SPECTRUM INSURANCE

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CONQUERING TEAM DYSFUNCTION

Patrick Lencioni On Improving Your Team

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+ LIZ WISEMAN - NEW MULTIPLIERS
+ DR. MARSHALL GOLDSMITH - BE LIKE YOUR HEROES

Spectrum INSURANCEGROUP

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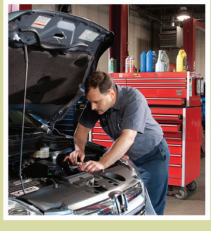


The reason people spend their hard-earned money on insurance is that there are certain things they simply can't afford to lose. Which is exactly why it's so nice to have a policy from West Bend.

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PATRICK LENCIONI:

CONQUERING TEAM DYSFUNCTION

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WELCOME

Welcome to the fall 2017 edition of *Risk & Business Magazine*. Spectrum Insurance Group is pleased to provide this magazine as a valuable resource for your company. The purpose of the magazine is to bring relevant content to help your business succeed. Inside this edition, you'll find many great articles related to business insurance, employee benefits, safety/risk management, employment law, banking, financial management, and general business topics. We think you will find these articles informative and useful to the success of your business.

When Spectrum Insurance Group was started in 2007, one of the core values we established was to provide value-added services to our customers. *Risk & Business Magazine* provides another outlet to help inform and educate not only our customers but all businesses located throughout the state of Wisconsin. What's good for all businesses in Wisconsin is good for Spectrum Insurance Group!

With the news in the headlines recently regarding Hurricanes Harvey, Irma, Jose, and Maria, many businesses are wondering what impact the hurricanes will have on insurance rates for 2018 and 2019. We are starting to see some of the numbers coming in, and the insured losses are quite staggering. The Insurance Council of Texas has estimated overall insured losses from Harvey to be nearly $19 billion. Irma is estimated to have in excess of $18 billion in insured claims.

While claim payments in Texas and Florida may not immediately impact insurance rates in Wisconsin, the long-term effect of reinsurance premiums paid by insurance companies in Wisconsin will more than likely cause a spike in property insurance rates. Stay tuned!

On behalf of the entire staff in all of our offices located throughout Wisconsin, we hope you enjoy this issue of *Risk & Business Magazine.* Please feel free to provide me any feedback regarding the magazine by emailing me at darrel.zaleski@spectruminsgroup.com. I'd love to hear from you.

Sincerely,

Darrel Zaleski, Owner

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Seventh Circuit Hands Employers Big ADA Win; Rejects EEOC's Long-Term Medical Leave Of Absence Guidance

JOSH JOHANNINGMEIER AND RUFINO GAYTÁN III

Few employment issues confound employers as much as employee requests for medical leaves of absence. Most employers know that the federal Family and Medical Leave Act of 1993 (FMLA) and similar state laws provide covered employees at least twelve weeks of unpaid leave for various reasons.[1] That requirement seems simple enough, but the Americans with Disabilities Act (ADA)[2] and state laws like the Wisconsin Fair Employment Act (WFEA)[3] complicate the FMLA's seemingly straightforward leave entitlement.

Some employers do not realize that, once an employee exhausts the FMLA leave entitlement (or if the employee is not eligible for FMLA leave at all), the employee may be entitled to additional protections under the ADA, WFEA, or similar laws in other states. For employers already aware of these issues, it may seem that, according to the United States Equal Employment Opportunity Commission (EEOC), an employer's obligation to provide leave has no bounds.[4] According to the Court of Appeals for the Seventh Circuit, which oversees federal courts in Illinois, Indiana, and Wisconsin, the ADA does not complicate leave requests as much as the EEOC has led us to believe.

In *Severson v. Heartland Woodcraft, Inc.*, Severson, the former employee, asked his employer, Heartland, for an additional two- or three-month leave after exhausting his FMLA entitlement.[5] Severson needed the additional time off due to a back surgery he had on his last day of FMLA-protected leave.[6] Heartland denied Severson's request, terminated his employment, and invited Severson to reapply for employment once medically cleared to work.[7]

Severson declined Heartland's invitation and instead sued Heartland.[8] Severson claimed that Heartland violated the ADA by failing to provide him a reasonable accommodation, i.e., three months of leave beyond the twelve-week FMLA entitlement.[9] The United States District Court for the Eastern District of Wisconsin disagreed with Severson and granted summary judgment in favor of Heartland because Severson was no longer a "qualified individual" as a result of his need for a months-long leave.[10]

