Enforcement Actions Highlight ADA Risk in Lawful Policies

by DAMIEN MUNSINGER of Barran Liebman

This year, federal regulators have collected millions of dollars from employers who correctly applied their own leave policies or who granted the full extent of protected medical leave to one or more disabled employees. Two recent EEOC enforcement actions demonstrate how complying with leave policies and laws may not be enough to avoid scrutiny from potential ADA violations.

In each case, the Equal Employment Opportunity Commission (EEOC) found that the employers violated the Americans with Disabilities Act (ADA) by terminating disabled employees who requested or exhausted medical leave.

In May 2016, the EEOC reached an agreement with a national home-improvement chain, requiring the company to pay $8.6 million for failing to provide reasonable accommodations to three disabled employees. Each employee's medical leave exceeded the maximum leave allowable under company policy (up to 240 days).The EEOC determined that terminating disabled employees who exhausted their available leave violated the ADA because the policy time limit was inflexible and arbitrary.

In June 2016, the EEOC announced that a car dealership would pay $50,000 to settle a disability discrimination claim for terminating an employee who requested leave to diagnose and treat a medical condition. Predicting a diagnosis of multiple sclerosis, the employee showed the dealership herdoctor's instructions prohibiting her from working until after a neurological appointment to confirm that diagnosis. Instead of allowing the employee to take medical leave, the company allegedly terminated her employment. Courts have generally agreed with the EEOC's position that the ADA supports disabled employees' requests to modify and extend leave beyond the bounds of company policies and applicable leave laws.

The ADA requires that employers with 15 or more employees provide reasonable accommodations to applicants and employees with disabilities who require them. A reasonable accommodation is generally a change in the working environment or a change to customary practices and policies that enables an individual with a disability to work.

Reasonable changes can include modifying existing leave policies and providing medical leave for disabled employees even when other employees would not have additional leave available. Employers, however, are not required to provide accommodation that would result in an undue hardship, though this can be a difficult standard to satisfy.

Because relying solely on leave policies and leave laws when considering a disabled employee's request for medical leave can raise the risk of violations and penalties, what can employers do to avoid potential ADA violations?

First, per EEOC guidelines, employers must treat employee requests to use available paid or unpaid leave for ADA purposes the same as a request to use any such leave for non-ADA purposes. If the company does not require a doctor's note from an employee using available paid time off or sick leave, the employer should not require disabled employees to provide any additional documentation. If the company's policy requires all employees to provide a doctor's note for any sick leave lasting more than three days, an employee with a disability can be asked to provide a doctor's note for a five day sick leave, but not for a two day sick leave.

Second, the EEOC maintains that anytime an employee requests leave for a medical condition, even without a request for an ADA accommodation, the employer must treat the request as an accommodation request. Requests for medical leave can often fall under existing employer policies, family and medical leave laws, or workers' compensation laws.

While the employer must provide disabled employees with equal access to leave under those policies and laws, the employer's ADA obligations do not end there. The employer must also consider providing additional unpaid leave as an accommodation if the employee requires it, as long as no undue hardship results.

Additional leave must be considered even if the employer does not offer leave as an employee benefit, and even if a disabled employee is not eligible for leave or has exhausted all available leave.

Finally, EEOC guidelines clearly indicate that employers should engage in an interactive process with an employee who requests medical leave but who is ineligible for leave under company policy or applicable leave laws. The interactive process will vary from one employee to another, but it should be designed to enable the employer to determine the feasibility of providing leave as an accommodation without causing any undue hardship. Generally, the focus of the interactive process will be to determine the employee's need for leave and the terms of the leave.

There is no specific amount of time beyond which an employer can claim that additional unpaid leave would cause undue hardship. Instead, employers must engage in an individual analysis, considering such factors as the leave's amount, frequency, and predictability, the impact on co-workers and performance of the employee's job, and the effect on operations.

As confirmed by the EEOC agreement with the national hardware chain, employers are allowed to design and enforce leave policies that set upper limits on the amount of leave available to employees. Where the company courted trouble, however, was by terminating disabled employees who required medical leave beyond the policy limits without first performing an analysis demonstrating undue hardship.

In most cases, employers are well-served by drafting careful policies and applying them consistently to all of their employees. For disabled employees on medical leave, however, a careful analysis and ability to address issues with some flexibility are needed to avoid violations and penalties.

Damien T. Munsinger is an attorney at Barran Liebman. He represents and advises private and public employers regarding a wide variety of employment law issues, including discrimination and wrongful termination claims. Contact him at 503-276-2112 or dmunsinger@barran.com