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## HUMAN RESOURCES UPDATE

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### ADA May Require Leave of Absence beyond FMLA

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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Most employers understand their obligation under the Family and Medical Leave Act (FMLA) to provide up to 12 weeks of unpaid leave to eligible employees. However, many employers are not aware that the Americans with Disabilities Act (ADA) may require them to extend an employee's leave beyond those 12 weeks as a form of reasonable accommodation.

A leave of absence may be a form of reasonable accommodation under the ADA when an employee asks for time off which exceeds the maximum allowable time away from work that an employer offers, under the FMLA or otherwise. There is no magic number or maximum amount of time that an employer must offer an employee to satisfy the reasonable accommodation requirement. Rather, the decision of what amount of leave to allow must be made on a case by case basis.

In determining whether extended leave is a reasonable accommodation, an employer may consider factors such as if or when the employee will be able to return to work and whether the leave will create an undue hardship on the employer. In considering whether the requested extension of leave creates an undue hardship, the employer may consider factors such as its financial and human resources and the nature of the employee's job. Any leave of absence granted to an employee as a form of reasonable accommodation should be documented in writing and placed in the employee's personnel file.

Note that unlike the FMLA, the ADA does not provide for any extended leave for an employee who needs to care for a family member. Also, the protections of the ADA extend only to disabled employees who have substantial limitations on major life activities.

The FMLA applies to any employer with 50 or more employees. In contrast, the ADA applies to any employer with 15 or more employees.

## Strong Sexual Harassment Policy Key to Defending Claims

The United States Supreme Court has made it clear that the development and distribution of a comprehensive sexual harassment policy is key to defending sexual harassment claims. The Courts have further indicated that it is prudent for the policy to (1) outline a procedure for reporting harassment, (2) promise that employees will not be retaliated against for raising claims of harassment, (3) give examples of prohibited conduct or statements, (4) state that the employer will not tolerate harassment by employees or non-employees, and (5) warn that employees who engage in sexual harassment are subject to disciplinary action, up to and including termination.

In drafting a sexual harassment policy, an employer should not guarantee that claims will be kept confidential. Total confidentiality may not be possible because the employer may need to disclose the nature of the allegations to the accused or witnesses in order to fully investigate the allegations. Thus, the policy should only promise that complaints will be kept confidential "to the extent possible."

In addition, a harassment policy should give employees at least two different avenues of reporting complaints. It is important not to limit reporting of such complaints to an employee's supervisor since quite often the offending party *is* the supervisor. The best approach is to ask the employee to report any complaint to human resources, his or her supervisor, or any other member of the management team. Supervisors and managers should be trained to immediately relay such complaints to the human resources department to handle the investigation.

## PRACTICE TIP: Keys to a Meaningful Performance Evaluation

- **Be honest.** Resist the temptation to avoid areas of the employee's performance that need improvement. Although it is appropriate to point out an employee's achievements and strengths, it is equally important to discuss his or her deficiencies. Being honest not only allows the employee the opportunity to improve, but creates a record of the problem areas in the employee's personnel file. Documentation of deficiencies in this regard is often of paramount importance in employment litigation.
- **Be uniform.** If you use a rating scale for performance evaluations, be certain to explain it in detail to supervisors and managers. For example, the terms "Poor" or "Satisfactory" may be interpreted differently by various members of management. All evaluators need a consistent understanding of the forms and terms used in the process.
- **Skip the quota approach.** A system which requires a certain percentage of employees in each evaluation category should be avoided. Employees should be judged on their individual performances, not pegged into a category merely to meet a quota based upon the number of employees a human resources department thinks should be in each group. This is an artificial method of evaluating workers that often leads to inaccurate results.
- **Use employee acknowledgments.** Employees should sign an acknowledgment that he or she reviewed the evaluation. This prevents an employee from later claiming ignorance as to the criteria or results of the evaluation. You should also give employees an opportunity to write a response to any element of the review he or she disputes.
- **Be specific.** Rather than using general or vague descriptions of the employee's work, cite specific examples that may be available. Reliance upon objective criteria of this nature bolsters the veracity of the performance review. For example, if one of the employee's weaknesses is being tardy, note the specific number of tardies during the covered period. Be certain that any supporting documentation is either attached to the evaluation or included in the personnel file.

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