Complying with the Americans with Disabilities Act: Practical Considerations for Employers

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Introduction

The Americans with Disabilities Act ("ADA") was enacted to protect qualified individuals with disabilities, making it unlawful to discriminate against a "qualified" individual in hiring and terms of employment. As the ADA does not provide concrete examples of many of its crucial elements, employers can easily become confused about what is/not allowed under the ADA.

This article summarizes main provisions of the ADA and gives specific examples of key terms such as "qualifying disability," "major life activities," and "reasonable accommodation."

Covered Employers

The ADA applies to employers of 15 or more employees, including state and local governments, employment agencies, labor organizations, and joint labor management committees.

Disability, Defined: Substantial Limitation

Under the ADA, a person is considered disabled if he/she has a physical or mental impairment that "substantially limits" one or more "major life activities."

Major life activities are essential activities including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. A "substantial limitation" is an inability or significant restriction on the ability to perform a major life activity.

Determining whether an individual is "substantially" limited in a major life activity requires examination of the nature and severity of the claimed impairment, its probable duration, and expected long-term impact of the impairment.

Qualified Employee

A "qualified" employee, i.e., one protected under the ADA, is an individual who, with or without reasonable accommodation, can perform the essential functions of a particular job.Generally speaking, employers are obligated to provide "reasonable accommodation" to qualified disabled individuals, unless to do so would impose an undue hardship on the employer's business.

An individual who cannot perform the essential functions of the job even with a reasonable accommodation, by contrast, is not a "qualified" employee and is therefore not protected by the ADA.

Perceived as Disabled

The ADA also prohibits discrimination against applicants and employees who are "perceived" or "regarded" as having a disability. However, there is a split in authority as to whether an employer must provide reasonable accommodation to an employee who is "regarded" as having a disability.

Reasonable Accommodation

Whether an accommodation is "reasonable" is case and fact-specific. Factors considered include the degree of disability, the employee's job duties, and the size of the employer. An employer is not required to lower its quality nor to provide personal use items such as glasses or hearing aids.

"Reasonable accommodation" may include:

- Making facilities readily accessible to employees with disabilities;
- Job restructuring, including shifting responsibility to other employees for minor job tasks an employee cannot perform because of a disability
- Altering when and/or how a job task is performed
- Modified work schedules, including altering starting and ending work times, providing periodic breaks, or adjusting the time when certain tasks must be performed
- Temporary transfers
- Unpaid leaves of absence
- Allowing an employee to use accrued paid leave
- Reassignment to a vacant position of equal pay and status if the employee is qualified
- Acquisition or modification of equipment or devices
- Appropriate adjustment or modifications of examinations, training materials or policies; and
- Providing qualified readers or interpreters.

Some practical examples of accommodation are:

- More frequent breaks to an diabetic employee to monitor blood sugar and insulin levels
- Amplification devices for the hearing impaired
- Work station modification
- Office equipment for an employee to work at home
- Telephone access for an alcoholic in recovery during working hours to contact a sponsor, even if telephone use for personal business is against policy
- Sign language interpreters for an interview
- Written materials in alternative formats such as Braille or larger print
- Voice recognition software for easier use of computers
- Ramps, widening a doorway or reconfiguring work space
- Ergonomically-correct equipment
- Parking or a closer parking space.

Undue Hardship: No Accommodation Required

An employer is not required to provide reasonable accommodation if doing so would impose an "undue hardship"on the operation of the business; i.e., significant difficulty or expense. Factors to be considered in determining whether an accommodation would impose an undue hardship include:

- Nature and cost of the accommodation
- Financial resources of the employer
- Number of its employees; the number, type, and location of its facilities; and
- Type of operation, including the composition, structure, and functions; the geographic separateness, administrative, or fiscal relationship of the facility in question.

The employer has the burden of proving undue hardship.

Required: Good Faith Engagement In Informal Interactive Process

When an employee requests accommodation, the employer must engage in a good faith "informal, interactive process" to identify limitations caused by the disability and potential reasonable accommodations to overcome them.

Impermissible Inquiries

An employer may not ask a job applicant about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions to determine if the applicant is "qualified." A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Employer Cannot Retaliate against the Employee

An employer may not retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in an investigation, proceeding, or litigation under the ADA.

