

HR Compliance Law Bulletin

Practical and Effective HR Management Advice

in this issue:

Spotlight

How to avoid potential pitfalls when returning employees to work1

Family and Medical Leave

Court upholds employer's call-in policy in case alleging it terminated worker to interfere with FMLA rights3

Breach of Contract

Payroll-processing provider sued after employee overpays herself by more than \$200,0004

Test Your

Understanding Of ...

Whether HSA contributions are up or down6

National Origin Discrimination

Scientist on temporary work visa claims he was terminated illegally because he is Chinese.....6

Disability Discrimination

Airline fires material specialist after doctor deems him unfit for duty in safety-sensitive areas7

Spotlight

How to avoid potential pitfalls when returning employees to work

by Maureen Minehan

Does your organization have an effective return-to-work policy? Do you follow a consistent process when bringing employees back on board following medical or disability leave? Do you automatically terminate employees who do not return to work at the end of their leave period? Depending on your answers, your organization could not only be vulnerable to a disability-related employment claim, but also taking an unnecessary hit to productivity.

\$3.2 million settlement

Grocery chain Supervalu Inc. (Supervalu) recently learned about return-to-work liability firsthand. On January 5, the Equal Employment Opportunity Commission (EEOC) announced Supervalu would pay \$3.2 million to settle a suit alleging that it terminated approximately 1,000 disabled employees when their medical leave ran out rather than returning them to work with accommodations. Such conduct violates the Americans With Disabilities Act (ADA).

In addition to the fine, Supervalu agreed to revise its employee communications to assure them that they do not need be 100% healed to be considered for returning to work,

and to inform them of some of the types of accommodations that may be available to them if they are considering returning with medical restrictions.

Some work better than no work

Returning employees to work even if they are not at full capacity is exactly what the Department of Labor's Office of Disability Employment Policy (ODEP) urges employers to do. "In cases where an employee is out of work due to illness or injury, it's in everyone's best interest to return him or her to work in some capacity as soon as they are able."

"Examples of effective return-to-work strategies include offering the opportunity to work part time, telecommuting, modifying work duties, modifying schedules, and implementing reasonable accommodations to provide employees with the tools and resources they need to carry out their responsibilities. Such efforts can help employees return to work sooner, even while still recuperating, thereby protecting their earning power and boosting an organization's productivity," ODEP says in a employers' return-to-work toolkit it released last fall.

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Steps to take

To avoid liability and unnecessary productivity losses related to returns-to-work, employers should consider several steps, including:

Plan ahead. “Adequate planning on the front end can prevent a bad situation on the back end,” says Joan McKenna, a partner in the Richmond, Virginia, office of LeClairRyan. Informing employees they do not have to be 100% healed before returning to work as the EEOC suggests is one element to consider; advising employees what will be required before returning to work is another.

On January 5, the Equal Employment Opportunity Commission (EEOC) announced Supervalu would pay \$3.2 million to settle a suit alleging that it terminated approximately 1,000 disabled employees when their medical leave ran out rather than returning them to work with accommodations. Such conduct violates the Americans With Disabilities Act (ADA).

Understand ADA regulations. Thomas McCally, a member at Carr Maloney in Washington, D.C., says employers need to pay close attention to the intersection of disability and leave laws at the federal and state levels. “Employers need to be aware of their ADA obligations when employees either return to work or delay their return. If an employee’s ability to perform is still affected by a disabling condition, employers may need to engage in an interactive process to determine if a reasonable accommodation can be used to allow the employee to per-

form the essential functions of his or her job.”

Be flexible. The Supervalu suit is just one of several cases recently settled by the EEOC and in each instance, the company had imposed a rigid return-to-work policy that automatically terminated anyone who did not return to work when their leave eligibility ended rather than explore alternatives and accommodations that could have brought the employee back in.

Be consistent. “A basic principle of liability avoidance is to apply policies consistently, but we still see employers tailoring their return-to-work policies to the employee and how much they like them,” McKenna says.

The bottom line

“Employers should think creatively and work with employees to identify what they need to resume working quickly and productively,” ODEP says. They also should consult with legal counsel before opting not to return to work an employee who is or could be regarded as disabled.

Practically Speaking: Take a look at your return-to-work policy. If it is rigid and automatically calls for the termination of an employee who does not return to work when his or her leave eligibility ends, you should consider revising the wording by adding language about exploring alternatives and accommodations that might be in order to bring him or her back to work.