

New York Employers Should Exercise Caution When Requiring Medical Documentation After Sick Leave

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To guard against abuse of sick leave, many employers have promulgated sick leave policies that require an employee to provide medical documentation verifying an illness or injury after a sick leave absence. The passage of the Americans with Disabilities Act (“ADA”) in 1990 forced employers to evaluate and revise those policies to ensure compliance with the ADA’s prohibition against medical inquiries. A recent decision of the United States Court of Appeals for the Second Circuit (the federal appeals court that covers the State of New York), *Fountain v. New York State Department of Correctional Services*, 333 F.3d 88 (2d Cir. 2003), may force employers to further evaluate and revise their sick leave policies.

The Lawsuit

Plaintiff Belinda Fountain filed her lawsuit alleging that her employer’s sick leave policy violated the ADA as it required her to provide a diagnosis of her medical condition each time she returned from sick leave. On its face, the employer’s sick leave policy required employees returning to work after taking any sick leave, regardless of duration, to provide medical documentation upon the request of a supervisor. The policy also required that the medical documentation be on the treating physician’s letterhead, signed by the treating physician, and contain: (1) a brief diagnosis of the condition treated; (2) a statement that the employee was unable to work during the absence; and (3) a prognosis.

The trial court granted Ms. Fountain’s motion for summary judgment, holding that the employer’s policy violated the ADA, which prohibits an employer from making “inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such . . . inquiry is shown to be job-related and consistent with business necessity.” The court found that by asking for a brief diagnosis of the condition treated, the employer made a prohibited medical inquiry that could result in an employee divulging information related to a disability or the nature or severity of a disability. The court also found that because the employer did not show a reasonable business justification for having such a

broad sick leave policy that gave supervisors the discretion to obtain this type of restricted medical information, even for absences of only one day, the policy was unlawful.

The Decision On Appeal

On appeal, the Second Circuit affirmed in part, but reversed the ultimate grant of summary judgment to allow a more complete record to be developed. Although the appeals court held that the employee's claim raised some fact issues which should not have been decided on summary judgment, the appeals court made clear that sick leave policies such as those promulgated by the employer will be given close scrutiny. The appeals court concluded that a request for even a general diagnosis is a prohibited inquiry (because it may lead to information disclosing a disability) which must be justified by business necessity to be lawful. On the other hand, the court suggested that it is lawful for an employer to ask employees about their general well-being and whether they can perform job functions without running afoul of the ADA's restrictions. For example, it appears that an employer may routinely ask for a treating physician's assessment of whether an employee returning from sick leave is able to perform the essential functions of the job, either with or without reasonable accommodations. However, an employer may not ask for a diagnosis (either general or specific) of the condition for which the employee was treated, absent a showing that such an inquiry is job-related and consistent with business necessity.

In this case, the employer argued that its policy and the manner in which it implemented its policy was job-related and consistent with business necessity. Specifically, the employer urged on appeal that it only required a medical certification with a general diagnosis after an absence of four or more days or in cases involving known attendance abusers. With respect to the first situation, the employer argued that the certification is necessary to determine whether the returning employee can safely perform his or her job without posing a risk to other employees. In the second situation, the employer argued that requiring a medical certification is necessary to determine whether an employee's absence is due to legitimate medical reasons. The appeals court held that these arguments might provide a justification for the requirement, but that could not be determined without resolving factual issues relating to whether the employer's implementation of its policy was limited to these situations and whether there was in fact a correlation between the employer's implementation of its policy and the objectives it claimed to

seek. However, the appeals court made clear that it will closely examine an employer's assertions of business necessity and will require that employers show that an inquiry is both vital to its business and minimally intrusive toward employees before the policy will be found lawful under the ADA.

The Second Circuit stopped short of holding that the ADA "categorically prohibits" an employer from having a policy requiring that its employees produce a medical certification after sick leave absences. However, the court made clear that if an employer requires medical documentation that includes even a general diagnosis, the employer must be able to show that such a policy is not applied in an overly broad fashion, and that the policy is job-related and consistent with business necessity. The appeals court indicated that asking an individual employee to provide a diagnosis could meet the business necessity standard if, among other things: (1) the employer has legitimate, nondiscriminatory reasons to doubt the employee's ability to perform his or her duties (such as because of the length of an absence or the existence of a known condition that had previously affected the employee's work); or (2) the employer has specific reason to suspect abuse of an attendance policy (such as frequent absences or a pattern of sick leave absences on Mondays or Fridays). The appeals court also indicated that a general policy applied to an entire class of employees (as opposed to a particular individual) may be lawful if the employer can show that it has legitimate business reasons for defining the class in the manner that it has. For example, if an employer can show that it has a reasonable basis for concluding that employees who are absent for four days or more pose a genuine health or safety risk and that requiring a general diagnosis decreases that risk effectively, the employer may properly define the class of employees as those who return from a sick leave absence of four days or more. However, in each case the employer must be able to demonstrate a correlation between the policy and its business justification.

Lessons For Employers

Based on the Second Circuit's *Fountain* decision, employers should carefully scrutinize their sick leave policies and the manner in which they apply these policies to ensure compliance with the ADA. It is unlikely that a broad policy requiring a diagnosis every time any employee returns from sick leave of any duration will be upheld as lawful. On the other hand, a policy

requiring a diagnosis only from those employees who have previously received warnings for abusing sick leave may be found lawful. Similarly, a policy requiring a diagnosis only from those employees who return from sick leave of an extended duration (as an extreme example, 30 consecutive days) is more likely to be upheld as lawful because such an extended absence provides a more reasonable basis to question the ability of those employees to perform their job without posing a health or safety risk. In this latter case, there is no bright line rule for how long a sick leave absence must be to justify requiring a diagnosis; the appropriate duration of the sick leave absence may be dependent upon each employer's own experience and circumstances. However, it seems clear from the appeals court's decision that requiring that type of restricted information for absences of only one day will not work.

The information contained in this column is not a substitute for professional counseling or advice.

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