FMLA Insights
Guidance & Solutions for Employers

Employer Best Practices: "Leave" as a Reasonable Accommodation Under the ADA

By Jeff Nowak on September 08, 2011

Thanks to those who attended my webinar last week with EEOC Regional Attorney John Hendrickson on "Examining the Use of 'Leave' as a Reasonable Accommodation Under the ADA." If you missed the program, you can access the webinar and materials here. As the survey feedback indicated, it was a great opportunity to discuss issues specifically relating to leaves of absence under the Family and Medical Leave Act and the Americans with Disabilities Act.

From an employer perspective, there are several key takeaways from the webinar as to an employer's obligation to provide leave as a reasonable accommodation under the ADA, particularly where FMLA is implicated:

1. **Utilize "Automatic termination" provisions at your own risk.** As employers now are well aware, the EEOC takes the position that policies which call for termination of employment after the employee has been absent for a certain period of time (e.g., 3 mos., 6 mos., etc.) do not sufficiently meet the employer's obligation to engage in the ADA's interactive process and to determine whether a reasonable accommodation is necessary. At a minimum, attendance policies must incorporate a case-by-case assessment of the individual employee's situation and an employer's duty as to reasonable accommodation.

2. **Engaging the Employee in the ADA's *Interactive Process* is Essential.** *Communicate during FMLA leave...after FMLA leave ends...and at all times before and in between!* When a client calls me for guidance on whether they can deny leave or terminate an employee after he or she has asked for the second or third extension of leave (particular when FMLA has already expired), I ask the client for a detailed report of all the communications they have had with the employee regarding issues such as: a) the employee's ability to perform his/her job; b) whether the employee likely will be able to return to work (and when); c) whether the requested leave will allow the employee to return to work immediately after the leave ends or very soon thereafter; d) whether there are other accommodations to help the employee return to work in a timely manner; and e) whether the employer has received any feedback from the employee's physician about the above issues. As evidenced by Mr. Hendrickson's comments in the webinar, the EEOC's decision to initiate litigation against an employer often hinges on whether the employer is to blame for the *breakdown* in the interactive process. To minimize your exposure to liability, keep communicating with your employees! The interactive process is essential.

3. **Analyze and Document how the Requested Leave of Absence Poses an Undue Hardship to your business.** In addition to Point 2 above, I want to know from my client how the requested leave *impacts* the employer's business. Thus, it is critical that employers review and document how the employee's request (and continued requests) for leave poses an undue hardship to their business and operations. During the webinar, we provided several factors that you should consider when analyzing whether the requested leave of absence poses an

undue burden. As noted in a survey (pdf) conducted by Mercer, these factors are extremely helpful in guiding your decision to grant or deny leave:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive customer service and increased customer dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust work flow or readjust priorities in light of absent employees
- Increased stress on overburdened co-workers
- Lower morale

4. **Communicate internally *and* with your third party administrator.** With increasing regularity, employers are looking to outsource FMLA and leave administration to TPAs. For many employers, this is a good move -- to name a few benefits, it can bring some predictability to your costs and it potentially helps combat abuse of leave. Keep in mind, however, that the employer is on the hook for the actions of its TPA in the event of an ADA or FMLA lawsuit. Therefore, it is imperative that your TPA effectively manages Points 2 and 3 above. Insist upon an open exchange of information with the TPA so that you can make the best call when faced with the decision to grant/deny leave or terminate employment.
5. **Implement a comprehensive "ADA policy" and include it in your employee handbook and personnel policies.** As I recommended in the webinar, in light of the ADAAA (pdf), employers should work with their legal counsel to draft an ADA policy that prohibits discrimination against individuals with disabilities and outlines a reasonable accommodation process. In doing so, employers can more convincingly argue that obligations of reasonable accommodation and non-discrimination have become part of their everyday practice and are communicated to employees in the very first instance.

As we learned during the webinar, it is clear that even the top officials within the EEOC struggle with the concept of leave as a reasonable accommodation. As Mr. Hendrickson pointed out, there is no one-size-fits-all approach to these real life situations. However, by regularly communicating with employees and documenting how they have engaged in the interactive process, employers clearly have a leg up in minimizing ADA and FMLA liability.