Employment Alert

Oct-13-2009

EEOC Takes Position That Inflexible Limit On Leave of Absence Violates ADA

Many employers believe that by providing a lengthy LTD/STD, illness and workers compensation leave to ill or disabled employees of 6 to 12 months they have, without more, satisfied the Americans With Disability Act's ("ADA") requirement to accommodate employees who may need such leave. Sometimes along with such generous leave policies strict limits are placed on such leaves to promote consistency among employee leaves and also to give the employer a date certain on which it can terminate employment. Thus, if an employer has a policy of giving disabled employees 6 months to recover, it often takes the position that it has a right to terminate the employee at the expiration of the 6 month period regardless of the employee's condition.

The EEOC continues to disagree with that position. It contends that such a hard and fast limit denies accommodation to employees who may just need a short extension of the time limit in order to return to work. Similarly, an employee's medical condition may change, making them available for reassignment to another position or part-time work. In the absence of a showing of undue hardship, the EEOC continues to take the position that employers must do more to ensure that employees are aware of their rights to accommodation than simply provide leave with a terminal limit. Recently the EEOC has stepped up enforcement around this view of the ADA. Employers should therefore be aware that the EEOC is targeting, with success, what are termed as "wooden" leave limits with inflexible termination dates for affected employees as one of their priority enforcement targets.

To avoid a confrontation on this issue, we are generally suggesting that shortly before the time limit for the leave expires, employers notify the employee that their leave is ending and invite discussions with the employee on possible return scenarios. In other words before the end of the leave, the employer should invite the employee to engage in an interactive discussion about the employee's ability to return to work with or without an accommodation so that by the end of the leave period either a plan is in place for the employee to return to work or to return to work in short order. If, on the other hand, as a result of this interactive process, the employee has admitted that he/she cannot return to work even with an accommodation and the employee has admitted that he/she has no idea when he/she can return to work, then the employer is in a much better position to proceed with termination as of the end of the employer's leave limit. For unlike where an employer simply applies a leave limit uniformly, here, the employer can show that it has engaged in the interactive process and discussed accommodation with the employee and that no reasonable accommodation appears likely to get the employee back to work.

Of course, as always, employers should document all interactive discussions of accommodation so as to have a record of all attempts at accommodation that were made. Because of the EEOC's recent successes in litigating this issue we believe that failure to follow these practices places an employer at significant risk of an EEOC lawsuit under the ADA given their recent successes.

For more information, please contact Brian Bulger, Paul Garry or any other MBT labor and employment lawyer at (312) 474-7900.

MBT is a leading litigation firm with 90 attorneys and offices in Chicago, Dallas and Phoenix. In addition to concentrating in labor and employment law, our attorneys focus on commercial litigation, insurance coverage, professional liability defense, attorney fee disputes and environmental law.

For more information, please visit www.mbtlaw.com.

MBT provides e-alerts for general information only; this information should not be construed as legal advice. Attorney Advertising.