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A collaborative program between the
Southwest ADA Center, Great Lakes ADA Center and members of the ADA National Network

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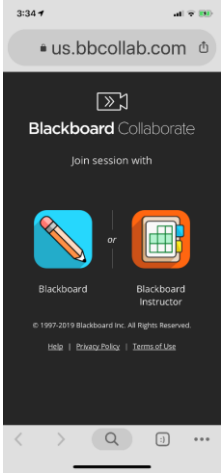

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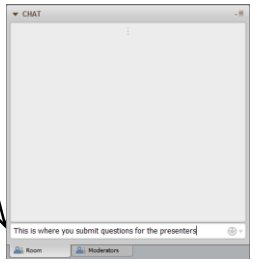

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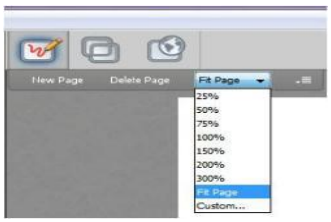

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Southwest ADA Center ilra

Inflexible Return to Work Policies

Diego Demaya, J.D.
Southwest ADA Center

General Question

- Our return to work policy requires all employees to be 100-percent healed without any medical restrictions before they return to work after an illness or injury. We believe this is an important policy to protect employee safety, but recently heard it might be unlawful discrimination. Is it?

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Inflexible Leave Policies Run Afoul of the ADA!

- One theme that resonates throughout court decisions and EEOC filings over the last few years is that application of inflexible employment policies to employees with disabilities often runs afoul of the Americans with Disabilities Act (ADA);
- Such is the case with "100% healed" policies, which require employees returning from leaves of absence to do so without any medical restrictions or face termination;
- As applied to a person with a disability, most courts hold that such a policy is a *per se* ADA violation. See, e.g., Powers v. USF Holland, Inc., 667 F.3d 815 (7th Cir. 2011).

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ADA Basics

- Remember that Title I of the Americans with Disabilities Act obligates covered employers to facilitate reasonable accommodations to the known disability-related functional limitations of an employee who makes a request.
- Logically, this applies to employees who return to work after recovery from an illness or even while receiving medical treatment or undergoing rehabilitation. This includes an employee with temporary or ongoing medical limitations or restrictions.

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General Rule of Thumb

- According to EEOC guidance a medical certification or doctor's note containing any kind of physical limitation or restriction due to a medical issue should be treated by the employer as a request for an accommodation;
- This "default" accommodation request triggers the employer obligation to engage in the interactive process with the employee, on a case by case basis, to determine if there are possible accommodations that would allow the employee to return to work.

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A Recurring Problem

- Many employers impose inflexible return to work policies that may either inadvertently or purposefully compromise the ADA accommodation requirement;
- Inflexible return to work policies are especially prevalent in the healthcare and physical labor intensive industries.

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Typical Sample Scenario

- An employee has been out of work for two months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions;
- Alternatively, the letter may state that the employee is released to return to a light duty position.

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Sample Unlawful Policy Statements

- "As your FMLA leave is nearly exhausted, we expect you to return to work on August 22 with a note from your physician stating that you are able to work with no restrictions...";
- "The Company cannot accept light duty restrictions upon your return to work. If you are unable to return to work without restrictions, you must remain on leave until you are able to return without restrictions..."

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What's the Problem with a "No Restrictions" Approach?

- When employers require that employees be 100% healed, or have no restrictions upon return to work, the majority of courts find that such policies discriminate against employees with disabilities who may be able to perform the essential functions of their position with or without a reasonable accommodation;
- Recall that the ADA prohibits an employer from using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria is shown to be job-related for the position in question and is consistent with business necessity. 42 U.S.C. § 12112(b)(6).

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UPS Case in Point

- On February 11, 2014, the court in EEOC v. United Parcel Serv., Inc., Case No. 1:09-cv-05291 (N.D. Ill. Feb. 11, 2014) provided yet another example of why inflexible employment policies and the ADA don't mix.
- In this class action, the EEOC alleged that UPS maintained an inflexible 12-month leave policy, which provided that employees will be "administratively separated from employment" after 12 months of leave. The EEOC contended that this leave policy acted as a "100% healed" requirement and limited the ability of qualified individuals with a disability to return to work.
- Therefore, the EEOC alleged that UPS's leave policy violated 42 U.S.C. § 12112(b)(6) because it operated as a qualification standard, employment test, or other selection criteria that screens out or tends to screen out a class of individuals with a disability and is not job-related or consistent with business necessity.

