

EEOC Cracks Down on Leave Policies That May Violate ADA

The Equal Employment Opportunity Commission (EEOC) is making it abundantly clear that employers must tread carefully in adopting and implementing medical leave policies. According to the EEOC, those policies that provide for the termination of an employee who has been out on leave for a specified amount of time violate the Americans with Disabilities Act (ADA) if they do not contemplate the possibility of a reasonable accommodation. In two recent cases publicized by the EEOC, the agency has asserted its considerable authority against two major U.S. employers, United Parcel Service (UPS) and Sears and Roebuck & Co.

In late August, the EEOC filed suit against UPS in federal court in Chicago, alleging that the company's medical leave policy violated the ADA. According to the lawsuit, which the EEOC filed on behalf of a class of employees, UPS offers 12 months' leave for employees experiencing medical issues. UPS characterizes this as "one of the more generous and flexible leave policies in corporate America." Nevertheless, the EEOC alleges that the company's termination of employees who are not able to return to work at the conclusion of the 12-month leave period is "inflexible" and "arbitrary" and violates the ADA because it fails to provide for reasonable accommodation of employees with disabilities. The EEOC specifically alleges that UPS failed to consider accommodations, including extending the 12-month leave or returning the employee involved in the case to work in an available position that she could have performed. UPS, in public statements responding to the lawsuit, disputes the EEOC's claim that it does not engage in an interactive process to identify reasonable accommodations for employees who have exhausted their leave. The case remains pending in federal court.

On the heels of the UPS lawsuit, on September 29, 2009, a federal district court in Illinois approved a \$6.2 million settlement in an EEOC class action against Sears. As in the UPS action, the EEOC alleged that Sears violated the ADA through an inflexible policy of terminating injured employees who exhausted their workers' compensation

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leave rather than seeking to return them to work. In agreeing to settle the case, Sears denied that it did not offer reasonable accommodations, but agreed to revise its internal policies to provide for notifying injured employees, at least 45 days before their leaves expire, that they can request accommodations to enable their return to work. In addition, Sears agreed to deposit \$6.2 million – characterized by the EEOC as the largest ADA settlement in history – into a settlement fund that will be allocated among an unknown number of former Sears employees who may have been affected by the leave policy. The settlement also provides that if the settlement fund is not completely distributed to claimants, the remainder will be donated to an Illinois disability rights advocacy organization.

These cases illustrate the EEOC's recent focus on enforcement of the ADA in the context of medical leave. Employers who comply with or go beyond statutory leave requirements (such as the Family and Medical Leave Act) must also consider whether an employee who has exhausted leave is entitled to an accommodation – including an extension of leave – under the ADA. In the UPS and Sears cases, the EEOC took the position that policies providing for termination of employment *after*

12 months of leave violated the ADA because they were “inflexible.” Although we do not yet know how the courts will react to the EEOC’s position, prudent employers should now review their leave and ADA policies and consider whether to revise them if they are not consistent with the EEOC’s approach.

For more information, or if you have a question about this or another employment matter, please contact any member of Pepper’s Labor & Employment Practice Group.

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