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Expert Analysis

The Accommodation Minefield: How The Rise In Disability Claims Complicates Leave Policies

By Patrick H. Hicks, Esq., and Hilary B. Muckleroy, Esq.
Littler Mendelson

Today's employer is increasingly faced with navigating a complex system of nebulous guidelines regarding the interplay of employee leave requests with the Americans with Disabilities Act, 42 U.S.C. § 12101. The employer's obligation to conduct a case-by-case assessment of leave requests creates a unique problem: How does an employer comply with the law without hindering business operations? The concern is heightened when one considers the Equal Employment Opportunity Commission's increasingly aggressive pursuit of litigation in this area.

THE ADAAA LEADS TO EXPLOSIVE CHANGES

Congress initially enacted the Americans with Disabilities Act in 1990 to, in part, ensure equal access to employment for disabled workers. Following the passage of the ADA, the federal courts narrowly interpreted the definition of the term "disabled" under the ADA, allowing employers to frequently and successfully dispose of meritless disability claims before trial. As a result, employers were able to avoid adverse verdicts and had significant leverage when addressing excessive settlement demands.

That all changed in 2008 with the passage of the ADA Amendments Act.

In addition to overruling several significant decisions of the U.S. Supreme Court, Congress sent a clear message to the courts and, in turn, employers, that the term "disability" is meant to be broadly interpreted.

The ADAAA and subsequent EEOC regulations significantly expanded the definition of "disability."

Under the ADA, as amended, an individual is disabled if he or she is substantially limited in one or more major life activity.[1] The regulations define "major life activities" as nearly every human function — from caring for oneself and breathing to concentrating, thinking and working.[2] Consequently, more employees now fall within the scope of the law and claims for disability discrimination continue to rise.

The nature of the underlying disability has further changed because of the ADAAA. Claims related to mental disabilities such as anxiety, depression, post-traumatic stress and other psychological disorders (as opposed to commonly considered physical disabilities) are rising.

Over the past several years, there has been a general increase in EEOC charges. In 2006, 75,768 total charges were filed.[3] That number increased to 95,402 in 2008 and to 99,412 in 2012, for an overall increase of 32 percent.[4] Within these general statistics, the increase in claims for disability discrimination has outpaced other categories of discrimination.

In 2006, disability claims constituted 21.4 percent of all charges filed.[5] In just six years, disability claims rose by more than 5 percent, making up 26.5 percent of all charges filed in 2012.[6] Compare those statistics with the relatively stagnant level of charges related to other forms of discrimination (race, age, gender, national origin and religion) and the impact of the ADAAA becomes clear.[7] Further, disability claims related to mental disabilities have outpaced those relating to more generally recognized physical disabilities. For example, ADA charges involving anxiety disorders rose from 2.8 percent of ADA charges in 2007 to 6.1 percent in 2012.[8]

The 2008 ADA Amendments Act and subsequent EEOC regulations significantly expanded the definition of "disability" to include a limited major life activity defined as nearly every human function.

By expanding the definition and scope of covered disabilities, the ADAAA has shifted the focus from analyzing whether or not an individual is disabled to whether the employer made a reasonable accommodation for the employee's disability. This case-by-case analysis results in a much more fact-intensive inquiry.

Thus, an employer's ability to dispose of an ADA claim before trial on the ground that there are no material facts in dispute has been restricted since the passage of the ADAAA, increasing the risk of adverse verdicts and driving up the cost of settlement.

Not surprisingly, the EEOC has been increasingly aggressive in settlement discussions as it relates to ADA claims since passage of the ADAAA. In 2007, prior to the amendments, the EEOC collected $54.5 million in monetary benefits related to disability claims.[9] In just five years, that figure nearly doubled to $103.3 million.[10]

HIDDEN DANGER: LEAVES OF ABSENCE AND REASONABLE ACCOMMODATION

The heart of the amended ADA lies in the employer's obligation to provide reasonable accommodation to its disabled employees. This obligation requires the employer to engage in an "interactive process" with the employee to determine whether an accommodation is needed and whether such accommodation is reasonable.

The interactive process must be conducted on an individualized basis.[11] Examples of reasonable accommodation include modification of existing facilities, job restructuring, modified work schedules and leaves of absence. It is this leave-of-absence-accommodation request that is one of the most difficult issues facing employers today, especially when many companies utilize "no fault" or "fixed leave" policies.

