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COURT DECISION LIMITS EMPLOYEE MEDICAL LEAVE UNDER ADA

Special Interest Articles

COURT DECISION LIMITS EMPLOYEE MEDICAL LEAVE UNDER ADA
By: G. Terence Nader

ENFORCEABILITY OF CONFIDENTIALITY PROVISIONS IN CONTRACTS
By: Richard M. Goldwasser

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting the preciousness of their time and business resources.

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The Americans with Disabilities Act of 1990 (the "ADA") is intended to prevent discrimination against persons with disabilities. Some provisions are well understood. For example, employers know that they cannot terminate an employee who suffers from a disability if the employee can perform the essential functions of the job. Other provisions of the ADA are less clear. One subject of particular dispute is whether employers must allow an employee to take a leave of absence for medical reasons.

Reasonable Accommodations -- The ADA requires employers to afford "reasonable accommodations" to "qualified individuals," but does not clearly define who is a "qualified individual" or what constitutes a "reasonable accommodation." The ADA states only that a "qualified individual" is a person who "with or without reasonable accommodation, can perform the essential functions" of the job. In turn, a "reasonable accommodation" may include "making existing facilities . . . readily accessible to and useable by individuals with disabilities;" or "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." "Qualified individuals" are entitled to such accommodations so long as they do not impose an "undue hardship" on the employer.[1]

EEOC's Current Position on Medical Leave -- The U.S. Equal Employment Opportunity Commission ("EEOC") takes the position that the ADA requires employers to grant a temporary leave of absence as a "reasonable accommodation" if the employee can return to work and perform the job requirements after the leave of absence. According to the EEOC, such a leave of absence could last for months.[2]

New Court Decision Contrary to EEOC's Position -- However, in the recent decision of *Severson v. Heartland Woodcraft, Inc.*, the Seventh Circuit Court of Appeals, which reviews decisions from Federal District Courts in Illinois, Indiana, and Wisconsin, held that the ADA does *not* require employers to grant a medical leave of absence if the leave extends over a long period of time. In the *Severson* case, the employee's job required heavy lifting, so when he aggravated a back condition the pain prevented him from working. The employer agreed to allow the employee the maximum, three-month, unpaid leave of absence provided by the Family and Medical Leave Act ("FMLA") so that he could receive treatment and rest. At the end of the FMLA leave of absence, however, his condition did not improve and he planned to undergo surgery. He requested an additional two to three-month leave of absence to recover from surgery that was scheduled for his final day of FMLA leave. His employer refused and his employment ended at the expiration of his FMLA leave.

In his lawsuit, the employee alleged that he was a "qualified individual" under the ADA and was entitled to reasonable accommodations. He took the position that a two to three-month leave of absence was a reasonable accommodation because he would be able to perform the essential functions of his job after he recovered from surgery. The Court of Appeals held that he was not a "qualified individual" under the ADA because he was not able to perform the essential functions of his job, reasoning that "an extended leave of absence does not give a disabled person the means to work; it excuses his not working." At the same time, the Court of Appeals qualified its holding by stating that a short leave of absence could constitute an accommodation under the ADA because "intermittent time off or a short leave of absence . . . may, in appropriate circumstances be analogous to a part-time or modified work schedule."[3]

Conclusion -- Courts in other jurisdictions have come to different conclusions under similar circumstances. Nonetheless, the Seventh Circuit held that the "inability to work for a multi-month period removes a person from the class protected by the ADA."[4] The leave of absence must be considered based on the circumstances of each case to determine whether it would pose an "undue hardship" for the particular employer. On April 2, 2018, the United States Supreme Court declined to hear the case,[5] which may give the Seventh Circuit's decision in *Severson* greater weight in other jurisdictions.

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[1] 42 U.S.C. §12111(8).
[2] *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).
[3] *Id.*
[4] *Id.*
[5] 138 S. Ct. 1441 (Apr. 02, 2018).

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Enforceability of Confidentiality Provisions in Contracts

Recent Recognitions

The **Disabled American Veterans** organization (DAV) recently recognized SFNR for its contributions in support of disabled veterans across the United States. DAV is a nonprofit charity supporting veterans and their families, providing rides for veterans to attend medical appointments and assists veterans with benefit claims. DAV assists veterans with finding meaningful employment opportunities and provides other resources and support. SFNR is honored by DAV's recognition, and is proud to support DAV's efforts to help our veterans.

Richard M. Goldwasser and **Joan T. Berg** completed a $42 million loan work-out involving the sale of four multi-family properties with over 550 units to multiple buyers and settlement of foreclosure proceedings in three states, coordinating to conclude the sales and funding of the settlement simultaneously.

