LEGAL UPDATES

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EEOC Continues Hard Look at Employer Terminal Leave Policies as Violating the Americans with Disabilities Act Amendments Act (ADAAA)

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As noted in our April 6, 2011 alert, the EEOC's comments in the final regulations interpreting the ADAAA signaled a continuing focus on maximum leave time policies. This focus on leave was reinforced in a June 8, 2011 public hearing on leave as a reasonable accommodation under the ADAAA, and gives further insight into the EEOC's interpretation of employers' obligations under the law.

A significant portion of this hearing focused on leave policies that require employees to return to work when the leave under the policy expires or face termination. Such policies had been challenged by the EEOC in two class actions against Sears Roebuck & Co. and SUPERVALU Supermarkets alleging the Americans with Disabilities Act (ADA) had been violated because these companies' policies allegedly required automatic termination of disabled workers if they were unable to return to work when the term of the leave expired. These cases were resolved by consent decrees under which Sears paid $6.2 million and SUPERVALU $3.2 million. Several other systemic cases are still pending.

The testimony of John Hendrickson, the EEOC's regional attorney for the Chicago District who handled these two cases, gives insight on how the EEOC views these cases going forward. He identified five lessons learned from these cases:

1. An inflexible period of disability leave, even if substantial, is not sufficient to satisfy an employer's duty of reasonable accommodation.

Reasonable accommodation requires more than putting an employee on leave and waiting to see if the employee heals 100% and can return in the same job performed in the same way as before the employee went on leave.

Leave may be the appropriate accommodation in some cases, but in other cases, the employer must determine whether there is any other accommodation—like reassignment or reduced hours or an assistive device—that would enable the employee to return to work.

2. The appropriate length of leave under the ADA requires an individualized analysis, even where the employer has a generous fixed leave policy.

Leave than can never be extended is not consistent with the ADA.

As a best practice, fixed leave policies should be amended to make clear that the leave period can be extended or adjusted as a reasonable accommodation where such extension or adjustment would not result in undue hardship to the employer.

3. Separating leave administration—like the administration of worker's compensation benefits or disability benefits—from ADA administration is risky for employers.

What may result is the proverbial left hand failing to know what the right hand is doing. The information collected for benefits administration by the employer is not used by the ADA administrators at the same employer to determine if the employee on leave can be brought back to work with a reasonable accommodation.

4. Clear lines of communication regarding reasonable accommodations are critical not only with employees on leave but also with their healthcare providers, supervisors and managers.

Best practices require communication about the availability of reasonable accommodations with the players at all levels of the leave process.

A successful accommodation process requires the involvement of all the players.

5. The EEOC occupies a unique role in litigating these cases.

Few private plaintiffs' attorneys have been willing or able to invest the resources to handle these cases. EEOC litigation remains absolutely critical in combating systemic employment discrimination in violation of the ADA. At the conclusion of the hearing, there was some consensus among the

commissioners present that the EEOC should update its ADA guidance for employers, but that guidance is likely not to be issued in the immediate future.

What This Means to You

This hearing, the cases filed and settled and the comments of the EEOC attorneys make it clear that there is a focus on these terminal leave policies as illegal under the ADAAA. Accordingly, we suggest the following:

Employers should carefully examine their leave policies or practices to determine whether there is a hard maximum limit to the leave that requires or results in the employee being terminated if unable to return to full duty. Such policies are likely to be found to violate the ADAAA and should be amended.

Make sure that the interactive process is invoked in every disability situation, including those where leave is a part of the accommodation. While some suggest that the burden of invoking that process is with the employee, prudent HR practice will ensure that there is interaction between the employer and employee in every disability situation including leave and that the interactive process and all other steps in the accommodation efforts are well documented.

If leave policies are administered by third parties, be sure the information obtained by them is available to the HR personnel involved in the accommodation practice.

Understand that the Family and Medical Leave Act, state worker's compensation laws, or short-term or long-term disability insurance policies do not define or limit the employer's obligations to employees under the ADA.

Contact Info

Should you have concerns or questions about these issues, please contact your regular Husch Blackwell attorney, or one of the individuals in our Labor & Employment practice group for assistance.

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