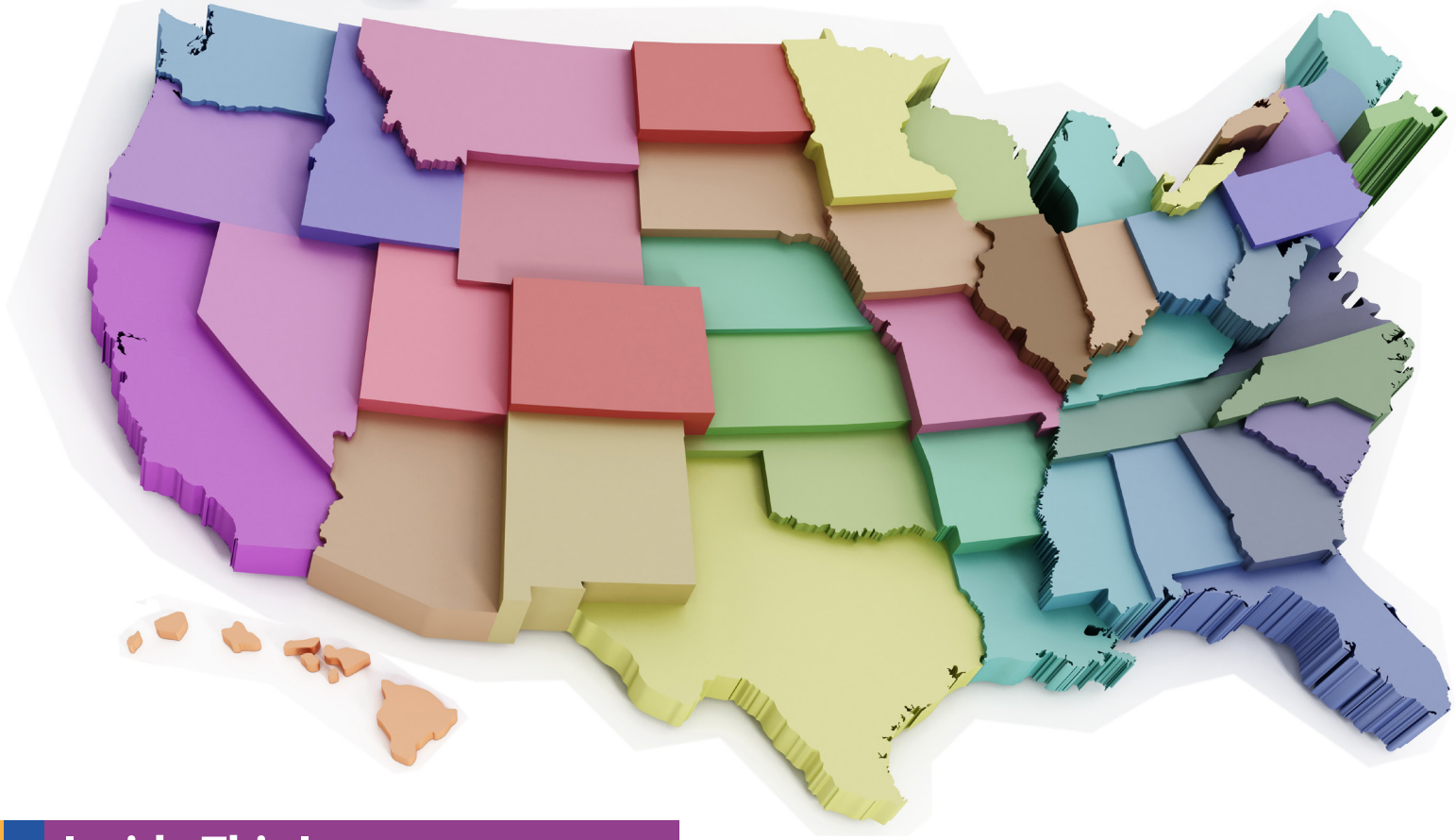
MARCH 2018 | VOL 10 NO 2

@work

Official Publication of Disability Management Employer Coalition

Employment Practices Compliance



Inside This Issue:

DMEC Disability Management Employer Coalition

Rachel Shaw, JD
CEO and Principal
Shaw HR Consulting

When a Fitness-for-Duty Examination Is the Appropriate Tool

An employer can coordinate a fitness-for-duty (FFD) examination with a qualified healthcare provider if the need is job-related and consistent with business necessity and objective facts,[1] if there are concerns about safety, or if an employee is not fully performing the job duties.

The Equal Employment Opportunity Commission (EEOC) requires an employer to have "reasonable belief" based on "objective evidence" that an employee's work may be impacted by a disability. Concern for an employee's general welfare is not grounds for an FFD exam, and using an FFD exam on accepted workers' compensation claims usually just duplicates an expense already incurred.

An FFD exam would not be used unless an employee's workplace performance or actions have triggered the Americans with Disabilities Act (ADA), and there is concern the actual or perceived medical condition is affecting the employee's ability to fully or safely perform the work assigned. Finally, the employer is only allowed two lines of inquiry:

1) Whether the employee has a disability that substantially limits performance at work, and if so, what the employee's *work restrictions*, functional limitations, or leave needs are

2) The *duration* of said restrictions, limitations, or leave needs

Since FFD exams are expensive, you want to be sure they are needed and there are no alternatives to clarify what the employee may or may not require to perform the job fully and safely. Below are some examples where FFD exams would be recommended and why.

1) Amy's doctor restricted her from "stressful work experiences." What does that include? Until the employer knows, it cannot begin to explore reasonable accommodations.

Recommendation: Place Amy off work during this process as you cannot be sure how to keep her safe at work and ensure a non-stressful experience. To keep the process timely and obtain the clarification needed, first ask her healthcare provider to clarify what "stressful work experiences" are. If the reply is unclear or her provider won't clarify, consider an FFD exam to be able to proceed with making reasonable accommodation decisions.

2) Darin was informed he would be terminated for sleeping on the job. At his termination meeting, Darin brings a medical note indicating he had "a sleep disorder that caused him to fall asleep at work" but is now "completely recovered and will never sleep on the job again." Darin had never told his employer he had a medical condition. The employer has reason to doubt the legitimacy of the note and has a business need to quickly address the claim before termination is implemented.

Recommendation: As frustrating as it is, you are strongly encouraged to pause discipline[2] and start the disability interactive process. You can ask his healthcare provider to review the disciplinary charges to confirm whether they are related to a serious medical condition and whether they can be totally mitigated with reasonable accommodations. Or you can skip his provider and go straight to an FFD exam. Either way, for Darin to be protected from termination, the behaviors/actions must have been caused by a disability and there must be reasonable accommodations to ensure the negative behavior will not occur again. That is a tall order for sleeping on the job. An FFD exam would likely result in useful information to help the organization proceed with making the right choice on discipline.

References

1. The EEOC's objective fact guidance can be retrieved from https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

2. *Gambini v. Total Renal Care, Inc.*, 9th Circuit Court of Appeals, 2007. "Conduct resulting from a disability is part of the disability and not a separate ground for termination."