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The EEOC has recently embarked on a major initiative and has sued several employers in various parts of the country alleging that the employers' leave policies violate the Americans with Disabilities Act (ADA). The EEOC appears to be targeting policies that require termination of employees who previously qualified for leave under the Family and Medical Leave Act (FMLA), are not able to perform their job because of medical issues, and therefore are unable to return to work at the end of the twelve-week FMLA period.

Recent EEOC Lawsuits Highlight Importance of Adopting Comprehensive Procedures for Managing Employee Leaves

By Kerry Notestine and Kelley Edwards

Introduction

The Equal Employment Opportunity Commission (EEOC) has recently sued major employers in various parts of the country alleging that the employers' leave policies violate the Americans with Disabilities Act (ADA). The EEOC appears to be targeting policies that require termination of employees who previously qualified for leave under the Family and Medical Leave Act (FMLA), are not able to perform their job because of medical issues, and therefore are unable to return to work at the end of the twelve-week FMLA period. The EEOC alleges that these policies violate the employers' reasonable accommodation obligations under the ADA. Several of these lawsuits have resulted in multi-million dollar settlements and agreements to change company policy in order to comply with EEOC guidelines.

Despite these well-publicized lawsuits, many employers have not reviewed their leave policies and practices to ensure compliance with reasonable accommodation obligations. This article will summarize the law on this issue and provide a recommended solution to comply with related legal obligations.

Legal Rights Related to Leave Issues

There are a number of legal obligations that govern an employer's management of employees who are not able to perform their jobs because of physical or mental restrictions and who require leaves of absence. These legal restrictions include provisions of the ADA prohibiting discrimination based on disabilities and requiring reasonable accommodation, the right to continuing medical coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), guaranteed leave rights under the FMLA, injury compensation under state workers' compensation programs, and contractual and Employee Retirement Income Security Act (ERISA) obligations related to Short-Term Disability (STD), Long-Term Disability (LTD) and other benefit and compensation plans.

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The ADA

General ADA Obligations

Congress enacted the ADA to prevent otherwise qualified individuals from being discriminated against in employment based on a disability.[1] The ADA prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2] Employers also may not contract or arrange with others to discriminate, utilize discriminatory standards, criteria, or methods of administration, or exclude or deny qualified individuals from jobs or benefits on the basis of a disability.

Besides prohibiting discrimination based on covered disabilities, the ADA also requires employers to take an extra step and make "reasonable accommodations" to the known physical or mental limitations of an otherwise "qualified individual with a disability."[3] Employers may avoid this reasonable accommodation obligation by establishing that the accommodation causes an "undue hardship" to the employer's business.[4] Much of the litigation under the ADA concerns whether a particular accommodation is "reasonable" and/or whether it causes the employer "undue hardship."

Permitting the use of accrued paid or unpaid leave is a form of reasonable accommodation when it is necessitated by an employee's disability.[5] This leave may include time off provided under the FMLA, workers' compensation leave, and/or any other leave available under applicable statutory law or employer policy. In addition, extended leave beyond that provided under FMLA or employer policy can be a reasonable accommodation of a disability under the ADA.[6]

"No-Fault" Leave Policies Under the ADA

The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship specifically states that "no-fault" leave policies, under which employees are automatically terminated after they have been on leave for a certain period of time, are unlawful under the ADA. The Enforcement Guidance states:

> 17. May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?
>
> No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[7]

No-fault leave policies, if uniformly applied, do not unlawfully discriminate against individuals with disabilities because the policies generally apply to anyone on leave, whether or not they have a covered disability. The EEOC takes the position that no-fault leave policies do not comply with an employer's obligation to reasonably accommodate employees with disabilities who need leave beyond the set leave period. This provision of the Enforcement Guidance indicates that a company should modify a no-fault leave policy to provide extended leave unless the employer can demonstrate that: (1) a different accommodation would enable the person to perform the essential functions of his or her position; or (2) granting additional leave would cause an undue hardship. The EEOC Enforcement Guidance specifically provides that "[m]odifying workplace policies, including leave policies, is a form of reasonable accommodation."[8] Courts have limited the reach of this EEOC interpretation of the reasonable accommodation obligation, however. Specifically, courts have concluded that indefinite extended leave is not a reasonable accommodation precluding employers from having to demonstrate undue hardship.[9]

