

The EEOC's Increased Focus on Leave Policies

By: Richard D. Alaniz

Several years ago, the Equal Employment Opportunity Commission (“EEOC”), the federal agency that enforces the nation’s anti-discrimination laws, filed suit against AutoZone, Inc., accusing the auto parts retailer of violating the Americans with Disabilities Act (“ADA”) by allegedly firing employees who took too much time off for disability-related absences. According to the Complaint, AutoZone failed “to make exceptions to a ‘no fault’ attendance policy for their [employee’s] disability-related absences, and discharged them as a result.” The case is still pending before a federal judge in Illinois, but it reflects a broader trend on the part of the EEOC.

In recent years, the EEOC has focused intensely on employers’ leave policies, alleging that many companies’ leave policies violate the ADA and filing numerous lawsuits over the past several years. In a press release following a large settlement with Verizon Wireless for \$20 million, the EEOC stated, “an inflexible leave policy may deny workers with disabilities a reasonable accommodation to which they’re entitled by law—with devastating effects.” Similar settlements the agency has reached include: Pactiv LLC for \$1.7 million, Interstate Distributor for \$4.85 million, Supervalu for \$3.2 million, and Sears for \$6.2 million. And in the EEOC’s most updated Strategic Enforcement Plan, the agency makes clear that it intends to continue to police employers’ leave policies.

Given the priority that employers’ leave policies have been given by the EEOC over the last several years and in the agency’s updated enforcement agenda, now would be a good time for employers to review and revise as needed any leave or no fault absence policies.

The Equal Employment Opportunity Commission

The EEOC is the federal agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of that person’s race, color, religion, sex, national origin, age, disability, or genetic information. Most employers are covered by EEOC-enforced laws. In Fiscal Year 2016, the last year for which complete statistics are available, there were a total of 91,503 Charges of Discrimination filed with the agency. Of these, 28,073, or over 30%, alleged violations of the ADA. And this number has only risen in recent years. For example, in 2005 there were only 14,893 Charges alleging disability discrimination filed. This trend is likely to continue.

Employer Leave Policies and the EEOC

Most employers have leave of absence policies that are routinely used by employees who need to be away from work for one reason or another. In the majority of cases the needed leave is related to a medical condition of the employee or a close family member. The federal government and numerous states mandate leave for qualifying reasons through such laws as the Family and Medical Leave Act (“FMLA”) and similar state laws.

Normally, they provide up to 12 weeks of unpaid leave for the birth or adoption of a child, the serious illness of the employee or an immediate family member, and for other similar reasons. For example, under the FMLA even longer leave is mandated for certain circumstances related to the military service of a close family member. Under most of these laws, at the conclusion of the leave, the employee must be reinstated to their prior position or to a substantially similar job if theirs is no longer available. “Substantially similar” has been ruled to be similar in pay, status, schedule, and other such characteristics. FMLA leave is mandatory for most employers with 50 or more employees, and many state laws track the FMLA’s requirements.

In addition to FMLA leave, most employers also provide other leave, usually of a specified period, to employees who have need of an extended period away from work. Many employers cap such extended leave at some maximum amount, frequently one year, at the end of which time the employee is automatically subject to termination. These are the types of leave policies that the EEOC refers to as unlawful “inflexible” leave policies. According to the EEOC, such policies violate the Americans with Disabilities Act.

Inflexible leave policies became a focus of the EEOC under their Strategic Enforcement Plan (“SEP”) for fiscal years 2012-2016. They have become such a high enforcement priority that they have again been included in the EEOC’s updated SEP for years 2017-2021. The EEOC has also challenged no fault attendance policies under the same rationale. The EEOC has concluded that such policies violate the “reasonable accommodation” obligations that employers have under the ADA when responding to an employee’s disability.

The EEOC has processed many charges and filed numerous lawsuits challenging an employer’s unbending application of such policies, such as the EEOC’s high-profile settlement with Verizon Wireless and its continued lawsuit against AutoZone. According to the EEOC, the failure to consider extension of a set leave period to accommodate an employee’s disability as well as holding employees accountable under a no fault attendance policy for absences or tardiness related to a disability are clear violations of the ADA. In the EEOC’s opinion, a leave extension need not be open ended. But, if several additional weeks or possibly even months might enable the employee to return without causing the employer undue hardship, such an extension may be an obligatory “reasonable accommodation.” When coupled with the vast expansion of what constitutes a disability brought about by the 2009 amendments to the ADA, an extremely large number of medical and mental conditions have begun to be deemed disabilities, making handling accommodations and leave policies even more confusing and burdensome.

What Employers Should Do Now

In light of the EEOC’s increased scrutiny on employers’ leave policies and the inclusion of “inflexible” leave policies in the agency’s most updated enforcement agenda, employers should take several steps now, to proactively address any potential liability.

- *Review Your Company’s Leave Policies and Call in the Experts, If Needed*

Employers should take a close look at their leave policies to determine whether any changes should be made in light of the EEOC's enforcement agenda. With the tangle of laws covering medical and disability leave (such as the ADA, FMLA, workers' comp., and state-specific laws), companies should work closely with HR, in-house, and outside counsel to become educated about the laws. In addition, employers should regularly train supervisors and others who are on the front lines of these types of requests.

Employers should consider bringing in a third-party to perform periodic audits of leave records and policies, to ensure that the company is handling all issues appropriately.

- *Be Aware of State Laws*

Many states have enacted their own versions of disability and family leave laws. These may be more generous to employees than federal regulations. When employees are covered by both federal and state laws, they are entitled to the greater benefit or more generous rights provided under the different parts of each law.

- *Take All Claims of Disability Seriously and Implement a Written Procedure*

All claims of disability should be taken seriously, even those that are clearly frivolous. It is easy for employees to create a case where none would have existed had the employer responded to a complaint with proper and timely action. All employers should have a written procedure for employees to follow in dealing with disability claims.

- *Refer All Disability Claims to Human Resources*

While supervisors and managers should be familiar with the law and ready to be the first step in the disability claim process, all disability claims should be referred to and handled by an in-house expert, such as Human Resources.

- *Go Through the Required Interactive Process in All Situations*

In all situations where a disability claim has been made, employers must go through the interactive process to determine what, if any, reasonable accommodations may be made to comply with the ADA, including possible additional leave.

- *Thoroughly Document Everything*

If companies aren't already doing so, they need to begin documenting every request and decision. Once leave is approved, the company should outline how long the leave will be and what the policy is for returning to work. This will help to eliminate misunderstandings and minimize the chances that employees can claim discrimination or other violations of their rights.

- *Communicate Throughout the Leave*

Companies should stay in touch with workers during their leave, particularly when the leave is set to expire and employees will be medically released to return to work. This

will help manage expectations on both sides and allow employers to plan for any necessary accommodations or changes to the initial leave agreement.

- *Proceed Carefully with Termination*

When a worker has exhausted his or her leave but is not willing or is unable to return to work, employers need to carefully consider whether firing the employee is the right step. It's important to determine whether any applicable laws could extend the leave. If the employer decides that terminating the employee is the appropriate action, every decision and communication should be put into writing. This will help ward off potential litigation and provide a defense if the employee decides to sue.

For several years now, claims under the ADA have seen the largest increase in filings with the EEOC. Add to the increased agency attention a rapidly aging workforce more prone to disabilities, and you can be virtually assured of more charges being filed in 2017. But, by being proactive and taking steps now, employers can put themselves in the best position to avoid any issues with the EEOC in the coming year.

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