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## EEOC Aims to Clarify Leave Rights Under the ADA

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On June 8, 2011, the Equal Employment Opportunity Commission (EEOC) held a public hearing to address leave as a reasonable accommodation under the Americans with Disabilities Act (ADA). Whether to provide unpaid leave as a reasonable accommodation, and how much leave to provide, are common problems for employers. Moreover, mishandling the leave as an accommodation issue is a frequent basis for litigation.

Although the ADA does not specify any particular amount of leave as a reasonable accommodation, the EEOC takes the position that some finite period of unpaid leave may be required. This situation frequently arises when an employee is out on Family and Medical Leave Act (FMLA) leave for a reason that also qualifies as an ADA disability. Employers who automatically terminate employment at the end of FMLA leave without considering whether some amount of additional unpaid leave will allow the employee to return to work face the possibility of litigation under the ADA.

Two recent federal court cases that led up to the EEOC's June 8th public hearing showed the problem with inflexible leave policies. In 2009, the EEOC settled a case with Sears Roebuck & Co. for \$6.2 million, and in 2011, the EEOC settled with Supervalu supermarkets for \$3.2 million. Both cases arose from terminations of employees based on inflexible leave policies and lack of an interactive process at the end of the leave period to determine if additional leave would allow the employees to return to work.

The recent public hearing allowed employers and employment attorneys to express their concerns about the lack of clear guidance on this issue. John Hendrickson, an EEOC attorney, said employers should bear in mind the following:

- Inflexible period of disability leave does not satisfy the ADA
- Appropriate leave under the ADA requires an individualized assessment of the employee's situation, even when the employer's leave policy is generous

Use of third party administrators to handle leave issues separate from the decision makers on ADA accommodation requests is a dangerous practice for employers  
Clear lines of communication between employer and employee are essential  
EEOC plays a critical role in litigating these ADA leave cases because of the resources required

EEOC Commissioner Stuart Ishimaru hopes to have the EEOC update its ADA guidance regarding leave by the end of the summer, although the other EEOC commissioners think the guidance will come later. Employers should stay alert for the EEOC's updates in this area and should be careful when terminating employees at the end of established leave periods to avoid ADA liability.

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