

**State of Illinois**  
Bruce Rauner, Governor  
**Department of Human Rights**  
**Department of Human Services**

**ICED NEWS**

**State Interagency Committee on Employees with Disabilities**

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**Special Issue on Leaves of Absence and the ADA**

**ICED Holds Webinar on Leaves of Absence and the ADA**

On October 4, 2016, ICED sponsored a webinar on 'Leaves of Absence and the ADA: What State Agencies Need to Know.' The speaker was Ms. Sharon Rennert, an Equal Employment Opportunity Commission (EEOC) attorney and expert on the Americans with Disabilities Act (ADA). This special issue of *ICED NEWS* is devoted to that presentation, and the contents have been reviewed by Ms. Rennert.

**Why this topic is important to State Agencies?**

As an employer, the State is subject to the Americans with Disabilities Act and the Illinois Human Rights Act, both of which require reasonable accommodation of employees with disabilities. Providing leaves of absence is a form of accommodation and an important benefit for older workers and employees with disabilities. This means State agencies in furthering opportunities for employees with disabilities and complying with state and federal laws, need to have information about leaves of absence.

**What Employees are covered by the ADA?**

The ADA is a broad statute that covers people with physical or mental impairments that limit major life activities. The laws don't cover very brief and insubstantial conditions, like the flu or a cold, medical conditions that generally last less than three months, however, it is probably more likely than not that an employee needing a leave of absence has a disability covered by the ADA. If an agency has a question about whether an employee's condition is a disability under the statute – for example, the disability isn't apparent or it is unclear about the impact on a major life activity – the employee can be asked to submit documentation (including medical documentation) to establish the point. The EEOC says it shouldn't be too difficult to determine whether an employee is covered by the ADA, and the need, if any, to verify coverage should not be that time-consuming.

**When does the ADA come into the picture?**

The State offers employees leaves of absence as a benefit, the terms of which can be explained by agency human resource or benefit staff. A leave of absence may be a block of time or intermittent leave. These leaves of absence are available regardless of whether a person has a disability under the ADA, which means no accommodation request is necessary to activate the leave coverage. Similarly, the Family and Medical Leave Act (FMLA) provides for leaves for

covered employees. A State employee doesn't have to make an accommodation request to qualify for FMLA coverage either, although he/she would have to meet the requirements of that statute. It's when State- sponsored and FMLA required leaves are exhausted that the ADA and reasonable accommodation comes into the picture.

### **What is a reasonable accommodation?**

Under the ADA, an accommodation is an adjustment made by the employer that will enable a person with a disability to apply for a job, perform a job, or participate in an employer-sponsored benefit, [EEOC Accommodation Guidance](#) . This newsletter will not discuss all the ramifications of the reasonable accommodation requirement; however, several principles are important. First, an employee with a disability must request accommodation. It doesn't have to be in those words, and another party, spouse, doctor, etc., could request the accommodation on an employee's behalf. The point is that an employer must not impose an accommodation, but waits for a request to be made.

Second, accommodation requests should be evaluated individually. An accommodation request triggers what is called an 'interactive process' between the employee and the agency. The employee must establish him/herself as a person with a disability under the statute, if that is in question. He/she may be asked to provide documentation to support that point. The interactive reasonable accommodation process is used to determine an appropriate and effective accommodation that will not cause the agency to incur undue hardship.

Third, disability-related information is confidential, however, an agency can ask an employee why he/she needs a leave of absence and when the employee can be expected to return to work. Apart from establishing him/herself as a person with a disability, the employee may be asked to provide a doctor statement supporting or explaining the need for leave, the anticipated date of return to work, and anything that might affect the date of return.

### **EEOC provides guidance on Leaves of Absence under the ADA**

The Equal Employment Opportunity Commission issued guidance on leaves of absence under the ADA earlier this year, and the guidance can be found here, [EEOC Leaves of Absence Guidance](#) . The overall guidance provided in this document is that agencies must provide equal access for leaves of absence that are offered to all employees, and reasonable accommodations to employees with disabilities who need flexibility or adjustment in provision of leave, or leave beyond that provided by the State or a program like the FMLA. This might mean an employee who doesn't qualify for leave yet or one who needs an extended leave may ask for reasonable accommodation from the agency. The guidance and Ms. Rennert explain that whenever an employee requests leave for a medical condition or requests additional leave after other leave time expires, it should be considered a request for reasonable accommodation.

It's important to remember that each employee's need may differ – one may need a block of time, while another employee needs intermittent leave. According to the guidance, a State agency may obtain information from the employee's health care

provider (with the employee's permission) to confirm or to elaborate on information provided by the employee. Further, agencies can 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.

### **What questions can Agencies ask Employees Regarding Leave?**

Leave accommodation requests are usually made by employees whose designated leave has expired or who are not entitled to leave for some reason. After receiving the accommodation request, the agency can begin the interactive process by determining if the employee has a disability under the law. Sometimes a disability is obvious and other times hidden. Documentation can be requested if that is necessary to establish the presence of a disability. Once that issue is satisfied, the agency can request information from the employee or the employee's health care provider about the need for leave or additional time needed during a current leave. The agency can ask about the likelihood that the employee will be able to return to work if a leave extension is granted. In some cases, the employee and his/her medical provider can't provide a specific return date. If an approximate date is given, an agency should accept that, however, an employer is not required to provide an indefinite leave under the ADA.

Once a leave has been granted with a fixed return date, an agency may not ask the employee to provide periodic updates. An agency may reach out to an employee on extended leave, however, to check on the employee's progress. Even as an employee on leave exhausts his/her FMLA leave, an agency should not threaten to discipline or discharge him or her for failure to return to work without notifying the employee of his/her right to request an extended leave as a reasonable accommodation.

### **What can agencies ask employees about Returning to Work?**

An employee returning to work following a leave of absence has the right to request reasonable accommodation in regards to job performance. An agency cannot require an employee with a disability to be returned to work without restrictions or 100%-healed. The agency must look at every case individually and determine whether the employee can return to work with reasonable accommodation. Reassignment to a vacant position is a form of reasonable accommodation. 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.

### **If laws overlap, which should control leave determinations?**

EEOC issued a guidance document comparing the Family and Medical Leave Act with the ADA, [EEOC publication](#) . Where the laws differ, Ms. Rennert said that the FMLA requires that employees be able to pick the elements of the law most favorable to them. However, generally most leave requests are able to be handled first under the FMLA, and then under the ADA, with no need to "mix and match" simultaneously from the two statutes.

## When can an agency deny a leave extension request?

Employers are not required to provide accommodations, including leave, that cause them to experience undue hardship, and an agency can deny a leave extension request on those grounds. The undue hardship concept is discussed in EEOC's guidance on accommodation, [EEOC Reasonable Accommodation Guidance](#), and is generally defined as an action causing significant expense or difficulty. In determining whether a leave accommodation causes undue hardship, an agency can consider the following: the amount and/or length of leave required, frequency of the leave, flexibility of the need for leave (for example, whether treatment normally provided on a Monday could be provided on some other day during the week), the predictability of intermittent leave (leave following a seizure is unpredictable, while intermittent leave for chemotherapy is predictable), the impact of the employee's absence on coworkers and completion of tasks, and the impact on the employer's operations and its ability to serve customers/clients appropriately.

## Questions?

Ms. Rennert said she would respond to questions about leaves of absence and reasonable accommodation, as her schedule permits. Send any questions you have to [Susan.Allen@Illinois.gov](mailto:Susan.Allen@Illinois.gov), who will send them on to Ms. Rennert.

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