Legal Risks of "100% Healed" Policies

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A "100% healed" policy is one that requires employees to be released by their health care provider with no restrictions prior to returning to their jobs. These policies can violate state and federal disability discrimination laws and employers should eliminate or edit them to minimize legal exposure. This article examines the reasons these policies should change and outlines alternatives.

Disability Law Provisions

The federal Americans with Disabilities Act (ADA)[1] and the Wisconsin Fair Employment Act (WFEA)[2] require that employees with a disability be provided a reasonable accommodation, if one exists and if it does not pose an undue hardship or direct threat to safety. Reasonable accommodation is any change or modification to a job, to the way an employee performs a job, or to the work environment that allows an employee with a disability to perform his or her job.

The ADA obligates employers to engage in an "interactive process" with a disabled employee to determine what reasonable accommodations exist that permit the employee to work despite the disability. The term "interactive process" simply refers to the obligation on both the employer and the employee to have a discussion around how to accommodate an employee's disability.[3]

The WFEA does not expressly speak to an interactive process. However, court and administrative decisions have held that employers must discuss with employees what reasonable accommodations exist, and that a violation of the WFEA occurs if the employee can show that a reasonable accommodation would have been identified had the employer engaged in that discussion.[4]

How 100% Healed Policies Violate the Law

A requirement that an employee be 100% healed violates disability laws because it does not allow for interactive discussion to determine whether an employee's restrictions can be reasonably accommodated; there is nothing to discuss because the policy mandates that employees return only when they are healed.

> "An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is, be "100%" healed or recovered – if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship. Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a 'direct threat.'"[5]

The Equal Employment Opportunity Commission (EEOC) looks closely into allegations that an employee has been adversely affected by a 100% healed policy, and it has targeted employers who have these policies over the past few years. One such case is instructive.

The employee in a lawsuit filed by the EEOC against a beverage company worked as a warehouse manager. He suffered an embolism and was hospitalized. The employee requested to return to work after his health provider released him to return with lifting restrictions. The company refused the request, insisting that he be fully healed before returning to work. The employee asked for additional unpaid leave to recover enough to comply with the completely healed requirement, but was terminated instead.

The EEOC filed a federal court lawsuit against the employer in September 2019, and the EEOC's regional attorney and district director stated at that time:

> "Employers cannot simply deny a request for accommodation because of a policy; the ADA requires employers to engage in the interactive process and offer reasonable accommodation.
>
> Employers have an obligation to give individualized consideration to reasonable requests for accommodations. Too often, instead of working with an employee with a disability to find an accommodation that works for all parties, employers simply fire employees seeking accommodation instead of meaningfully engaging in the interactive process required by the ADA."[6]

Practical Application

The case illustrates employer obligations to consider all requests for accommodations, to give each one individual consideration, to engage in the interactive process, and to eliminate requirements for 100% healing prior

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to return to work.[7] Employers should rewrite policies to reflect these principles.

The law does not consider every employee with a medical condition to be disabled as that term is defined under state or federal law. However, the analysis of who meets the statutory definitions of a person with a disability is a decision best made in consultation with an employment attorney.[8]

Absent this consultation, the safest course of action is to treat a request for return to work with restrictions as one for reasonable accommodation, and to engage in an interactive discussion with the employee to determine what accommodations exist that permit the employee to perform the job despite the restrictions. Employers should document all discussions, and should train their managers to understand the obligations involved in returning an employee to work.

Conclusion

Employers should eliminate any policy or practice that requires employees to be 100% healed before they can return to work. They should rewrite policies to be flexible and allow an employee to return to work, even with restrictions, provided the employer can accommodate those restrictions without undue hardship or posing a direct threat to safety.

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1. 42 U.S.C. §§ 12101 et seq.
2. Wis. Stat. §§ 111.31-111.395.
3. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002).
4. *Schulz v. Wausau Sch. Dist.*, ERD Case No. CR200703497 (LIRC 4/30/2012).
5. Equal Employment Opportunity Commission, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016); see also *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958 (7th Cir. 2014) (permitting an employer to require that an employee be 100% healed would negate the ADA's requirement that an employer provide reasonable accommodation if it enables an employee to perform his job).
6. https://www.eeoc.gov/newsroom/eeoc-sues-allstate-beverage-disability-discrimination
7. For the same reasons expressed in this article, employers should not have mandatory leave cut-off policies, for example, a policy that calls for an employee's termination after 12 weeks of leave. These policies have been deemed unlawful by the EEOC as well.
8. A common misconception is that work comp injuries are not covered by disability laws; however, work-related injuries are subject to the same analysis under disabilities laws as any other medical condition.

Did you know? The published Legal FAQs are taken directly from the extensive library of resources on the League's website. Have a question? Try the search function on the website and get an answer. http://www.lwm-info.org

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What is the Board of Review?

The Board of Review (BOR) is a statutory board responsible for correcting any errors in assessment that have been made by the local assessor. The BOR's primary duties are set forth in Wis. Stat. § 70.47(6) and include examining the assessment roll for omitted property and double assessments, correcting any errors or omissions in the descriptions or computations found in the assessment roll, and adjusting assessments when they have been proven incorrect by sworn oral testimony. (new 2/21)

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What is the Open Book period?

Open Book is the period of time during which the assessment roll is open for examination by the public. Wisconsin Stat. § 70.45 requires that a class 1 notice be published, or posted if applicable, under ch. 985 at least 15 days before the first day on which the assessment roll is open for examination informing the public that the assessment roll will be open for examination by taxable inhabitants on certain days named therein. The assessor must be present for at least 2 hours while the assessment roll is open for inspection and instructional material under § 73.03(54) shall be available at the meeting. Upon examination, the commission of assessments (1st class cities) or assessor(s) may make changes necessary to perfect the assessment roll. After corrections are made, the roll is submitted by the commissioner of assessments or the municipality's clerk to the Board of Review. (new 2/21)

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When is the Board of Review's first meeting?

State law requires the Board of Review (BOR) to meet annually any time during the 45-day period beginning on the 4th Monday in April, but no sooner than 7 days after the last day of the Open Book. Wis. Stat. § 70.47(1). Current state statutes authorize the BOR to meet within the statutory time frame and then adjourn if the roll is incomplete. Wis. Stat. § 70.47(3). At least 15 days before the first BOR session, or at least 30 days before the first session in any year in which a revaluation under Wis. Stat. § 70.05 is conducted, the clerk of the BOR shall publish a class 1 notice under ch. 985 of the time and place of the first meeting under § 70.47(3) and of the requirements under § 70.47(7)(aa) and (ac) to (af). (new 2/21)

See Board of Review Training Requirement on page 34.