

100% healed back-to-work rule could backfire

Do you have a companywide policy that requires all workers who are out on leave to get a doctor's certification that they are completely healed before they can return to work?

Such a rule may run afoul of the ADA if an employee has become disabled and needs more time off as a reasonable accommodation. Refusing to let workers come back to work unless they have fully recovered may also constitute retaliation for taking FMLA leave.

Even worse, a 100% healed corporate policy could spur a nationwide class-action lawsuit.

Recent case: Matthew worked as a general manager for a Petco store in New Mexico. He took FMLA leave to deal with a medical condition that occasionally flared up. A few months later, his doctors cleared him to work with restrictions.

That's when he ran up against the company's 100% healed rule. He was terminated without being reinstated and sued, alleging violations of both the ADA and FMLA.

During discovery, Matthew's attorneys demanded documents about every employee nationwide who had ever been involuntarily discharged after taking FMLA leave, either because they didn't ask for a reasonable accommodation or couldn't certify they were 100% healed.

Matthew's attorneys also demand-ed access to every response Petco had ever filed in other cases involving the ADA and FMLA.

Petco protested that this information was not relevant to Matthew's case, but the court disagreed. It said evidence of how a company treated other workers was relevant to determining its intent to discriminate or to see if there was a pattern of retaliation.

Because Petco's 100% healed policy applied company-wide, the court wanted to know about all the times the company terminated workers for not providing the certification or an accommodation. (*Donlin v. Petco Animal Supplies*, DC NM, 2017)

Bottom line: An inflexible, corporate-wide 100% healed policy spells trouble.

Advice: Consider changing the rule to one that allows deviation for disabled workers as well as those who seek reinstatement after FMLA leave with some medical restrictions.