



Strategy & insights - EEOC's recent enforcement in the area of leave as a reasonable accommodation: five immediate action steps to consider

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Employers need to be aware that the EEOC has begun aggressively litigating against employers with maximum leave policies, asserting that they violate the ADA. The EEOC has filed more than a half-dozen nationwide pattern or practice lawsuits in this arena and in two cases, there were significant settlements. In September 2009, the EEOC reached a \$6.2 million settlement against Sears, Roebuck & Co. (*EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D. Ill.)). In the *Sears* case, the EEOC claimed the retailer's policy of terminating employees on leave due to workers' compensation injuries in excess of the company's one-year maximum leave period violated the ADA. Earlier this year, a \$3.2 million consent decree was reached in *EEOC v. Supervalu, Inc.*, No. 09-5637 (N.D. Ill.), a case where the EEOC again challenged the employer's one-year maximum leave policy.

While EEOC regulations make it clear that there is a duty to "modify workplace policies" as a reasonable accommodation, there is disparate guidance as to exactly what this means or requires. The maximum leave issue, as well as related leave issues including indefinite leaves, part-time work, and no-fault attendance policies, is the subject of an EEOC public meeting in Washington, DC on June 8, 2011. The EEOC is seeking clarification from regional EEOC counsel as well as a small number of employee and employer stakeholders. Seyfarth's Chair of Absence Management and Accommodations Team, is one of only two employer stakeholders who has been asked to speak.

What this increased attention means for employers is that leave practices must be reexamined in light of the EEOC's recent enforcement efforts so as not to find themselves the subject of the next class action.

Here are five immediate action items employers should consider:

1. Determine whether your leave policies and practices could be construed as having an identifiable "maximum" leave period or an "automatic" cut-off, and consider what policy or practice changes are needed in light of the EEOC's recent enforcement efforts.
2. Review all leave policies and practices and assess whether you utilize a case-by-case assessment when determining the duration of an employee's leave, or whether holding an employee's position open while on leave causes an undue hardship.
3. If you do not already have one, create a reasonable accommodation policy that includes a clear procedure for making a request for accommodation. Review your interactive process

when considering a reasonable accommodation request to make certain it complies with EEOC's expectations and that your efforts are well-documented to defend against any claim.

4. Keep abreast of EEOC's positions in the leave area, as well as case law developments related to reasonable accommodations under the ADA when dealing with a workplace accommodation issue.
5. When faced with an EEOC charge on leave issues, proceed with caution and contact counsel to make certain the individual charge does not evolve into a class case.

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