GUIDELINES FOR EVALUATING ACCOMMODATION REQUESTS

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The Americans with Disabilities Act generally requires employers with 15 or more employees to reasonably accommodate qualifying disabled employees, unless doing so would cause undue hardship. Even employers with the best intentions struggle to determine who is disabled and what accommodations are "reasonable" under the act. This challenge is most apparent where requested accommodations are expensive or effectively result in reallocation of job duties to other overstretched employees.

Following enactment of the ADA Amendments Act of 2008 and implementing regulations, and the EEOC's growing focus on disability issues, the need for employers to thoughtfully and carefully identify and handle accommodation requests has become heightened. Before enactment of the ADAAA, an individual generally did not qualify as "disabled" unless his or her impairment severely or significantly restricted a "major life activity." The ADAAA and the EEOC's interpretive regulations expanded what constitutes a major life activity and the types of impairments that may qualify as disabilities. This shift has resulted in increased scrutiny of employer accommodation decisions. For example, pregnancy by itself generally was not considered a disability without concurrent medical conditions affecting major life activities, but the EEOC now interprets the law differently.

According to published data, the number of disability-related charges filed with the EEOC has grown from approximately 15,000 charges in 1993 to over 25,500 in 2014. In its "Strategic Enforcement Plan for Years 2013-2016," the EEOC specifically identified reasonable accommodation issues and accommodating pregnancy-related limitations under the ADAAA and Pregnancy Disability Act as "emerging and developing" issues that are national priorities. In keeping with these stated priorities, the EEOC filed 49 ADA lawsuits against employers in 2014 seeking to enforce or expand the law, and in July of 2014 issued its EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues.

The guidance essentially proclaimed the ADAAA "make[s] it much easier for pregnant women with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA" and suggested reasonable accommodations for pregnant workers with qualifying impairments such as altering how job functions are performed and providing temporary assignment to light duty positions.

While the EEOC's guidance is not binding law in its own right, federal courts interpreting the ADA have viewed EEOC enforcement guidance to be persuasive authority on the statutory interpretation of the ADA. For employers to stay out of the EEOC's line of fire and limit potential liability under the ADA, it is important to take the EEOC's guidance into account when making accommodations decisions.

Below are a few basic guidelines to keep

in mind when evaluating an accommodation request:

1. *Give each accommodation request individualized consideration.* Employers should engage in an interactive dialogue with the requesting individual and then carefully evaluate the accommodation request, taking into consideration the nature of the disability, the individual's specific job duties, and the work environment.

2. *Never say never.* Because individualized consideration of all reasonable accommodations requests is necessary, employers should avoid making blanket statements in their policies that certain types of accommodation requests will never be reasonable or warranted.

3. *Never say always.* Inflexible leave policies and neutral absence control policies that mandate termination no matter what should be avoided or—at the very least—contain some qualifying language for ADA compliance. This is because the automatic termination of a disabled employee upon reaching a maximum amount of leave forecloses the possibility of additional leave as a reasonable accommodation and sidesteps the interactive process.

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4. *Don't make assumptions or play doctor.* An employee is not automatically disabled just because he has a medical issue, and not every person with a particular medical issue will be limited the same way. Regarding someone as disabled may subject the employer to liability under the ADA, even if the individual is not actually disabled. Acting with best intentions is not a defense.

5. *Ask for only necessary information.* When a disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation (and even talk to his doctor) about his disability and functional limitations in relation to essential job functions. However, employers should limit requests for disability related information to specific information necessary to establish that the person has a disability and/or what is needed for the employee to do his job.

6. *"Undue hardship" is not just about money.* "Undue hardship" means significant difficulty or expense for the particular employer based on the resources and circumstances of the employer in relation to the cost or difficulty of providing a specific accommodation. Reasonable accommodations that are unduly extensive, substantial, disruptive, or those that would fundamentally alter the nature or operation of the business could qualify for the undue hardship exception. However, the fact that a reasonable accommodation is inconvenient or expensive, alone, rarely will render it an "undue hardship."

7. *Employers have a choice.* Employers are not beholden to an employee's requested accommodation. If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or least burdensome accommodation as long as it is effective.

8. *Document your efforts.* The employer may need to show it treated the employee with respect and tried to work with the employee to find a reasonable solution that will allow the employee to do his job. Communicate in writing and assume a sympathetic jury will read it.

In short, the best way to minimize ADA claims is to engage in an interactive process with employees, carefully evaluate each accommodation request, take into consideration all of the relevant factors and circumstances, and document all efforts to do so. IHT

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