Employers Face Complex Regulations For Dealing With Sick Employees

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One of the toughest issues companies face is how to treat the sick or disabled employee who cannot come to work or does not perform adequately when at work. The passage of the ADA Amendments Act (ADAAA), amended FMLA regulations and the H1N1 crisis have made these issues even more complex for employers.

The FMLA is a complex law with many intricacies, and employers are wise to carefully consider FMLA issues prior to terminating or counseling employees on attendance. If an employee calls in sick, be mindful of the FMLA obligations. Although it is the employee's duty to provide enough information in order for the employer to determine if the absence may be covered under the FMLA, the primary burden remains on the employer to seek the information. Many employers are under the mistaken belief that if the employee does not mention or ask for FMLA, no action by the employer is required. This is absolutely not true. Employers must make enough inquiries to determine if the absence qualifies.

The ADA is just as complex as the FMLA and requires that employers be cognizant of the requirements under this law. The recent statutory amendments were extensive, and final regulations are currently pending. The law dramatically changed the definition of a disability so that "disability" is very broadly construed, making it much easier to be considered disabled under the ADA.

If an employee requests an accommodation such as a change in work schedule, change in job duties, modified equipment or time away from work, all such requests must be considered by the employer. The employer must enter into an interactive discussion with the employee to determine what the needs of the employee are and how the employer can meet those needs if possible. The employer should consider the essential functions of the position, customer or client needs, business needs, past practices and other factors to determine if the accommodation can be met. Although not all accommodations must be granted, all must be considered and discussed. The discussion with the employee should be documented to prove that it occurred.

If an employee is having work performance issues, an employer should never ask the employee whether the employee has a medical condition causing the performance issues. Under the ADA, it is the employee's responsibility to identify the need for an accommodation and request it from the employer. It is not the employer's responsibility to seek out a need for an accommodation. Such inquiries by the employer can create an ADA claim, where an employee can allege that the employer perceived the employee as being disabled. Employers should focus on job performance and follow their discipline policy and practice.

Established attendance requirements that are communicated via a company handbook to their employees are vital for employers. Those requirements should be evenly applied to all employees to avoid allegations of favoritism and discrimination. One exception to the attendance policy has been the onset of H1N1. Employers have been strongly encouraged to modify attendance requirements due to H1N1 and to discourage sick employees from reporting to work to avoid a wide-scale spread of the virus. Therefore, it is advisable to adopt a written H1N1 plan. Many employers are not counting absences relating to H1N1 under their normal attendance policies. Although this may lead to some abuse by

employees, the alternative is that you have infected employees reporting to work and spreading the virus to co-workers, thereby increasing attendance issues. H1N1 is a rare circumstance and employers must be willing to adapt to this situation.

An employer should also be aware that if employment is terminated due to attendance issues and the employee can prove a legitimate illness or reason for the absence, the employee will most likely be awarded unemployment benefits in Ohio and Kentucky.

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