For purposes of this article, we will not engage in an extensive analysis of the employer's obligation to reasonably accommodate an

employee's disability so that the employee may be able to return to work. Our experience is that employers are familiar with this topic and generally are prepared to engage in the reasonable accommodation process associated with return from leave. Instead, this article focuses on the interplay of reasonable accommodation and undue hardship when the employee is not able to return to work with or without reasonable accommodation and the employer should consider extended leave as a reasonable accommodation to the employee. It is important to note that the EEOC Enforcement Guidance advises that undue hardship cannot be based solely on the existence of a no-fault leave policy.[10] The EEOC states that the employer must demonstrate undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy.[11]

In certain situations, an employer may be able to demonstrate undue hardship because of the financial cost of providing extended leave or because of operational difficulties associated with rearranging schedules or hiring temporary workers to cover for employees on extended leave. The employer bears the burden of showing undue hardship and should use caution in attempting to justify denial of extended leave based on such financial and operational difficulties. In addition, employers generally cannot demonstrate economic hardship based solely on the purported financial burden of having to keep an employee on extended leave because employers are not obligated to pay employees on extended leave or continue their health benefits. Moreover, the provisions of COBRA allow an employer to provide COBRA notice to individuals on extended leave just as an employer would provide notice to terminated employees. The employee on leave then would need to pay the full cost of medical benefits under the provisions of COBRA.[12] As a result, employers should refrain from assuming that undue hardship automatically results from extended leave.

The EEOC also states that an employer is required to hold open a person's job as a reasonable accommodation unless the employer demonstrates that doing so imposes an undue hardship.[13] This accommodation obligation also may extend to vacant equivalent positions for which the employee is qualified and, if no such positions are available, vacant non-equivalent positions for which the employee is qualified. Employers sometimes assert that they suffer an undue hardship based on the need to have the job performed by the employee on leave, or by a permanent – instead of temporary – replacement who presumably will be of the same caliber as the employee on leave. Employers may be able to establish undue hardship for this reason and replace the employee on leave once the employee's statutory right to reinstatement under the FMLA has expired.

But the mere end of an employee's right to reinstatement under the FMLA or similar laws may not necessarily justify terminating the employee. Even if the employer is confident that its undue hardship analysis and decision to replace an employee (after considering alternative open positions) will withstand scrutiny, the employer may elect to adopt a practice of hiring a replacement for the employee but continuing the employee on extended leave. This may be an issue of risk tolerance, with employers being more or less aggressive depending on their particular workforces and litigation experiences. It is our experience that employers that utilize a practice of extended leave often do not have to make the difficult undue hardship determination because an extended leave process often resolves the employee's employment status. For example, the employee may fail to properly apply or reapply for extended leave, thus abandoning employment, or may receive medical information that was not available at the time guaranteed leave expired, justifying the employer's decision to deny further leave.

Good Faith Interactive Process under the ADA

An employer has a duty to participate in a good faith interactive process with an employee upon receiving notice of the employee's disability and request for accommodation.[14] The interactive process requires a good faith exchange of information between employer and employee, but courts have interpreted the regulations to place the burden on the employer to take the initiative and request additional information that it believes it needs.[15] Courts have held that where the employer does not consider the reasonable accommodation of extended leave, and instead terminates an employee for being absent without approved leave, the employer fails to engage in the flexible, interactive process.[16] The employer also has an obligation to seek any additional information it needs to appropriately consider an employee's request for extended leave.[17]

On the other hand, employers are not required to grant employees indefinite leaves of absence. Instead, extended medical leave is only reasonable where "it is finite and will be reasonably likely to enable the employee to return to work."[18] The EEOC's Enforcement

Guidance similarly refers to accommodation for a "specific period of time." Accordingly, an employer must consider whether the employee has a need for extended leave based on the employee's particular facts and circumstances.

Employee Benefit (STD, LTD) and Workers' Compensation Programs

Many employers have employee benefit plans or salary continuation programs that provide for compensation during periods of time when an employee is unable to work due to disability. These plans or programs vary widely in terms of the amount and length of the compensation. Plans or programs providing for complete or partial replacement of income for six months or less generally are know as Short-Term Disability (STD) plans. Plans for compensation for longer periods of time generally are know as Long-Term Disability (LTD) plans. Particularly with LTD programs, an employee must represent and obtain supporting medical documentation that the employee is prevented completely from doing his or her former job for some period of time, and sometimes that period is permanent. Employees on LTD often also apply for Social Security Disability Income (SSDI), which requires medical evidence demonstrating that the person is totally and permanently disabled. One might assume that if an employee represents that he or she is totally and permanently disabled either on an LTD or SSDI application, he or she would not be otherwise qualified to work and would not be entitled to reasonable accommodation such as extended leave, and in most cases that would be true. Employers must be careful, however, about assuming that someone who claims LTD or SSDI necessarily is not entitled to protection under the ADA.

