BY-LINED ARTICLE

EEOC Continues to Target Inflexible Leaves-of-Absence, Attendance Policies

September 21, 2011 by Linda Hollinshead
The Legal Intelligencer

Since the enactment of the ADA Amendments Act of 2008, and its broadening of the definition of "disability," employers have recognized that they will be faced with an increased number of requests for reasonable accommodations under the Americans with Disabilities Act (ADA).

Common accommodation requests are a leave of absence and flexibility in an employee's work schedule. Such requests, however, can be of considerable frustration to employers.

An employee's request for a lengthy leave of absence, a continuous pattern of shorter leaves and unexpected changes to the employee's work schedule create uncertainty about the employee's availability to perform his or her job. Operationally, this can be burdensome on both the organization as well as colleagues. From a legal perspective, an employer's denial of an employee's leave or schedule change increases the possibility of an ADA claim for failure to accommodate.

A leave of absence and a flexible schedule are forms of reasonable accommodation. The Equal Employment Opportunity Commission and courts recognize that use of accrued paid leave or additional, unpaid time off from work may be a reasonable accommodation under the ADA.

Employers have a number of methods at their disposal to respond to and accommodate employee requests for time away from work. For example, they can permit the employee to utilize accrued paid-time-off benefits (*e.g.*, paid vacation or sick time). They can also designate the absence as a leave under the Family and Medical Leave Act, during which the employee may concurrently use accrued paid-time-

off benefits or receive payments pursuant to a disability or workers' compensation benefits plan. In addition, they can provide paid or unpaid leave pursuant to company policy.

All of these efforts may be viewed as a form of reasonable accommodation under the ADA.

It is not uncommon, however, for employers to mistakenly believe that their accommodation obligation ends once these efforts have been exhausted. In recent years, this mistaken belief has been challenged by the EEOC, and at a very high cost to employers.

Costly Settlements for Employers

Over the last few years, the EEOC has challenged employer leaves of absence and attendance policies, and has secured significant settlements.

In 2009, in a federal lawsuit brought against a retail chain, the EEOC alleged that the employer's policy of terminating employees who were unable to return to work after a 12-month workers' compensation leave violated the employer's obligation to provide a reasonable accommodation. The retailer settled for $6.2 million.

In a class action lawsuit brought against a grocery chain, the EEOC contended that the employer's policy of terminating employees at the end of a fixed medical leave period rather than bringing the employees back to work with reasonable accommodations violated the ADA. In this case, the policy was alleged to have required employees who were returning from leave to be able to return to full duty with no restrictions. Earlier this year, a settlement resulted in the supermarket's paying $3.2 million.

In another class action lawsuit filed against a nationwide communications company, the EEOC maintained that the employer's no-fault attendance policy violated the ADA because employees were "charged" for absences, resulting in discipline or discharge, even where the absences were due to ADA-covered disabilities. The EEOC alleged that the employer should be required to provide, as a reasonable accommodation, an exception for such absences under the no-fault policy. The company recently settled the case for a stunning $20 million.

Lastly, in a federal lawsuit brought against a national airline, the EEOC alleged that the employer's blanket policy prohibiting employees from working a reduced work schedule violated the ADA. The EEOC claimed that the employer's practice of requiring employees who could not work full-time to either retire or go out on a leave of absence and then firing them when their leave ran out failed to consider other reasonable accommodations to enable employees to retain their positions. The eventual settlement amounted to $600,000.

Today, the EEOC's assault against leave policies continues. The EEOC currently has several pending lawsuits against employers in which it contends that the employers' inflexible leaves-of-absence policies fail to reasonably accommodate individuals with disabilities. At issue in these cases are policies in which employees are terminated where they are ineligible for the FMLA or have exhausted FMLA leave or have exhausted a fixed maximum leave period.

Leaves-of-Absence Policy Changes

While the monetary damages in these settlements have been staggering, employers should also be mindful of the significant policy and leave administration changes secured by the EEOC in some of these consent decrees.

In one instance, an employer was required to hire a consultant to review and recommend revisions to job descriptions to ensure that they accurately reflected the physical requirements of a position and to identify and provide recommendations on possible accommodations to common work restrictions in various positions. This employer was also required to notify an employee on leave, well in advance of the employee's anticipated return-to-work date, of the employee's right to request a reasonable accommodation and to provide examples of various types of available accommodations, including modified duty; part-time schedule; and additional leave.

