

Hot Issues Alerts – Law Firms

Responding To Employee Requests For Extended Disability Leave And Heeding EEOC's Stand Against "Inflexible" Policies

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The following scenario should be familiar to most readers: The Good Guys Company provides generous benefits to its employees, including six-months of short-term disability leave. Some or all of the leave is paid depending on the employee's tenure with the company, and the employee's job is secure provided he or she returns within the six-month time period. As the six-month period draws to a close, HR begins sending the employee notices that his leave is about to expire, and asks the employee to contact HR to provide a date on which the employee will return to work. The letter also reminds the employee that under the company's leave policy, the employee will be terminated if he does not return to work by the end of the six-month leave period. Finally, the letter explains how to apply for long-term disability benefits should the employee feel that is appropriate. What could be wrong with that? After all, Good Guys provided the employee with far more leave than required by the Family Medical Leave Act. Plenty, according to the Equal Employment Opportunity Commission ("EEOC") and a number of courts.

EEOC Enforcement Guidance

An enforcement guidance issued by the EEOC specifically addresses the lawfulness of leave policies that terminate employees who exceed a set leave period. In its enforcement guidance titled "Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," (the "Enforcement Guidance") the EEOC takes the position that an employer may not apply a leave policy "under which employees are automatically terminated after they have been on leave for a certain period of time" to a disabled employee "who needs leave beyond the set periods."¹ Instead, if a disabled employee needs additional time as a reasonable accommodation, the EEOC advises that the employer must grant the requested time unless (i) the employer can propose another effective accommodation that would enable the person to perform the essential functions of her position, or (ii) granting additional leave "would cause an undue hardship." To establish that additional leave would cause an undue hardship, the employer must conduct "an individualized assessment showing the disruption to the employer's operation."

While EEOC's interpretations of the ADA are not controlling, they are entitled to respect by the courts,² and at least one federal court has relied on the Enforcement Guidance in holding that an employer violated the ADA by terminating a disabled employee because she exceeded a period of leave set by policy.³ Additionally, without reference to the Enforcement Guidance, at least two courts have found that an employer violated the ADA by relying on a company policy to automatically terminate a disabled employee who requested leave beyond the maximum allowed under that policy.⁴

EEOC v. UPS

The EEOC has backed up its Enforcement Guidance with litigation. The EEOC recently filed a class action against the

United Parcel Service, Inc. ("UPS") in the U.S. District Court for the Northern District of Illinois⁵ claiming UPS violates the ADA by instituting an "inflexible" leave policy.⁶ Contemporaneously with filing its lawsuit, the EEOC issued a press release in which Stuart J. Ishimaru, the EEOC's Chairman, stated, "[t]his case should send a wake-up call to Corporate America that violating the Americans with Disabilities Act will result in vigorous enforcement by the EEOC."⁷

The EEOC alleges that UPS maintains a leave policy under which employees are terminated if they exceed a 12-month allotment of leave. The complainant in the action, Trudy Momsen, a former administrative assistant at UPS, allegedly took a 12-month leave of absence from work because she was suffering from what was later diagnosed as multiple sclerosis. After returning to work for several weeks, she asked for additional time off. UPS denied her request and terminated her employment, allegedly for exceeding its 12-month leave policy. The EEOC claims that Momsen could have returned to work if she had been given an additional two-week leave of absence, and that UPS failed to accommodate her disability by refusing to provide her the additional requested leave. For this and other alleged violations, the EEOC seeks wide-ranging injunctive relief in addition to multiple categories of monetary damages from UPS for Momsen, as well as for a class of disabled persons that UPS similarly refused to accommodate.

UPS disputes various of the factual allegations asserted by the EEOC, and has expressed surprise at the EEOC's position, arguing that the EEOC "is attacking one of the more generous and flexible leave policies in corporate America." In opposing a policy that provides a relatively lengthy period of permissible leave, the EEOC is taking a position that leave policies that "set arbitrary deadlines for returning to work after medical treatment" violate the ADA irrespective of how generous that deadline may be, because, the EEOC asserts, they "unfairly keep disabled employees from working." Instead, the EEOC advises employers that "[s]ometimes a simple conversation with the employee about what might be needed to return to work is all that is necessary to keep valued employees in their jobs."

Further Guidance From New York State's Appellate Division

New York's Supreme Court, Appellate Division, First Department, recently weighed in on the issue of leave policies that do not permit employees to exceed a predetermined amount of leave, holding that an employer violated the disability discrimination provisions of the New York State and City Human Rights Laws ("HRLs") when it denied an employee's request for an extension of her unpaid medical leave based on the employer's uniform policy of denying leave beyond a set period.⁸ According to the decision, the employer first granted the employee 12 weeks of medical leave per the employee's initial request. Several weeks into her leave the employee requested a full year leave of absence. The employer denied this request, stating that the employee's 12 weeks of leave had been provided pursuant to the FMLA, and that she was ineligible for additional unpaid medical leave per the employer's general policy of limiting leave to 12 weeks. The employer communicated that it would terminate the employee's

employment should she fail to return to work at the conclusion of the 12-week leave period. The employee then asked if she could obtain "any further extension of her medical leave," to which the employer responded, again, that she could not take additional leave and would be terminated if she did not return as originally scheduled.

The Court held that an employer facing a request for a reasonable accommodation from a disabled employee must, under the HRLs, "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." The employer cannot avoid engaging in this individualized "interactive process" by relying on a blanket policy of limiting an employee's medical leave to the 12 weeks mandated by the FMLA.

