When Cancer Comes to Work

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1.688 million cancer diagnoses in 2017 (National Cancer Institute)

15.5 million cancer survivors expected to rise to 20.3 million by 2026
Diagnosis Can Be A Very Difficult Time:

Tips for the Employee
Handling Diagnosis

• Follow-up appointment after initial shock of diagnosis subsides
• Focus on your health first; ask your doctor key questions
• Understand how the condition and treatment may affect your work (request need for accommodation from your doctor)
• What to do about your job?
Whether to Tell Your Employer That You Have (or a Family Member Has) Cancer

- Factors to consider:
  - The type of workplace: friendly and close-knit or formal and business-focused?
  - Your relationship with co-workers
  - Past practice in handling similar situations
  - Nature of prognosis
## Pros and Cons of Telling Employer About Diagnosis

<table>
<thead>
<tr>
<th>Pros</th>
<th>Cons</th>
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<tbody>
<tr>
<td>Facilitates need for accommodation, if necessary</td>
<td>Fear of retaliation</td>
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<tr>
<td>Can address possible misunderstandings</td>
<td>Fear of isolation</td>
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<td>Leave (paid or unpaid) or flex-time</td>
<td>If employer does not know about diagnosis and your work is affected, may be seen as poor work performance</td>
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<td>Employer can help educate you on benefits options</td>
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<td>Support from your professional community</td>
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<tr>
<td>Employer cannot use disability-related performance issues as “poor performance”</td>
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## Leave Benefits and Overview of Applicable Laws

<table>
<thead>
<tr>
<th>Law</th>
<th>Employers Subject to Law</th>
<th>Leave Available</th>
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<tbody>
<tr>
<td>ADA</td>
<td>15+ employees</td>
<td>No Limit</td>
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<tr>
<td>WLAD</td>
<td>8+ employees</td>
<td>No limit</td>
</tr>
<tr>
<td>FMLA</td>
<td>50+ employees</td>
<td>12 weeks</td>
</tr>
<tr>
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Diagnosis Can Be A Very Difficult Time:

Tips for the Employer
How You Can Support Your Employees

- Show compassion – “Your focus now should be on your health”
- Listen without agreeing or disagreeing
- Explain leave and other benefits available
- Assign an HR rep that the employee can call directly
- Identify a helpful family member who may help with forms
How You Can Support Your Employees

• Explain Open Door complaint process and Anti-Retaliation policy
• Discuss how employee wants to handle sharing news, if at all
• Don’t forget the employee even when they are not at work!
Avoiding Liability: Interactive Process

• Train managers on disability interactive process and begin process
• EEOC Guidance Memorandum:

“[An] employer must provide a reasonable accommodation that is needed because of the limitations caused by cancer itself, the side effects of medication or treatment for the cancer, or both.”
Avoiding Liability: Interactive Process

• Once employer identifies information necessary to propose reasonable accommodations, employee’s failure to provide it violates the requirement to engage meaningfully in the interactive process.

• Deprives employer of opportunity to provide appropriate accommodation:
  o **Example:** *Hayes v. Walmart Stores*, Dist. Court, D. Oregon 2011: employee refused to complete accommodation form identifying substantial limitations and needed accommodations.
  o **Outcome:** Court held plaintiff’s refusal to provide necessary medical documentation deprived defendant of fair notice that he was limited by disabilities and was seeking accommodations because of such limitations.

• Failing to give employee disability and medical leave as accommodation can lead to significant and financially disastrous results (*Jorud v. Michaels*)
Interactive Process: Tips for the Employee

- Understand the disability interactive process (*Anderson v. Kaiser Foundation Health Plan of the Northwest*)
- Employee must actively participate in the interactive process
- Interactive process requires communication and good-faith exploration of possible accommodations between employer and employee—neither side can delay or obstruct the process
- Participation in the interactive process is a continuing obligation
- Failure of an attempted accommodation does not excuse an employer from further participation in the interactive process
Handling Side Effects of Treatment
Accommodations for Side Effects of Cancer and Medication

• Chemotherapy and side effects (American Cancer Society)
  o “Chemo brain” Short-term memory lapse—forgetting things usually remembered
  o Difficulty concentrating—loss of focus, limited attention span
  o Difficulty word finding—names, completing sentences, searching for words despite available cues
  o Difficulty multi tasking
  o Slower thinking/processing
Accommodations for Side Effects of Cancer and Medication

• From perspective of oncologist/hematologist, Dr. Janet R. Hosenpud
  o Chemo brain can last 6-12 months
  o Brain not firing on all cylinders (foggy)
  o Could not find word for watch while staring at it
  o Directed pharmacist to double check prescriptions

• Liability for regarding as disabled and record of disability
  (Eshelman v. Agere Systems, Inc. (3rd Cir. 2009))
Handling Impact of Drugs Used During Treatment
Cancer Treatment and Zero Tolerance Workplace Drug Policy

- State Supreme Courts and Federal Courts that have ruled on issue held: Employer may fire employee who tests positive for THC—medical marijuana is Schedule I drug and illegal
- How to reconcile zero tolerance policy with compassion toward employee and potential for violation of Federal Drug-Free Workplace Act
  - But, see Connecticut Federal case Noffsinger v. SSC Niantic Operating Co. LLC
Cancer Treatment and Zero Tolerance Workplace Drug Policy

• Do not be too quick to terminate employee undergoing chemotherapy who tests positive in random drug screen

• Marinol—the legal Schedule III synthetic THC prescription has half life of 25-36 hours; metabolites can persist up to five weeks

• EEOC has also taken the position that inquiring into prescription medication taken by disabled employee may be done only in very limited circumstances involving public safety considerations
Cancer Treatment and Zero Tolerance Workplace Drug Policy

• You may enforce zero tolerance policy—obtain explanation from employee why tested positive for THC

• If employee provides evidence of prescription for Marinol (or Naboline—another legal Schedule II synthetic), then no violation of drug policy
Questions?