

Eva, the HR Compliance Diva



Ask Eva

Eva, the HR Compliance Diva answers questions posed by new & seasoned HR professionals, employees and small business owners. Answers are based on knowledge, experience, research and feedback from other HR and compliance resources. This week, we have a question from Gina on August 11, 2016:

Question

Hi,

Do I have to make an "accommodation" for one of my older employees who says he has to work part time and use a walker while he heals from some recent surgery? I really need him to be full time.

Thank you

Gina

Eva's answer:

Hi Gina,

I hate to be one of those people who answer your questions with a question but, here goes. It sounds like your employee had a recent surgery and is expected to recover although you do not mention how long he has requested this accommodation or how long recovery is. Is using a walker in your company a safety issue? First series of clarifications:

- 1. Does your company have more than 50 employees and has this employee worked more than 1 year or over 1250 hours? If so, you are required to offer Family Medical Leave under the Family Medical Leave Act provisions. FMLA (if the requirements are met), is unpaid leave and an employee can request intermittent leave for the purpose of recovery for a surgery as long as he is eligible and the physician indicates part time work as a medical necessity. If this is a request made by the physician, under FMLA, you would have to honor that.*
- 2. If he is not eligible for FMLA, you should consider the American with Disabilities Act (ADA) and the American with Disabilities Act Addendum (ADAA). The requirements under both of these laws can obligate you to make accommodations except if you are able to prove it would be a financial hardship. According to the ADAA, the definition of a disability is no longer defined as a permanent condition. In fact, since it is not clear if the condition will or will not become a*



permanent condition after the recovery, I would tread carefully. There is a provision in the ADAA that makes temporary medical conditions of less than 6 months, not a requirement for accommodations however, I would recommend acting as if the condition falls under the ADAA to avoid any appearance of violating ADA incase the condition changes. This was one of those vague definitions in the ADAA, but there were a few appeals that put this definition at risk.

- 3. I totally understand that you really need him for full time however, you can be liable if he injures himself because you did not allow him to work part time for recovery.*
- 4. Although not mandatory, does your employee have any form of short term disability insurance (STD) offered by the company? If so, there are certain options that can be considered.*
- 5. Remember, what you do for one employee, should be offered to other employees in the same situation no matter what age the employee is (since you indicate the employee is an “older employee”). Something else to take into consideration, employees age 40 or older are considered “protected” as defined in The Age Discrimination in Employment Act (ADEA).*

Gina,

What I am saying is the situations may not require an accommodation however, you need to ask yourself, shall I or my company be at risk for not granting the requested accommodation and it later become a disability? Can you afford to reject an accommodation request of this kind? How will other employees see this? Are there other alternatives that will help you during this brief recovery time if you approve the accommodation? I am obviously, recommending you take all these factors into consideration which might help in making a decision taking the best interest of the employee and the company (no pressure).

For a more specific answer and if you feel comfortable without naming the company, you can provide some more details on the situation on the Ask Eva tab on the website at www.hrcompliance.biz. Good Luck ☺

Eva

Resources

<https://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

[file:///C:/Users/Margie/Desktop/AskEva ComparisonofADAandADAAA .pdf](file:///C:/Users/Margie/Desktop/AskEva%20ComparisonofADAandADAAA.pdf)

<http://www.laborandemploymentlawcounsel.com/2014/02/temporary-disabilities-no-need-to-worry-about-the-ada-right-think-again/>

<https://www1.eeoc.gov/eeoc/publications/adaqa1.cfm?renderforprint=1>