Andrew Bell gave a presentation to the Chicago Bar Association on estate planning for clients with foreign assets. The seminar focused on pitfalls of owning foreign real estate and naming a foreign person as a fiduciary in estate planning documents.

Andrew Holstine was elected Vice President of The Chicago Farmers. Mr. Holstine has been on the Board of Directors since 2007 and is a past president among holding other positions.

The firm congratulates **Adam J. Glazer** on completing 20 years of teaching as an adjunct professor at Northwestern University's Pritzker School of Law.

Newsletters

Prior editions of the Firm's Newsletter, Sensible Solutions, are available on the Firm's website.

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The Donald Trump/Stormy Daniels legal slugfest has placed the issue of confidentiality provisions front and center. While not many clients call upon their lawyers to negotiate hush agreements to cover up personal indiscretions, an enforceable confidentiality provision is a key component in many agreements. Parties have varying motives to keep a contract's terms hidden from public scrutiny. For example, a settling defendant may not want it known that it paid out a significant sum to a plaintiff in order to deter future lawsuits. Likewise, a plaintiff, for its own privacy interests, may not want it known just how much it wrangled from the defendant. In cases not involving disputes, parties often want to keep business terms and other confidential or proprietary information from getting into the public sphere, and non-disclosure agreements barring the parties from disclosing to outsiders the terms of a business arrangement can provide the parties the assurances they seek before they close a deal.

With the publicity surrounding Ms. Daniels's challenge to her agreement, clients are understandably asking about the enforceability of confidentiality provisions. The short answer is that courts will generally enforce non-disclosure agreements obligating the parties to maintain the confidentiality of the terms of an agreement. The law, however, is full of exceptions, and a recent Illinois Appellate Court decision provided an excellent example of an unenforceable non-disclosure agreement. Understanding the exceptions to the rule allows parties to know what terms they can confidently keep confidential.

The basic rule in Illinois is that courts will uphold the confidentiality provisions except where it violates public policy. The term "public policy" is an amorphous concept, but is understood in law to mean the policies expressed by the state's constitution, statutes, and judicial opinions. Whether a contract provision violates the state's public policy will depend on the particular facts and circumstances of each case. In Illinois, courts have long ruled that public policy favors the exposure of crime and the cooperation of citizens with knowledge of illegal behavior.

Based on this reasoning, the Illinois Appellate Court recently held that a confidentiality provision intended to conceal the parties' misrepresentations to financial institutions was void and unenforceable as a matter of public policy.[1] The agreement in question sought to conceal misrepresentations made by an uncle and nephew on loan applications connected to the purchase of Red Roof Inn hotels. The parties to the confidentiality agreement sought to hide false statements regarding citizenship status, arrest history, and hotel management experience. The parties also feared that changes in the ownership structure would trigger a default under their loan documents, requiring them to immediately repay the loans. As a result, the parties continued borrowing from the financial institutions while concealing the fact that they had parted ways. To protect themselves (and defraud the banks), the parties agreed to keep the terms of their agreement confidential and not to disclose them to any third-party, including banks and financial institutions. They further agreed to a damages provision requiring a $100,000 payment for each disclosure. The nephew ended up in unrelated litigation in India where he submitted an affidavit disclosing the contents of the agreement with his uncle.

Back in Illinois, the uncle sued his nephew seeking to collect $100,000 for each of three separate disclosures. The court dismissed the uncle's case, finding that the confidentiality provision was intended to keep the prior and continuing misrepresentations hidden from the parties' lenders and was void and unenforceable as against Illinois public policy. Interestingly, the nephew did not raise the public policy argument—the court raised it on its own, concluding, "We will not enforce a contract that purports to bar a party from reporting another party's misconduct."

It is noteworthy that despite citing several federal bank fraud statutes, the court found it did not matter whether the conduct sought to be concealed rose to the level of criminal conduct or simply worked to cause a civil injury on a third party. An agreement to conceal misconduct, criminal or civilly tortious, will not be enforced.

Finally, notwithstanding a prevailing party attorney fee provision in the agreement, the court held the nephew was not entitled to an award of fees for defeating his uncle's claim. The court reasoned: "Where the parties to a contract against public policy are in *pari delicto*, or equally at fault, a court will not aid either party but will leave both parties where it finds them."

Clients seeking to keep sensitive and legitimate business information confidential can rest comfortably knowing that courts are apt to enforce non-disclosure agreements that seek to protect legitimate business interests, and not illegal or tortious conduct.

[1] *Signapori v. Jangaria*, 2017 IL App (1st) 160937.

This newsletter is not intended to be legal or tax advice and is not a substitute for obtaining legal or tax advice.