CTSI
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Technical Update

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Use of "100 Percent Healed" Type of Return to Work Policy When A Disability "May" Be Present

In a series of ADA enforcement activities, the EEOC is challenging employer policies requiring a return to work litmus test of "100 percent healed" or "100 percent able" as a systemic violation of the ADA.

The Tenth Circuit (covering Colorado) has, prior to the Americans with Disabilities Amendments Act (ADAA), previously held that a 100 percent healed policy did not violate the ADA. Specifically, the court held that the employer's no-restrictions policy did not, by itself, indicate that the policy showed an employer regarded an individual employee as disabled. (Dillon v. Mt. Coal, 569 F.3d at 1216-1217, 10th Cir. 2009). For a discussion of the Tenth Circuit holding, which is said to be an out of date holding, See http://www.stroock.com/SiteFiles/Pub1011.PDF.

The most recent reported court action, by the U.S. District Court for the Northern District of Illinois, Eastern Division, denied a motion for summary judgment by UPS, to dismiss ADA claims filed on behalf of a former UPS employee and a class of similarly situated employees with disabilities. This ruling means the case will proceed through the discovery stage, an onerous requirement for defending against a class action. (EEOC v. UPS, Inc. No 09-C-5291 (N. Dist Ill. Feb 11, 2014). The class status of these plaintiffs has already been vetted. The EEOC claims that UPS failed to engage in the ADA's interactive process whereas UPS asserts that the employee(s) never asked for an accommodation. This is the second time the EEOC has attempted to challenge a set of UPS policies. The first case, Hohider v. UPS, 2009 LW 2183267 (3rd Cir. July 23, 2009) found that a group of employees hadn't shown that each individual was a qualified individual with a disability. The Seventh Circuit has already held that a "100 percent healed policy" is per se impermissible under the ADA requirement of individual assessment and the interactive process. Steffen v. Donahoe, 680 F.3d 738, 748 (7th Cir. 2012).

Related EEOC enforcement actions have included attendance policies. While regular or attendance may be established as an essential job requirement, then that attendance policy may be subject to attack if coupled with a "100 percent" litmus test for return to work. See EEOC v. Yellow Freight System, Inc. 253 F.3d943, 958-949 (7th Cir. 2001).

The bottom line is that the ADA prevents an employer from using qualification standards, employment tests or other selection or retention criteria that screen out or tend to screen out an individual with a disability unless the standard test or other criteria is shown to be "job-related and is consistent with business necessity (42 U.S.C. Section 12112(b)(6). It's the employer's burden to keep records on this issue.

What This Means to Counties

Regardless of any workers' compensation policy or practice, employers still need to have an interactive accommodation process documented. The purpose of that business documentation is to demonstrate that each person who may be perceived as having a disability, and who may be otherwise qualified for their job with or without an accommodation, has been afforded an opportunity to engage in an interactive process under the ADA. Because an ADA claimant does not have to make such a request in writing under the regulations and because being perceived as having a disability may also protected, it's risky to assume that no written ADA request equals no ADA protected status without documenting an analysis.

For more information, contact CTSI at 303-861-0507.