The EEOC's 5 warnings about medical leaves and the ADA

By Robin E. Shea on June 10, 2011

The U.S. Equal Employment Opportunity Commission held a public hearing this week on leave of absence as a reasonable accommodation under the Americans with Disabilities Act.

This is a smokin' hot subject, particularly in light of the ADA Amendments Act and its regulations, which 

expand the ADA's coverage to a dramatically larger population, the "new," more activist EEOC under Chair Jacqueline Berrien, and two recent multi-million-dollar settlements in leave-of-absence lawsuits brought by the EEOC against Sears, Roebuck & Co. and Supervalu, Inc. (Jewel-Osco).

John Hendrickson, the EEOC's Regional Attorney for Chicago, said that these settlements contained five lessons for employers, and that's what I'd like to talk about today because Hendrickson's points are consistent with warnings we've been giving to employers for quite some time.

1. An "inflexible period" of leave will not satisfy ADA requirements. Most of the employers I've worked with have very generous leave of absence policies -- one employer I know offers up to two years of leave for a single medical condition (and possibly more, if the employee contracts a new condition). However, many policies provide for "automatic" termination if the employee's leave exceeds the designated period of time.

Nunh-unh, no can do, says the EEOC.

If the employee needs, say, two years plus two weeks, but then will be able to return to work, you have to consider granting that additional two weeks.

Or, if the employee can come back but needs reasonable accommodations (including reassignment to a vacant position), you have to consider allowing the employee to come back in the new capacity.

And when I say "consider," I mean, *seriously*. I mean, if you decide to say no, you'd better have a darned good reason.

Your next question may be, Well, if our leave is so generous and we still have to do all this when an employee has been out of work (and probably receiving disability benefits or workers' compensation), then why on earth do we want to offer so much leave in the first place? And my answer to that would be, Good question, and a point that was made by an employers' lawyer who testified at the EEOC hearing. You can shorten the "minimum leave" under your policy, as long as you comply with the requirements of the Family and Medical Leave Act. (You should check applicable state laws, as well.)

2. "Appropriate leave" requires an "individualized assessment" when the designated leave period expires, if not before. See #1. The "individualized assessment" would include determining whether the employee needs additional leave beyond the official company maximum, and whether the employee can come back to work with a reasonable accommodation.

Many employers still require employees returning from medical leaves of absence to be "100 percent recovered," or able to return to work without restrictions. These requirements have arguably violated the ADA from the get-go (in my opinion, they have), but there is no question that they should be scrapped in our modern era. If an employee has restrictions, the employer is supposed to assess whether the employee can return to work with a reasonable accommodation. If not, then it may be ok to terminate. But if so, then the employer should allow the employee to return to work.

And, have I mentioned that "reasonable accommodation" includes reassignment to a different vacant position?

3. Keep your friends close, and your leave administrator and ADA decisionmaker closer. Many employers outsource leave administration to a third party. Meanwhile, the person making decisions on ADA accommodations is usually someone in Human Resources, in consultation with the employee's supervisors and managers, and possibly legal counsel.

This is a fine arrangement, as long as the leave administrator stays in close contact with HR or legal counsel, and knows how to identify potential ADA issues. (Which should be a cinch now that virtually everyone on an extended medical leave qualifies for ADA coverage.)

That said, third party administrators, or even in-house leave administration "specialists," should almost never be the ones to terminate an employee for hitting the maximum allowable leave. A best practice would be for the leave administrator to refer these employees to Human Resources or legal counsel for an ADA assessment. The decision to terminate, extend leave, or bring back to work with or without reasonable accommodations should be made by HR/Legal in consultation with the appropriate operations management.

4. Ya gotta talk to the employee. The reasons for this rule are too numerous to mention. From a pure morale standpoint, it's always good to stay in touch with an employee on medical leave because it makes the employee feel that she's still "part of the family" and makes return to work that much easier. But just in case these warm and fuzzy reasons aren't enough to satisfy you, allow me to use *more persuasive methods*. (Imagine Dr. Evil laugh here. *Mwahahaha.*)

Many jurisdictions require that the employer and employee conduct an "interactive process" when discussing possible ADA accommodations, and the EEOC takes this position as well. The "interactive process" is fancy-lawyer-talk for having a discussion with the employee (ideally, face-to-face, but phone or email will suffice if the employee can't come in) about possible reasonable accommodations. In these jurisdictions, *the failure to engage in the interactive process is an ADA violation in itself.*

Even in jurisdictions like mine, which do not *require* an interactive process, failing to engage in the process means that the employer "assumes the risk" if there is an accommodation that might have worked but was missed because the employer didn't talk to the employee.

For these reasons, I strongly recommend that all employers, no matter where they are located, discuss directly with employees their reasonable accommodation options and get the employee's suggestions. (Employers with unions will, of course, have to include the union representatives in these discussions.)

5. Better get used to being sued by the EEOC. The agency believes that private plaintiffs' attorneys will not usually have the resources to be able to pursue these "systemic" discrimination cases involving automatic terminations at the end of medical leaves.

So, to paraphrase all those spam email jokes that we love so much, you may be a defendant in an EEOC lawsuit if

*You have a "100%-recovered/no restrictions" requirement for return from a medical leave of absence;

*You automatically terminate employees who reach their maximum leaves without making "individualized assessments";

*You delegate all of your medical leave terminations to your third-party administrator, or your benefits administrators; or

*You don't engage in "the interactive process" before automatically terminating employees who reach their maximum leaves.

(Sorry that wasn't the least bit funny. Hey - just like the spam email jokes!)

Generally speaking, the EEOC is a formidable plaintiff. Unlike private plaintiffs' attorneys, the agency does not have a strong economic motivation to settle cases early and inexpensively. They'll serve you with aggressive written discovery and requests for documents, and they'll want to take everybody's deposition. They'll file motions and fight every motion that your side wants to file. They *dig* "systemic" cases, where they can get large verdicts or settlements that they can post on their "Newsroom" web page. This is not to say you can't beat them, but most employers will prefer being in compliance to being a test case.

Forewarned is forearmed, as they say.

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