WORDS ON WISE MANAGEMENT

Focus on vulnerable workers means more ADA claims

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The Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL) have been trying to change the regulatory landscape affecting what some call "vulnerable" workers—agricultural workers, low-wage earners, racial and ethnic minorities, same-sex couples, and persons with disabilities. In fact, nearly half of the EEOC's enforcement lawsuits filed in 2014 contained claims under the Americans with Disabilities Act (ADA). The focus on the ADA is increasing, most likely because it is an area of weakness for most employers. This is especially true when the ADA interacts with other laws like the Family and Medical Leave Act (FMLA). What can you do to reduce the risk of an ADA claim?

Know who should be covered

In general terms, a "disability" is a physical or mental impairment that substantially limits a major life activity. The 2008 amendments to the ADA expanded the definition to include "operation of a major bodily function," such as functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

A temporary impairment is also considered a disability even when it is "episodic or in remission" if, when active, it would substantially limit a major life activity. So a condition with episodic periods of illness—e.g., diabetes, asthma, or irritable bowel syndrome (IBS)—still would be considered a disability even though symptoms aren't currently active. Even if you haven't studied medicine, you are probably thinking this covers almost everything. If so, your suspicions are correct.

Know what 'reasonable' means

(Warning: This is an intensive, fact-specific, case-by-case definition.) There are three general categories of reasonable accommodations: a modification to a job application process, a modification to the work environment, or a modification that allows a disabled employee to enjoy benefits of employment that are enjoyed by other employees who don't have disabilities. Possible accommodations include making existing facilities available (such as ramps for wheelchairs or bigger restroom stalls), job restructuring, part-time or modified schedules, modifying equipment, acquiring new equipment, changing current tests or policies, providing qualified readers or interpreters, and reassignment to a vacant position.

The general idea is that a modification is "reasonable" if it seems reasonable at face value. Examples include providing a deaf employee with a text telephone (TTY) to call a relay service operator or providing a stool to an employee who is fatigued because of a disability. In some cases, a reasonable accommodation is just extending a leave of absence beyond the legal limit (read: FMLA).

An important distinction is that a reasonable accommodation doesn't mean removing an essential function of the position. In a recent disability discrimination case involving Ford Motor Company, the U.S. 6th Circuit Court of Appeals found that regular and predictable on-site work attendance is essential to most jobs, especially interactive jobs in which the employee is facing the public. Ford's determination that an employee's request to telecommute four days per week to deal with her IBS was unreasonable because the proposed accommodation eliminated attendance as an essential function for a resale-buyer job.

That doesn't mean telecommuting never can be a reasonable accommodation for a disability; it means you must carefully examine the essential functions of the position and compare them to the proposed modified position. That's where carefully drafted job descriptions help you.

Know what is an 'undue hardship'

According to guidance from the EEOC, undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense or would fundamentally alter the nature of the operation or business.

The takeaway is that you should check with a qualified employment attorney before rejecting an accommodation request from an employee or applicant with a disability.

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