The United States Supreme Court, in *Cleveland v. Policy Management System Corp.*, reasoned that an individual claiming SSDI was not necessarily prevented from asserting that she was qualified for the position she formerly held when she applied for SSDI benefits because the Social Security Administration (SSA) does not take into account the possibility that a "reasonable accommodation" could permit the individual to continue working.[19] Therefore, if a plaintiff asserting an ADA claim obtained SSDI benefits and represented his inability to work, he is allowed to explain the apparent contradiction to his employer. The Supreme Court specifically stated that "[w]hen faced with a plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's conclusion that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'" Therefore, even where the employee is eligible for LTD or SSDI benefits, prudent employers should allow employees an opportunity during the interactive process to provide information indicating whether or not the employee can perform the essential functions of the job.

In addition to STD, LTD and similar benefit and compensation programs, most employers have workers' compensation insurance or programs, often mandated by state law, to compensate employees injured on the job. After an employee is injured, in most states the state workers' compensation agency conducts an administrative proceeding to determine the extent of the injury and any permanent impairment of the employee's ability to perform the prior job.

Employees often emphasize the seriousness of the injury to increase the workers' compensation recovery, which sometime is inconsistent with a claim that the employee can perform the prior job. Workers' compensation proceedings often conclude with a finding of "maximum medical improvement" (MMI), which may or may not allow the employee to return to work. As with SSDI and LTD, a particular MMI rating may or may not support a conclusion that the employee cannot return to work. Instead, the employer must conduct a factual analysis based on all the available evidence to determine whether an employee can perform the essential functions of the employee's prior job with or without reasonable accommodation, including extended leave. An employer may conclude that an employee cannot return to work based on MMI or eligibility for SSDI or LTD, but the employer should allow the employee an opportunity to present evidence that he may be able to return to work in the foreseeable future. Furthermore, the laws in several states prohibits terminating employees while on leave of absence because of workers' compensation claims. Some of these statutes do not only prohibit discrimination in the application of leave policies but also affirmatively prohibit any adverse action against an employee while on workers' compensation leave.[20] In those states, employers must grant extended leaves in compliance with those statutory provisions.

Return from Leave

The FMLA guarantees employees the right to return to their prior job or an equivalent position if the employee returns from leave within

twelve weeks of the commencement of the leave or within twenty-six weeks for certain military leave situations.[21] There are no other federal statutes that require employers to reinstate employees upon return from leave caused by the employee's medical condition within a specific time period. Generally, state laws do not require reinstatement other than FMLA-like statutes, some of which provide slightly longer reinstatement periods. An employer should contact employees who are approaching the end of such guaranteed leave and determine whether or not the employee will be able to return at the conclusion of leave with or without a reasonable accommodation and, if not, whether the employee intends to return in the future. If the employee indicates a need for an on-the-job accommodation or an intent to return to work after the expiration of guaranteed leave, the employer should engage in the reasonable accommodation interactive process. This process should include discussions about reasonable accommodations that could return the employee to work immediately or, if that is not an option, reasonable accommodations related to extended leave. To the extent that current, sufficiently detailed medical information is not already available to the employer (for example, through the administration of a STD or LTD plan), the employee should be required to provide such information. This interactive process also should include undue hardship considerations, including whether the employer should replace an employee who remains on leave past the time of guaranteed leave.

If extended leave is considered, as it likely would be in most situations where the employee is unable to return to work with or without an on-the-job reasonable accommodation, the employer should send the employee an application for extended leave that requires the employee to provide medical information justifying extended leave and indicating an expected date of return. In some cases, the medical certification indicates the employee can return to work with certain accommodations. If the medical evidence demonstrates that the employee cannot return to work with or without reasonable accommodation but needs extended leave, the employer should place the employee on extended leave, and may replace the employee. The employer should not terminate employees replaced while on extended leave unless the employee fails to return the application for extended leave, the employee does not return to work when released by a medical care provider, or the available medical evidence demonstrates there is no need for extended leave because the employee is not likely to be able to return to work within a reasonable time period. If the employer replaces the employee while on leave and the employee eventually is able to return to work, the employer should return the employee to the former job if it is still available or any equivalent job that the employer held open during leave, search for another open position for which the employee is qualified and place the employee in any such open position, or terminate if there is no open position for which the employee is qualified upon return from leave. Employers should notify all employees of this practice to minimize risk of disability claims associated with return to work. This process will generally comply with the employer's obligation to reasonably accommodate a disability.

