AUGUST 17, 2018 | DISCRIMINATION, HARASSMENT & RETALIATION

EEOC Attacks "No Fault" Attendance Policies as ADA Violations

As you know, the Americans with Disabilities Act (ADA) prohibits discrimination against disabled employees and job applicants in all aspects of employment, including hiring, firing, and promotion. It also provides rules for employers regarding the extent to which they may inquire about an employee's physical or mental health, and requires employers to provide reasonable accommodations to covered employees, unless such accommodations would cause undue hardship. Whether an accommodation is reasonable or would cause undue hardship on the employer is very fact-specific and is usually determined on a case-by-case basis, but the Equal Employment Opportunity Commission (EEOC) seems to have taken a hardline approach on employer policies related to certain types of accommodations.

One type of accommodation often requested is leave (which also tends to implicate the Family and Medical Leave Act). Employers frequently receive such a request where an employee suffers a disabling injury, such as a broken bone, that requires him to miss work for an extended period of time to recover. In this context, the employee will normally request leave for an extensive, but certain amount of time with at least a tentative end date, usually in accordance with his doctor's recommendation. Although most circuit courts agree that employers need not provide employees with indefinite leave, enforcement guidance provided by the EEOC states that company policies setting a finite limit on the length of leave violates the ADA's requirement for employers to engage in the interactive process to discuss reasonable accommodations.

So, what happens if an employer implements a blanket "no fault" attendance policy, whereby employees are assigned points for absences, regardless of reason, and are terminated for not being able to return to work after 180 days of leave? Employers might think this is an effective way to maintain neutrality and avoid asking employees about their reasons for taking leave – it gives employees the power to manage their leave as they see fit and takes management out of the picture. But, the EEOC disagrees. In fact, the EEOC would call this a form of "systemic discrimination against employees with disabilities" in violation of federal law, as demonstrated by a recent July 2018 consent decree entered into by the EEOC and Mueller Industries, Inc.

In *EEOC v. Mueller Industries, Inc.*, the EEOC filed suit in the U.S. District Court for the Southern District of California against Mueller Industries, Inc., a global metal goods manufacturer, claiming disability discrimination. It charged the company with terminating employees and/or failing to provide reasonable accommodations for those exceeding its maximum 180-day leave policy. The EEOC also stated that the company violated federal law by implementing its attendance policy in a way that assigned points for absences, regardless of reason.

Essentially, the EEOC took issue with the fact that the "no fault" policy did not allow for the type of individualized assessment that the ADA requires. Through the interactive process, employers and covered employees are meant to discuss the types of accommodations needed to allow the employee to perform his essential job functions, and to permit employers to determine whether the accommodations discussed are reasonable. Although the burden of raising the need for an accommodation rests on the employee, once an accommodation has been requested, or the need for an accommodation has been identified, it is the responsibility of the employer to initiate the interactive process and determine a reasonable accommodation for that individual employee. The EEOC's enforcement guidance and July 2018 consent decree seem to direct that a "one-size-fits-all" leave policy simply does not work.

The case concluded when the parties entered into a consent decree, which will remain in effect for two-and-a-half years and applies to all Mueller facilities nationwide. It provides for $1 million in monetary relief, as well as broad injunctive relief. Namely, the consent decree requires that Mueller reinstate any affected individuals, revise its written policies and procedures regarding its complaint system, appoint an ADA coordinator, create and maintain an accommodation log, post a notice for its employees about the case, provide training to all employees on the ADA, develop a centralized tracking system for accommodation requests, and submit annual reports to the EEOC verifying compliance with the decree. This can be a pretty hefty price for employers to pay, all over one policy.

In light of the EEOC's guidance and apparent enforcement posture, employers should review their attendance procedures and make sure they are not implementing such blanket "no fault" leave policies that do not make room for employers and disabled employees to engage in the interactive process. Leave policies should always be developed and written with the ADA in mind. This is especially true in today's enforcement climate where the EEOC has announced that addressing emerging and developing issues in equal employment law, including issues involving the ADA, is one of its six national priorities identified in its Strategic Enforcement Plan.