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EEOC CONTINUES TO TARGET EMPLOYERS WHO HAVE MAXIMUM LEAVE POLICIES AND SEEKS TO RECOVER MULTI MILLION DOLLAR DAMAGE AWARDS

In 2009, the Equal Employment Opportunity Commission filed a complaint against UPS on behalf of employee, Trudi Momsen, and a class of similarly situated disabled UPS employees to challenge UPS's practice of firing employees after they exceeded the Company's twelve-month maximum leave of absence policy. The EEOC claims that employers with maximum leave of absence policies violate the Americans With Disabilities Act by failing to engage in an appropriate reasonable accommodation analysis on a case by case basis.

The individual plaintiff, Trudi Momsen, started her career as an administrative assistant at UPS in 1990, and it was not until 2006, that she was diagnosed with Multiple Sclerosis after her first symptoms appeared. After 12 months away from work she tried to return but her ongoing symptoms and complications from her medication made it a challenge. When the symptoms became worse and she put in a request for additional time off for treatment, Momsen claims that UPS denied her request because she had already exhausted UPS's maximum allowable twelve months of leave.

UPS maintains a 12-month maximum allowable leave policy based on the reasonable premise that attendance is an essential job function. The EEOC rejects an employer's right to impose such maximum allowable leave policies when dealing with employees with ADA covered disabilities. According to the EEOC, the ADA prohibits an employer from drawing a bright line when it comes to leave of absence or attendance policies. According to the EEOC, an employer must always engage in a case specific analysis to determine whether in the case at hand providing additional leave under the circumstances is a reasonable accommodation and whether such additional leave would create an undue burden for the employer. In the UPS case, Chicago regional EEOC attorney John Hendrickson stated, "policies like this one at UPS, which set arbitrary deadlines for returning to work after medical treatment, unfairly keep disabled employees from working."

Although courts are clear that employers need not provide indefinite leaves of absence, neither the EEOC nor the courts have been particularly helpful in providing guidance to employers as to how much leave an employer must provide to an employee. The amount of required leave is a moving target depending on the size of the employer, the nature of the job in question and the objective needs of the employer. We anticipate that this issue will continue to be hotly contested in the courts and may remain unresolved for years to come because the EEOC's position turns the ADA into an FMLA hyper-leave statute for those unable to work.

The EEOC has devoted tremendous resources to pursuing aggressively employers who maintain maximum allowable leave policies. The EEOC has often brought lawsuits against such employers on behalf of a class of disabled employees rather than on behalf of just one employee. This strategy expands exponentially the financial exposure for the employer. For example:

- In EEOC v. Sears Roebuck, filed in 2004, the parties were engaged in litigation until 2009, when the case was resolved with a $6.2 million consent decree covering more than 250 claimants who had been separated under Sears' generous 12-month leave policy.

- In EEOC v. Supervalu, filed in Chicago in 2009, the parties entered into a $3.2 million consent decree covering more than 100 claimants who had been separated under an equally generous 12-month leave policy.

- In EEOC v. Verizon, filed in Baltimore in 2011, the parties entered into a $20 million consent decree providing relief to 800 claimants who were disciplined or terminated under Verizon's no-fault attendance and leave policies.

Many employers favor "fixed-leave" and no fault attendance policies because they are clear and set expectations. However, with the EEOC's position on the matter, and the current litigation trend, employers must consider moving away from rigidly following such policies when dealing with employees with disabilities. Prior to terminating an individual's employment because of that employee's attendance or inability to return to work, an employer should consult with qualified counsel and consider how ADA compliance issues impact the decision.

As always, we encourage you to discuss your termination decisions with us before implementation to ensure a sound decision and to avoid giving either employees or the EEOC a viable basis to pursue litigation. For more information on this complex matter, contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com).