

management matters

'Reasonable Accommodation' Under the ADA

By Jonathan A. Wexler, Esq.

The Americans with Disabilities Act of 1990 (ADA) has applied to employers of 25 employees or more since 1992 and to employers of 15–24 employees since 1994. One of the ADA's main features is the requirement that employers provide reasonable accommodation to the limitations of disabled applicants and employees. In addition, the New York City and state Human Rights Laws impose an analogous obligation of reasonable accommodation and apply to employers of four or more employees. Last year, the Equal Employment Opportunity Commission (EEOC, the federal agency responsible for administering the ADA) issued a policy guidance on reasonable accommodation under the act.

Background

To be covered by the ADA, an applicant or employee must have a disability and be able with or without reasonable accommodation to perform the essential functions of the position in question. Failure to provide a reasonable accommodation is a discriminatory practice under the ADA, as long as accommodation will not result in undue hardship for the employer.

A disability is 1) a physical or mental impairment that substantially limits one or more major life activities, 2) a record

of such an impairment, or 3) being regarded as having such an impairment. "Physical or mental impairments" that might be considered disabilities include cancer, heart disease, alcoholism, AIDS, epilepsy, diabetes, asthma, tuberculosis, dyslexia, learning disabilities, depression, and psychological conditions. "Major life activities" include caring for oneself, performing manual tasks, walking, hearing, seeing, speaking, learning, and working.

Request for Accommodation, Employer's Response

In requesting an accommodation, the individual need not use the words "reasonable accommodation" or put the request in writing. The request can be made by someone other than the applicant or employee, such as a relative or health care provider. If an employee does not ask for reasonable accommodation, the employer should not inquire whether one is necessary unless the employer knows the employee has a disability, or knows or has reason to know that the employee is having workplace problems due to a disability.

Upon receiving a request for reasonable accommodation, the employer should respond promptly. The EEOC guidance suggests that an employer engage in an informal "interactive process" with the applicant or employee

to clarify the individual's needs and identify appropriate reasonable accommodations. In response to a request for an accommodation, an employer may request "reasonable documentation," which is limited to that necessary to establish that the applicant or employee has an ADA disability and what accommodation may be needed. The employer should have the applicant or employee sign a limited release of medical information that can be presented to the appropriate health care professional but should not request a complete medical record or information about unrelated disabilities. If the appropriate information is not provided, the individual is not entitled to accommodation. If insufficient documentation is provided, the applicant or employee may be required to visit a health care professional of the employer's choice.

Reasonable Accommodation

In addition to full-time employees, the reasonable accommodation obligation extends to applicants, part-timers, and probationary employees and applies to all terms and conditions of employment, such as training, services (e.g., EAPs, gymnasiums, cafeterias, transportation), parties and social functions, and internal communications (e.g., e-mail, bulletin boards).

The employer need not provide the reasonable accommodation the applicant or employee wants. If more than one reasonable accommodation is effective, the individual's choice should be given "primary consideration," but the employer has the "ultimate discretion" to choose. An individual with a disability cannot be required to accept a reasonable accommodation he or she does not want, but if an effective accommodation is rejected,

the individual may no longer enjoy the protections of the ADA.

Specific Accommodations

Job restructuring may be required and may include reallocating or redistributing marginal job functions (but there is no obligation to eliminate an essential job function); altering when or how a function (essential or marginal) is performed; and requiring the accommodated employee to take on other marginal functions. A leave of absence is a form of reasonable accommodation, and while additional paid leave is not required, unpaid leave may be required, absent undue hardship. While several courts have held that a leave of absence of indefinite duration is not a reasonable accommodation, automatically discharging an employee on leave for a set period of time is unlawful.

Upon conclusion of the leave the employee should be returned to the same position. If the same position is not available, the employee should be returned to an equivalent position or, if none is available, to a vacant lower-level position.

Also, instead of leave, the employee may be assigned to another position if such an assignment would eliminate the need for the leave. A modified or part-time schedule may be required in order to enable the employee to get medical treatment or deal with the effects of medication at certain times of day. Workplace policies may need to be modified (e.g., a policy prohibiting employees from eating at their desks, in the case of an employee with diabetes who needs to have quick access to food). Reassignment to another position may be required and does not include the requirement of giving the employee a promotion. Allowing an

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Reasonable Accommodation (continued from page 8)

employee to work at home may also be a reasonable accommodation.

Undue Hardship

An employer is relieved of the obligation to make an accommodation if it would result in undue hardship. The ADA defines "undue hardship" as an action requiring significant difficulty or expense when considered in light of the employer's overall financial resources and the facility at which the individual works, the

number of employees at the facility, and the nature of the operation. Undue hardship is determined based on net cost to the employer: Outside sources of funding must be considered, and if cost is an undue hardship the employee may be asked to bear part of the expense. ▀

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