Employment law update: FMLA & ADA, FLSA & higher education

This month, we have updates on the interaction between the FMLA and the ADA, and on the U. S. Department of Labor's new guidance on the FLSA and higher educational institutions.

Running out of FMLA leave isn't the end of the time-off road

Employers must remember that an employee's exhaustion of his or her FMLA entitlement is not necessarily the end of the family and medical leave road for that worker. Employers may have to offer additional leave, pursuant to the ADA.

Consider the following scenario: An employee is out of work on approved FMLA leave for a properly-certified "serious health condition." Since taking leave, the employee's condition has not improved, even though she has remained out of work for a substantial period of time.

The employee repeatedly submits notes from her doctor, certifying that she is totally unable to work. The notes repeatedly extend the date when she can be expected to return to work.

The employee eventually exhausts all of her available FMLA leave and she has no other leave benefits she can draw against. She still cannot yet return to work.

What to do now?

At some point, ADA may kick in

First and foremost, remember that your compliance obligations as an employer may not end there.

The ADA may require the employer in this scenario to engage in an interactive process with the employee regarding her health condition and how that condition may affect performance of her essential job functions.

Depending on what information was contained in the prior FMLA medical certification, it may also be necessary for the employer to request additional documentation regarding the employee's impairment and her corresponding work limitations. In turn, the ADA may require the employer to provide a reasonable accommodation to the worker.

And employers must also remember that an additional period of unpaid recuperative leave may constitute such a reasonable accommodation!

Not all courts agree

In a notable decision, the 7th Circuit Court of Appeals recently held that—in the particular facts of the case presented—a leave of absence lasting several months did not constitute a reasonable accommodation under

the ADA. (*Severson v. Heartland Woodcraft, Inc.*, 7th Cir., 2017)

However, it remains unclear whether or not other courts will uniformly adopt this analysis. Regardless, state and local human rights laws may impose different and more onerous requirements. Further, the facts of your case may lead to a different result.

In sum, employers must proceed cautiously in the above scenario, by analyzing the particular facts, and, when necessary, by engaging in an interactive process with the employee and considering whether there is a reasonable accommodation that must be provided.

Higher ed and the Fair Labor Standards Act

The U.S. Department of Labor just released a new "Fact Sheet," targeted specifically at higher education institutions and their compliance with the Fair Labor Standards Act.

This guidance provides new insight on several unsettled issues frequently discussed during the DOL's prior attempt to raise the minimum salary threshold for so-called "white collar" exempt employees.

For example, the guidance provides that the "teaching professional" exemption may include faculty members who provide remote instruction to students. Specifically, the fact sheet states: "The exemption would therefore ordinarily apply, for example, to a part-time faculty member of an educational establishment whose primary duty is to provide instruction through online courses to remote non-credit learners."

While the fact sheet provides helpful guidance on this and other topics, questions will remain with respect to the exempt status of other higher education positions. Colleges and universities must also remain mindful of any separate wage-and-hour requirements that may exist under state law, including any higher minimum salary requirements for exempt employees.

Notably, the DOL fact sheet also indicates in a footnote that new rulemaking on the FLSA's minimum salary requirement will be forthcoming.

Read the new DOL guidance, "Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act," at www.dol.gov/whd/overtime/whdfs17s.pdf.

Readers will recall that under the Obama administration, the DOL attempted unsuccessfully to raise the white-collar overtime salary threshold to $913 per week.

Although the DOL is still enforcing a minimum salary requirement of $455 per week under the FLSA, there are expectations that future rulemaking could set a new minimum threshold at around $675 or so per week, or around $35,000 per year.

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