Yet another employer was required to include a statement in its communications to employees concerning leaves of absence, informing employees that they need not be able to return to full duty in order to be considered for a return to work. The EEOC required a separate employer to include in its no-fault attendance policy that "excusal of an absence as 'nonchargeable' may be considered a reasonable accommodation under the ADA." Other instances include the EEOC finding that an employer must create a core review system of all accommodation requests, and that the employer must establish a clear procedure to enable individuals to request accommodations.

The EEOC's conciliation efforts have been focused on securing commitments by employers to be proactive, requiring them to reach out to employees to ascertain when and if they are capable of returning from a leave of absence and reminding employees of the opportunity to request additional leave or other accommodations.

However, the EEOC's focus on requiring employers to unilaterally offer employees on leaves of absence the opportunity to extend their leave is perplexing as it appears, on its face contrary to another principle espoused by the EEOC, and supported by the courts—that is, to be entitled to an accommodation, an individual must request one. Similarly, the EEOC's apparent rejection of fixed-leave policies has been a source of frustration for employers who valued the ease of their consistent application.

Hearings on Use of Leave as a Reasonable Accommodation

Cognizant of the continued struggle of employers in determining how much leave must be provided to an employee as a reasonable accommodation, the EEOC held hearings earlier this summer to discuss these issues. The commission also indicated that it will be issuing guidance on an employer's obligation to provide leaves of absence as a reasonable accommodation.

In testimony during the hearings, representatives of the EEOC emphasized that fixed-leave or no-fault leave policies do not, in and of themselves, violate the ADA. Rather, employers must be prepared to modify those policies to provide additional leave as a reasonable accommodation. Their testimony highlighted several other key "lessons."

First, an inflexible period of disability leave, even if lengthy, does not automatically satisfy the ADA duty to reasonably accommodate. Second, an individualized assessment of how much leave must be provided is vital, even when the employee has a lengthy fixed-leave policy. Third, employers should coordinate the administration of FMLA, workers' compensation and disability programs with ADA administration to ensure the appropriate coordination of information. Finally, employers should ensure strong lines of communication with employees, health care providers and, for purposes of determining the viability of various accommodations, supervisors and managers.

How to Keep the EEOC from Challenging Such Policies

Keeping in mind that these "lessons" are a strong indicator of the EEOC's enforcement policy, while we await the EEOC's anticipated guidance on leaves of absence, a number of steps should be taken to reduce a potential challenge to an organization's leaves-of-absence and related attendance policies.

First, employers should be mindful of enforcing company-provided fixed-leave policies. If the organization chooses to offer a fixed-leave policy, it should consider including an explicit statement in the policy that an employee may be eligible for leave as a reasonable accommodation, even if the employee is not eligible for or has exhausted the company-provided leave. Similarly, it would be vital to include a statement in the organization's FMLA policy that an employee may be eligible for leave as a reasonable accommodation, even if the employee is not eligible for FMLA leave or has exhausted FMLA leave.

Employers should consider training managers and supervisors to notify human resources of all leave or time-off requests to ensure that the organization promptly engages in an individualized interactive process with all disabled individuals, even where they are not eligible for or have exhausted FMLA and company-provided leave. Implementing a clear procedure to which managers may refer individuals who wish to seek an accommodation would be helpful in that regard. Next, if an organization enforces a no-

fault attendance policy, it should ensure that it does not "charge," and thus discipline, an employee for absences that are covered by the FMLA or for conditions that qualify as "disabilities" under the ADA.

In addition, employers should consider eliminating all statements from leave and attendance policies stipulating that an employee must be able to return on full capacity, without restrictions, in order to return to work. Finally, it is essential to communicate with employees, in advance of their anticipated return-to-work date, to confirm when they are returning and whether they will be requiring any additional accommodations, such as additional leave.

While the extent to which the EEOC will expand its challenge to various components of leaves of absence and attendance programs cannot be anticipated, implementing the policy and administration changes highlighted in these recent significant EEOC settlements could better enable organizations to effectively manage employee leaves of absence and, hopefully, avoid future EEOC and court scrutiny.

Linda Hollinshead is a partner in the Employment, Labor, Benefits and Immigration Practice Group of Duane Morris in Philadelphia. Hollinshead provides training and counseling to employers throughout the country on a variety of subjects.

This article originally appeared in The Legal Intelligencer and is republished here with permission from law.com.