Nevada Employer Pays $3.5 Million To Settle "100-Percent Healed" Claim

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Slots chain employer Dotty's recently agreed to pay $3.5 million to settle litigation alleging its "100-percent-healed" policy discriminates against disabled workers. The June 5 settlement and consent decree entered in the federal court case of *EEOC v. Nevada Restaurant Services Inc.* is just the most recent victory in the EEOC's campaign to target employer "maximum-leave" and "100-percent-healed" policies.

This $3.5 million price tag should serve as a reminder to all employers that the EEOC continues to target both the formal written policy limitations on medical and disability leave and employers' administration of return-to-work requests for reasonable accommodations.

Background: EEOC Targets Employer Blanket Policies
The Equal Employment Opportunity Commission (EEOC) complaint against Dotty's alleged that the company's "well-established 100-percent-healed practice" discriminated against disabled employees in violation of the Americans with Disabilities Act (ADA). Under the 100-percent healed policy, employees returning from a medical, sick, or disability leave needed to be fully recovered before being permitted to return to work. The EEOC alleged that Dotty's 100-percent-healed policy was discriminatory because it established "an unlawful qualification standard that does not allow for reasonable accommodation of qualified individuals with disabilities."

For example, under such a policy, an employee who was on FMLA leave to have knee surgery would not be allowed to return from leave until the employee was fully recovered from the surgery. This means that if an employee was released to work with medical restrictions (such as not being permitted to stand for more than two hours without sitting for 10 minutes), the employee was not considered to be fully healed and therefore could not return to work.

The concern about such a policy is that, depending on the employee's position and essential job duties, restrictions such as sitting for 10 minutes might be an easily granted accommodation under the ADA. These types of policies automatically presume that the employee cannot work but do not allow management to consider the essential functions of the position or whether an alternative position within the company may represent a reasonable accommodation. Employers with such policies frequently reject return-to-work notes that contain any limitations out of hand rather than engaging in the interactive process.

Litigation targeting employer policies regarding employees returning from medical leave have become more prevalent since the issuance of the EEOC's 2016 Guidance and the agency's designation of this area as one of its top enforcement priorities. The EEOC's guidance took the position that employers may need to extend additional leave time beyond the maximum duration provided for in a company policy as a reasonable accommodation, or perhaps offer employment in an open position. The EEOC's guidance is clear that a medical certification containing any kind of a limitation or restriction should be treated by the employer as a request for an accommodation that triggers the duty to engage in the interactive process.

The Settlement And Consent Decree

In lieu of further litigation and a potential trial, Dotty's agreed to a settlement and consent decree, which Judge James C. Mehan approved on June 5. While Dotty's did not admit any liability or wrongdoing, the terms of the consent decree show the extent of the concessions the company had to make to avoid further EEOC litigation. As part of the consent decree, Dotty's agreed to hire an equal employment opportunity monitor, revise its disability and leave policies, and implement a mandatory training program for all staff on the interactive process and other duties required by the ADA (with additional training for managers, supervisors, and human resources personnel).

Additionally, the consent decree grants the EEOC the sole discretion to determine which employees and former employees are eligible to share in the $3.5 million settlement fund and how much each class member will receive (including six months of back pay and any applicable compensatory damages the EEOC feels is appropriate). Dotty's also agreed to implement an elaborate log system to track employee requests for disability accommodations and perform an audit of the accommodations log both retroactively and annually for the next three years.

Finally, the consent decree requires the company to send notice to all potential class members and invite them to complete an online survey to determine if they are a member of the class, and even requires the company to give priority consideration to class members (former employees) when hiring for open positions. Dotty's has agreed to work with the EEOC to determine the qualifications for reemployment. The company also agreed that, in situations where a class member is found to be eligible for reemployment in a particular position but there is no open job with matching duties, it will provide notice to the EEOC within 10 days of a suitable position becoming available.

Implications Of This Settlement

It seems clear that the EEOC's trend towards litigation targeting disability leave policies is not going away any time soon. Public comments from the EEOC regarding the consent decree show that the agency views these policies as evidence of "systemic disability discrimination." The agency announced that it is on a quest to identify such policies and hold employers accountable, targeting them for enforcement lawsuits to ensure that company decision makers are complying with the ADA.

Therefore, you should treat this settlement as a warning and review all company policies procedures and practices for potential issues of disability discrimination. This area of the law is

procedures and practices for potential issues of disability discrimination. This area of the law is often complicated by the interplay between various statutory requirements and external and internal policy interpretations. A request by a single individual might require you to determine what your obligations are under the ADA, FMLA, state workers' compensation laws, and other state-specific statutory requirements. Make sure you don't let your comprehensive compliance efforts fall by the wayside just because you feel confident of having satisfied one specific law.

Recommendations For Employers

In light of this specific settlement and the EEOC's renewed efforts to focus on this area, you should consider tackling the following priorities:

1. ***Review Written Policies***

   Review your written policies on leave and confirm that your company does not have any formal policies which might be discriminatory, such as:

   - a 100-percent-healed policy (employee must be released to full-duty with no restrictions);
   - a maximum leave policy (employee is not entitled to any additional leave beyond their 12 weeks of FMLA leave); and
   - restricted "light duty" positions (only employees with workplace injuries can fill that open position).

2. ***Evaluate Requests On A Case-By-Case Basis***

   Address return-to-work requests on an individual basis and evaluate each employee's request to return to work as a potential request for an accommodation that might trigger the interactive process.

3. ***Ensure Consistent Administration Of Leave***

   Confirm that leave is carefully and consistently administered across all departments and third-party administrators. Ensure that managers, supervisors, and human resources representatives are all on the same page and follow set guidelines throughout the interactive process so that non-discriminatory company policy is not administered in a discriminatory fashion.

4. ***Engage In And Document The Interactive Process***

   Employer best practices include carefully documenting not only each request for accommodation, but also every stage of the interactive process. Make sure to record the ultimate conclusion reached or accommodation provided to the employee.

If you have questions regarding your leave policies, or a particular employee's requested accommodation or return to work certification, please contact the author or your Fisher Phillips attorney for further assistance.

This Legal Alert provides an overview of a specific settlement and consent decree. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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