

Taking Work Restrictions Seriously: The EEOC Is Targeting “100% Healed” Policies as Systemic Disability Discrimination

2 min read

Jul 10, 2018

A “100-percent healed” policy refers to a practice or procedure that mandates that an employee be released to work by his physician without any restrictions before he may return to work. For example, if an employee who took FMLA leave for carpal tunnel surgery was released to return to work with a reasonable restriction, e.g., 10 minute break after every hour of prolonged typing, a 100-percent healed policy would prevent the employee from returning to work, perhaps altogether if the restriction becomes permanent.

Such policies can run afoul of the Americans with Disabilities Act (ADA). The ADA requires employers to provide a reasonable accommodation to workers’ with disabilities unless the employer can prove the employee is not a “qualified individual” or that accommodating the employee would cause it an undue hardship. Once an employee claims a qualifying disability and requests a reasonable accommodation, the employer must proceed in good faith and engage in the “interactive process” to identify a reasonable accommodation. Engagement in the interactive process is a key item the courts look for in assessing disability cases. 100-percent healed policies are by their very nature non-interactive.

The EEOC issued [Guidance](#) addressing this very issue in 2016. Since then, they have been on the hunt, targeting employers with “100-percent healed” policies. It has taken a hard line approach that any medical certification with a work should be treated as request for reasonable accommodation that would trigger the interactive process. The EEOC has gone so far as to say that they view “100-percent healed” policies as “systemic disability discrimination.”

Having a “100-percent healed” policy or practice is extremely risky. *EEOC vs. Nevada Restaurant Services Inc.* is a cautionary tale. Last month, Nevada Restaurant Services paid \$3.5 million to settle the case. In addition, it agreed to onerous non-monetary settlement terms. For example, the employer agreed to implement a detailed logging system/database to track employee’s requests for disability accommodations with consistent auditing of those logs. In addition, it agreed to give former employees who were dismissed or unable to return per the policy priority for open job positions.

To err on the side of caution, any work slip, note or medical document giving an employee work restrictions should be treated as a request for reasonable accommodation by the employer. Upon receipt, the employer should engage the employee in every step of the interactive process—and document, document, document it.

Another thing an employer can do give the employee taking medical leave some a designation notice. The notice should state he will not be able to return to work unless he can perform the “essential functions” of the job with or without a reasonable accommodation. The notice should specifically lay out or attach the essential functions of the employee’s job, and explicitly state the employee does not need to return from FMLA leave 100% or completely healed without restrictions.

Based on this settlement, the trend in case law, and the priorities of the EEOC, employer should carefully scrutinize their written policies and procedures to make sure they are not expressly, or even tacitly, following a “100-percent healed” policy.

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Topics

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