SEYFARTH SHAW

Senior Living and Long-Term Care Blog

Perspectives on the legal trends, regulatory policy and other issues facing the senior living and long-term care industry

Senior Living and Long-Term Care Employers Should Review Their Practices on Leaves of Absence

By Joan E. Casciari

It has been over 22 years since the enactment of The Family and Medical Leave Act ("FMLA"), which provides up to 12 weeks of job protected leave for an employee with a serious health condition. While most senior living and long-term employers are well-versed in the FMLA and its requirements, some level of confusion continues as to what obligations an employer has under the Americans with Disabilities Act ("ADA") to provide leave above and beyond FMLA requirements for persons with disabilities. This obligation is compounded by the 2009 revisions to the ADA, which expanded the scope of the definition of a disability.

Many healthcare employers have "other leave" or "personal leave" policies that are designed to provide leave for employees who either are not eligible for FMLA or who have exhausted FMLA. Often these policies set short durations for such leave (*e.g.*, 30 days or not longer than 6 weeks), and contain language that leave is "purely at the discretion of the employer" or, if leave is granted "there is no "no guarantee of reinstatement." Other employers provide some sort of job protection for the duration of short-term disability benefits, which is often 26 weeks. Sometimes these policies simply state that the employee "may be reinstated to an available comparable job." It is also typical to see "maximum leave" language in employer leave policies. Such policies are often referred to as "leave cutoffs," and the application of such leave cutoffs has resulted in a considerable amount of litigation.

Prior to the 2009 amendments to the ADA, employers won the vast majority of ADA cases by arguing the condition at issue was not a covered disability. Since January 2009, when the ADA amendments went into place, an employee's burden to prove that a condition is a substantial impairment in a major life activity has lessened. Essentially, this change has put the burden on the employer to show undue hardship or direct threat. This means it is harder for an employer to deny leave or terminate employees who are unable to work due to a medical condition.

EEOC's Position

The FMLA was enacted in February 1993 and became effective in on August 5, 1993. The ADA was enacted in July of 1990 and became effective on July 26, 1992. Significantly, the ADA does not address leaves of absences. Nevertheless, for many years, the U.S. Equal Employment Opportunity Commission ("EEOC"), which enforces the ADA, as well as other federal discrimination laws, has taken the position that leaves of absences are a type of accommodation under the ADA that employers must consider. An employer must do more than comply with the requirements of the FMLA or other leave laws. In fact, EEOC has stated that an inflexible period of disability leave, even if substantial, is not sufficient to satisfy an employer's duty of reasonable accommodation.

The EEOC believes that if an employee has a disability, employers must consider granting job-protected leave on a case-by-case basis. Further, if leave is granted, the employee is entitled to be reinstated to his/her position (absent hardship), whereas under the FMLA, an employee may be restored to an *equivalent* position. If an employee is on indefinite leave, however, an employer is not required to hold a position open. Yet, determining what is meant by an indefinite leave is not always an easy analysis. Medical providers often defer the decision on an employee's ability to return to work to the next appointment, resulting in a "floating return to work date." The EEOC grapples with this issue in an ADA Guidance, and provides the following general guidelines:

Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return [sometime] between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.

Case Law

The case law is not consistent within the Circuits, and the Supreme Court has yet to address the issue of whether job protected leave is a form of accommodation under the ADA, and, if so, what are its parameters. The EEOC's enforcement position is a nationwide approach. Accordingly, EEOC challenges "automatic leave cut offs" even in jurisdictions like the Seventh Circuit (which covers Illinois, Wisconsin and Indiana), where the appellate case law supports such practice. *See Byrne v. Avon Products, Inc., 328 F.3d 379 (7th Cir. 2003).*

Recommendations

Because the law continues to evolve on leave rights, prudent senior living and long-term care employers should review their leave policies, especially if this has not been done since the ADA was amended in 2009. Best practice recommendations include:

- establishing "Non-FMLA Leave" policies that specifically state that the employer will consider providing job-protected leave for those not eligible for FMLA (or who have exhausted FMLA) on a case-by-case basis;
- adoption of a formal ADA/Accommodation policy;
- checking state and local law to make sure that there are not additional requirements; and
- having an accommodation request process that includes the right to request job protected leave outside of the FMLA or state law requirements.

If you would like further information on this topic, please contact Joan Casciari at *jcasciari@seyfarth.com*, your Seyfarth attorney, or any member of the Senior Living & Long-Term Care Team.