Recent Cases May Warrant Change In Employment Agreement Templates

Feb 01 2005

Practice Area: Health Law & Health Industry Labor, Employment and Immigration & Labor and Employment

Most employment agreements include language permitting an employee's termination in the event of the employee's disability. Before an employer terminates any employee due to disability, employers subject to the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1974 and the Wisconsin Fair Employment Act (WFEA) have a duty to consider reasonable accommodation of the employee's disability. Some employment agreements contain express language recognizing this duty to accommodate, often referring to terms defined in regulations promulgated under the ADA, 29 CFR Part 1630. In light of recent case law, these disability termination clauses should now be replaced with new language for all Wisconsin employees. Recent case law interpreting WFEA, as it relates to accommodation and prohibiting discrimination on the basis of disability, significantly impacts an employer's duty to accommodate.

Both Wisconsin and federal laws prohibit discrimination on the basis of disability. Both state and federal laws require employers to make reasonable accommodations at the request of an individual with a disability as necessary to allow the employee to continue working without placing an undue hardship on the employer. The employer bears the burden of proving undue hardship.

While similar, WFEA is not identical to the ADA and Rehabilitation Act in its wording. For example, the ADA requires an employer to make reasonable accommodations to the disability of a qualified individual (defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that the individual holds). WFEA, on the other hand, does not limit the term "individual with a disability" to an individual who can perform all of the essential functions of the position, with or without reasonable accommodation.

Until recently, both WFEA and the federal laws were frequently interpreted similarly. Wisconsin courts provided little guidance to employers regarding the scope of the employer's duty to reasonably accommodate an individual with a disability under WFEA. This changed, however, with the issuance of two recent Wisconsin Supreme Court decisions— *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, issued July 11, 2003, and *Hutchinson Technology, Inc. v. LIRC*, 2004 WI 90, issued June 30, 2004.

In *Crystal Lake*, the court rejected the body of case law from other jurisdictions interpreting federal disability discrimination laws and instead established a different standard under WFEA. The federal laws have been interpreted to not require employers to eliminate job duties, create a new job, or employ others to perform functions that an employee with a disability cannot perform. In *Crystal Lake*, however, the Wisconsin Supreme Court stated that it is not bound by federal law in interpreting the reasonable accommodation requirement under WFEA. It then specifically held that reasonable accommodation under WFEA is not limited to those accommodations that would allow the employee to perform all of his or her job duties. Rather, the court indicated that a change in job duties may be a reasonable accommodation in given circumstances.

The facts in the *Crystal Lake* case were fairly unique. The employee at issue became a quadriplegic with partial use of both arms. She could still perform some but not all of her job duties. She had been working in a 4-person department, where 2 of the other 3 persons included her mother and her sister. One of the factors influencing the court's decision was the willingness of the employed coworkers to take over responsibility for the job duties the employee could no longer perform with or without accommodation. It was unclear to what extent the unique facts in that case resulted in the determination that a change in essential job duties was a reasonable accommodation.

It remained to be seen how this new principle that Wisconsin employers may need to reallocate even essential functions as an accommodation would be applied in other factual circumstances. This issue was clarified in the court's subsequent *Hutchinson* decision, which discussed the *Crystal Lake* decision in some detail. In *Hutchinson*, the employee had asked that the employer accommodate her disability by allowing her to work only 8-hour shifts rather than the 12-hour shifts the employer utilized to staff its phototech department. The court held that, absent proof of undue hardship, the employer had a duty to provide the requested accommodation. The court held that the employer had only speculated that such an accommodation would pose an undue hardship without providing actual proof of hardship. The court was no doubt influenced by the fact that the employer had allowed the employee to work 8-hour shifts for 8 months (before the employee's condition was determined to be permanent).

In *Hutchinson*, the court reiterated its position that changing job duties could be a reasonable accommodation in certain circumstances. The factual circumstances in the *Hutchinson* case were not as unique as in *Crystal Lake*, but still demonstrated that employers must consider changes in job duties in nearly every circumstance requiring accommodation. The Court essentially eliminated the concept of essential functions under WFEA.

These two decisions made the language in many employment agreement templates no longer consistent with the requirements of Wisconsin law. Those templates generally phrase the employer's duty to accommodate in terms of accommodations that would allow the employee to perform all of the *essential* functions of the employee's job. Those templates that refer to language and definitions contained only in federal laws now are not consistent with an employer's obligation under WFEA. Since more will now be expected of employers to achieve compliance with Wisconsin law than this contract language requires, such contracts should be revised so that they cannot be interpreted to require a process or outcome that is inconsistent with and in violation of Wisconsin law.

If your employment contract contains language similar to the following:

Upon the death or disability of the Employee. Disability is defined as any illness or injury which prevents the Employee from safely performing the *essential functions* of his or her employment, with or without *reasonable accommodation*. The Employer is responsible for determining the essential functions of the Employee's employment. If the Employer determines that the Employee cannot safely perform one or more essential functions of his or her employment, the Employee may request an accommodation that would allow the Employee to safely perform all of the essential functions of the Employee's employment despite his or her disability. The Employer will determine whether or not the accommodation requested is reasonable or whether an alternative reasonable accommodation could be made, without *undue hardship*, that would allow the Employee to safely perform the essential functions of his or her employment. If the Employer cannot reasonably accommodate the Employee's disability so that the Employee can safely perform the essential functions of his or her employment, this Agreement will be terminated. The meaning of the above-italicized terms shall be as defined in 29 CFR Part 1630 and related regulations, if any.

It should be replaced with:

Upon the death or disability of the Employee, subject to the Employer's duty under the law to accommodate. The parties acknowledge that it would constitute an undue hardship for the Employer to provide an accommodation that leaves the Employee still unable to safely perform the Employee's patient care responsibilities.

To make the contract clause consistent with both Wisconsin and federal requirements, the clause contains only a general statement of the employer's duty to accommodate. Given the Wisconsin case law developments, each disability situation will need to be considered and evaluated on a case-by-case basis to determine whether accommodation is both possible and reasonable, including the possibility of relieving the employee from some job duties that would otherwise have been required as part of his or her job.

Since both Wisconsin and federal laws still recognize that an employer is not expected to accommodate an employee if the accommodation imposes an undue hardship on the employer, the revised clause also includes a sentence to be used for employees with patient care responsibilities. This clause is intended to show that both parties have agreed in advance that it is unreasonable to provide an accommodation that leaves the employee still unable to safely provide patient care. The sentence may aid the employer in establishing that a disability cannot be reasonably accommodated where safety is an issue.
