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The EEOC's Attack on Maximum Leave Policies

Sometimes companies fail to consider an employee's rights under the ADA

By Patrick T. Collins / Norris McLaughlin & Marcus, P.A.

United Parcel Service, with over $61 billion in revenue reported in 2016, can afford to be generous with the benefits it provides its employees. One such benefit is the UPS leave policy, which allows employees to take up to 12 months of leave. Most employees would be happy to work for a company that would hold their job for up to a year, and such a generous leave policy would seem to be beyond legal challenge.

Not according to the Equal Employment Opportunity Commission. The EEOC issued a press release on August 8 announcing a $2 million settlement with UPS in a lawsuit that began in 2009. In the lawsuit, the agency alleged that UPS violated the Americans with Disabilities Act (ADA) by enforcing an inflexible maximum-leave policy whereby employees, including those on leave due to disability, were automatically fired when they reached 12 months of leave. In addition to paying $2 million in the settlement, UPS also agreed to update its policies and train those employees responsible for administering the policies.

The settlement highlights the EEOC's longstanding position that maximum leave policies, also known as no-fault policies, may have to be modified for employees who request leave beyond the amount permitted in the policy, when such additional leave is requested as an accommodation to an employee's disability.

The ADA prohibits discrimination on the basis of an employee's disability and requires employers to grant reasonable accommodations to employees so that they can perform their jobs, unless granting the accommodation would cause the employer an undue hardship. One form of accommodation that frequently arises in the workplace is unpaid leave. Granting a period of unpaid leave enables an employee to return to work once their disability leave ends.

When an employee requests an accommodation, for example a request for leave due to a medical condition, the employer must communicate with the employee to determine the full scope of the request. An employer may inquire about the reason the leave is needed, the length of the requested leave, and it may obtain medical confirmation from the employee's doctor. By engaging in this "interactive process," employers can determine whether the requested accommodation is reasonable, or whether it would cause an undue hardship.

A possible scenario, using the UPS policy as an example, could play out as follows: An employee is involved in a serious accident requiring multiple operations and a long period of rehabilitation and recovery. As the one-year anniversary of the employee's leave approaches, the employee provides a doctor's note indicating that an additional month is needed before the employee can return to work. The question, then, is whether the additional month of time off will cause the employer an undue hardship.

> ***One form of accommodation that's frequently negotiated is unpaid leave.***

In the EEOC's suit against UPS, it claimed that the UPS leave policy violated the ADA because employees were automatically fired after 12 months without engaging in the interactive process required by ADA. On May 9, 2016, the EEOC issued Guidance on Employer-Provided Leave and the Americans with Disabilities Act. The guidance touches on a number of issues relating to leave and the ADA, including an employer's obligation to provide equal access to all employees under existing leave policies and the prohibition against policies that require employees to be 100 percent healed from their disabilities before they can return to work. About these policies, the guidance states that "an employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is be '100 percent' healed or recovered – if the employee can perform her job with or without reasonable accommodation, unless the employer can show providing the needed accommodations would cause an undue hardship."

On the issue of maximum or no-fault leave policies, the EEOC's position is also unequivocal: "The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies

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that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship."

UPS is by no means the first employer to have a leave policy challenged by the EEOC. In 2009, Sears, Roebuck and Co. agreed to pay $6.2 million to settle a suit in which the commission alleged that Sears' inflexible workers' compensation leave exhaustion policy violated the ADA because it failed to provide reasonable accommodations to employees with disabilities. In 2011, supermarket giant SuperValu settled a lawsuit filed by the EEOC for $3.2 million. That suit alleged that SuperValu had a policy of terminating employees at the end of their medical leave as opposed to providing accommodations that would allow them to come back to work. Also in 2011, Verizon agreed to settle an EEOC suit based upon the agency's attack on Verizon's no-fault attendance policy. Under this policy, once an employee accumulated a certain number of "chargeable absences," a disciplinary process began that escalated to potential termination.

And there are more. In 2014, Princeton HealthCare System (PHCS) paid $1.35 million to settle an EEOC lawsuit that challenged PHCS' fixed-leave policy. This policy was linked to the 12 weeks of leave provided under the Family and Medical Leave Act (FMLA). Leaves of absence under the PHCS policy were limited to 12 weeks, after which employees were terminated. Under a consent decree entered into when the suit was settled, PHCS was prohibited from having a leave policy that limits the amount of time an employee with a disability could take. PHCS was instead required to engage in an interactive process with each employee requesting leave to determine how much leave was needed. In the EEOC guidance, it again clearly sets forth its position "that compliance with the FMLA does not necessarily meet an employer's obligation under the ADA, and the fact that additional leave exceeds what is permitted under the FMLA, by itself, is not sufficient to show undue hardship."

An employer's burden of establishing that a request for leave would cause an undue hardship is not an easy one to meet. A clear showing will be required as to how leave already has impacted operations, as well as how additional leave will affect the business. This is a fact-sensitive inquiry that considers a number of factors, including the employer's overall financial resources and size, the nature and cost of the requested accommodation, and the extent to which the accommodation is disruptive to operations. An employer may consider whether the requested leave is predictable or unpredictable. (For example, leave to obtain a medical treatment on a specific day is predictable, while leave whenever an employee experiences an asthma attack would be unpredictable.)

An employer may also take into consideration the amount of leave that an employee has already taken, and the impact that this leave and the additional leave being requested has and will have on co-workers' job duties. The EEOC has noted, however, that the impact an accommodation has on the morale of other employees is not a factor bearing on the issue of undue hardship.

UPS will also not be the last employer subject to the EEOC's attack on maximum leave policies. In its Strategic Enforcement Plan for Fiscal Years 2017–2021, the commission identifies as a priority its continued focus on "inflexible leave policies that discriminate against individuals with disabilities."

While maximum leave policies or no-fault attendance policies are not per se prohibited by the ADA, employers must avoid rigid, inflexible enforcement of such policies. Any form of leave policy that automatically imposes discipline or termination is subject to challenge. Employees who are responsible for administering leave policies must be trained on the ADA's requirements on reasonable accommodations and the need to engage in the interactive process. The approach to this issue should be consistent, and an employer's response must be the same every time. When an employee requests time off beyond the leave that is already provided under an employer's policies because of a medical reason, the interactive process must begin, and ultimately the employer must answer the question, "Will the requested leave really cause an undue hardship?"