EEOC Crack Down on "Line in the Sand" Leave of Absence Policies

Word to the wise, if you currently have a leave of absence policy which either expressly states or otherwise is applied to say "**Once an employee has been on a leave of absence for X amount of time, regardless of the reason, if he/she is unable/has not been released to return to work the employee will be terminated**," **YOU NEED TO AMEND THIS POLICY IMMEDIATELY**.

If you have attended any of our ADA or ADAAA seminars or webinars, then you already have received this gospel truth – and hopefully already have followed it!

If not, the EEOC has recently sent two very loud and clear messages that it regards all such policies as **INHERENTLY DISCRIMINATORY AND A VIOLATION OF THE ADA/ADAAA**.

Specifically, the EEOC currently is pursuing civil litigation against UPS for what it has labeled "an inflexible leave of absence policy." The UPS nationwide company handbook contained a "one-year maximum leave of absence" policy. UPS is defending this policy by stating that, despite the draconian language which has drawn the EEOC's ire, its "maximum" leave of absence policy is "flexible" *as applied*.

Then, just 12 days ago, a federal court approved a $6.2 million settlement of another EEOC lawsuit against Sears which involved 235 former employees who had been terminated under that company's "inflexible" "maximum leave of absence" policy.

These "maximum leave of absence" policies became somewhat of "the norm" in the late 1990's after courts in most federal circuits issued decisions which upheld terminations under the ADA when the disabled employee had been off work for at least a year.

So, what happened? Why are these "maximum leave of absence" policies now under fire by the EEOC?

The answer lies in the **inflexible wording and/or application of such policies**.

So, the new question becomes, "What do we do now? Just keep employees 'on the roster' forever?"

The answer is NO. The good news is you do not have to throw the baby out with the bathwater. Notice in the opening paragraph of this alert we said "AMEND" not "DISCARD" your "maximum leave of absence" policies. If you currently have such a policy, all you have to do in order to avoid "the wrath of the EEOC" is amend the policy by adding the "magic" phrase **unless the employee qualifies for additional leave under state and/or federal law**.

Then, **in addition to changing the wording** of such policies, you also have to **change your process/application** of them. Specifically, do not wait until an employee has "blown through" all of their company-provided leave time and send them an "automatic termination" letter. Instead, send them a letter a few weeks prior to their "leave expiration date" reminding them of your "maximum leave of absence" policy and asking them to update you on their medical status and when they anticipate being able to return to work. If they have been on leave due to a temporary condition such as pregnancy, a broken leg, arm, etc., then they will not qualify for any additional leave (unless the illness or injury is covered by workers' comp and the workers' compensation laws of the state they are covered by provide job protection). However, if they have a longer term condition such as cancer, depression, diabetes, etc., they most likely will be covered by the new "disability" provisions of the ADAAA and, as such, can be eligible for additional leave beyond your "maximum leave of absence" policy.

Even the EEOC does not require employers to keep a "disabled" employee "on its rosters" forever. "Indefinite leave is NOT a reasonable accommodation" per the EEOC's own ADA guidelines. So, if in response to the "pre-leave exhaustion letter" described above the employee responds either "I don't know when I will be able to come back" or "my doctor says it is still going to be several more months, if ever," etc., then you can go ahead and terminate this employee at the end of his/her "maximum leave of absence" per your company policy. If instead the employee responds, "I should be able to come back in a few weeks, or another month or two," then get medical documentation supporting the employee's response, and do not terminate. Instead, analyze whether an additional short leave extension would be a reasonable accommodation under the circumstances (bearing in mind that if you already have held the employee's job for a year, arguing "a few more weeks is not reasonable" is going to be an uphill battle). Also, consider whether the employee could return to some form of "light duty" work as a reasonable accommodation. (Remember another of the EEOC's big "no no's" is having a blanket policy which requires all employees to have a "full release" before allowing them to return to work.) Assuming "a few more weeks" of leave is "reasonable," check back with the employee at that time. If the employee continues to do this "just a few more weeks" routine more than twice after the initial leave has expired (call your Miller & Martin L&E attorney!), but in most cases you will be able to terminate at that point based on what is arguably turning into a *de facto* "indefinite leave."

Employee leaves and other "reasonable accommodation" issues are not an easy area of the law to navigate. Even having a nice, neat "maximum leave of absence" policy is no longer "safe" if you apply it inflexibly or otherwise incorrectly.

We are all in this together! Let us know how we can help you chart a legal course through what are sure to be increasingly murky waters in the ADA/ADAAA realm. Put on your life jacket! This ain't no Disney cruise!

If you have any questions, please contact Stacie Caraway, scaraway@millermartin.com, Brad Harvey, bharvey@millermartin.com, or any other member of Miller & Martin PLLC's Labor and Employment Practice Group.

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