Compliance Corner Webinar:

Leaves, Accommodations and Compliance Challenges for 2018

March 15, 2018

Q: Where does the law strike a balance between reasonable accommodation and burdening the employer with "creating" a position just to avoid liability if one truly doesn't exist?

A: There is no definite rule that employers can follow when it comes to reasonably accommodating an employee and complying with the Americans with Disabilities Act (ADA). One of the court cases we highlighted in the webinar (*McClain v. Tenax Corporation*) demonstrated that failure to make reasonable efforts to accommodate an employee's disability could result in a costly lawsuit like this one that is working its way through the justice system. In that case, the employer eliminated the employee's position and gave him another job that he was unable to perform based on his disability. According to the plaintiff's statements, the company gave the employee an ultimatum to take the new job or resign from the company without any interactive discussion about job modifications to accommodate the employee's known disabilities.

According to the EEOC, an employer should consider reassigning an employee to another job as a last resort once all other attempts to modify the non-essential functions of the job are made. Reassignment should be considered after:

*"(1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or*

*"(2) all other reasonable accommodations would impose an undue hardship. However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee."*

The EEOC doesn't suggest "creating" a position but defines a transfer to a "vacant" position that is available in the organization or may be after a reasonable amount of time. These terms are defined as follows with examples:

*"A 'reasonable amount of time' should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time. A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy;* ***nor does it have to create a new position****.*

*"Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.*

*"Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the*

*application the consideration it deserves.)"*

The EEOC expects that employers will enter into good-faith interactive discussions with employees who have disabilities covered by the ADA and request accommodations as long as they are reasonable and do not cause undue hardship to the business. It is up to the employer to show its good faith effort to accommodate and provide the burden of proof if the accommodation request would create an undue hardship to the business.

Q: What is your opinion of employers outsourcing the FMLA and ADA leave management responsibilities to their disability insurance carrier?

A: Given the complexities of federal FMLA, state family leave, paid sick leave, parental leave, other local leave ordinances, company time off benefits, plus the many variables an employer must consider when faced with ADA accommodation requests, not to mention privacy rules, more employers are turning to third party administrators to outsource administration of leaves. If the vendor is already managing the company's disability insurance program and has the technology to track and administer leaves, coordinating the various benefits available to employees can be less daunting. What we are seeing today is a combination of both the employer and vendor working together to manage leaves. The employer handles the initial employee communications, employee relations, and trains supervisors to better understand their roles, while the outsourced leave vendors handle leave tracking, payment coordination, obtaining medical certification, and leave notifications.

Q: Is the Tax Credit for paid family medical leave limited to employers who are subject to FMLA, or even smaller employers?

A: The Tax Cuts and Jobs Act is available to employers that have a qualifying plan, regardless of size of the employer. The tax credit ranges from 12.5 percent to 25 percent of the cost of each hour of paid leave, ranging from 12.5 percent of the benefit if eligible employees receive 50 percent of their regular earnings, rising up to 25 percent if eligible employees receive their entire regular earnings. The plan must be written and provide:

- Qualified full-time employees with at least two weeks of paid family and medical leave per year (up to 12 weeks is allowed for credit purposes),
- Part-time employees with a pro-rata share of paid leave, and
- Pay employees at least 50 percent of normal wages.

A qualified employee must have been employed by the employer for at least one year, and received less than $72,000 in the last year.

The reasons for the leave are similar to FMLA and include leave for:

- The birth of a child and to care for the child,

- Placement of a child with the employee for adoption or foster care,
- Care of certain family members (spouse, child, parent) with a serious medical condition,
- The employee's serious health condition making the employee unable to perform the functions of their position, or
- Any qualifying exigency arising from a family member on covered active duty in the Armed Forces.

We expect that there will be additional regulations and guidance for employers regarding the tax credit. Now is a good time for employers to consider how they might take advantage of this potential tax credit.

Q: Please speak about how continuation of benefits would work if under 50 employees...therefore not subject to FMLA.

A: An employer of any size can establish a more generous leave policy than the law requires and continue benefits during the leave under certain conditions. One of the most important considerations is to determine how long the insurance carriers will allow the continuation of benefits when employees are not actively at work or on a leave. Check each plan's eligibility and termination conditions to determine whether the insurance contract specifies the maximum period that coverage can be continued during the leave. Each type of benefit coverage may vary by benefit and type of leave, e.g. FMLA versus other company leaves.

Some states may also have more generous family and medical leave laws that apply to smaller employers with continuation of benefits provisions, so check the applicable laws for your state. For example, the Maine Family and Medical Leave applies to employers that employ 15 or more employees at one location in the state. The law requires an employer to make it possible for employees to continue their employee benefits at the employee's expense, with the provision that the employer and employee may negotiate for the employer to maintain benefits at the employer's expense for the duration of the leave.

Q: If the employee does not pay their premium, e.g. as of Feb 1 2018 can the employer retro dis-enroll the employee back to Feb 1 2018?

A: According to the DOL, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late, absent an established employer policy providing a longer grace period. To drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. The notice must be mailed to the employee at least 15 days before coverage is to cease, and must advise that **coverage will be dropped on a specified date at least 15 days after the date of the letter** unless the payment has been received by that date.

To make the drop in coverage retroactive to the date when the premium was not paid, or February 1st in your question, this can be done only if the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, provided the 15-day notice was given.

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Q: If failing to pay premium during FMLA is not a qualifying event for COBRA, is coverage just termed or would you have to offer COBRA based on last day worked if less than 30 days ago?

A: While the employee is still on FMLA but not paying his or her share of the premium cost, the coverage is dropped for the remainder of the FMLA leave. No COBRA coverage is offered because failure to pay premiums during FMLA leave is not considered a qualifying event. If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave, the employer must restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed.

If an employer terminates an employee's insurance in accordance with the FMLA and fails to restore the employee's health insurance upon the employee's return, the employer may be liable for:

- Benefits lost by reason of the violation;
- Other actual monetary losses sustained as a direct result of the violation; and
- Appropriate equitable relief tailored to the harm suffered.

COBRA is triggered if the employee does not return from FMLA (or notifies the employer of the intent to not return to work).