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3 Key P's For Minimizing Liability For Employee Health Issues

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We often remind employers here about the importance of not rushing into adverse employment actions against employees with health issues. For example, see ['Play It Safe' I](#), [II](#) and [III](#) from earlier this year. In my opinion, employers who play the game right can get one of the following good results a high percentage of the time:

- Employ a dedicated employee in a way that maximizes her abilities and benefits the company.
- Work an employee who really doesn't want to maximize her abilities out of the company without significant risk of liability.
- Compassionately separate from an employee whose health makes it impracticable to continue working, at least until she is able to work again.

So it is a missed opportunity when employers rush into decisions and complicate one of these good results with potential liability. Indeed, I think it is the most [common employer mistake](#) when it comes to employment law issues. Of course we understand decisionmakers' urgency to have a team of

productive employees to help them meet the production demands being placed on them, but from a distance and with the benefit of hindsight over many employers' decisions, we can see that the payoff of working through a situation a little farther is great. To that end, and to consolidate this broader point into a sound bite, I often give employers the 3 P's for minimizing liability when it comes to employee health situations:

PROACTIVE:

If you read through some of those linked posts, you will see that employer's potential liability goes down with each interaction or communication with the employee. It shows the employer is working to solve the problem, whether in the technical sense of proving reasonable accommodation under the ADA, or just being able to tell a [good story in an FMLA](#) or other kind of dispute. The sooner you start these communications, the sooner you can safely end the relationship if that is going to be the result.

PATIENT:

I often tell employers – I know it's tough but when you think you have done enough to be fair to the employee before moving to a termination, take one more step. That rule of thumb is a good liability avoidance rule in many situations.

PERSISTENT:

Having said that, that does not mean the employer should be passive. If the employee is not responding to reasonable requests for information to assist the employer in fulfilling its legal obligations, ask again and document that the employee is not responding. If the employee's physician offers vague information scratched on a prescription pad rather than filling out your form, ask again. If the employee's physician won't give you the information you need, find another one. Work with counsel to make sure you are not overstepping under the laws, but don't wait to make your next permissible move to keep the process going.

Following the 3 P's will help keep employers out of ADA and FMLA and other trouble.