EEOC meeting on ADA cutting-edge issues - a cautionary tale for employers

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Author page »

The EEOC held a public meeting this morning (Wednesday, June 8) to examine the use of leave as a reasonable accommodation under the Americans With Disabilities Act. The Commission provided a platform for invited panelists to discuss and analyze the use of leave as a reasonable accommodation and on compliance with relevant ADA regulations. While EEOC regulations make it clear that there is a duty to "modify workplace policies" as a reasonable accommodation, there is little definitive guidance as to exactly what this means or requires. The EEOC's meeting sought clarification from regional EEOC counsel as well as a small number of employee and employer stakeholders.

As Chair of Seyfarth's Absence Management and Accommodations Team, I was one of two employer stakeholders asked to speak at the EEOC's meeting. My written submission to the EEOC is here.

The two panels this morning included:

1. **Panel 1 – EEOC's Current Position and Policy Statements:** Christopher Kuczynski, Assistant Legal Counsel of the EEOC; and John Hendrickson, Regional Attorney of the Chicago District Office of the EEOC.
2. **Panel 2 – How to Comply with the Law and Appropriately Permit Leave to Employees:** Brian East, Senior Attorney, Texas Disability Rights; Claudia Center, Director, Disability Rights Program, Legal Aid Society Employment Law Center; Edward Isler, Partner, Isler Dare Ray Radcliffe & Connolly, P.C.; and myself.

This is an area of intense focus by the EEOC, and a subject over which the EEOC has litigated some of its largest pattern or practice lawsuits.

ADA leave of absence lawsuits resulted in one of the largest EEOC settlements in 2009 - the case of *EEOC v. Sears, Roebuck & Co.*, Case No. 04-CV-7282 (N.D. Ill. Sept. 28, 2009) (approval of consent decree stemming from an EEOC pattern or practice lawsuit alleging that Sears violated the ADA by maintaining a workers compensation leave exhaustion policy that terminated employees instead of providing them with reasonable accommodations) - and the largest EEOC settlement to date in 2011 - the case of *EEOC v. Supervalu,* Case No. 09-CV-5637 (N.D. Ill. Jan. 5, 2011) (approval of consent decree stemming from an EEOC pattern or

practice lawsuit alleging that Supervalu violated the ADA by its alleged practice of terminating employees with disabilities at the end of leaves of absence rather than bringing them back to work with reasonable accommodations).

What this increased attention means for employers is that leave practices must be reexamined in light of the EEOC's recent enforcement efforts so as not to find themselves the subject of the next class action.

As a result of today's discussion in Washington, D.C., here are five immediate action items employers should consider:

1. Determine whether your leave policies and practices could be construed as having an identifiable "maximum" leave period or an "automatic" cut-off, and consider what policy or practice changes are needed in light of the EEOC's recent enforcement efforts.
2. Review all leave policies and practices and assess whether you utilize a case-by-case assessment when determining the duration of an employee's leave, and whether holding an employee's position open while on leave causes an undue hardship.
3. If you do not already have one, create a reasonable accommodation policy that includes a clear procedure for making a request for accommodation.
4. Review your interactive process when considering a reasonable accommodation request to make certain it complies with EEOC's expectations and that your efforts are well-documented to defend against any claim. Keep abreast of EEOC's positions in the leave area, as well as case law developments related to reasonable accommodations under the ADA when dealing with a workplace accommodation issue.
5. When faced with an EEOC charge on leave issues, proceed with caution and contact counsel to make certain the individual charge does not evolve into a class case.

The bottom line is that employers with ill-prepared or non-compliant leave programs will remain in the cross-hairs of the EEOC's enforcement litigation program and susceptible to class claims.

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