If the termination or other adverse employment action occurred after a request for accommodation or a complaint that an accommodation was not provided may provide a basis for a claim of retaliation. Timing of such actions can give credence to such a claim. An employer must be careful about taking adverse employment action against an employee who has requested an accommodation or recently notified the employer of a disability.

No Preemption

The ADA does not preempt state or local laws that provide greater protection than the ADA. An employer may be required to meet different and more expansive standards at a state or local

level. In California, for example, the definition of disability is a condition which limits a major life activity – not substantially limits. A person is "limited" in a "major life activity" if the disability makes the achievement of that activity "difficult."

Disabilities for Which "Accommodation" Must Be Provided

Certain medical conditions require an employer to provide reasonable accommodation. Whether the disability places substantial limitations on the employee's ability to work is irrelevant. The following conditions are disabilities requiring accommodation under the ADA:

- AIDS/HIV
- Cancer, heart disease, and other terminal illnesses
- Impotence or any condition that limits sexual relations or procreation
- Diabetes
- Asthma
- Dyslexia and learning disabilities
- Severe arthritis
- Bipolar disorders and paranoid schizophrenia
- The inability to perform cognitive functions on the level of an average person
- Depression, anxiety, and obsessive-compulsive disorders that substantially limit the ability to think and concentrate
- The inability to care for oneself; and
- Anxiety disorders and panic disorders which affect "major life activities," such as sleeping and engaging in sexual relations.

Conditions That Are Not Disabilities

The statute provides that certain conditions are conclusively not covered by the ADA. They are homosexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders.

Alcoholism and Drug Use by Employees

Alcoholism may be a "disability" under the ADA if it substantially limits a major life activity. Accordingly, an employer may not make an adverse employment decision simply because the employee is or is perceived to be an alcoholic. However, an employee who is abusing alcohol or drugs can be held to the same standards for job performance and behavior as other employees "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee."

A former addict may be treated as disabled if he/she has successfully completed or is participating in a rehabilitation program and is no longer using drugs. The employee must refrain from the use of the drug to be protected by the ADA. Employers are entitled to "seek reasonable assurances" that employees are not using drugs at present or in the recent past.

An employer may have to provide time off work for rehabilitation sessions, counseling, or other treatment.

An employee currently using or addicted to drugs is not protected by ADA. An employer may:

- Prohibit all illegal use of drugs and the use of alcohol at the workplace by all employees
- Require that employees not be under the influence of alcohol or the use of illegal drugs at the workplace
- Hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same standards and qualifications as other employees, even if the unsatisfactory conduct, performance or behavior is related to the drug use or alcoholism.

Unreasonable Accommodations

The question of what is a reasonable accommodation is usually a question of fact. The following have been held to be unreasonable accommodations:

- Creation of position for disabled employee who is unable to perform the essential functions of the position for which he/she was hired
- Conversion of a temporary rotating position into a new full time position as an accommodation for an employee whose disability has become permanent. The ADA does not require an employer who has set aside a pool of positions for recovering employees to make those positions available indefinitely to an employee whose treatment has failed to restore the employee to his or her original healthy state. A person is "otherwise qualified" for ADA purposes only if she can perform one of the regular jobs, with or without accommodation. The ADA does not require an employer to create a new position as a "reasonable accommodation;"
- "Bumping" other employees to accommodate the disabled employee
- Promoting an individual with a disability as an accommodation
- Violating the seniority rights of other employees in a collective bargaining agreement to accommodate a disabled employee
- Excusing "erratic, unexplained absences." In most cases, attendance is a basic requirement of the job. Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions. However, if an employee is able to perform the job by working from home, working from home may be required as a reasonable accommodation.
- Requests for unlimited sick days without being penalized. However, providing a leave of absence to an employee may be required.

Conclusion

The United States Equal Employment Opportunity Commission determined that most accommodations are not expensive. One fifth of them cost nothing. More than one half only cost between $1.00 and $500.00. Often there are tax credits available to the employer to assist in providing the accommodation.

In contrast, defending a lawsuit for discrimination, retaliation or failure to engage in good faith in the interactive process will cost an employer tens of thousands of dollars in defense costs

alone and expose it to punitive damages which may be in the millions of dollars. In addition, upon a finding in his or her favor, a prevailing employee may recover reasonable attorneys' fees.