EEOC Consent Decree a Reminder That Attendance Policies Must Have an ADA Escape Valve

Labor & Employment Law Update

on August 13, 2018

In July the EEOC announced the terms of a consent decree settling claims of systemic disability discrimination against a global metal products manufacturer. Pursuant to the terms of the decree, the employer will pay $1 million, reinstate affected employees, appoint an ADA coordinator, revise its policies and procedures, track accommodation requests, maintain an accommodation log, provide ADA training to all of its employees, and report its progress to the EEOC over the next two and a half years.

Where did the employer go wrong? According to the announcement, the employer violated the ADA in two ways: by awarding attendance points regardless of the reason for the absence and by terminating employees who were not able to return to work after 180 days of leave.

So called "no fault" attendance policies are common and have many advantages. They are transparent and easy to administer, they remove discretion from frontline supervisors (and with it potential favoritism and bias), they treat employees as adults by allowing them to manage their own time, and they remove much of the burden of policing the reason for each absence. But problems arise when employers – no longer called upon to scrutinize the reason for each absence – miss ADA and FMLA triggers.

Remember, employees are not required to say "disability," "ADA," or "reasonable accommodation" to trigger the ADA-mandated "interactive process." There are no "magic words." The same is true of the FMLA. Anything that alerts *or should have alerted* the employer that an employee has a disability and may need reasonable accommodation (or that absences may qualify for FMLA protection) triggers statutory obligations. And to further complicate matters, anything a supervisory employee knows can be imputed to the employer.

Even policies designed to help employees, like the policy for providing up to 180 days of medical leave which far exceeds the 12 weeks the FMLA affords, must be applied with the ADA in mind. A blanket policy that any employee who is not able to return after 180 will be terminated does not allow for the individualized

assessment mandated by the ADA. Bottom line, all policies, attendance policies as well as work rules, performance metrics, etc. must be analyzed with the ADA in mind. Always include an ADA escape valve.

Best Practices:

1. Regularly review your ADA and FMLA policies to make sure they are clear, concise and easily understood;
2. Clearly direct employees to contact HR if they believe they need leave or reasonable accommodation for a disability;
3. Clarify that your attendance and leave policies (and others as appropriate) are applied within the framework of the ADA and FMLA and again invite employees who believe they may need leave or an accommodation to discuss the issue with HR;
4. Include FMLA and ADA issues in regular supervisor training and require supervisors to elevate potential issues to HR; and
5. Finally, there is no escaping the fact that ADA and FMLA issues are difficult. Partnering with trusted, experienced employment counsel as you navigate these complicated issues can often allow you to avoid the expense and hassle of defending legal claims later.