In the human resources industry, one of the traditionally cited "best practices" is to create and enforce consistent, neutral policies. To that end, employers often adopt no-fault or fixed-leave policies. Such policies automatically grant a set number of

days for additional leave beyond what the employee would be entitled to under the Family and Medical Leave Act, 29 U.S.C. § 2601.

Additional leave, commonly granted in one- to six-month extensions, would not be "job protected," and the employee's return to work would be subject to the company's employment needs at that time. Many policies further provide that, in the event the employee is unable to return to work upon the expiration of the extended leave period, the employee may be terminated, although eligible for rehire.

At face value, these policies appear to be a good idea — they are explicit, definitive, can be neutrally applied and allow the employer to adequately staff its positions. In light of the ADA's individualized assessment requirement, however, fixed-leave policies can present a problem if the employer neglects to consider an employee's rights under the ADA.

Employers are confronted ever more with a seemingly simple question: What happens when, after 12 weeks of FMLA leave, an employee is unable to return to work? After all, once an employee exhausts FMLA leave, the FMLA rules cease to apply.

The answer is as deceptively simple as the question itself: When the employee's inability to return to work arises from a disabling condition, the employer must engage in the interactive process in order to determine whether an extended leave would be a reasonable accommodation under the ADA. The problem with the enforcement of fixed-leave polices, therefore, is the elimination of the individualized assessment required under the ADA.

While the EEOC has not taken the position that a fixed-leave policy is a per se violation of the ADA, the application of such policies may be problematic, and the EEOC is taking notice.

Claims related to mental disabilities such as anxiety, depression and post-traumatic stress — as opposed to commonly considered physical disabilities — are rising.

In a recent case, a large retailer agreed to pay several million dollars to resolve an EEOC challenge to a policy that resulted in termination if the employee was unable to return to work after a 12-month workers' compensation leave. The retailer additionally agreed to revise its one-year no-fault policy to include a procedure whereby the retailer would provide notice to the employee 45 days prior to the expiration of the one-year leave period and explain the employee's right to reasonable accommodation under the ADA, including additional leave.

In the event the employee failed to respond to the initial notice, the retailer agreed to issue a second notice reminding the employee of the ability to request a reasonable accommodation and stating that the employee would otherwise be terminated if he or she failed to respond to the second notice.

Similarly, a telecommunications company recently agreed to pay a multimillion-dollar settlement of an EEOC lawsuit involving its no-fault attendance policy. In that case, the EEOC charged that the company violated the ADA in refusing to make exceptions to its no-fault attendance plans. Under the attendance plans, employees accumulating a designated number of "chargeable absences" were subject to discipline, up to and including termination. The EEOC argued that discipline and/or termination of employees who incurred absences because of a disabling condition was a violation of the ADA.

There is reason to suspect that the EEOC will continue to pursue litigation of fixed-leave policies. In 2012, the EEOC issued its strategic enforcement plan for 2013 to 2016, emphasizing the agency's intent to focus on "systemic enforcement actions."[12] The EEOC defines systemic cases as "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business or geographic area."[13]

Fixed-leave policies are per se systemic and fall directly in the EEOC's cross hairs. Additionally, the EEOC identified the ADAAA (specifically, accommodation of pregnancy where women are required to take unpaid leave after being denied accommodations routinely provided to similarly situated employees) as one of the "emerging issues" to address under the enforcement plan.[14]

In the past year, the EEOC secured $365.4 million through its strategic enforcement activities, an increase of $700,000 over 2011.[15] The stakes are high, both for employers and the EEOC.

Because fixed-leave policies, by their definition, do not require an individualized assessment or evaluation of the reason-ableness of additional leave, strict application of such policies risks violating the ADA. In other words, the ADA requires an employer to apply exceptions to fixed-leave policies, and the EEOC has made clear that inflexibility in this regard may equal discrimination.

The ADAAA has shifted the focus from analyzing whether an individual is disabled to whether the employer made a reasonable accommodation for the employee's disability.

