



Alert

Labor & Employment Client Service Group

To: Our Clients and Friends

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Recent EEOC Lawsuits Remind Employers to Act with Caution In ADA Situations

The Equal Employment Opportunity Commission (EEOC) has filed two lawsuits in the past few months that indicate the Commission is taking an aggressive stance on Americans with Disabilities Act (ADA) issues. The EEOC chooses relatively few lawsuits to pursue on its own, making their choices highly instructive for employers to avoid the risk of an EEOC investigation. While it remains to be seen how the courts will view the EEOC's arguments, employers should consider the EEOC's current arguments in making employee decisions.

Twelve-Month Administrative Leave

Many companies employ a version of the practice of administratively terminating employees who are away from work on leave for more than twelve consecutive months. This has long thought to be acceptable under the ADA as long as the company engages in an individualized inquiry for each employee's situation, instead of blindly terminating employees after twelve months without regard to whether they may be able to return shortly or with restrictions.

The EEOC has filed a class action against shipping company UPS for instituting an "inflexible" policy of terminating employees after twelve months of leave. The case arose from a long-term employee terminated after twelve months even though the employee stated she could have returned in another two weeks after the twelve-month mark. According to UPS, however, the employee never asked for an accommodation under the ADA or submitted medical documentation to back up a request for additional time off. In a similar class action suit only weeks later, the EEOC sued Supervalu for allegedly prohibiting employees on a one-year paid disability leave from returning to work unless they had no mental or physical restrictions, or unless they could return to work "without any accommodation to full service."

What this means for you: The fact pattern that set off the UPS and Supervalu cases is a common one. The best way to avoid the risk of a similar argument by the EEOC is to extend employees several chances to provide medical documentation about their need for further leave after twelve months. If

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the employee gives any indication that he/she may be returned to work in the next six months, we recommend that employers involve counsel to assist in an individualized inquiry into the obligations under the ADA with respect to that employee.

Medication Usage

Similarly, some companies may request employees to notify the company if they are taking medications that may affect their ability to do their job. More commonly, managers learn that an employee is taking a certain powerful medication and wonder if they have any ability to probe further.

Recently, the EEOC sued a Minnesota sheet metal manufacturer for requiring its employees to report whether they are taking any prescription drugs or over-the-counter medications. The EEOC is seeking an injunction against allowing the company to maintain this policy, as well as reinstatement of an employee terminated for not telling the company that he took Vicodin while working. The EEOC says that the policy violates the ADA because it is not related to the ability of employees to do their jobs. It also contends that employees complying with the policy likely disclosed information about any disabilities or impairments they might have.

An EEOC spokesperson noted that there are limited circumstances when a company would have legitimate need to know if an employee is using prescribed or over-the-counter medication, although she did not elaborate on what those might be.

What this means for you: Employers should engage in a careful review of their own circumstances and whether it is appropriate to inquire about employee medication use. In particular, be mindful that at a minimum employers should assure that:

- The inquiry is limited to whether the medication would affect this particular employee's ability to safely perform his/her job duties; and
- Employees are notified that they do not have to disclose underlying medical conditions.

Moreover, if an employee exhibits erratic or unsafe behavior and the managers suspect that medication may be the cause, an employer may respond appropriately to those observed facts. We strongly recommend, however, that legal counsel be involved in these situations.

These two recent lawsuits brought by the EEOC emphasize that any employee issues involving a medical condition should be handled conservatively and with caution.

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