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EEOC RESOURCE DOCUMENTS ON TRANSGENDER EMPLOYEE BATHROOM ACCESS AND LEAVES OF ABSENCE FOR EMPLOYEES WITH DISABILITIES

The U.S. Equal Employment Opportunity Commission ("EEOC") recently published resource documents on two hot topics in the labor and employment world: bathroom access for transgender employees and leaves of absence for disabled workers. The EEOC notes that its resource documents do not create new policy, are not voted on by the Commission and are only meant to assist the public in understanding already-existing EEOC positions. The EEOC issues resource documents in various formats, including best practices, brochures or flyers, fact sheets, informal discussion letters, primers & other small business information; Q&A; technical assistance; what-you-should-know; and toolkits.

BATHROOM ACCESS FOR TRANSGENDER EMPLOYEES

On May 2, 2016, the EEOC issued a Fact Sheet discussing bathroom access for transgender employees under Title VII. The Fact Sheet starts by defining the term "transgender" as "people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g., the sex listed on an original birth certificate)." The definition also clarifies that a "person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman."

The EEOC reiterates its position that discrimination on the basis of an employee's status as transgender constitutes unlawful sex discrimination under Title VII. The Fact Sheet cites to a 2015 case in which the EEOC held that:

- Denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
- An employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and
- An employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

The EEOC also explained its position that gender-based stereotypes, perceptions or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment.

The EEOC took an apparent shot at the controversial North Carolina law by asserting that "contrary state law is not a defense under Title VII." The EEOC is not alone on this front as the Justice Department filed a complaint against the state of North Carolina on May 9, 2016, alleging that it (along with the University of North Carolina and the state Department of Public Safety) is unlawfully discriminating against transgender individuals in violation of federal law as a result of the implementation of House Bill 2.

As can be seen from the fact sheet and other recent activity, the EEOC and other federal agencies (including OSHA, the DOJ and the DOL) are taking a strong stance on the protections they believe are afforded to transgender employees under federal law. Accordingly, employers are well advised to let employees use the restroom corresponding with their gender identity.

EMPLOYEE LEAVES OF ABSENCE AND THE AMERICANS WITH DISABILITIES ACT

On May 9, 2016, the EEOC issued a Resource Document describing the circumstances under which employers must provide leaves of absence to disabled employees. The EEOC states that the document creates "no new agency policy" and that it instead presents answers to commonly asked questions posed by employers and employees alike. The agency offers its guidance in the form of 20 "examples" to illustrate employer obligations and includes links to other EEOC guidance on employee leaves of absence.

Medical leaves of absence represent a significant challenge to employers as they balance the staffing and scheduling requirements with employee needs. Under the Americans with Disabilities Act ("ADA"), an employer must sometimes provide reasonable accommodation to an employee with a disability unless the accommodation would cause an undue hardship. The ADA also prohibits discrimination against disabled workers.

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The EEOC reminds us that an employee leave of absence policy must be implemented in a non-discriminatory manner by providing leave to a disabled employee under the same circumstances it would provide leave to a non-disabled employee. Thus, for example, the employer cannot require a psychiatrist's note from an employee who requests time off due to depression when the employer's written sick leave policy imposes no conditions on use of the sick leave.

The EEOC's second main point is that an employer must sometimes provide unpaid leave to a disabled employee as an accommodation when the employee needs time off for his/her medical condition. For instance, if the employer's policy does not make an employee eligible for any leave until he has worked for six months, the employer must provide leave to a disabled employee who needs time off for medical treatment even if he only began work three months earlier (unless the employer can establish undue hardship).

The EEOC also emphasizes the "interactive process" and focuses attention on the information an employer may request from an employee who seeks time off of work as an accommodation. In order to determine whether leave can be provided as an accommodation, the EEOC says that the employer typically should focus simply on: (a) the reason leave is needed; (b) whether leave will be taken in a block of time or intermittently; and (c) how long the leave will last. The agency adds that requesting periodic "updates" during the leave would be improper unless the employee requests an extension.

One of the issues that often puzzles employers is the obligation, as the EEOC describes it, to "make exceptions" to employee leave of absence policies. The EEOC's resource document makes clear that:

Although 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.

In this regard, the agency takes aim at employer "form letters" that do not adequately explain to employees that a leave of absence may be extended if necessary to accommodate the employee's disability. The EEOC expresses its hope that employers affirmatively tell employees in form letters that if they need additional unpaid leave as a reasonable accommodation, they should request it as soon as possible.

The EEOC goes a step further in its resource document and describes issues that often arise when the employee returns to work from a leave of absence. The agency explains that an employer cannot insist that an employee be "100% healed" before returning to work and that "[t]aking a rest break is a form of reasonable accommodation."

These and other issues are covered in the EEOC's new resource document on employee leaves of absence under the ADA.

EMPLOYER CONSIDERATIONS

Although the EEOC's newly published resource documents do not themselves carry the force or effect of law, they do compile the EEOC's current "wisdom" and are generally supported by existing law. Employers are well advised to consider the EEOC's guidance when making decisions on the subjects of bathroom access by transgender employees and leaves of absence under the ADA.

If you have any questions, please contact Brad Taormina at btaormina@hallrender.com, Jon Rabin at jrabin@hallrender.com or your regular Hall Render attorney.

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