Beware of Inflexible Return-to-Work Policy Following Exhaustion of Workers' Compensation Leave

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Employers that have a policy of automatically terminating employees who fail to return to work following the exhaustion of workers' compensation leave need to be aware that such a policy puts companies at risk of a class action lawsuit alleging violations of the Americans With Disabilities Act ("ADA").

On September 29, 2009, a federal district court in Illinois approved a $6.2 million settlement of an Equal Employment Opportunity Commission ("EEOC") class action filed on behalf of former employees who were terminated pursuant to a policy that required automatic termination of injured workers at the conclusion of their workers' compensation leave. The settlement is the largest ADA settlement in the EEOC's history.

In the lawsuit, the plaintiffs (former employees of a large nationwide retailer) alleged that the company violated the ADA by failing to explore reasonable accommodations that would allow them to return to work once their leave period had expired. The ADA requires employers to accommodate individuals with disabilities or who are regarded as disabled, unless doing so would result in an "undue hardship" -- defined as an action requiring significant difficulty or expense.

As part of the settlement, the company will be required to revise its internal policies to notify injured employees at least 45 days before the expiration of their leave period that they can request an accommodation to enable their return to work. The revised policy must give examples of the types of accommodations available such as modified duty, part-time work, reassignment and extended leave.

In order to manage the process going forward, the company has put a centralized leave management team in place in order to transition injured workers back to work and to explore alternative working arrangements such as locating alternative positions.

How Can Your Company Protect Itself From Costly Litigation?

Due to the large nature of the settlement and recent amendments to the ADA which make clear that the statute's protection is very broad, it is likely that the EEOC will be on the lookout for policies like the one at issue in the Illinois lawsuit. Therefore, similar lawsuits may be on the horizon. As a result, employers that have such a policy should, at a minimum, take the

following steps:

- Amend the company's workers' compensation leave policy and practices to require notification, sufficiently in advance of the expiration of the leave period, of an employee's right to request a reasonable accommodation;
- List examples in the revised policy of reasonable accommodations so that employees are aware of the types of alternative working arrangements that may be permitted (e.g. light duty, additional leave, reassignment, etc.);
- Designate an individual or team of individuals to send out a timely notice pursuant to the terms of the policy, review requests for reasonable accommodations and explore available accommodations with employees returning from workers' compensation leave.

Do not terminate an injured worker whose leave has expired without seriously exploring possible accommodations. Under the ADA, employers have a duty to engage in the interactive process with employees who are protected by the ADA. Therefore, by offering an employee a reasonable accommodation, even if it is not an employee's preferred accommodation, an employer is in a better position to demonstrate that it complied with the requirements of the statute.

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