The Court also disagreed with the trial court's determination that the employee's request for one year of leave was an impermissible request for "open-ended leave" rather than a request for a reasonable accommodation. While the Court acknowledged that "in a great many cases a request for a one-year leave will not turn out to be a 'reasonable accommodation'" because it deprives the employer of the employee's services for too long, an employer may not rely on a bright line "beyond which leave time is automatically unreasonable" even with respect to a one-year leave request. Accordingly, the Court found that the employer was required to engage in an interactive process when an employee requests a leave, even for as long as one year.

Uniformly Applied Policies May Not Violate The ADA

While the EEOC's position is clear – that automatically terminating employees who exceed a set period of leave runs afoul of the ADA – some courts have found that such a policy does not, on its face, violate the ADA as long as the policy is uniformly applied and does not distinguish between disabled and non-disabled employees.⁹ Nevertheless, none of those courts expressly addressed the issue of whether an employee's request to extend her leave beyond the maximum allowable period could constitute a request for a reasonable accommodation, such that denial of the request would violate the ADA.

Lessons For Employers

Employers should review their policies and practices and consider whether they want to continue automatically terminating disabled employees who need extended leave or who do not return to work within the time period set by policy. Given the EEOC's position and the position of some courts, employers should consider permitting leave that extends beyond the fixed periods set by company policy if an employee makes a viable request for an extension that would be a reasonable accommodation after an appropriate interactive process. For example, we have advised employers that automatically discharge employees who fail to return to work within an approved period of leave, to include language in their leave policies permitting an extension of leave if the employer "receives from the employee a request for extension of reinstatement rights for an additional, reasonable period to allow the employee to recover sufficiently and to return to work and such extension is required under federal, state or local disability laws."

If an employee requests extended disability leave, employers should probably treat

that request as seriously as it would view a request for wheelchair accessibility; the employer should engage in an open "interactive process" with the employee, eliciting information from the employee about the needs of the employee and the reasonableness of the request. Typical information an employer should seek includes whether the employee will be able to perform the essential functions of the job upon conclusion of leave and when the employee will be able to return to work.¹⁰ In considering this information, employers should evaluate whether other viable accommodations exist that would allow the employee to perform her job. If employers go down this road, they need to make an "individualized" assessment of the reasonableness of the request and the burden to the organization from providing the requested leave rather than rely on any bright line standards (i.e., the length of the requested leave). Employers also need to document their decision process, so that if they are sued for a denial of the request, they can show that they have engaged in an interactive process, that the proposed accommodation is unreasonable and/or that it would cause undue burden.

¹ See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 17 (as revised October 17, 2002).

² See e.g., Bergman v. Paulson, 555 F. Supp. 2d 25, 32 (D.D.C., 2008).

³ See Gibson v. Lafayette Manor, Inc., 2007 WL 951473 at *7 (W.D. Pa., 2007) (court relied on EEOC guidance No. 915.002 in permitting an ADA claim to proceed to trial where defendant/employer terminated employee who did not return to work at the end of his FMLA leave period pursuant to employer's policy of terminating employees who failed to return to work at end of their FMLA leave).

⁴ See e.g., Garcia-Ayala v. Lederle Parenterals, Inc. 212 F.3d 638 (1st Cir. 2000); Phillips v. New York, 884 N.Y.S.2d 369 (1st Dep't, 2009) case discussed infra under section titled "Further Guidance from New York State's Appellate Division."

⁵ See Complaint, EEOC v. UPS, No. 1:09-cv-05291 (N.D. Ill. Aug. 27, 2009).

⁶ The EEOC also recently announced a \$2.2 million settlement of an administrative claim brought against Bank One, in which the EEOC made an administrative determination that Bank One had violated the ADA by its policy of terminating employees who took more than six months of disability leave if their position had been filled during the leave. By terminating employees without first attempting to determine whether they required accommodation because of a disability, Bank One had run afoul of the ADA according to the EEOC. See Press Release, EEOC, EEOC and Chase Reach \$2.2 Million Settlement in Disability Discrimination Claim (Nov. 22, 2006) available at <http://www.eeoc.gov/press/11-22-06.html>.

⁷ Press Release, EEOC, UPS Sued for Disability Discrimination (Aug. 28, 2009) available at <http://www.eeoc.gov/press/8-28-09.html>.

⁸ Phillips v. New York, 884 N.Y.S.2d 369 (1st Dep't, 2009).

⁹ See Covucci v. Service Merchandise Co., Inc., 115 Fed. Appx. 797, 799-800 (6th Cir. 2004) (employer did not violate state disability discrimination statute by terminating employees who exceed one year of leave because the policy "imposes a uniform approach" that "does not distinguish between handicapped and non-handicapped individuals"); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046 (6th Cir. 1998) (policy of terminating employees who do not return to work within 12-month leave period did not violate ADA because it was a "uniform policy" that did not "distinguish between disabled and non-disabled employees"); Balek v. Hobart Corp., 1999 WL 639184 at *3 (N.D. Ill., 1999) (policy of terminating employees who did not return to work after six months of medical leave did not violate the ADA because "[t]here is nothing in the record to indicate [the employer's] policy distinguished between disabled and non-disabled employees").

¹⁰ See in mind that questions that go to whether an employee is disabled and the nature and severity of an employee's disability are impermissible under the ADA, unless those questions are "necessary to the reasonable accommodation process" or are "job-related and consistent with business necessity." See 42 U.S.C. § 12112(d)(4)(A)-(B); 29 C.F.R. Part 1630, App. § 1630.14(c).

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