How to Avoid An "Absolut" Disaster When Managing Worker Medical Restrictions

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When a medical or mental condition prevents an employee from working at full capacity, the situation can quickly become complicated for everyone, including the employee, human resources leaders, and well-intentioned supervisors. Such scenarios often trigger obligations under the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), workers' compensation statutes, and other state laws. In fact, distinct legal duties may arise under *all* of these laws *at the same time*. Depending on the circumstances, the Pregnancy Discrimination Act (PDA) could also bubble up in this statutory alphabet soup.

Employer's Seemingly Non-Discriminatory Policy Leads To Massive Settlement
Whichever statutes apply, stringent bright-line policies often cause serious complications for employers. A group of nursing and healthcare facilities in upstate New York, Absolut Care, LLC, recently learned this the hard way. The company's so-called "100-percent healed" policy was central to the controversy. The existence and implementation of this policy led to a $465,000 settlement of claims filed by the Equal Employment Opportunity Commission (EEOC) on behalf of some employees who were disabled or pregnant.

The EEOC alleged that Absolut failed to accommodate disabled workers, subjected them to impermissible medical examinations, and treated pregnant employees less favorably than non-pregnant employees. The biggest issue, however, seemed to be the company's policy that barred disabled employees from returning to work unless they could do so without *any* medical restrictions.

At first blush, this result may seem puzzling. After all, doesn't an employer have the right to require an employee to be able to perform all the essential functions of the applicable job, especially if it treats all employees the same way? Yes, it does.

Companies Must Conduct Individualized Assessments
In this case, however, the "missing link" is that the employee must have been able to perform those duties with or without *a reasonable accommodation*. By following a policy that required an employee to be "100-percent healed" before returning to work, Absolut effectively skipped the critical step of considering whether an individual employee could perform essential job functions with a reasonable accommodation. If effective reasonable accommodations existed, the employer had a legal obligation to offer one.

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This example highlights a point that we emphasized in a 2017 article about actions that can "automatically" land your hospital in court: the failure to at least *consider* possible accommodations before concluding that an employee cannot perform a job will likely violate the law. The employer's duty to consider feasible accommodations can arise even if the employee does not expressly ask for one; instead, if the employer should have recognized the need to consider an accommodation, the law will consider the employer to be obliged to have acted. In Absolut's case, the EEOC specifically challenged the employer's denial of employee leave (i.e., time off) as an accommodation.

Besides the "100-percent healed" policy itself, this scenario also highlights the importance of training supervisors to spot potential accommodations issues early, and then ensuring they confer with their human resources representatives.

A Systematic Approach To Managing The Alphabet Soup Of Statutes

What can employers do to better protect their employees and themselves in such situations? First, understand the fundaments of this group of laws: these statutes all prohibit discrimination or retaliation against employees who exercise their related rights. Supervisors should not get involved in evaluating or even seeing the details of an employee's medical or mental conditions.

Second, identify and focus upon the requirements that make each statute unique: the FMLA, for example, provides job-protected leave and benefit protections when applicable. The PDA ensures that pregnant employees are not treated less favorably than non-pregnant employees in any respect (and although pregnancy itself is not a disability, some complications of pregnancy are protected by the ADA). State workers' compensation statutes provide for medical services and some income replacement for employees who experience workplace illness or injury. Finally, the ADA *requires* you to provide reasonable accommodation to an otherwise qualified applicant or employee, if the accommodation would enable the employee to perform the essential functions of the job. Some additional job-protected leave, beyond the requirements of the FMLA, may be considered a reasonable accommodation. Focusing upon these distinct requirements, which often apply simultaneously, will help you avoid overlooking any of your legal duties.

As always, it is vital to gather complete information and involve subject matter experts, such as HR representatives, as soon as these issues begin to emerge. Involving HR early also helps you ensure consistency in responding to such circumstances. And it is critical to develop a documentation trail to help you demonstrate that you *considered* alternatives (and legal duties) before making any final decisions, especially if any decision is adverse to the employee.

As a final point, consistent application of these practices can also help employers manage malingerers and others who may abuse their rights.

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