How to Survive the ADAAA: Seven Best Practices for Employers

By Robin E. Shea on November 02, 2010

In my previous post, I noted that litigation under the Americans with Disabilities Act Amendments Act was starting to emerge from its dormant stage and promised to provide some best practices for employers to follow.

The most important thing to remember about the ADAAA is that, for the most part, all it does is change (albeit drastically) the definition of "disability." The ADAAA does not affect the old ADA's anti-discrimination, reasonable accommodation, confidentiality, or "medical examination" provisions. As a practical matter, what this means is that employers will no longer be able to rely on the defense of "no disability," but if they avoid discrimination and handle reasonable accommodation requests well, they should still be able to avoid liability.

With that "bottom line," here are my best practices for staying out of trouble in light of the ADAAA:

1. Unless the employee is claiming the flu or a common cold as the alleged disability, **forget about nit-picking whether the condition is a "disability" within the meaning of the ADA. In all likelihood, it is.** Challenging the employee's "disability" status is a waste of time with the new expanded definition of "disability" under the ADAAA. Proceed on the assumption that the employee is "disabled," and save your resources for ensuring that the employment decision is handled fairly and defensibly.

2. Unless the employee's medical condition really does prevent her from effectively performing the job or threatens her or her co-workers' health or safety, *"with or without a reasonable accommodation,"* **do not consider medical conditions in making any employment decisions.** An obvious point, but I hate to omit it from a "best practices" list! (PS-And, yes, even "direct threats" have to be accommodated if possible.)

3. Unless the disability is obvious or for some other reason you do not question it, **request documentation from a qualified medical professional before making any reasonable accommodations.** The ADAAA has not affected your right to do this, and now that conditions like

diabetes and hypertension are considered "disabilities" even if controlled, it will be more important than ever for you to verify that the claimed condition actually exists.

4. **Engage in the "interactive process."** This means simply sitting down with the employee and discussing reasonable accommodation options, "brainstorming" if necessary. This is a requirement in some jurisdictions, although not all, but even where it is not required, it is a good idea to seek the employee's participation in finding a solution. As the EEOC points out, sometimes the employee can propose an inexpensive, simple accommodation while you might have thought something more elaborate was necessary. Often, the employee herself will admit that no accommodation is possible, and that can be helpful to you, too.

5. **In considering reasonable accommodation options, follow the EEOC's recommended priority:** first, try to accommodate the employee in his current job; if that is not possible, consider transferring him to a position that is similar to his old job, and the more similar the better - in terms of job duties, hours of work, pay and benefits, and "perks"; if that is not possible, considering transferring him to a different position, even if that means a demotion or a change from full-time to part-time status; if that is not possible, place on medical leave (giving him his rights under the Family and Medical Leave Act if it applies); and only if all of those options are not possible should you terminate the employee.

6. **Don't make accommodations that you don't have to make.** Even under the new ADA, you still do not have to create a job, displace another employee, promote the disabled employee, or eliminate essential functions as reasonable accommodations. On the other hand, it may be in your best interests to be flexible: for example, the ADA does not require an employer to provide personal equipment (such as wheelchairs, eyeglasses, or hearing aids) to an employee with a disability, but in some cases that may be the easier and less expensive solution. If so, don't rule it out just because it is not required.

7. **Know the difference between "light duty" and reasonable accommodation.** These are not the same thing, but employers and employees often think they are. Light duty is intended to keep the employee involved in the workplace while recuperating from an injury, usually a workers' compensation injury. It often involves "make work" -- in other words, duties that the employer does not really need to have performed but assigns to the employee to facilitate recovery. Employers can put a time limit on the amount of light duty they will allow, and they can impose other conditions. Indeed, an employer does not have to offer light duty at all. Reasonable accommodation is different. It involves changes to a job that the employer actually needs to have performed so that a person with a disability can perform the essential functions of the job. Reasonable accommodations are mandated by the ADA (for those employers covered by the ADA), and the employer does not have the right to impose a time limit or establish a maximum number of reasonable accommodations it will make. Theoretically, at least, the duty to make reasonable accommodations lasts as long as the employee is in your workplace, and if her condition changes over time, you may have to adjust the accommodations accordingly.

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