SHORT FUSE: OPERATIONAL CONCERNS

There is no doubt that the need to provide flexible work schedules or grant leave requests can create logistical challenges for employers. Leave requests are often undefined, open-ended or subject to requests for extensions. This poses operational concerns for employers (for example, how to properly staff the business, and when and whether to hire a replacement employee). Employers often begin to feel that the interactive process is never-ending and, in turn, say "enough is enough" before they have in fact done enough. Further, because the ADA does not provide a specific time limit for leave as a "reasonable accommodation," a company's obligations can vary with respect to different positions and different employees, and becomes the epitome of a case-by-case analysis.

Overlap of applicable leave under the FMLA, ADA, workers' compensation and other state-specific leave, and company-sponsored disability and time-off policies, can create yet another challenge for employers.

Consistent with the ADAAA, the U.S. Department of Labor has instructed employers to forgo an "extensive analysis" as to whether a medical condition is actually a disability when evaluating an employee's request for FMLA-covered leave.[16] Thus, employers should review their obligations under all applicable laws, as well as the ADA, before making decisions on granting employees time off for a disability.

DIFFUSING THE IMPACT: BEST PRACTICES

It is important to note that fixed-leave policies do not *automatically* violate the ADA. However, employers can further protect themselves and provide employees with the rights they are entitled to by implementing changes to their application of fixed-leave policies. The key is for employers to maintain flexibility.

For example, employers should:

- Revise leave policies to include language that the employee may be eligible for additional leave as a reasonable accommodation at the conclusion of an approved leave period. Similar language should be included in the employer's FMLA policy.
- Remove any language that requires an unequivocal return to full duty upon the expiration of leave. Reduced work schedules and/or restricted duty may be considered a reasonable accommodation and, accordingly, an employer's failure to offer or consider such alternative arrangements may be in violation of the ADA.
- Ensure that employees are not "charged" or otherwise disciplined for absences under the company's attendance policy when such absences are covered by FMLA and/or the ADA.
- Train supervisors and managers to notify human resources of all leave or time-off requests so human resources can conduct a fact-specific, individual assessment and properly engage in the interactive process.
- Continually communicate with employees regarding their anticipated return-to-work date and need for additional accommodation. The company should also keep in close contact with any third-party leave administrator to ensure early identification of potential ADA issues.
- Document the interactive process, including documentation of disability status, accommodation requested, alternative accommodations considered and any undue hardship posed. It is especially important to note that engaging in good-faith accommodation negotiations provides a defense to claims for compensatory and punitive damages.[17]

In the end, it may turn out that an employer is unable to approve an extended leave request without undue hardship. Regardless of the outcome, engaging in the interactive process, no matter how protracted it may seem, can save employers considerable time, money and aggravation in the end. When it comes to extended-leave requests under the ADA, it appears the exception has now become the rule.

NOTES

[1] 42 U.S.C. § 12102.

[2] 29 C.F.R. § 1630.2(i).

[3] EEOC Charge Statistics, Fiscal Years 1997-2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] EEOC Charge Data by Impairment/Basis, Fiscal Years 1997-2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm.

[9] EEOC ADA Charge Data – Monetary Benefits, Fiscal Years 1997-2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/ada-monetary.cfm.

[10] *Id.*

[11] 29 C.F.R. § 1630.

[12] EEOC Strategic Enforcement Plan, Fiscal Years 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

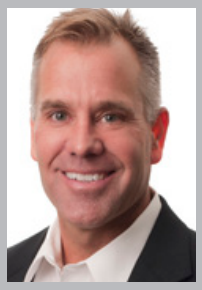
[13] *Id.*

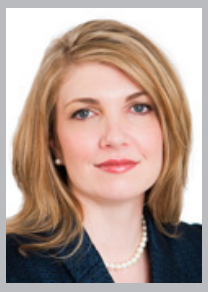
[14] *Id.*

[15] EEOC 2012 Performance and Accountability Report: Results Achieved in Fiscal Year 2012 Under Strategic Plan Performance Measures, *available at* http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm.

[16] Department of Labor, Administrator's Interpretation No. 2013-1 (Jan. 14, 2013), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm.

[17] 42 U.S.C. § 1981a(a)(3) (compensatory and punitive damages may not be awarded against an employer who successfully establishes "good-faith efforts in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make reasonable accommodation").





Patrick H. Hicks (L) is the founding shareholder of **Littler Mendelson**'s Las Vegas and Reno, Nev., offices. He can be reached at phicks@littler.com. **Hilary B. Muckleroy** (R) is an associate in the Las Vegas office. She can be reached at hmuckleroy@littler.com.