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DISABILITY LAW REMAINS UNCERTAIN AS THE ANNIVERSARY OF THE ADAAA REGULATIONS APPROACHES

As we approach the one-year anniversary of the ADAAA regulations, we have caught only a glimpse of the true effect of these legal changes.

We have seen a string of multi-million dollar settlements from the EEOC involving class disability claims, culminating in Verizon's payout of $20 million for an allegedly "illegal" and "inflexible" no-fault attendance policy that had the unfortunate effect of counting disability-related absences for disciplinary occurrences. The facts of this settlement were most concerning for employers, many of whom had (and some who continue to have) similar policies. The EEOC remains focused on leave and attendance policies, emphasizing the need for flexibility to allow for additional leave time even after already generous policy limits have been exhausted. Prior EEOC Guidance indicates:

- An employer may NOT apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period.
- If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer **must** modify its "no-fault" leave policy to provide the employee with the additional leave (unless there is another effective accommodation **OR** the additional leave would cause an undue hardship).

While publicity around EEOC settlements appears to have slowed over the past few months, the EEOC recently announced its Strategic Plan for Fiscal Years 2012-2016, which continues to highlight the Commission's focus on attacking discriminatory policies and what it deems "systemic" discrimination.

We are starting to see judicial decisions applying the ADAAA, which painfully remind employers of the ADAAA's edict that the definition of "disability" is to be construed "in favor of broad coverage," and the question of whether an employee's impairment is a disability under the ADA "should not demand extensive analysis." For example, the bridge worker with acrophobia, who was unable to work at heights over 20-25 feet. The 7th Circuit Court of Appeals rejected the employer's argument that working above 25 feet was an essential function of the bridge worker's job and reversed the district court's grant of summary judgment for the employer, allowing the claims to proceed to a jury trial. In its decision, the Court noted, "The ADA does not give employers unfettered discretion to decide what is reasonable. The law requires an employer to rethink its preferred practices or established methods of operation. Employers must, at a minimum, consider possible modifications of jobs, processes, or tasks so as to allow an employee with a disability to work, even where established practices or methods seem to be the most efficient or serve otherwise legitimate purposes in the workplace." *Miller v. Illinois Dep't of Transportation* (7th Cir. 2011)

Human Resources Professionals responsible for administration of leaves must also remember that FMLA issues can prompt an ADA analysis. For example, even if an employee has not worked enough hours to qualify for FMLA leave, he or she may qualify for time off from work (either in a block of time or on an intermittent basis) as a reasonable accommodation under the ADA.

The one thing of which employers can be certain in the face of this legal uncertainty (absurdity?) is that revision of existing reasonable accommodation, leave of absence, and no-fault attendance policies should not be taken lightly. At a minimum, employers should be reviewing existing policies and procedures to build in flexibility, to ensure an individualized inquiry for each and every situation involving an employee with a disability. As the focus on reasonable accommodation continues, remember that there are no set formulas concerning disability or reasonable accommodation, and in many instances making an exception to a standard policy or practice may be considered reasonable.

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