

## **MANAGING EMPLOYEE ATTENDANCE: EMPLOYERS' RIGHTS AND RESPONSIBILITIES UNDER ADA, FMLA AND THE EEOC**

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Managing employee leave and staying on the right side of the law is challenging for employers, especially as interpretations of laws change and evolve.

In 2012 the Equal Employment Opportunity Commission approved its Strategic Enforcement Plan for 2012-2016. In the SEP the EEOC stated five priority enforcement areas. One of the five areas is "emerging and developing legal issues," including reasonable accommodation under the Americans With Disabilities Act.

The EEOC is vigorously pursuing employers for failure to modify their leave and attendance policies to accommodate disabled employees. Moreover, an EEOC commissioner recently made the blanket statement that "disability-related absences cannot be counted against an employee." Add in the time-off obligations from the Family and Medical Leave Act, and it is no wonder that employers can feel frustrated when trying to manage leave and attendance issues. Indeed, uniform application of leave and attendance policies can lead to liability under the ADA, and a failure to modify attendance and leave policies to accommodate disabled employees can result in a class action ADA lawsuit. Consequently, employers should be mindful of their legal obligations when addressing leave and attendance issues.

The ADA and the FMLA (as well as state disability and leave laws) may restrict an employer's ability to manage employee attendance issues. An employer must assess its obligations under each law independently when attendance and leave issues arise. Since an employer could easily comply with

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one law but violate the other, the law providing the greater protection will control. Employers must train supervisors to recognize requests for leave or attendance issues that may implicate either law and should address attendance and leave issues from a centralized decision-making perspective to ensure consistent application of, and possible modification of, relevant company policies.

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