



KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

Returning to Work: Responding to Requests from Employees and Related Issues

As described in the news (as well as a recent Krokidas & Bluestein [client alert](#)), Massachusetts is cautiously beginning to reopen. Not only must employers comply with the mandatory safety standards summarized in that client alert, but they also must heed their obligations under other employment laws such as the Americans with Disabilities Act (“ADA”) as they begin to reopen and call their employees back to work.

Many employees will continue to be reluctant to return to work. Some employees may have an underlying health condition that puts them at greater risk of complications should they contract COVID-19; others may have a household member with such an underlying condition and may fear bringing the virus home; and some may express generalized anxiety about contracting the virus. Thus, the question is: must employers allow employees to stay home? The answer is: it depends.

Apart from whether the employee qualifies for paid leave under the Families First Coronavirus Relief Act (see [prior alert](#)), the answer depends on whether the employee is entitled to the protections of the ADA, which prohibits employers from discriminating on the basis of disability, and mandates that employers make reasonable accommodations for employees with disabilities. It also depends on whether the request to stay home is a reasonable request, or if there are alternative accommodations that would reduce the chance of exposure.

Determining Applicability of the ADA

An employee is protected by the ADA if he or she is a “qualified individual with a disability,” which is someone who (1) is qualified to do the job, with or without a reasonable accommodation, and (2) has a disability, meaning that he or she:

- (a) Suffers from a physical or mental impairment that substantially limits one or more major life activities;
- (b) Has a record of having such an impairment; or
- (c) Is regarded as having such an impairment.

The ADA also protects an otherwise qualified employee who has a known relationship or association with someone who has a disability.

An employer may ask questions or request medical documentation to substantiate the claim that an employee has a disability, or that the employee has a relationship with someone who has a disability. However, the employer should take care only to require the information that is minimally necessary to establish that the individual has the disability in question. That is, rather than require information regarding the individual's specific diagnosis, the employer should require only that information necessary to describe the employee's functional limitations.

Performing Reasonable Accommodation Analysis

If an employee is entitled to protection under the ADA, the employer must treat the employee's request to stay home as a request for a reasonable accommodation. In evaluating the request, the employer must engage in an interactive process with the employee to determine if the requested accommodation—a leave of absence—is reasonable or if other alternatives exist that would be sufficiently effective.

In the case of an employee with an underlying health condition (or an employee whose household member has an underlying health condition), the employer may consider alternatives that are less drastic than a leave of absence, such as allowing the employee to work from home, reassigning the employee to an isolated, more sterile workspace, or altering the employee's hours to minimize the number of other employees at work during the employee's shift. If those or other alternatives are not feasible, or would not be sufficiently protective, the employer should consider granting the request for a leave of absence (typically unpaid).

As for the length of a leave of absence, it remains to be seen what will be considered reasonable under current circumstances. In one pre-pandemic case, the First Circuit decided that a request for a 12-month leave of absence was facially unreasonable. Delgado Echevarria v. Astrazeneca Pharmaceutical LP, 856 F. 3d. 119 (1st Cir. 2017). In reaching such decision, the First Circuit favorably cited decisions of other courts, which rejected 6-month leaves as being unreasonable. Nevertheless, the analysis might be different now, as the ongoing public health emergency continues. It may be that a 6-month leave of absence that would have been deemed unreasonable in 2017 is considered reasonable now, assuming the public health emergency continues for that length of time. Thus, employers should not set hard line rules for leaves of absence, and instead should consider each request on a case-by-case basis.

As a final note about the ADA, an employer is not obligated to grant a request for a reasonable accommodation if doing so would pose an "undue hardship," meaning that granting the request would be at the employer's "significant difficulty or expense." The Equal Employment Opportunity Commission recognizes that the calculus of determining whether an "undue hardship" exists is different in the age of COVID-19 than it was before the pandemic. Circumstances that would not have met the threshold a year ago may well do so now in light of the employer's current resources as affected by the virus.

Responding to an employee's request to stay home is undoubtedly complicated. Employers should approach each request carefully and consider it in light of the facts and circumstances of each case.

Other Issues Regarding Return to Work

Some other issues for employers to consider as their employees return to work include:

- What reasons related to COVID-19 entitle an employee to unemployment benefits?
- How do employers select particular employees for return from furlough consistent with antidiscrimination laws?
- What OSHA requirements must employers be aware of regarding COVID-19?
- When may employers inquire about off-work activities as part of a safety plan for returning employees to the workplace?
- May employers require temperature checks or other measures as a condition of returning to the workplace?
- How does the non-emergency Family and Medical Leave Act play into employee leave requests?

If you have any questions about how to respond to an employee's request for a leave of absence, or any other questions about employers' obligations and best practices in light of COVID-19, including the questions listed above, please contact a member of our employment law team: Paul Holtzman (pholtzman@kb-law.com), Jill Brenner Meixel (jmeixel@kb-law.com), Allison Belanger (abelanger@kb-law.com), or Brian Richichi (brichichi@kb-law.co)

FA\0001\621239.1