ADA Reasonable Accommodation Requests: Avoid Rigid Policies and Consider Technology

The EEOC recently issued an "Informal Discussion Letter," addressing an employer's use of sample forms for responding to Americans with Disabilities Act (ADA) accommodation requests. The advisory letter underscores that reasonable accommodation requests must be reviewed on a case-by-case basis and that a "one-size fits-all" approach is to be avoided. In the advisory letter, the EEOC identified several parts of a sample policy and forms that it felt violated the ADA. It specifically indicated that setting absolutes in how individualized circumstances are addressed is dangerous.

Unscheduled/unpredictable absences: The sample policy reviewed by the EEOC stated the employer was not required to "permit unscheduled (or erratic, unpredictable, intermittent) or excessive absenteeism or tardiness as a reasonable accommodation." The EEOC cautioned that having such policy language is unclear and could lead to an inappropriate denial of an employee's request for reasonable accommodation. For example, an employee with epilepsy suffering from seizures could require unscheduled leave (unless the employer could demonstrate an undue hardship). The EEOC also noted disapprovingly that "excessive" was not defined in the policy, and that this could lead to inconsistent implementation.

Medication and assistive devices: The sample policy under review stated that if an employee's impairment could be controlled with medication or assistive devices, so that essential job functions could be performed, no reasonable accommodation would be provided. The EEOC noted that even with a mitigating measure such as medication or an assistive devices, an employee might still require an accommodation because the measure may not eliminate all of the disability-related limitations.

The EEOC's more serious concern was that this type of language would allow an employer discretion to decide whether an employee could benefit from a mitigating measure, or how effective that mitigating measure was, in order to deny an accommodation.

Technology and the definition of the workplace: The EEOC's guidance highlights that what is considered a reasonable accommodation is evolving with technology. The EEOC stated in its advisory letter that telecommuting could be a reasonable accommodation, and that policies stating otherwise may be illegal.

This guidance is in line with a recent Sixth Circuit Court of Appeals holding in *EEOC v. Ford Motor Co.*. In this case, the court held that telecommuting could be a reasonable accommodation for an employee with irritable bowel syndrome (whose symptoms caused her to soil herself without warning) based on her position and the circumstances. Departing from previous precedent holding that "attendance" is almost always an essential job function, the court ruled that changes in technology have rendered attendance nonessential at many jobs because a "workplace" is anywhere that an employee can perform their job.

Notably, Ford had denied the employee's request while allowing others in the same position to work from home on a limited basis, making it hard to show that telecommuting would cause it undue hardship. In adopting this expanded view of the workplace, the Sixth Circuit did not change the legal framework necessary to establish a failure to accommodate

claim under the ADA. The legal burdens remain the same, but in this specific factual scenario, telecommuting was a reasonable accommodation because physical attendance and personal interaction was not essential to the job.

Questions not to ask (and other advice): The EEOC cautioned in its advisory letter that forms often include many questions that may not be applicable to every situation and should not be asked. Employers should only ask questions that are necessary to establish that the person has a covered disability (unless it is obvious) and needs a reasonable accommodation. Although employers are permitted as part of the interactive process to ask disability related questions if necessary, this does not entitle the employer to obtain any and all medical information. Appropriate questions will differ for each request. Specifically, the EEOC warned employers not to ask an employee to "describe your treatment plan in detail," or "what medication and/or devices have been recommended for use." These types of questions are too broad and seek detail not typically required during the interactive process, according to the EEOC.

Instead, employers should ask short questions aimed at the specific request for accommodation. There is no need to ask about work schedule limitations when an employee seeks modification of equipment as an accommodation. There should be a reason for each question asked, which necessarily requires tailored and individualized requests for information, not form questions.

If used, forms should also not require yes or no answers without the possibility of additional input, which could cause misinterpretations. Acknowledging that it is exceedingly difficult to develop a form with appropriate questions, the EEOC cautioned that forms should be short. Regarding the existence of a disability, if not obvious, a form questionnaire could ask for the nature of the requestor's medical condition and its expected duration. The employer could also ask for:

- The kind of activities, including major bodily functions that the condition affects;
- The way in which activities are affected; and
- The extent to which mitigating measures eliminate or control the impact of the medical condition.

Examples should be given to explain terms that employees may not recognize as having specific legal significance. However, because the ADA Amendments Act of 2008 made it much easier for employees to show they have covered disabilities, most of the focus should be on the reasonable accommodation process. As for the accommodation needed, simply ask what the employee wants and how the change will enable the employee to do the essential functions of their job. Then determine if the request would cause an undue hardship to the employer.

The bottom line: The message for employers from the recent EEOC advisory letter and Sixth Circuit decision is to review your ADA policies and procedures to make sure they are flexible and in line with current law that is taking into consideration advances in technology. If you use forms to address accommodation requests, they should contain short, simple questions that can be modified depending on the specific request for a job accommodation.

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IRS Issues Guidance on Qualified Plan Amendments Regarding Same Sex Spouses

Employers have been considering the impact on benefit programs, including the qualified retirement plans, following the U.S. Supreme Court's decision in *United States v. Windsor* recognizing the validity of same sex marriages. In September 2013, the IRS issued guidance about the prospective impact of the decision on qualified plans. In April 2014, the IRS issued guidance regarding the retroactivity of the decision.

In Notice 2014-19, the IRS concluded that qualified retirement plans were not required to recognize

same sex marriages before June 26, 2013, the date of the Supreme Court decision. From June 26, 2013, through September 15, 2013, plans were required to recognize same sex spouses based upon the state of residency of the plan participants. Beginning September 16, 2013, plans must recognize spouses based upon the state of celebration of the marriage.

