FMLA and ADA Intersection Dangerous For Employers

With a growing number of ADA lawsuits connected to FMLA leave policies, employers must remain flexible and pay attention when setting their own internal strategies.

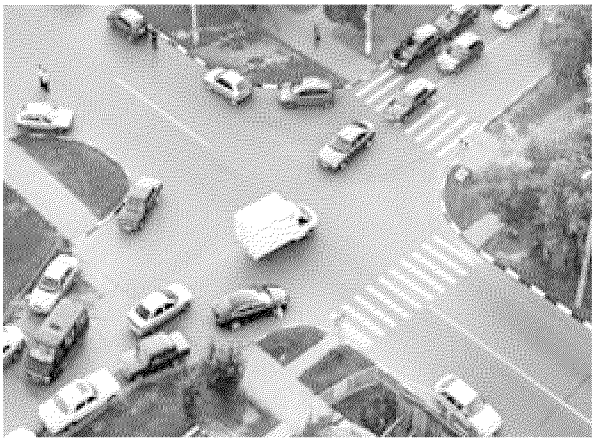
By Tom Starner

In the recent past, there has been an uptick in EEOC charges related to the interplay between the Family and Medical Leave Act and the Americans with Disabilities Act. For employers, say legal experts, those numbers can mean only one thing: Unwanted litigation.

Yet, while the reasons for the increase in those FMLA/ADA-related cases may not be controllable by employers, there are steps they can take to help avoid being on the wrong end of an EEOC lawsuit.

"More cases are going to trial and more cases will settle for more money than they have in the past, partially resulting from the FMLA and ADA significantly intersecting," says Patrick Hicks, founding shareholder of the Las Vegas office at Littler Mendelson, the employment law firm.

For example, Hicks says, an employer may give an employee all the FMLA leave they are entitled to (maximum for non-military leave is 12 weeks, 26 for military). However, under the ADA an employer also has the obligation to reasonably accommodate a "disabled" employee. The employer may think just in terms of the FMLA and not consider ADA requirements, which can extend the FMLA leave. That is a critical mistake.



"If an employee has a serious health condition, it may or may not be a disability, but due to changes in the ADA in 2009, that's no longer the issue," he says.

Hicks is referring to the ADA Amendments Act of 2008, which amended the ADA and other disability nondiscrimination laws at the federal level. The ADAAA broadened the number and types of people who are protected under the ADA and other federal disability nondiscrimination laws.

According to Hicks, the ADAAA requires that courts interpreting the ADA and other federal disability nondiscrimination laws focus on whether the covered entity has discriminated, rather than whether the individual seeking the law's protection has an impairment that fits within the technical definition of the term "disability." Because the ADA Amendments Act expanded this definition to include more people, employers now have a harder time denying FMLA leave for employees who need it because they still can't return to work, due to their health status.

And, Hicks says, that's where the FMLA and ADA intersection emerges. Employees taking an FMLA leave who run out of leave time can make a claim that the ADA, which requires a reasonable accommodation by the employer, take over. In this case, a reasonable accommodation often is extended leave.

The numbers bear out that there has been increased activity with AD-related cases. In 2008, there were 19,453 charges brought by the EEOC. In 2012, that number had jumped to 26,379. Hicks also notes that of all EEOC charges, 25 percent fall within the ADA.

"The bar has been lowered when it comes to a focus on reasonable accommodations," he says. As a result, ADA claims are more attractive, more difficult to get dismissed and settlement value has gone up.

In terms of disabilities and EEOC settlement stats, in 2007, 1.6 million people made ADA claims based on anxiety disorders. In 2012, that number was 6.4 million. Regarding back impairments, there were 3.8 million claims in 2007. In 2012, that number reached 10 million.

"I've always felt since the ADA was initially passed in 1990, it has been hijacked by the able-bodied community," Hicks says. "We are seeing so many ADA claims brought by individuals with temporary impairments and injuries, not the ones anticipated by the original ADA law."

In 2008, the courts were seeing the same thing, he adds. There were employees filing lawsuits who really were not disabled. But in 2008, Congress shifted the focus not on the disability but on what reasonable accommodations the employer can make and are making.

"The bar has been lowered on those claiming to be disabled," he says.

Nancy Leonard, an employment law expert and partner in the Kansas City office of Constangy, says that with the expansion of ADA in 2009, employers actually now can assume that "everyone has a disability," which makes it very difficult to manage requests for ADA accommodation.

"The courts and Congress have mandated that employers no longer consider if a person has an actual disability," Leonard says. "The question now is did the employer make a reasonable accommodation?"

