Employers Face Difficult Leave Issues

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One of the more complex issues employers face from time to time is a request from an employee for extended or sporadic leave related to a medical condition. This article will touch on a number of the factors to consider in such scenarios, as well as highlight a recent federal court case which dealt with issues related to extended medical leave. This discussion is based on generalities and competent legal advice should always be sought for guidance in actual instances.

Often issues arise when employees with historically good attendance records contract a chronic illness or mental health condition that requires extended treatment or interferes with the employee's ability to attend work on a regular basis. Even though the employer often wants to assist the employee, the absences can create tension caused by supervisors who are frustrated with unexpected lack of availability, coworkers who need to do extra tasks, and similar issues.

Employers need to keep in mind that both state and federal law must be considered before taking action in such instances. If the employer is covered under the Wisconsin or Federal Family Medical Leave Act (FMLA) and the employee has worked sufficient duration and hours to be eligible for such leave, then the first phase of the issues is more straightforward. If the employee secures medical certification of a serious health condition from their health care provider, then the employee is entitled to up to two (2) weeks under Wisconsin law and twelve (12) weeks under the FMLA for their own serious health condition. Those leaves usually can run concurrently.

More complex issues arise when the employer is not subject to the leave laws, or the employee is not eligible for the leave, or the employee has exhausted all available employer and statutory leaves but is still unable to return to work on a regular basis. This crossroads is where some employers fail to appreciate the need to consider whether additional unpaid leave may be required as an accommodation under the Americans With Disabilities Act (ADA) and/or the Wisconsin Fair Employment Act (WFEA). Such additional unpaid leave is distinct from FMLA leave.

The first factor to consider is whether the employee's physical or mental condition qualifies as a "disability" under those laws. Not all serious health conditions will be disabilities. Both disability discrimination laws, however, have broad definitions of "disability" and many conditions can satisfy the applicable

definition. If a disability exists, the next issue is to determine if the employee remains qualified to perform the job with or without reasonable accommodation. The next level of inquiry then becomes whether the additional leave requests constitute "reasonable" accommodations under state and federal law.

When it comes to accommodation, part of the difficulty in analysis is that case-by-case assessment is required. A business with 180 employees can often accommodate sporadic or extended absences more easily than a company with 18 employees. Factors such as whether there is more than one employee doing the job at hand to allow for coverage, the sensitivity or required timeliness of the work, and numerous other variables need to be considered.

In *Whitaker v. WI Dept. of Health Services*, (No. 16-1807, 7th Cir.) decided on February 27, 2017, the United States Court of Appeals for the 7th Circuit (which includes Wisconsin) dealt with issues arising from the termination of an employee who had been out under a series of requests for extended leave after exhaustion of the workplace and statutory leaves. Recognizing that Whitaker's condition satisfied the definition of a disability, the Court moved on to the "otherwise qualified" standard. The Court noted that "for purposes of the Americans With Disabilities Act and the Rehabilitation Act, regular attendance is an essential function of many jobs."

The Court found that Whitaker's doctor's notes were too vague and insufficient to provide the employer any reason to conclude that additional leave would accommodate a return to work. The employer had extended Whitaker's leave more than once, but at the end the Court concluded "Whitaker did not offer any evidence regarding the effectiveness of her course of treatment or the medical likelihood of her recovery." Her claim was dismissed. Had the employer reacted too quickly, or had the employee provided more detailed medical opinions, the result of the case may have been different.

Employers need to assess the particular facts of the leave request, as well as the factors surrounding the job at issue when making decisions about extended or sporadic leave requests. No two of these cases are alike, and sometimes slight variations in the facts can drive the analysis in a particular direction. As litigation under state or federal employment laws can take years to resolve and thus significant back pay and other costs can hang in the balance, employers are well advised to proceed cautiously.