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Do not Bypass the Individualized Assessment Process

- Most courts find that employers improperly bypassed the ADA individualized assessment process when employers implement a "100% healed" policy;
- These policies mistakenly presume an employee to be unable to perform the duties of his or her job without duly considering whether the employee's restrictions can be accommodated – regardless of nature of the work.

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Two Problems Arise

1. The inflexible return to work policy bypasses the process requiring an employer to make an individualized assessment under the ADA; and,

2. It increases the chance that the employer will have "perceived" or "regarded" the employee as disabled – which vitiates the "regarded as" prong of the ADA definition of "disability."

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ADA Definition Refresher

- An individual has a "disability" under the ADA when:
- (1) she has a mental or physical impairment that substantially limits one or more major life activities;
- (2) she has a record of a disability; or
- (3) she is being regarded as having a disability. 42 U.S.C. §12102(1)(A)-(C).

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"Regarded As" Reminder by the Court

- One employer argued that an employee cannot be both regarded as disabled and actually disabled. The court disagreed, citing a provision of the ADA Amendments Act of 2008 (ADAAA).
- Section 12102(3)(A) says a person is regarded as disabled if subjected to a prohibited action because of either an "actual or perceived" impairment "whether or not the impairment limits or is perceived to limit a major life activity."
- The regulations also state that whether a person is actually disabled is "not relevant" to coverage under the regarded-as prong. 29 C.F.R. §1630.2(j)(2).

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Illustration

- Patricia, a long-term employee at Legendary Baking's Oak Forest, developed CSP myelopathy, a condition affecting the spinal cord, as a result of a non-work injury. Patricia took a leave of absence for surgery. While recuperating, she sought to return to work with restrictions in a temporary light-duty capacity, but was told that she was ineligible because such work was reserved for employees injured on the job. Consequently, she remained on leave and was terminated for failure to return to work at the expiration of 180 days pursuant to company leave policy. When Patricia was released to full duty a month later, she sought rehire, but was denied.

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Recommended Practice

- Patricia should have been allowed to work with reasonable accommodations consistent with her temporary restrictions or granted additional time as "ADA leave."
- Failure to modify the restricted light duty policy and failure to grant additional leave time violate the ADA where no assessment was made on either possibility. ;
- Remember, just because temporary light duty might be assigned does not obligate the employer to eventually not require performance of essential job functions.

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Yet Another EEOC Settlement

- A Nevada employer agreed to pay $3.5 million to settle litigation over its "100-percent-healed" policy (see EEOC v. Nevada Restaurant Services press release).
- The policy required employees returning from a medical, sick, or disability leave to be 100 percent fully recovered before they were allowed to return to work. The EEOC has been targeting employers with these bright-line policies that prevent employees with disabilities from returning to work in violation of the ADA.
- Such policies are discriminatory because they establish an unlawful workplace standard that do not allow for reasonable accommodation of qualified individuals with disabilities.

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Recommended Practices

- Evaluate existing return to work policies to include individualized assessments of an employee's ability to return to work with or without a reasonable accommodation;
- Obtain clear medical information to discuss:
  1. the employee's ability to return to work; and
  2. determine whether an accommodation may help the employee perform essential job functions.

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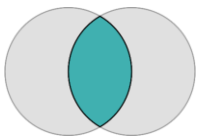
FMLA and ADA Overlap - I



- Employers should engage in a consistent and regular practice of requiring all employees returning from FMLA leave to provide a fitness-for-duty certification from their health care provider that confirms their ability to return to work and perform the essential functions of their job -- with or without a reasonable accommodation;
- The fitness for duty report becomes a "default" request for possible ADA accommodation – especially where restrictions are medically imposed.

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FMLA and ADA Overlap - II

- Example: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment;
- BUT under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

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Questions?

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Contact Your Regional ADA Center

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