Employer Beware – Automatic termination policies are illegal. Just ask Sears.

Qualified employees with a disability are entitled to a reasonable accommodation from their employer to enable them to perform the essential functions of their job. One of the most difficult issues employers face is assessing when and how to provide an unpaid leave of absence as a possible accommodation. How do you know the person is disabled? Do you have to tell them about the American Disabilities Act ("ADA") or wait for them to claim they are disabled? How much medical information are you entitled to and how do you get it? Do you ever need to give more leave than Family and Medical Leave Act ("FMLA") provides? What happens if the doctor keeps extending the leave because the employee is not recovering as fast as expected?

Good questions, the detailed answers to which are for another day (and much longer article). The simple answer is "it depends". The law is fairly clear. The difficulty for Human Resource professionals is that every situation is different, and applying the law to your particular facts always presents a unique challenge.

The lesson of this article is to avoid the bigger problem which exists for employers who believe they are not discriminating because they have a neutral policy that terminates all employees who have been absent for some period of time (say six months). The typical scenario is this: the employee goes out on FMLA leave. The employer is not thinking ADA at this point – most employers are not overly rigorous in evaluating these situations and a "serious health condition" that triggers an employee's right to FMLA leave is not that hard to satisfy. Then the FMLA's 12-week leave entitlement ends, but the employee is still not medically able to return to work. The employer may then automatically terminate the employee, or in some instances provide more time – let's say three additional months of leave – under a company policy allowing for extended medical leave. After the extended leave is exhausted, the employee is automatically terminated if unable to return (many employers provide three "extra" months as it is often the time when a truly disabled employee can apply for long term disability benefits).

This is, in essence, the type of policy Sears and many other large employers have in place. The theory is that with thousands of employees it is impractical to consistently address every situation on an *ad hoc* basis, and by having a policy in place that treats everyone exactly the same no employee could ever claim that they were terminated or not provided more leave due to their age, race, gender or any other protected class. Not too long ago Sears agreed to pay $6.2 million to resolve the Equal Employment Opportunity Commission's ("EEOC") claim that Sears' inflexible leave policy failed to provide for the possibility that a further extension of leave could be a form of accommodation legally required under the ADA. Similarly, the EEOC sued UPS for an allegedly discriminatory leave of absence policy. UPS's leave policy called for automatic termination after 12 months of medical leave. The EEOC stated: "[P]olicies like this one at UPS, which set arbitrary deadlines for returning to work after medical treatment, unfairly keep disabled employees from working." A large national bank also found out how the EEOC feels about automatic termination policies the hard way, entering into a $2.2 million settlement agreement. The bank's case was actually a bit different but also very instructive in terms of how strictly the EEOC views the accommodation requirement. The bank's policy was seemingly generous, providing six months of leave. Those who came back within six months got their exact job back. But those who needed more time could not be guaranteed a job. Instead, if their position was filled, they were given 30 days to find another vacant position in the organization, otherwise they were terminated. The EEOC found the bank policy violated the ADA.

The lesson – eliminate any policy that provides for automatic termination after a set period of leave. The EEOC is very clear that such a policy, by definition, fails to allow for the "individualized analysis" required by the ADA. Such a policy ignores the ADA's requirement that both the employer and employee engage in an interactive dialogue, and often liability under the ADA can hinge on whether it was the employee or employer who is to blame for the breakdown in the dialogue. Furthermore, consider the applicability of the ADA to every situation where an employee on FMLA leave is unable to return at the end of the leave. Additional unpaid time off may

be required. To decide if this is the case, you will need to engage in a detailed and careful analysis of the existence of a disability and whether the accommodation requested is indeed reasonable and will allow the employee to perform the essential functions of their position, while at the same time not creating an undue hardship for the company.

Date Created
February 13, 2013