the ADA. In most cases, however, the "interactive process" will focus on the specific reason(s) for leave; whether leave will be a block of time or intermittent; and when the need for leave will end. With the employee's permission, an employer may ask the employee's health care provider to respond to questions designed to enable an understanding of 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, perhaps resulting in the need for less leave.

While an employer never has to provide an accommodation that causes undue hardship, there are no fixed, universally-applicable criteria for determining when undue hardship would result.



David C. Henderson, Partner
Litigation Department

617.439.2345
dhenderson@nutter.com

David C. Henderson is a partner in Nutter's Litigation Department, a member (and former co-chair) of the firm's Labor, Employment and Benefits practice group, and a member of the Business Litigation practice group. David concentrates his practice on civil litigation and corporate general counsel advice, with a particular focus on employment and labor law and general business and commercial matters.

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Press Contact:

Heather Merton
Senior Communications Manager

617.439.2166
hmerton@nutter.com

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