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Blanket Policies Can Increase Your Risk of A Class Action Lawsuit

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(Healthcare Update, No. 4, November 2010)

Generally, employees have not been successful in trying to bring class actions under the Americans with Disabilities Act (ADA). The reason is that – unlike Title VII or the Age Discrimination in Employment Act – it's not enough for an employee to belong to a protected class. Under the nondiscrimination provisions of the ADA, an employee must be a "qualified individual with a disability." Determining whether the class members are all qualified generally forecloses treating them as a class.

On the other hand, the ADA's prohibition of pre-employment medical examinations, does not require that the employee or applicant be a qualified individual with a disability. Neither does the section of the law that requires that the results of such examinations be kept confidential. It requires only that the plaintiff be a job applicant or an employee. Thus, an employer that requires applicants to submit to medical inquiries, or to medical examinations that are not job related and consistent with business necessity, stands a greater chance that a court will allow a class action against it to proceed.

Bring On The Plaintiffs

On August 25, 2010, Renee Atkinson-Bush filed a class action lawsuit against her former employer, Baltimore Washington Medical Center (BWMC), which required employees who missed more than three days in a row to submit to a medical examination before being allowed to return to work.

Atkinson-Bush's physician had released her to return to light duty work, which she had been doing for the year preceding her need for leave. When the hospital's in-house physician examined her, he did not have her job description, did not discuss her job responsibilities with her, and did not discuss any possible accommodations, according to the complaint.

A few days after the return-to-work examination, the hospital advised Atkinson-Bush that the physician had placed her on disability leave and would not permit her to return to work. Additionally, according to the lawsuit, the in-house physician discussed her medical condition with other BWMC employees in violation of the ADA's confidentiality provision. The complaint seeks class treatment for all current and former employees during the past three years who took three or more medical leave days.

A uniform policy like the one alleged above potentially violates the ADA. That's because the ADA permits an

employer to make medical inquiries of an employee and to require employees to undergo fitness-for-duty examinations where job related and consistent with business necessity.

"Job related" deals with the scope of the examination, while "business necessity" deals with need. Consequently, any medical examination or inquiry must be narrowly-tailored to seek only that information necessary to determine whether employees can perform their job, whether they are a direct threat, whether they have a disability, or whether an accommodation would allow them to perform their essential job functions. Blanket policies that require employees to submit to a medical examination increase the risk that the job-related and consistent-with-business-necessity test will not be met.

The Commission's View

The EEOC has stated that the job-related and consistent-with-business-necessity requirement may be met when the employer has a reasonable belief, based on objective evidence, that 1) an employee may pose a direct threat; or 2) an employee's ability to perform essential job functions will be impaired by a medical condition; and 3) when required by federal law. The degree of evidence necessary to support the fitness-for-duty examination may vary depending on the functions of the job. Jobs that involve public safety, e.g., police officers, firefighters, physicians, may require less evidence than less safety-sensitive jobs.

Summing It Up

You may require a medical examination for an employee who has requested an accommodation only in certain limited circumstances; specifically, only if the information that the employee's physician has provided is insufficient to establish that the employee is disabled and needs a reasonable accommodation. But before doing so, you must explain why the information provided is insufficient and give the employee the opportunity to provide the requisite information. The best course of action to take in such a situation is to prepare a medical inquiry to the employee's physician to obtain the necessary information.