The Court of Appeals also disagreed with Severson, stating that "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement."[11] The Court focused on the purpose of the ADA, which is to prohibit "discrimination against a 'qualified individual on the basis of disability.'"[12] The ADA defines "qualified individual" with a disability as "a person who, 'with or without reasonable accommodation, can perform the essential functions of the employment position.'"[13]

Taking a common sense approach, the Court ruled that the ADA limits reasonable accommodations "to those measures that will *enable* the employee to work"[14] and does not require accommodations that *excuse* the employee from working.[15] According to the Court, "an employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA."[16]

The EEOC, which appeared as *amicus curiae*, argued that a long-term medical leave of absence qualifies as a reasonable accommodation if: (1) it has a definite duration, (2) the employee requests it in advance, and (3) it will enable the employee to perform the essential functions of the job upon returning to work.[17] After pointing out that the EEOC's interpretation ran contrary to Supreme Court precedent,[18] the Court of Appeals reasoned that the EEOC's approach rendered the length of the leave irrelevant.[19] The Court rejected the EEOC's interpretation of "reasonable accommodation" as "untenable" because it would transform the ADA "into a medical-leave statute—in effect, an open-ended extension of the FMLA."[20]

Despite the Court rejecting the argument that a long-term medical leave constitutes a reasonable accommodation, the Court stated that intermittent or short leaves of "a couple days or even a couple of weeks" may be reasonable accommodations in certain cases.[21] Employers must therefore continue to evaluate leave requests on a case-by-case basis.

Employers must also be aware of and manage any differences between the ADA and applicable state laws addressing disability accommodations. In Wisconsin, for example, the state Supreme Court has interpreted the WFEA to require greater accommodation efforts than the ADA.[22] Employers in most other circuits should also not view the *Severson* decision as a license to deny extended leaves of absence. For example, the First and Tenth Circuit Courts of Appeals have approved multiple-month leaves as reasonable accommodations under the ADA.[23] Nevertheless, employers throughout the Seventh Circuit have certainty that, under the ADA, a multiple-month leave following exhaustion of the FMLA entitlement is not a reasonable accommodation. +

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(Endnotes)

1 29 U.S.C. § 2612(a)(1); *see, e.g.*, Wis. Stat. § 103.10.
2 42 U.S.C. § 12101 *et seq.*
3 Wis. Stat. § 111.321.
4 *Employer-Provided Leave and the Americans with Disabilities Act*, Equal Employment Opportunity Commission, last modified May 9, 2016, *available at:* https://www.eeoc.gov/eeoc/publications/ada-leave.cfm*; see also Severson v. Heartland Woodcraft, Inc.*, ___ F.3d ___, 2017 WL 4160849, *4 (7th Cir. Sep. 20, 2017) (describing the EEOC's position as rendering the duration of the leave "irrelevant as long as it is likely to enable the employee to do his job when he returns").
5 2017 WL 4160849 at *1.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Severson v. Heartland Woodcraft, Inc.*, 2015 WL 7113390, *7 (E.D. Wis. Nov. 12, 2015) (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 380-81 (7th Cir. 2003)).
11 *Severson*, 2017 WL 4160849 at *1.
12 *Id.* (quoting 42 U.S.C. § 12112(a)).
13 *Severson*, 2017 WL 4160849 at *1 (quoting 42 U.S.C. § 12111(8)).
14 *Severson*, 2017 WL 4160849 at *1 (emphasis added).
15 *Id.* at *3.
16 *Id.* at *1 (emphasis in original).
17 *Id.* at *4.
18 *Id.* (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (stating that the EEOC's interpretation equated a "reasonable accommodation" with an "effective accommodation" and rejecting such interpretation)).
19 *Severson*, 2017 WL 4160849 at *4.
20 *Id.*
21 *Id.* at *3; *see also Byrne*, 328 F.3d at 381.
22 *See, e.g., Crystal Lakes Cheese Factory v. L.I.R.C.*, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.
23 *See, e.g., Garcia-Ayala v. Lederle Parenterals Inc.*, 212 F.3d 638 (1st Cir. 2000); *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014) (addressing long-term leaves in Rehabilitation Act context).