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Disabilities

EEOC Commissioner, Attorney Address Leave as Possible ADA Accommodation

By C. Reilly Larson

April 2 — A commissioner of the Equal Employment Opportunity Commission and a Chicago-based attorney addressed the issue of leave as a reasonable accommodation for employees with disabilities during an April 1 conference on employer obligations under federal law.

Before the 2008 ADA Amendments Act broadened the definition of disability, courts in many cases did not reach issues beyond the question of disability, such as reasonable accommodation, Commissioner Chai Feldblum (D) said during a general session of the Disability Management Employer Coalition FMLA/ADAAA Employer Compliance Conference.

From the "very beginning, EEOC's guidance established that leave could be one form of reasonable accommodation, without rigid limits, Feldblum told participants.

Although the law does not bar an employer from having neutral rules, "it does say if you're going to have that rule and it adversely affects someone, you have to make a modification" to accommodate a person with a disability "so long as it's not an undue hardship,"she added.

Under the ADA, a person with a disability is qualified if, with a reasonable accommodation, he or she can perform the essential functions of the job. That means "there are expectations set up by the employer about how the job needs to be done," Feldblum said. "Those are expectations the employer decides: how much, how well, how quickly. That's the prerogative of the employer."

But if the person needs a reasonable accommodation in order to achieve those expectations, then the employer is obligated to provide the accommodation "so long as it's a plausible accommodation"and there is no undue hardship "in the individual circumstances of that employee and that job," the commissioner said.

It's "completely individualized," she added.

Focus on Reasonable Accommodation

Employers have an obligation to provide reasonable accommodations to help qualified individuals with disabilities perform the essential functions of the job, according to Jeff Nowak, labor and employment practice co-chair with Franczek Radelet in Chicago.

One of the many "nuggets" to take away from the EEOC's regulations implementing the amendments (57 DLR AA-1, 3/24/11) is to "shift the focus away from, 'does this person have a disability' "and to concentrate instead on reasonable accommodation, he said.

"Let the attorneys argue that point in a court case," Nowak said. "When we're on the ground and we have to make real-time decisions, our focus should not be on, 'does this person first have a disability?' and then 'do we need to provide a reasonable accommodation?' Keep that in mind as you're implementing this in your own workplace."

Examples of potential accommodations include changing work schedules, providing equipment, reassignment "as a last resort," and shifting nonessential duties, Nowak said. He added that an accommodation could include a leave of absence longer than the 12-week allotment under the Family and Medical Leave Act leave or beyond the leave provided under the employer's policies, including sick and vacation time.

Employers have an obligation to provide that unless it causes an undue hardship, according to Nowak.

When determining whether something poses an undue hardship, "put aside the tendency to focus on expense," he said.

Undue hardship "in its very basic form" is a significant difficulty or expense, but employers often think about it in terms of cost alone, Nowak said. If the employer can show how difficult an accommodation is, how it affects operations, "that, I think, gets us somewhere."

But if the sole focus is on cost, "that's a loser" at the EEOC and in the courts, he said.

Turning to Case Studies for Guidance

Feldblum and Nowak discussed a case study based on a real-life scenario involving an executive assistant with multiple sclerosis who had been a good performer and wanted to come back to work after six weeks of FMLA leave. She requested a new supervisor and written assignments as accommodations. She also expressed a fear of being terminated.

Referring to the employee's request to have her assignments in writing as "one of the low-hanging fruit," Nowak said the proposed accommodation might also prove helpful to her boss. That "seems to me to be an easy accommodation to provide."

Her request for a new supervisor is "a tough issue," yet "it's one we often encounter," Nowak said. The case law is "fairly supportive of employers," favoring the notion that "an employee can't willy nilly request new supervisors."

But Nowak suggested that employers keep an eye out for signs there may be an issue with the supervisor and his or her methods in such cases, where, for example, there is high turnover in an executive assistant position. He added that there may be "some other issue going on," so "be aware of that."

"I think it's incredibly important to educate employees about the expectations of the employer for a job and how the law does not excuse them from having to perform those duties up to the level of the employer's expectations," Feldblum added.

"It's very important for the person with the disability to understand"that the law is going to require changes to enable them to perform the job up to the expectations of the employer "but ultimately the job has to be performed up to those expectations," she said.

But supervisors may need to modify the way they operate, she said, and should be educated that there's "a federal law out there"that could put the company at risk if you "just blow it off."

"[F]rom my perspective, this is an interactive process with the supervisor also," Feldblum said, "jolting the supervisor" out of an "I've always done it this way" mindset.

The "entire goal of the ADA is to keep the person with a disability attached to the labor force," she added. "That's the goal."

Considering FMLA and ADA Interaction

Addressing another case study in which an employee is requesting additional leave beyond the 12 weeks provided under the FMLA, Nowak emphasized the importance of maintaining communication with employees who are out on leave. If an employee is on FMLA leave, "I'm not waiting for week 12 of FMLA to end" before reaching out to the employee, he said.

Presumably an employer's FMLA policy will include having regular communication with the employee while out on leave, he said, not to harass the employee, "but to keep the lines of communication open," to check in, or offer assistance or accommodations. By doing so, he said, the employer may discover an employee could come back to work sooner with a workplace accommodation.

It is "really important to remember that you've got two different laws operating here, both of which apply to the same situation,"Feldblum said. There is no undue hardship defense for the FMLA, but there is such a defense for the ADA, she said.

Feldblum advised employers to begin an undue hardship analysis early. An employer potentially could show some circumstances where business will suffer significantly at week one or two of a particular employee's leave.

The regulations say the impact on morale of other employees is "not something that can be taken into account" as undue hardship, Feldblum noted. Unhappiness cannot be a basis for undue hardship, "but actual impact on operations—that is an essential element of undue hardship," she said.

Although an impact on operations could affect morale, "I would never put in" morale as a justification for undue hardship, she said. Rather, it is important to reference how the employee's leave "is affecting your business."

"[R]emember—the concept is, keep the person with the disability attached to the labor force, but not if it imposes an undue hardship on the employer,"Feldblum said.

In response to Nowak's question as to whether she had "any idea"when further related guidance from EEOC may be forthcoming, Feldblum said "it's up to the chair" as to "what guidance gets moved through." She added, "I encourage you to communicate with the chair of the EEOC."

Including Disability in Diversity Agenda

Kathleen Martinez, assistant secretary of labor for the Office of Disability Employment Policy, addressed the challenges of the aging workforce and the need to incorporate disability into the workplace culture.

"I think as we look at the workplace," it is "no longer productive to see disability as 'other' or put disability on the 'special shelf,' " she said.

"We really have to begin weaving disability" into the overall diversity agenda in workplaces, Martinez said. "[W]e want to see disability baked in, not layered on."

One way to "bake it in" she said, is ensure technology in the workplace is accessible. For example, employees need to be able to fill out time sheets and travel forms.

Referring to accommodations as "productivity tools," Martinez said "if we look at productivity as something that we all need," not just as something that people with disabilities need, it "takes the stigma away."

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