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EMPLOYER ALERT

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EEOC TARGETS EMPLOYERS' LEAVE OF ABSENCE AND ATTENDANCE POLICIES *By Kelley E. Kaufman*

Does your company's leave policy call for an employee's termination following the expiration of his or her leave entitlement? Does your company charge "attendance points" against employees regardless of the reason for the absence? Does your company require employees to be released to work without restrictions before they are permitted to return from a medical leave? If so, beware: "inflexible" leave of absence and attendance policies are being targeted by the Equal Employment Opportunity Commission ("EEOC") and plaintiffs under the Americans with Disabilities Act ("ADA").

The ADA prohibits discrimination in employment based upon an individual's physical or mental disability. The definition of disability was significantly broadened under the ADA Amendments Act of 2008, which also shifted the focus from whether or not an individual has a "disability" to what steps the employer takes to determine whether a reasonable accommodation exists. Thus, the extent to which an employer engages in an interactive accommodation process will be closely examined in order to determine whether the law was violated. This shift in focus necessitates a case-by-case analysis of reasonable accommodation issues in your workplace, including both long-term and intermittent employee medical leaves of absence.

Employer Policies Are the Subject of Increased Enforcement Activity

It is vital that employers recognize that the end of an employee's leave entitlement under company policy or the Family and Medical Leave Act ("FMLA") may not be the end of the company's obligations under the ADA. For example, offering an additional unpaid leave of absence to employees who have exhausted all leave under established policies may be a reasonable accommodation under the ADA.

Over the past few years, the EEOC has aggressively challenged employers' leave of absence and attendance policies under the ADA. The agency's increased enforcement activity has resulted in a number of multi-million dollar settlements against employers in 2011 alone, including the largest disability settlement in EEOC history – to the tune of $20 million.

The EEOC continues to target two general types of employer policies: inflexible leave of absence policies and no-fault attendance policies. The agency's focus highlights areas in which employers' policies can expose them to significant legal risks under the ADA – and also provides valuable insight into ways your company can reduce these risks by proactively reviewing leave and attendance-related policies and procedures.

- What Are Inflexible Leave of Absence Policies?

Inflexible leave of absence policies are those that provide for the automatic termination of employees who cannot return to work

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after exhausting a fixed period of leave. For example, a policy requiring termination of employees who cannot fully return to work after 26 weeks of leave (including any FMLA entitlement) would likely be considered inflexible.

According to the EEOC, the ADA requires employers to engage in a case-by-case analysis of an employee's individual needs in order to determine whether additional leave would constitute a reasonable accommodation. Even overly generous leave of absence policies (e.g., those providing up to one year of leave) may be viewed as circumventing the interactive process if they require termination after a certain period of time. Similarly, policies that require the employee's "full medical release" to return to work may be subject to close scrutiny by the EEOC since the ADA requires employers to accommodate work limitations if reasonably possible.

The EEOC takes the position that employers have an affirmative duty to communicate with employees on leaves of absence to assess their ability to return to work at the end of a period of leave. For employees who are unable to return to work, with or without restrictions, an additional leave of absence may be a reasonable accommodation under the ADA.

Notwithstanding the EEOC's recent enforcement efforts, a number of federal courts have made clear that the ADA does not require employers to provide leave indefinitely. Likewise, if an accommodation causes an undue hardship to the employer, it may not be required. Each of these considerations, however, requires an individualized, case-by-case assessment.

- What Are No-Fault Attendance Policies?

No-fault attendance policies also are viewed less-than-favorably by the EEOC. No-fault attendance policies are those policies that charge an absence against an employee regardless of the reason for the absence. Thus, problems arise when the employer fails to recognize – and exclude from the policy – any absences that relate to a disability or which fall under the FMLA.

Minimizing Your Company's Exposure

Review your policies and practices now. The end of the year is the perfect time for an internal review of policies and practices – take a look at your leave of absence policies and the practices by which your company administers them. If your policy provides for automatic termination after a fixed period of leave, consider softening the language to state that the company will consider the need for additional leave on a case-by-case basis – or eliminating the language entirely. If you have a no-fault attendance policy, provide clear exceptions for FMLA leave and disability-related absences. If your policy requires employees to be clear of all restrictions before they may return to work from a medical leave, you will need to eliminate that requirement.

Clearly define employee responsibilities under attendance and leave of absence policies. Just because leave may be protected under the ADA or the FMLA does not mean that employees have a "free pass" to disregard the company's policies and procedures. As noted in our September 27, 2011 blog post, a copy of which is included on page 3 of this Alert, a recent Pennsylvania federal court decision, *Pellegrino v. Communications Workers of America*, discussed companies' rights to create and enforce leave policies so long as the policies do not abridge the employees' rights under the law. The court reiterated that nothing in the FMLA prevents employers from ensuring that employees who are on a leave of absence from work do not abuse their leave. Thus, employees can be required to follow the company's call-off procedures, restrictions on moonlighting during leave and more.

Train your employees. Ensure that your Human Resources personnel and leave of absence administrators are trained to understand the company's legal obligations. If your leave of absence administrator is a third party, ensure that the appropriate lines of communication are established and maintained. Additionally, train supervisors and managers to recognize situations which may implicate the ADA and the FMLA, and to understand their responsibility to promptly refer leave of absence requests and accommodation issues directly to Human Resources for proper handling.

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CURBING FMLA ABUSE: POLICIES RESTRICTING AN EMPLOYEE'S TRAVEL WHILE ON PAID SICK LEAVE *By Jodi M. Frankel*

So your employee recently posted photos of herself lounging poolside with margarita in hand while out on FMLA leave. Can you do something more than just compliment her nice tan?