The 2014 Notice requires employers to amend their qualified retirement plans consistent with the above requirements, to the extent that a plan references the Defense of Marriage Act (DOMA), the statute held unconstitutional in the *Windsor* decision, or to the extent that the definition of "spouse" is limited to opposite sex couples only. Plans that do not define "spouse" in a way that limits same sex spouses from being recognized do not need to be amended.

In determining whether an amendment is needed, employers may need to consider the plan provisions, if any, regarding choice of law. If the choice of law provision names a state that does not recognize same sex marriages, the employer will need to take that into account in deciding whether a plan amendment defining spouses to include same sex spouses is needed. Plan amendments must be made by December 31, 2014, or if later, the usual deadline for plan amendments for non-calendar year plans.

Plans are also permitted, but not required, to recognize same sex spouses before June 26, 2013, the date of the Supreme Court's decision. Employers who choose that approach must amend their plans to do so, even if the plan's definition of "spouse" is otherwise consistent with recognizing same sex marriages. Employers should consider all ramifications before adopting a retroactive amendment. All distributions made during the period of retroactivity would be required to be consistent with recognizing a same sex spouse. In addition, controlled group rules, under which a spouse is considered to own business interests held by the other spouse, should also be evaluated. If a marital relationship is recognized retroactively, it may be that businesses would be considered part of a controlled group for tax and ERISA purposes, which could affect plan nondiscrimination testing and liability for plan contributions in some cases. Employers would want to consult their benefits counsel before taking such an approach.

Safe harbor 401(k) plans can be amended during a safe harbor plan year only in limited circumstances. The IRS clarified in Notice 2014-37 that amendments to conform the plan's definition of spouse to the Supreme Court's decision are permitted (and in some cases required), as discussed above.

For background, see our articles:

- *District Court Rules Same-Sex Spouse has Right to Pension Benefit under ERISA*, in the August 2013 Executive Briefing
- *U.S. Supreme Court Rules on Same-Sex Marriage: What Does This Mean for Employers?* in the September 2013 Executive Briefing
- *Department of Labor adopts, for ERISA purposes, "State of Celebration" Rule For Same-Sex Marriages*, in the October 2013 Executive Briefing

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OSHA to Refer Untimely Claimants to the NLRB

The National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) are teaming up to tackle workplace safety concerns. Under the agencies' arrangement, OSHA will refer employees' untimely Occupational Safety and Health Act (OSH Act) complaints to the NLRB, and the NLRB will help employees decide whether to file an unfair labor practice (ULP) charge. Given this development, both union and non-union employers can expect to see an uptick in the filing of safety-related ULPs.

Protections and Statutes of Limitation

The OSH Act is the primary federal law ensuring employees a safe workplace. Under the OSH Act, employees cannot be retaliated against for, among other things, complaining about a workplace safety issue. If an employee believes her employer violated this provision of the OSH Act, she can file a complaint with OSHA within 30 days of the alleged violation.

Section 7 of the National Labor Relations Act (NLRA) gives employees the right to "engage in concerted activities for the purpose of . . . mutual aid or protection." In other words, the NLRA guarantees employees—both union and non-union—the right to take group action. Employer actions that chill Section 7 rights are unlawful, and employees may file a ULP with the NLRB to correct such actions. Importantly, the NLRA has a six month statute of limitations.

Given the OSH Act's shorter, 30-day statute of limitations, OSHA estimates that between 300 and 600 employee complaints are dismissed as untimely each year.

The Agreement

In an apparent effort to give new life to untimely OSH Act claims, OSHA has decided to advise all complainants who miss the 30-day OSH Act statute of limitations that they may be able to file a ULP with the NLRB. OSHA agents have been advised to encourage untimely complainants to contact the NLRB, and OSHA will send out follow up letters reminding such complainants that "employees are protected under the NLRA to act together to try to improve working conditions, including safety and health conditions, even if the employees aren't in a union."

As OSHA points out, "[a]lthough there may be some individual safety and health activities which may be protected solely under the OSH Act, many employee safety activities involve concerted activity protected under the NLRA." The NLRB, similarly, stated that there will likely be overlap in the protections of the NLRA and the OSH Act in "instances of employer retaliation for group complaints concerning unsafe working conditions."

Going Forward – Be Proactive

Going forward, both union and non-union employers can expect an increase in the number of ULPs filed related to safety concerns. The NLRB under the Obama administration has expansively interpreted "concerted" Section 7 activity and aggressively policed employer violations of Section 7 rights. We expect that when employees bring their untimely OSH Act complaints to the NLRB, the current Board will have little trouble deciding that most safety complaints involve Section 7 activity, as safety concerns generally affect multiple employees.

Non-union employers should take special note of this new OSHA/NLRB collaboration, as union organizers have long used group safety concerns as a way to build support for unionization. Employers would be well advised to take proactive steps to prevent potential OSH Act complaints and related NLRA ULP charges. One of the best ways to do this is by creating an internal "safety first" culture where employees feel free to bring safety concerns to management's attention, and management knows how to quickly and effectively respond to such concerns. Employers can create and foster a safety-first culture by establishing safety protocols and internal reporting mechanisms, and effectively training supervisors and employees on how they work.

If you would like more information on establishing internal safety protocols, the recent NLRB/OSHA collaboration, or any other labor or employment matter, please contact an attorney in Stinson Leonard Street's Employment and Labor Division.

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