

Strategies for Dealing with Workers with Disabilities



Discipline, Leave and Accommodations

With the incremental increases in employers' duties to accommodate disabilities, our discussion will focus on obstacles for which employers should prepare; common mistakes and pitfalls that employers should avoid in order to best meet their legal duty; and how employers effectively manage discipline for employees with disabilities.



Employer Mistakes in Employee Leave Issues

- Forgetting the ADA may require leave even when the employee has already taken all of the leave he/she may be entitled to under the FMLA.
- Management's lack of knowledge of the basic rules of what is required under the law.
- Failure to appropriately manage leave. Know the rules and follow them.
- Not taking advantage of the right to receive clear and sufficient medical information to support employee's leave request.
- Not using light duty when it is to your advantage.
- Lack of discipline for employee's abuse of leave

Additional Considerations:

- Keep in mind the leave need not be indefinite and the leave must make it reasonably likely the employee will be able to return to work and perform the essential functions of the job.
- Inadvertent mistakes in the administration of FMLA leave requests can often lead to claims of interference.
- Under the ADA, Employers are entitled to ask for reasonable documentation about an individual's disability and functional limitations. Similarly, under the FMLA, employers have the right to have a leave request certified.
- Employers are not required to reallocate essential functions. If an employer has an existing light duty job, reassigning the employee to a light duty job may be a reasonable accommodation.

Reasonable Accommodations

- Leave (Indefinite Leave ≠ Reasonable Accommodation)
- Job Restructuring
- Modified Work Schedules and Flexible Leave Policies
- Modification or Purchase of Equipment and Devices
- Training
- Reassignment to Vacant Position and Light Duty

Tips for Managing Employees with Disabilities

- Evaluate the performance of disabled employee in the same manner/using same metrics you evaluate another employee's performance. If employee with disability receives poor evaluation and asks for an accommodation to remedy the performance problem, engage in the interactive process.
- Speak directly to the employee and focus on his/her abilities rather than their disability. Be sure expectations such as job performance, behavior, and dress are clearly defined, and that they are met.
- Provide specific feedback on job performance. If you have concerns about performance, express the reservation.
- Employers may discipline employees if disability causes a violation of a conduct rule if the rule is job-related, consistent with business necessity and other employees are held to the same standard. (See "The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities ('ADA: Performance and Conduct')," available at <http://www.eeoc.gov/facts/performance-conduct.html>, at Q&A at 9.)
- An employee who does not report back to work after completion of service does not necessarily lose reemployment rights but is subject to the company's discipline policies for absences.

Additional Considerations:

- Once an accommodation is approved, it should be implemented as soon as possible.
- Assess the effectiveness of the accommodation(s) in enabling the employee to perform the essential functions of the job. If there is a need for additional accommodations, or changes to the existing accommodations, reevaluate the accommodations.
- "...if an employer has a vacant light-duty position for a vacant permanent position for which the disabled employee is qualified, it would be a reasonable accommodation to reassign the employee to that position." Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1492 (M.D. Ala. 1994) (denying the employer's motion for summary judgment).



Interrelated Federal Statutes

- Occupational Safety and Health Administration (OSHA): Employers providing accommodations for mentally disabled employees with conduct problems must balance the ADA's reasonable accommodation standard with OSHA's focus on protecting workers' safety
- The Age Discrimination in Employment Act (ADEA): Although the ADA does not make aging a disability, some effects of old age (e.g., dementia) may be protected by the ADA

Best Practices

- Train management to handle leave and accommodation requests.
- Make policies and procedures accessible in multiple formats in a timely manner.
- Consider temporary transfer of the employee to another position with equivalent pay and benefits and that better accommodates the employee's unpredictable leave.
- Conduct an interactive process with the employee. Document any requested accommodations by the employee and any the employer proposes.
 - "The interactive process is a mandatory rather than permissive obligation on the part of employers under the Americans with Disability Act, 42 U.S.C.S. § 12101 et seq., and this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist initiating the interactive process." Barnett v. U.S. Air, Inc. 228 F. 3d 1105, 1108 (9th Cir. 2000).
- Get complete and accurate information from the physician.
- If denying a request for accommodation, analyze whether denying the accommodation will truly cause an undue hardship.
- Think in terms of cost versus benefit before making discipline decisions. Is it worth it to have to litigate?
- Consult counsel.

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