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EMPLOYERS BEWARE: AUTOMATIC TERMINATION FOLLOWING MEDICAL LEAVE IS RISKY

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Most employers have written leave of absence policies published to employees, typically through a handbook. If covered by the Family and Medical Leave Act (FMLA) and/or its state counterpart, they have a written family medical leave policy. Many employers (particularly large and/or unionized employers) also have separate supplemental non-statutory leave policies providing additional personal or medical leave (e.g., leave beyond the FMLA-mandated 12 weeks of job-protected leave).

Many such supplemental leave policies also have a set maximum duration on the leave, regardless of the reasons for the leave (e.g., a maximum of 12 weeks, a maximum of 52 weeks, etc.). Under these so-called “neutral” policies, the idea is to treat all employees needing leave the same once the maximum level of time off work has been reached for whatever reason (whether through a combination of FMLA, personal leave for other reasons, or leave beyond the typical 12 weeks). Specifically, when the maximum leave time is reached, these policies call for the employee to be discharged. Beware. Although these maximum leave policies are facially neutral, it is becoming increasingly clear that automatically terminating an employee at the end of the employer's maximum leave limit may result in a finding of liability under the Americans with Disabilities Act (ADA).

EEOC Takes Aggressive Stance Against Maximum Leave Policies

The ADA and its new amendments make clear that reasonable accommodation may include modification of policies, including leave policies. The EEOC has always interpreted this to mean that an employer's reasonable accommodation obligation may include extending their medical or personal leave policies (including no-fault, neutral or maximum leave policies), so long as doing so does not create an undue hardship. Recently, however, the EEOC has bolstered its interpretation with active and aggressive litigation against employers with neutral or maximum leave policies.

Practical Thoughts for Compliant Leave Management

With this in mind and in light of the more active EEOC enforcement policy, remember:

1. **Automatic termination upon the exhaustion of maximum leave of absence policy is too risky.**
   If you have a policy that provides 12 weeks of leave regardless of the reason (or 12 weeks of FMLA plus thirty days, or up to one or two years as some employer’s policies do), remember that automatically terminating employees once leave exceeds the designated period of your policy will not satisfy the ADA. The ADA requires an

individualized (case-by-case) assessment to evaluate whether that particular employee needs a limited extension of medical leave as a reasonable accommodation (and/or whether any other form of accommodation might be reasonable and available). Having a "blanket" uniform policy that treats everyone the same (i.e., a policy that requires all employees to return to work following the end of your particular leave of absence policy) is not the "individualized" assessment contemplated by ADA.

2. **If you know an employee needs more leave, enter into the interactive process.** Even the FMLA (and most state counterparts) requires an employer to contemplate whether ADA reasonable accommodation is a possibility upon exhaustion of the typical 12 weeks. A policy should call for an interactive process (dialogue between employer and employees) designed to determine whether the employee needs a limited, additional leave of absence beyond the company policy maximum, or whether the employee can come back to work with reasonable accommodation. Requiring employees returning from medical leaves to be released to "full duty," without restrictions likely violates the ADA since such a blanket policy implies that employer will not accommodate work-related restrictions following leave, no matter what the limitations may be. Remember, employers do not have to provide "indefinite" leaves of absence nor do they have to create new jobs for a returning, work-restricted employee. An employer does, however, have to enter into an interactive process with employees to evaluate if and when they may return to their former position (with or without reasonable accommodation), which may include limited leave extensions, part-time work for a short duration, and reassignment to a different vacant position).
3. **The interactive process requires you to talk to the employee.** At a minimum, employers should be contacting an employee who is close to the end of a medical leave if they have reason to believe that the employee may need an extension of leave following designated leave period. Actually talking to the employee about what he/she needs, and about possible reasonable accommodations, is key (ideally face-to-face, but communication by phone or email will suffice if face-to-face is not feasible, such as because the employee is unable to come to the workplace because of his/her medical restrictions). Of course, the ADA does not require you to implement the employee's preferences for returning to work; it just requires you to gather the employee's preferences and suggestions and to provide reasonable accommodation where that is possible. Employers with unions may need to include the union representative in these discussions (particularly where a potential accommodation may conflict in any way with the terms of a collective bargaining agreement).
4. **Proactively managing the employee while on medical leave will help.** Do not wait until the employees exhaust FMLA or other medical leave before talking to them. If you take full advantage of providing a job description to healthcare providers to ensure they understand the essential functions of the job, they may provide more information related to the need for leave at the commencement of the leave. Make sure you seek recertification of the need for leave at appropriate times to stay on top of the employee's current need for leave. Remember that extended leave following exhaustion of FMLA leave is likely a "qualifying event" under COBRA if the employer's obligation to pay for group health medical premiums ceases.
5. **Extending medical leave beyond the maximum policy limit is not the end of the world**. A present and individualized assessment of an employee's need for an extension of leave for his/her disabling medical condition for a limited duration is an option many employers have used for a long time – even before the ADA came alive over two decades ago. The difference now is that the EEOC is looking for employers who stubbornly stand by their uniform maximum leave of absence policies "no matter what." Such a hard line may attract the EEOC to your job site. You may be able to win if

challenged, but it will be difficult. Moreover, you probably do not want to be a test case.

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