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Medical Diagnosis Requirements in Doctor's Notes: Recent Decision May Tip the Scales in Favor of Privacy Protection

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Often employers require doctor's notes if employees are required to use sick leave for extended periods of time. However, a recent trend has arisen where employers are requiring employees to disclose their specific illness or a "medical diagnosis" along with a doctor's note before they are allowed to return to work. This requirement, however, may run afoul with the American's with Disabilities Act (ADA).

Employers and labor organizations are sometimes at odds as to whether a medical diagnosis can be required of employees returning to work. Employees and labor organizations argue that this sort of inquiry is specifically prohibited by the ADA, while some employers interpret the ADA as not prohibiting a diagnosis in a doctor's note. Some employers have even gone as far as firing employees who refuse to provide such a diagnosis. Several recent developments may provide some clarity on the issue and may tip the scale toward employee protection for undecided states.

Recently, a District Court in California held that a private employer's return-to-work policy requiring a doctor's note which stated "the nature of the absence (such as migraine, high blood pressure, ect....)" was impermissible as it violated the Americans with Disabilities Act. *See Order Denying Defendant's Motion for Summary Judgment, US EEOC v. Dillard's*, case # 3:08-cv-01780 (S.D. Cal. February 9, 2012). In that case, an employee was absent from work from May 29 to June 3. She provided a doctor's note to her supervisor upon return to work; however, this note did not describe the nature of her absence. The employee refused to provide any further documentation and was terminated.

In *Dillard's*, the EEOC brought suit on the aggrieved employee's behalf along with some 60 other employees it claimed were subject to the employer's unlawful policy. The Court, in denying the employer's motion for summary judgment, made several decisive holdings regarding an employer's right to require a diagnosis in a doctor's note. Namely, the Court stated, "[we conclude] Dillard's Attendance Policy, on its face, permitted supervisors to conduct impermissible disability-related inquiries under [the ADA]". *See Order*, Page 7. The Court further held that even a general, unassuming request still "'may tend to reveal a disability'" and is impermissible under the ADA. *See Order*, Page 8.

The *Dillard's* Court came to its conclusion by holding in-line with a Court of Appeals decision in *Conroy v. New York Department of Correctional Services*, 333 F.3d 88 (2d Cir. 2003). *Conroy* stands for one definitive side of the coin, siding in favor of protection for employee diagnosis information. The *Conroy* decision was handed down in the Second Circuit Court of Appeals covering New York, Connecticut, and Vermont and other courts have already followed suit. In Pennsylvania, a U.S. District Court also followed in-line with the *Conroy* decision, holding that the Pennsylvania State Police's policy requiring officers to disclose the "nature of

their illness" when requesting sick leave violated the ADA. *Pennsylvania State Troopers Association v. Miller*, 621 F. Supp. 2d 246 (M.D. Pa. 2008).

A minority of courts, however, disagree with the *Conroy* decision. In *Lee v. City of Columbus*, the Sixth Circuit Court of Appeals covering Ohio, Michigan, Kentucky, and Tennessee, expressly disagreed with *Conroy*, holding that a City's policy requiring returning employees to state the "nature of the illness" did not necessarily tend to reveal whether an employee was disabled and was permissible. *Lee v. City of Columbus*, 636 F.3d 245 (6th Cir. 2011). In Virginia, a U.S. District Court distinguished its case from *Conroy*, holding that an inquiry into the reasons why an employee used sick leave "was not likely to elicit information about a disability" and did not invoke protection under the ADA. *Montano v. Inova Health Care Services*, 2008 WL 4905982 (E.D. Va. 2008).

Which of these two competing interpretations will govern is uncertain in a number of undecided states. However, the *Dillard's* case strongly suggests that the U.S. District Courts in California, as well as potentially the Ninth Circuit Court of Appeals which covers California, Nevada, Arizona, Oregon, Washington, Idaho, and Montana, would support the *Conroy* holding in favor of employee privacy. Adding another Circuit in support of *Conroy* may act to persuade undecided jurisdictions that requiring medical diagnosis in return-to-work policies is impermissible under the ADA.

Another weight which may tip the scales in favor of employee privacy for other undecided jurisdictions is the position expressed by the EEOC in *Dillard's*. The EEOC is tasked with enforcing federal laws that make it illegal to discriminate against an employee because of the person's protected class, as well as interpret and provide guidance regarding these laws. In filing the *Dillard's* lawsuit, the EEOC made several strong interpretations of the provisions of the ADA favoring employee privacy. Additionally, in September 2008, the EEOC issued a press release regarding the *Dillard's* litigation and its position and interpretation of the applicable portions of the ADA. This press release stated, "[t]he EEOC contends [Dillard's] corporate policy, potentially effecting thousands of workers, is an unlawful disability-related inquiry under the ADA and not justified by a business necessity." Further, an EEOC Regional Attorney was quoted in the press release as stating, "[t]he ADA's prohibition of disability-related inquiries was enacted to protect employees from being subjected to harmful and unfounded stereotypes on the basis of a perceived or actual medical illness."

This issue is not yet settled. If you reside in a jurisdiction where this issue has yet to be litigated, you should err on the side of producing a medical diagnosis, if ordered to do so. However, the EEOC's position and the recent holding in *Dillard's* may help persuade employers to respect their employees' privacy should the issue arise. Be sure to keep informed regarding any developments in your jurisdiction, as this issue continues to be highly contested.