No-Fault Attendance? In light of the EEOC/Verizon settlement, what's the point?

By Robin E. Shea on July 14, 2011

Are no-fault attendance policies to go the way of the horse and buggy?

Employers would do well to ask themselves that question, in light of the recent $20 million settlement between the U.S. Equal Employment Opportunity Commission and Verizon Communications. First, let's debunk a few erroneous assumptions about the settlement:

***We can blame this on the overly-aggressive, anti-employer Obama Administration.** Nope. Actually, the case began with a Commissioner's charge filed in the fall of 2008, when George W. Bush was still in office.

***Well, then, we can blame it on that horribly-liberalized Americans with Disabilities Act Amendments Act.** Nope again. The ADAAA didn't take effect until January 1, 2009. The charge against Verizon was already pending by that time.

***OK, whatever. But this still isn't any big deal. I've read all those articles about how employers need to be flexible with their leave policies, and I'm trying to do that now.** *Great!* But that isn't what the Verizon case was about. The case was about charging *absences* under a no-fault attendance policy to employees who missed work because of medical conditions that were "disabilities" within the meaning of the ADA. It does not appear* that *medical leaves* were at issue. Exempting ADA conditions from no-fault attendance policies is a huge deal.

**Facts are sketchy because the parties reached an agreement before the EEOC actually filed suit. The lawsuit and the proposed consent decree that will settle the lawsuit were filed at the same time.*

***Yawn.** **The Family and Medical Leave Act already says you can't charge no-fault absences against someone who's out for an FMLA-qualifying reason.** True. But the EEOC's interpretation of the ADA(AA) means that no-fault absences shouldn't usually be charged if the absence is due to a disability even if the employee does not qualify for FMLA leave -- whether it's because she hasn't been employed for 12 months or 1,250 hours, or because he's exhausted his entitlement already.

***Well, anyway, the EEOC is a big dog and gets settlements like this all the time.** Not true. This is the biggest settlement in the EEOC's history, according to the agency.

***Well, then, Verizon is a great big wimp.** Maybe yes, and maybe no. I vote no, although I can't help wishing that Verizon had put the EEOC to the test. The threatened litigation was against 24 subsidiaries nationwide on behalf of employees represented by the Communication Workers of America (who, by the way, has an iPhone app -- *they don't call 'em "Communication Workers" for nothing!*), and in addition to the Commissioner's charge, charges were filed by the CWA and individual employees. Litigation of this scale brought by an agency of the federal government promised to be astoundingly expensive and disruptive, even if Verizon were to eventually win. As part of the settlement, Verizon got a pretty good deal (considering) on how to apply its attendance policy in the future. The proposed consent decree (see paragraph 20.03) at least allows the company to consider whether the employee or designee followed the company's procedures, whether the absences have been or are expected to be "unreasonably unpredictable, repeated, frequent or chronic," and whether excusing the absences would be an undue hardship.

You digress. What about your original question? Oh, yeah. Sorry. In my opinion, employers should seriously reassess the utility of no-fault attendance policies. The FMLA has prohibited charging of no-fault absences for a long time. Most employers I know voluntarily refrain from charging no-fault absences to employees who are out because of work-related injuries or illnesses. Now, it appears that the EEOC's position is that exceptions have to be made for "disabling" conditions, and with the ADAAA, that means a *lot* of conditions. So, with all these exceptions, an employer has to ask: Is there any point to having a "no-fault" attendance policy?

In the old days before no-fault policies, certain types of absence were treated as "excused," and other types of absences were treated as "unexcused." There were lesser or no penalties for excused absences but fairly severe penalties for unexcused absences. Most employers abandoned these policies at least 20 years ago, before the FMLA and the ADA were gleams in a Congressman's eye, because it took too much effort to police them, and it made sense to treat employees as adults. In light of the Verizon settlement, employers may want to consider returning to the more-paternalistic "fault-based" attendance systems.

What do you think? Talk amongst yourselves.