Earlier this year, in the case of *Pellegrino v. Communications Workers of America*, a Pennsylvania federal court answered yes. The court upheld the termination of an employee for violating a work rule that restricted employee travel outside the immediate vicinity while on FMLA leave.

...companies have the right to create and enforce leave polices, including policies designed to rein in FMLA abuse...

Under a policy in its employee handbook, CWA provided sick pay to eligible employees on approved medical leave. Such wage replacement, however, was subject to certain restrictions. Specifically, employees were required to remain in the immediate vicinity of their homes while on sick leave unless they were seeking treatment or attending to ordinary and necessary personal or family needs. Employees also were permitted to leave the immediate vicinity if they received express permission from CWA.

Denise Pellegrino, a CWA employee, was out on approved FMLA leave following surgery. She also received sick leave pay under the CWA policy. While out on leave, Pellegrino took an unapproved week-long vacation to Cancun, Mexico. CWA learned of Pellegrino's travels and fired her; at the time of her termination, Pellegrino had yet to return from FMLA leave. Pellegrino sued claiming that CWA had unlawfully interfered with her right to take FMLA leave. CWA claimed that her termination was unrelated to her status under the FMLA, but rather because she violated its leave policies. CWA said it would have terminated Pellegrino regardless of whether or not she was on FMLA leave.

While the court agreed that Pellegrino was entitled to unpaid leave under the FMLA, it found no evidence that CWA's sick leave policy or its decision to terminate her employment while she was still out on leave improperly interfered with her rights under the FMLA. In fact, the court noted that to the extent the CWA policy provided a wage supplement, it might have actually encouraged employees to take advantage of their rights under the FMLA.

In its ruling, the court noted that "the FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of FMLA leave." Similarly, companies have the right to create and enforce leave polices, including policies designed to rein in FMLA abuse, so long as such policies do not abridge an employee's rights under the FMLA. Where a sick leave policy has been adopted, the employer has the discretion to enforce it through means such as termination. The court further noted that, even in the absence of an explicit policy limiting employee travel while out on FMLA leave, an employer might reasonably terminate an employee for taking a vacation while receiving sick leave pay.

Sick leave policies similar to CWA's were previously upheld by courts in Pennsylvania. Such policies have included requirements that employees absent on sick leave stay at home during working hours, that employees obtain medical authorization and employer permission to leave the home, and that employees be subject to calls or visits by their employer.

The Pellegrino case underscores the court's growing concern with FMLA abuse and provides precedent for restrictive sick leave policies. However, an employer who suspects that an employee is abusing FMLA should conduct a thorough investigation and allow the employee to explain his/her conduct before taking immediate employment action. ■

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Coordinate paid and unpaid leave of absence administration. Remember that a variety of laws (and your policies) can work together with respect to paid and unpaid leave – from the ADA to the FMLA to Workers' Compensation. For example, Worker's Compensation injuries or illnesses also likely will implicate the FMLA and the ADA. It is to your company's benefit to coordinate the administration of employee leaves of absence under each of these laws.

Engage in the interactive process – and document it. No decision should be automatic. Ensure that the company engages employees in a dialogue about their need for leaves of absence (or other restrictions). Follow up with the employee during the leave of absence to assess whether they will be able to return to work at the end of the requested leave period, or whether additional leave may be necessary. Document the process, including communications with the employee as well as medical certifications, and keep these documents in a confidential medical file separate from the employee's personnel file. ■

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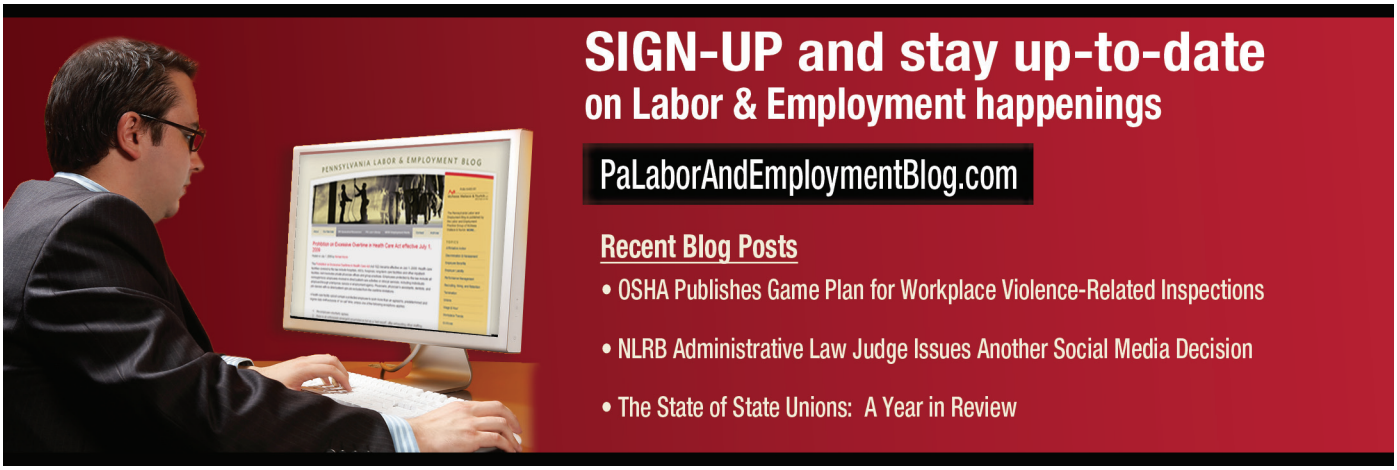

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