It is important that the employer not discriminate in how it applies this policy on returning from leave because discrimination in reinstatement based on disability or other protected category also violates the ADA and possibly other laws. An example of such discrimination would be if the employer did not replace individuals on leave due to cancer but immediately replaced employees on leave because of workplace injury. Such conduct typically violates state statutes prohibiting termination based on filing workers' compensation claims.

An employer should have a legitimate business need to replace someone on extended leave that is well documented. If it can demonstrate such a business need to replace the individual and the reinstatement process referenced above is followed, the employer will likely be able to avoid claims of unlawful discrimination. Of course, employers should keep in mind that in some states it is unlawful to terminate employees on workers' compensation leave.

Our experience is that human resources policies often do not address the actions the employer will take if an employee is not able to return from leave within the period of protected leave under the FMLA or similar state statutes. In addition, many employers have potentially unlawful no-fault termination policies providing for termination of employees unable to return to work at the end of the twelve or twenty-six weeks protected by FMLA and/or after six months or one year. It is recommended instead to have policies that comply with the principles stated above.

Recommended Process

To avoid potential liability under the ADA, and to coordinate obligations under the FMLA, COBRA, and applicable benefit plans, it is

recommended that employers take the following course of action with regard to any employee unable to work because of a physical or mental health condition.

- Place employees on leave when their mental or physical condition prevents them from performing the essential functions of their job with or without reasonable accommodation. It is recommended that employers issue an FMLA notice of eligibility and rights and responsibilities to anyone who is away from work for three or more days because of a mental or physical condition. Even if the employee is not entitled to FMLA leave, it is important to notify the employee of rights that they may have while on leave.
- Prior to the expiration of an employee's FMLA leave (or other type of guaranteed leave), or at the time the employee is seeking leave if the employee is not eligible for FMLA or other guaranteed leave, the employer should engage in the interactive process to determine if the employee needs reasonable accommodation. This interactive process may include consideration of possible accommodations that could return the employee to work, or if the employee is not able to return to work with or without reasonable accommodation, consideration of extended leave. The employer may utilize an application for extended leave which includes supporting medical documentation for extended leave. Employers also should consider sending a cover letter with the application for extended leave explaining the purpose of extended leave and consequences of failure to return a completed application.
- If the employee returns a completed application and medical information supports the need for leave, the company should place the employee on unpaid leave, although the employee may be eligible for STD, LTD, workers' compensation or other benefits. Furthermore, the company should require employees to reapply for extended leave with supporting medical documentation every three, six, twelve months or other period, depending on what is most administratively feasible for the company. The company should not terminate the employee merely because the employee's leave extends beyond the FMLA period or at any set intervals unless the employee fails to apply for extended leave. In that situation, the termination should be coded as job abandonment.
- A committee should consider returned applications for extended leave, along with supporting medical information as well as any other available medical evidence (including worker's compensation documentation, the employee's LTD benefits application, etc.). A committee could be used to reduce the risk of unlawful bias that may be established if a single decision-maker is involved and some adverse evidence of unlawful intent is discovered. This also enables the company to have a witness available to testify about the decision, even if one or more committee members leave the company. The committee should consist of individuals familiar with the issues addressed in this article and typically would include representatives from human resources, benefits, legal, operations, and/or finance.
- The committee should make the decision regarding reasonable accommodations and undue hardship. These analyses might include consideration of reasonable accommodation to return the employee to work, holding the former or other jobs open for the employee, replacing the employee while on leave, and extended leave. If the available medical evidence indicates that the employee can currently perform the job with or without reasonable accommodation, the employer should inform the employee that the he is expected to return to work. If the employee fails to return to work, the employer should terminate for job abandonment. If extended leave is a possible accommodation, the committee should consider whether the available medical evidence demonstrates that the employee cannot currently perform the essential functions of the job and there is some indication that the employee will be able to perform the essential functions of the job with or without reasonable accommodation in the future. If the available medical evidence indicates that the employee will not be able return to work in the future (for example, a permanent impairment rating prevents the employee from performing the job or an application for LTD indicates the employee is totally and permanently disabled), in the absence of other medical evidence or representations to the contrary received from the employee as part of the interactive process, there is no reason to provide extended leave as a reasonable accommodation. As a result, the company can deny extended leave and terminate employment.
- However, if the available medical evidence indicates that the employee cannot currently perform the job with or without reasonable accommodation but may be able to perform by some specified or estimated date in the future, the company should place or continue the employee on extended leave, absent an undue hardship determination. In conducting the undue hardship analysis,

the committee should review any operational and/or financial hardship associated with extended leave, including any hardship associated with maintaining the employee's position and, if warranted, should consider the availability of other open positions. These considerations may be assessed at regular intervals during extended leave, such as at time of application, to determine if there is a change in the undue hardship analysis.

