THE EEOC JUST KEEPS ON GIVING!
NEW "GUIDANCE" DOCUMENT RE: EMPLOYER-PROVIDED LEAVES AND THE ADA

By: Lizbeth V. West, Esq.

On May 9, 2016 the EEOC issued yet another "guide" – this time to outline its position on when and how leave must be granted for reasons related to an employee's disability under the Americans with Disabilities Act ("ADA"). The publication, entitled "*Employer-Provided Leave and the Americans with Disabilities Act,*" contains information on the EEOC's position in connection with six subject areas relating to leaves as a form of reasonable accommodation under the ADA, and contains various examples to illustrate those positions. Below is a summary of the EEOC's position in each of the six subject areas:

1. Equal Access to Leave under an Employer's Leave Policy.

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.

2. 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. 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. 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).

3. Leave and the Interactive Process.

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. According to the EEOC, 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 unless the leave is covered under an employer's leave program, the FMLA, or a similar state or local law, or the workers' compensation program.

Requests for leave as an accommodation under the ADA trigger the employer's duty to promptly engage in an "**interactive process**" with the employee -- a process designed to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship. Employers can obtain information like:

- the specific reason(s) the employee needs leave;
- whether the leave will be a block of time or intermittent; and
- when the need for leave will end.

Upon authorization from an employee, an employer may obtain information from the employee's health care provider 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**.

4. Maximum Leave Policies.

The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Thus, while 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.

5. 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. Thus, an employer will violate the ADA if it requires an employee with a disability to have no medical restrictions (e.g. be "100%" healed or "released to full duty") in order to return to work, provided the employee can perform her job with or without reasonable accommodation. The only way an employer can prevent returning the employee to work is by showing that no reasonable accommodation is available that can be provided without causing an undue hardship on the employer.

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 or her 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, the requested reasonable accommodation will be reassignment to a new job because the disability prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship for the employer. The EEOC's position is that if reassignment is required, an employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions. However, the EEOC acknowledges that reassignment does not include promotion, and generally an employer does not have to place someone in a vacant position as a reasonable accommodation when another employee is entitled to the position under a uniformly-applied seniority system.

6. Undue Hardship.

Determination of whether providing leave would result in undue hardship may involve consideration of the following:

- the amount and/or length of leave required;
- the frequency of the leave;
- whether there is any flexibility with respect to the days on which leave is taken;
- whether the need for intermittent leave on specific dates is predictable or unpredictable;
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner; and
- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

Indefinite leaves - meaning that an employee cannot say whether or when she will be able to return to work at all - will likely constitute an undue hardship and does not have to be provided as a reasonable accommodation.

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may take into account leave already taken -- whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

Take Away:

Despite the fact that the ADA is **not** a leave statute, the first thing employers should do is train their managers and supervisors regarding the rights available to eligible employees under the ADA. It is important to dispel the erroneous belief by many supervisors that if an employee is not eligible for a statutory leave of absence under a federal or state law (e.g. the federal FMLA or California's equivalent - the CFRA) that he/she is not entitled to any leave of absence. As the foregoing makes clear, an employee may be entitled to leave under the ADA as a form of reasonable accommodation. This is also true under California's Fair Employment and Housing Act.

When faced with a situation where an employee is asking for leave as a form of reasonable accommodation, employers should exercise their right to obtain a medical certification from the employee's health care provider so that the employer has the relevant information to make informed decisions when determining whether the leave can be provided without creating an undue hardship for the company. Finally, while not stated in the EEOC's "guidance," employers should be aware that if there are alternative forms of reasonable accommodation available (other than a leave of absence) the employer gets to choose which accommodation to provide as long as it is not punitive and meets the employee's restrictions. However, employers should consult with legal counsel when conducting this analysis and before denying any reasonable accommodation to an employee that does not create an undue hardship for the company.

For a full reading of EEOC's publication, please visit:
https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.