PUBLICATION

Extended Leave Under the ADA: Necessary Next Steps to Consider

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Earlier this summer, I wrote an article for the July issue of our firm's L&E Newsletter, surveying cases on when an employee's request for extended medical leave is, and is not, a reasonable accommodation under the ADA. As that article explained, there is a recent trend in litigation demonstrating that leave beyond the FMLA – and, even beyond an employer's (otherwise generous) leave policies – can be required by the law. The goal of the article was to provide employers with tangible boundaries to operate within on this challenging new issue. Knowing those boundaries, however, is only half the battle.

Determining what to do next – such as, whether to adjust maximum leave policies and how to manage employees who are returning to work not fully recovered – are all matters that employers should be considering and planning for now. Indeed, action may be necessary in many instances. The purpose of this article, therefore, is to provide some insight and guidance on those particular implementation issues.

A. Adjusting Inflexible Maximum Leave & Attendance Policies

Many employers have a maximum leave policy that provides for an employee's automatic discharge once he or she has exhausted all the employer's available leave. Often these policies specify that after an employee has been out-of-work for one full year, the employee will be "administratively discharged." Similar policies provide that an employee's accumulation of a certain number of attendance occurrences during a particular year will result in termination as well. While these policies are certainly justified by the need to have a workforce that does, in fact, show up to work, employers who utilize them should be aware that their *inflexibility*may run afoul of the law. Revising them to provide room to respond to (or "accommodate") extraordinary circumstances may be prudent as a result.

The Equal Employment Opportunity Commission has been vigorously litigating this issue for years. In 2004, the EEOC's Chicago field office filed a class action against Sears, alleging that the company's policy to terminate employees automatically if they could not return to work after the conclusion of their workers' compensation leave "without considering whether a brief extension…would enable the employee to return to work" was a violation of the ADA. After years of costly litigation, the case settled in September 2009 through the entry of a consent decree. Sears committed to (among other things) revise its policy to make individual assessments after the conclusion of employees' workers' compensation leave and also agreed to pay the class of affected workers $6.2 million, the largest settlement for a single lawsuit in the history of the ADA.

To further prove its point, the EEOC's Chicago field office then sued UPS that same month, September 2009, alleging that the company's 12-month leave of absence policy violated the ADA. The core contention in the UPS case is very similar to the Sears case: that UPS's practice of automatically terminating employees who cannot return to work after the expiration of their maximum 12 months of leave violates the company's duty to engage in the good faith, interactive process. That case is still being litigated – zealously, I might add – with no clear end in sight.

The EEOC's focus on litigating this issue has recently moved south. In August of this year, the Commission's Northern Alabama field office sued Wayne Farms, alleging that the poultry company's "inflexible" attendance policy to terminate employees who accumulate more than nine points in a twelve-month period violates the

ADA. The attendance policy, the EEOC alleges, fails to consider the reasons for any absence beyond those provided by a recognized leave and also fails to consider other alternatives to termination once an employee has nine occurrences. Thus, the EEOC claims the policy violates Wayne Farms' duty to consider potential accommodations for disabled employees and also operates as an impermissible qualification standard or employment test that is not job-related and consistent with business necessity. In a press release, Wayne Farms expressed its intent to vigorously defend the company's attendance policy — which appears just as vigorous as the EEOC's intention to attack it.

Whatever the outcome, these cases demonstrate the wisdom of revising maximum leave and attendance policies to require an individual assessment of each employee's circumstances, even when they have exhausted every form of leave an employer otherwise provides. Often, the provision of more leave or other potential accommodations in these situations will not be reasonable. However, simply revising your policies (and adjusting your practices) to ensure you engage, sincerely, in that determination will keep your company from getting entangled into some expensive and contentious litigation. If those adjustments do not make sense for your business, be sure you can explain why.

B. Managing Returning Employees Who Are Not Fully Recovered

Employers everywhere are familiar with the process of returning employees to work who have not fully recovered. This process often involves the consideration of extending their leave, transferring them into a different position, or providing them with a light duty assignment. A few things are important to remember when facing such a situation.

First, while extending an employee's leave of absence can be reasonable if it does not pose an undue burden on the employer's operations, doing so *indefinitely* until a job becomes open that the employee can do is not required by the law. That was the holding in *Monette v. Electronic Data Systems* (6th Cir. 1999), and it is still good law. Any extension of leave must be both temporary and definite, such that an employer can gauge the leave's impact on its business. Employers should accordingly obtain all the details they can about how long a proposed extension of leave will be before the employee can return. Failing to do so will impair the employer's ability to make lawful and efficient decisions in this regard.

Second, providing light duty to an employee returning from leave can often be a reasonable accommodation, particularly when that employee is *not yet* fully recovered. However, that light duty assignment should only be temporary. As the court reiterated in *AT&T v. Meade* (6th Cir. 2016), the creation of a permanent light duty position is not a reasonable accommodation under the ADA. Reassignment to a *vacant* position (for which the employee is qualified) may be a reasonable accommodation, but generating a new, permanent light duty role is not. As a result, remember that light duty assignments are intended to bridge the gap between an employee's recovery (i.e., ability to work) and his or her current job assignment. They are not intended to re-employ the worker on perpetually different terms.

Third, and finally, do not be afraid to hold employees on light duty assignments accountable to their job's performance standards. In *Dillard v. City of Austin* (5th Cir. 2016), an employee who worked on a street maintenance crew was injured on-the-job and, at the conclusion of his leave, cleared to work only in a limited or administrative capacity. The City offered him a job as an administrative assistant in order to accommodate his recovery, which the employee accepted. However, the employee failed to attend multiple trainings on office software that were necessary to do the job, and he otherwise failed to perform the role in an acceptable or, it appeared, sincere fashion. The City terminated him as a result, and the Court upheld that termination as lawful. Specifically, the 5th Circuit held the employee's failure to perform the job or show any "desire to try and succeed" caused a breakdown in the good faith, interactive process—for which the employee, not the employer, was responsible. Thus, the lesson from this case is that, once a light duty assignment is provided

and accepted as a reasonable accommodation, the employee bears some responsibility for making it work. If the employee fails to do so, and those failures cannot be legitimately tracked to his or her condition, then hold the employee accountable. After all, at that point, the employee is considered a "qualified individual" because he or she *can perform* the essential functions of the job with the reasonable accommodation provided. Do not be afraid to manage these employees fairly like your other workers.

To conclude, recognizing that extended leave can be required as a reasonable accommodation under the ADA is only the first step toward compliance with the law. Revising inflexible leave and attendance policies would be a wise next step, at least, to avoid getting roped into protracted litigation on this issue. Furthermore, employers should not forget their rights in managing employees who return from leave before they are fully recovered. While extending such an employee's leave may be a reasonable accommodation, any extension should be both temporary and definite. In addition, if a light duty assignment makes sense, remember that it should only be temporary as well. The creation of permanent light duty roles is not required by the law. Finally, do not be afraid to scrutinize the performance of disabled employees working light duty assignments. The good faith, interactive process requires something from the employee too, which in this context means an honest and real effort to do the job well. Remembering these things and taking action accordingly will help you pave the smoothest road possible in navigating extended leave under the ADA.