- The company can adopt a more or less aggressive approach in evaluating the medical documentation submitted with the application for extended leave regarding whether or not the employee may be able to return to work in the future. The *Cleveland* decision referenced above provides that evidence that the employee is totally and permanently disabled for purposes of SSDI benefits does not necessarily demonstrate that that the employer could not reasonably accommodate the employee. The decision suggests that the employer should deny extended leave when there is evidence that the employee will not be able to perform the essential functions of the job in the future (such as an SSDI award) but allow the employee an opportunity to provide medical information indicating a future return. Some recent decisions have indicated that an employer may deny leave if the employee fails to present actual medical evidence that the employee can return to work in the relatively near future, regardless of whether there is evidence of total and permanent disability.[22] This authority supports the employer's right to specifically require medical evidence from the employee regarding an expected return date. Under this theory, the company could deny extended leave and terminate employment if the employee does not provide that information.
- Because extended leave after the expiration of FMLA leave is a qualifying event under COBRA, the company may send the employee COBRA notice requiring the employee to pay for medical benefit coverage while on extended leave.
- Finally, this process would not apply to employees on leave because of workplace injuries in states that prohibit termination of employees on workers' compensation leave, such as Oklahoma.

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[1] 29 C.F.R. § 1630.

[2] 42 U.S.C. § 12112(a).

[3] 42 U.S.C. §§ 12111(8), 12112(a).

[4] 42 U.S.C. § 12112(b)(5)(A).

[5] 29 C.F.R. § 1630.2(o) (1997); see *Cehrs v. Northeast Ohio Alzheimer's*, 155 F.3d 775, 782 (6th Cir. 1998).

[6] *See, e.g., Gibson v. Lafayette Manor, Inc.*, No. 05-1082, 2007 U.S. Dist. LEXIS 99008 (W.D. Pa. March 5, 2007).

[7] EEOC Enforcement Guidance at Q. 17.

[8] EEOC Enforcement Guidance at Q. 17; see also 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); *US Airways, Inc. v. Barnett,* 122 S. Ct. 1516, 1521 (2002).

[9] *See, e.g., Fiumara v. President & Fellows of Harvard College*, 526 F. Supp. 2d 150, 157 (D. Mass. 2007) ("Under Massachusetts and federal law, a leave of absence and leave extensions are reasonable accommodations in some circumstances. An open-ended or indefinite leave extension, however, is not reasonable."), *aff'd,* 327 F. App'x 212 (1st Cir. 2009) (citations omitted).

[10] EEOC Enforcement Guidance at n.50.

[11] *Id*.

[12] *See* 42 U.S.C. § 1163.

[13] EEOC Enforcement Guidance at Q. 18.

[14] *See Taylor v. Principal Fin. Group, Inc.*, 93. F.3d 155, 165 (5th Cir. 1996).

[15] *See, e.g., Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 315 (3d Cir. 1999).

[16] *See, e.g., Young v. Nicholson*, No. CV-05-407, 2007 U.S. Dist. LEXIS 2756, at *52 (E.D. Wash. Jan. 12, 2007).

[17] *See, e.g., Gibson v. Lafayette Manor, Inc.*, No. 05-1082, 2007 U.S. Dist. LEXIS 99008, at *27 (W.D. Pa. March 5, 2007).

[18] *Kitchen v. Summers Continuous Care Ctr.*, 552 F. Supp. 2d 589, 596 (S.D. W.Va. 2008) (quoting *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185-86 (2d Cir. 2006)); *see also Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995).

[19] 526 U.S. 795, 803 (1999).

[20] *See e.g.*, Okla. Stat. tit. 85, § 5(B).

[21] 29 U.S.C. § 2614(a).

[22] *See, e.g., Kitchen v. Summers Continuous Care Ctr.*, 552 F. Supp. 2d at 596.