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How To Keep Sick Time Policies From Becoming A Headache

By **Braden Campbell**

Law360, New York (June 6, 2017, 9:34 PM EDT) -- Employee absences due to illness can be a major headache for employers, who may need to walk a thin line between protecting their bottom line and running afoul of a complicated array of sick leave laws.

The potential for sick leave policies to get employers in trouble was highlighted last week when Wal-Mart Stores Inc. found itself the target of a scathing report from advocacy group A Better Balance that accused the retail giant of violating the Americans with Disabilities Act, the Family and Medical Leave Act and state and local laws by playing hardball with workers. But while sick leave obligations may seem daunting, they don't have to be, according to Scott Liner of Liner LLP.

"The laws seem very cumbersome and complicated for many employers. But actually, with a little bit of consultation with an employment lawyer and reading up themselves on the law, it doesn't have to be so complicated," Liner said.

The report takes aim at Walmart’s attendance policy, which assigns workers “points” for infractions ranging from mouthing off to a supervisor to showing up late for work, the group claims. If workers rack up a certain number of points, they’re fired, according to the report. Among other things, the group accuses Walmart of assigning a point to a worker who suffered a heart attack on the job and had to be rushed to the hospital, refusing to let another worker take time off to care for her terminally ill mother and otherwise pressuring workers to come in despite their illness or that of a loved one.

In response to the survey, Walmart said it does not count legally protected absences against workers and provides leaves of absence and otherwise accommodates workers as required by law.

The group, which filed a complaint with the U.S. Equal Employment Opportunity Commission in November, alleges the company’s application of its points policy to certain illness-related employee absences violates various federal and state laws, including the FMLA, the ADA and state sick time, disability and pregnancy discrimination laws where they exist.

According to attorneys, it’s at the intersection of these laws that employers of all sizes can run into legal woes.

“You’ve got a number of different statutes that are intertwined and have interplay with each other,” said Jeffer Mangels Butler & Mitchell LLP partner Barbra Arnold. “Navigating that can be very difficult.”

These laws come into play at different times in the sick leave process, attorneys say. Often, the FMLA is the first triggered.

The FMLA requires employers with 50 or more workers to give 12 weeks of unpaid medical leave to workers they have employed for more than 12 months, and who have worked at least 1,250 hours in that period. Employers must provide leave for childbirth and immediately post-birth, an illness affecting the worker or one affecting a family member to the point they need care.

The common cold does not invoke protections of the FMLA. Rather, the law comes into play when workers or their loved ones have a “serious medical condition,” which can include an acute condition that requires an overnight stay in the hospital or incapacitates them for three or more days, or a chronic condition that occasionally requires them to miss work for treatment.

Several FMLA provisions can trip employers up. The law imposes complicated notice requirements that an inexperienced human resources staffer can easily misapply, attorneys say. Because the law forbids employers from asking about a worker’s illness after being presented with a valid doctor’s note, nosy employers risk violation. Firing a worker on leave is also a big no-no, absent a few narrow circumstances.

“An employee doesn’t have any rights greater than they would have if they were not ill,” Liner said. “If there’s a job elimination or restructuring, or if information is discovered about that employee’s performance, that type of info can still be used to the extent it might lead to an adverse employment.”

An employer can generally cut ties with workers under the FMLA if they don’t return to work after their leave runs out. However, an employer may run the risk of violating the ADA if it fires workers who can’t return to the company or to their old jobs because of a disability.

A disability is defined in the ADA as “a physical or mental impairment that substantially limits one or more major life activities.” If an illness is severe enough to keep a worker out of work for more than 12 weeks, there’s a strong chance it would qualify as a disability under the ADA, attorneys say. For example, if a manual worker was forced off the job by a serious back injury and was still limited after 12 weeks, he would likely be covered by the ADA.

Unlike the FMLA, the ADA allows employers to ask about the specifics of a worker’s condition. But this comes with a caveat: An employer can know the extent of a worker’s disability because the ADA requires it provide him a “reasonable accommodation” that lets him return to work as long as it doesn’t pose an “undue hardship” for the employer.

Unfortunately for employers, what's reasonable and what's undue are going to vary depending on several factors, including how big an employer is, how costly a requested accommodation is, how long it will be needed and how it will affect other employees. As such, employers need to have a frank, interactive dialogue with workers when faced with an accommodation request.

“I advise my clients … to try to figure out, what can this employee do for you to continue working, and what can you do for him,” Taylor English Duma LLP attorney Randy C. Gepp said. “There are a lot of factors that go into what an employer’s responsibility will be.”

Sick leave is made more complicated still by a range of policies. While workers in some states and municipalities are covered only by the ADA and FMLA, workers in other areas may accrue a certain

amount of sick time per hour worked. Other jurisdictions have passed laws that extend the ADA's accommodation protection to women who suffer from certain pregnancy-related complications not otherwise covered.

"For an employer that has business in numerous states, it's critical they understand the laws for each state, because they vary," said Liner, whose practice is based in California. "For example, California has pregnancy disability leave, also paid sick leave, which many states simply don't have."

Worker absences can place a hefty burden on employers by forcing them to pick up slack where they can and simply weather a loss where they can't.

Fortunately for employers, there are limits to the protections afforded workers by the ADA, the FMLA and various state laws. But against this ever-evolving legal backdrop, attorneys say it's best to call them before taking action.

"My best clients are the ones who like to call me in advance," Gepp said. "Because all these are pretty tricky, there's a lot of gray area there, and even experienced HR people aren't keeping track of the latest case developments."

--Editing by Pamela Wilkinson and Jill Coffey.

Update: This story has been updated to reflect that A Better Balance has filed an EEOC charge against WalMart.

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