Leonard, as both a paraplegic and a diabetic, speaks from personal experience.

"It's all kind of a mess right now," she says. "I happen to have a disability, the inability to walk. But diabetes is now considered a disability under the new expansion. The ADA includes such a broad number of people, everyone has a disability. We've gotten to that point, it seems.
"I defend employers and when they get sued, I find it frustrating to navigate this aspect of the ADA," she says.

Regarding the ADA and FMLA intersection, under the FMLA, someone can have a serious health condition and receive up to 12 weeks of unpaid leave. But at the end of the 12 weeks of leave, if they still can't come back, employers then need to determine if the ADA kicks in.

"They employee still needs to prove they can't return to work, but even a temporary impairment can be a disability under the amended ADA," she says. "If they can't come back and need more leave, employers can no longer just say, 'You don't have any more leave. If you can't come back your employment will be terminated.' The EEOC and private individual litigation says this is a violation of the ADA. Several large companies have reached enormous settlements in these types of cases."

Leonard says that eliminating the chance of being sued is impossible, but the best advice is for an employer to understand that while they may need to give additional leave, they don't have to give indefinite leave. In other words, if a person says they can't return to work and they don't know when they will be able to return, that's not a reasonable accommodation.

"One of the ways I help clients is to get that information about whether it's an indefinite leave," she says. "Employers are entitled to some closure."

Both Hicks and Leonard say a major factor in employers facing these charges are employers that are using inflexible leave policies, which basically say if a person can't come back, they will lose their jobs.

"That lack of flexibility is a danger point, can't apply inflexible leave of absence policies with the ADA and FMLA scenario," she says.

Teri Weber, a partner at Spring Consulting Group, an employee benefits consulting firm in Boston, says that although there is overlap to consider between ADA and FMLA, the best approach is to satisfy each regulation independently and if inconsistencies exist be conservative and review each case independently.

"Strong documentation is critical, especially for employers that want to claim undue hardship and/or a direct threat under ADA/ADAAA," she says.

Weber adds that supervisors are a critical component to managing absence and return to work, including but not limited to accommodations. They must be equipped with clear tools to help guide them.

"Perhaps the most important thing to train them on is when to seek help in any given situation," she says. "Probing employees for information may be a violation, even for a well-intentioned supervisor."

Danielle Kaplan, an FMLA administrator at Washington-based HR consulting firm F&H Solutions Group, uses the terms "interact and balance" to describe the relationship of the ADA and FMLA. Kaplan says employers must find the right balance between the regulations in order to ensure they are granting employees the greatest benefit under the law(s).

"Employers should educate themselves on the expectations within the regulations, so they know where their boundaries lie," she says, noting that the DOL and Office of Disability Employment Policy offer a very useful link (http://www.dol.gov/odep/pubs/fact/employ.htm) to help employers achieve this balance.

"Employers also need to review all medical certifications closely and request release-to-duty documentation from their employees," she says. That way, if benefit administrators carefully review the medical forms coming in for FMLA, they also can preemptively determine and take action to determine if an employee might also qualify under ADA.

"Education, preemptive action and communication are key factors we communicate to our clients," she says.

Kaplan notes that employers also should work with HR experts and legal professionals to educate staff and for ADA and FMLA audits.

"Don't be blindsided by a misunderstanding or mishandling of an employee's individual situation, because a majority of the time these cases will be decided in favor of the employee," she says.

Littler Mendelson's Hicks says given the EEOC's strategic emphasis on acting on systemic cases, if a policy that applies to a workforce of 10,000 people is problematic and runs afoul of the EEOC, it will be an especially attractive target for litigation.

Hicks' advice to employers is to review all ADA and FMLA policies to ensure they are compliant with the current state of the laws.

"Way too often when budgets are cut, training and reviewing policies are on the chopping block. That is not a good idea when it can lead to this type of scenario," he says.

Hicks also suggests that if an employer has a "fixed leave" policy, it should at the very least include language that employees may be eligible for additional leave as an accommodation under the ADA.

Most of all, employers must remove any language in a leave policy that unequivocally says an employee must return to full duty at the end of FMLA leave. Also, employers should train supervisors to notify HR of all leave and time off requests, so they can be analyzed on a case by case basis.

"That way you can reduce the risk of a claim," he says. "And even if a claim is filed, it puts an employer in a much better to defend itself.

"My experience is that more often than not, employers who violate ADA do so unintentionally," Hicks adds. "They just don't know what their legal obligations. Also, it's important to consider that disabled Americans often are among a company's best employees, so it's to the employer's advantage to not lose those workers from a competitive standpoint as well."

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