Managing Leaves of Absence in a Changing Legal Landscape

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Navigating the complex laws related to ill and injured workers—primarily the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) (and, with increasing frequency, state and local laws)—is an important area of risk management for employers. The Equal Employment Opportunity Commission (EEOC) litigates a high percentage of ADA claims. Moreover, its 2017-2021 Strategic Enforcement Plan indicates that a key area of focus is inflexible leave policies. It is therefore imperative for employers to have strong leave management protocols in place and fully understand their legal obligations. Of course, the PEO structure adds an additional layer of complexity.

The Basics—FMLA Protections

The first layer of analysis is to determine whether a leave entitlement statute, such as the FMLA (or a state law equivalent), applies. Companies that employ at least 50 employees are covered employers under the FMLA. Determining whether the FMLA applies will most often turn on the size of a PEO client company. Because the average number of worksite employees per client is 21,[1] many PEO clients are not covered. Indeed, the FMLA regulations indicate that a PEO is not normally a joint employer with its client company, particularly if the PEO simply provides administrative support through payroll and benefits or updating employment policies. Clear language should be included in the client service agreement (CSA) allocating FMLA responsibilities to the client.

However, a PEO potentially could be held responsible as a joint employer based on the PEO's actions in participating in conduct that interferes with the employee's right to leave. Although PEOs vary widely operationally, a PEO could be found to be a joint employer if, for example, it has the right to hire, fire, assign, or direct and control client employees. Therefore, a thorough evaluation and understanding of the PEO's involvement in FMLA decisions is critical in assessing potential risk.

Expanding Legal Protections at the State and Local Levels

State and local laws, as well as an employer's own policies, may provide additional leave obligations. More and more state and local governments have adopted such protections (e.g., in 2018, California expanded parental leave protections to smaller employers not otherwise covered by the FMLA). Additionally, many jurisdictions require employers to provide a minimum amount of paid sick leave.

It is important to understand whether such laws create a leave entitlement, a source of payment, or both, while ensuring that, when protections overlap, the most generous requirement is respected. For example, workers' compensation laws are often a source of payment that may run concurrently with a required leave of absence such as FMLA leave. Rarely, however, does a state workers' compensation law create a leave-like entitlement itself. Given the rapid expansion of these state and local laws, this is an area where a PEO can provide valuable client support.

ADA Leave Requirements

If FMLA leave (or a state or local leave law entitlement) is not available to an employee, and after all legal and company-created entitlements have been exhausted, the last critical step is to evaluate whether additional leave is required by the ADA (or a state law equivalent). In its 2016 resource document, "Employer-Provided Leave and the Americans with Disabilities Act,"[2] the EEOC assumes that it is reasonable for employers to provide

1 See NAPEO 2017 Financial Ratio & Operating Statistics Survey, *www.napeo.org/peo-resources/publications-products/online-store.*

2 *www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm.*

leave to employees under the ADA in most instances, unless the employer can demonstrate an undue hardship. As with most undue hardship inquiries, this is a multi-factored analysis. The EEOC directs employers to look to factors such as the amount of leave being requested, whether there is an anticipated end date, the frequency of leave, whether there is flexibility about when the leave is taken, whether intermittent leave can be anticipated or not, and the impact of the absence on co-workers, operations, or the ability to service clients.

In practice, respecting the EEOC's position can be frustrating for employers because, unlike leave entitlement statutes, the amount of leave required under the ADA varies in each case. That requires employers to make judgment calls, thereby assuming some degree of risk whenever leave is denied. Such risk and uncertainty prompts conservative employers to err on the side of providing leave, effectively turning the ADA into a leave entitlement statute (and some would argue a social safety net).

This outcome has proved controversial and perhaps unsustainable. Recently, the U.S. Court of Appeals for the 7th Circuit, in *Severson v. Heartland Woodcraft, Inc.*, held that the ADA does not require an extended, multi-month leave of absence. The court rejected the notion that the ADA is a "medical-leave statute" (although it noted that the ADA may require shorter leaves of absence, such as intermittent leave, a "couple of days," a "couple of weeks," or modified schedules). Similarly, the U.S. Court of Appeals for the 10th Circuit, in *Hwang v. Kansas State University* (interpreting a statute similar to the ADA), held that an employer did not have to extend its generous six-month leave of absence policy as an accommodation. Justice Neil Gorsuch, sitting on the 10th Circuit at the time, reasoned that accommodations are to enable work, not "not work[ing]."

The U.S. Supreme Court has not addressed ADA leave requirements (a petition for *certiorari* in *Severson* was denied). For that reason, employers with low risk tolerance may choose to follow the EEOC resource document regarding ADA leaves, and deny such leaves only when there is a compelling case of undue hardship or when indefinite leave is required. After determining that other accommodation options are exhausted and before ending the employment relationship, employers should consider whether transfer to a vacant alternative position for which the employee is qualified would enable the employee to return to work.

PEOs may be considered employers or joint employers under the ADA or state law depending on the support they provide to client companies. Similar to the FMLA, a multi-factor test applies (which

may vary depending on the jurisdiction). However, risks associated with ADA leave issues also could apply simply because of the PEO's involvement in the decision making. Courts often look to the EEOC's enforcement guidance, "Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms,"[3] to determine PEO responsibility under the ADA. That guidance directs that a PEO would be liable if it "participates" in the client's discrimination or if it "knew or should have known" about the client's discrimination and "failed to take corrective action within its control." Accordingly, PEOs that provide support to client companies on accommodation issues may also be subject to liability as a result of poor decisions.

Fair questions for PEOs to consider about leave management include:

- How much support should we provide client companies?
- Is the client subject to FMLA and, if so, what level of leave administration assistance will the PEO provide?
- Should the PEO use a third-party leave administration company?
- What will the PEO do if the client refuses to provide job-protected leave?
- Based on the array of state and local paid leave laws, how is the PEO remaining current as new legislation is passed and making sure the requirements are implemented at client worksites?

Given the shifting state of the legal landscape, this area of risk management is one that should be examined thoughtfully. ●

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3 *www.eeoc.gov/policy/docs/qanda-contingent.html.*