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EEOC Updates Enforcement Guidance Regarding Reasonable Accommodation and Undue Hardship Under the ADA

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On October 17, 2002, the EEOC issued its updated Enforcement Guidance regarding Reasonable Accommodation and Undue Hardship Under the ADA. The Enforcement Guidance, which was originally issued in 1999, expounds on a wide range of issues, including “what ‘reasonable accommodation’ means and who is entitled to receive it.” The update incorporates the U.S. Supreme Court’s decision in *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002), which held that, absent “special circumstances,” it will be “unreasonable” for an employer to reassign a disabled employee in violation of a seniority system. HR professionals must familiarize themselves with the updated Enforcement Guidance, particularly the revised standard for “reasonableness,” because:

- EEOC investigators rely on the Enforcement Guidance to analyze administrative discrimination charges.
- While courts are not bound by the Agency’s interpretation of the ADA, judges regularly defer to the EEOC in areas of the law that the Agency enforces.

The summary of the update in this ASAP is not exhaustive. Copies of the updated Enforcement Guidance are available on the EEOC’s website (www.eeoc.gov/docs/accommodation.html).

Requests for Accommodation

How is accommodation requested?

Generally, the employee must request accommodation before the employer’s obligations are triggered. Requests can be oral and do not have to use any “magic” words (e.g., “ADA,” “reasonable accommodation,” etc.). Requests can be made by a family member, friend, health professional, or other representative.

When should accommodation be requested?

Accommodation can be requested at any time during the application process or employment. The duty to provide accommodation is also ongoing. Certain individuals may need one reasonable accommodation for a period of time, and then at a later date, require another type of accommodation. An employer must consider each request.

Should an employer ask whether accommodation is needed without a request?

According to the EEOC, the employer should initiate the interactive process if it knows, or has reason to know, that a disabled employee who is experiencing workplace problems is prevented by his or her disability from requesting accommodation. For example, an employee with a mental impairment may be unable to request accommodation.

Responding to Accommodation Requests

How should an employer respond? A request for accommodation does not

mean that the employer is required to provide accommodation. A request for accommodation is the first step in the process. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition is "disabling." Requests must be evaluated on a case-by-case basis.

What information is the employer entitled to?

In some instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations. The employer is entitled to this information and may request reasonable documentation from an appropriate health care professional. The individual can be asked to sign a limited medical release. In some circumstances, the individual can also be required to submit to an examination by a health care professional of the employer's choice, at the employer's expense. If the employee refuses to cooperate, then he or she is not entitled to reasonable accommodation.

Does an employer have to provide the requested accommodation? The employer does not have to provide the requested accommodation and may offer alternatives. The employer has the ultimate discretion to choose between reasonable accommodations. According to the EEOC, however, the employee's preference should be given "primary consideration." Further, the employer may not require the employee to accept an accommodation. But, if an employee needs accommodation and refuses to accept the employer's offer of a reasonable accommodation, he or she may not be qualified to remain in the job.

When should an employer respond to a request for accommodation? An employer should respond expeditiously. If an exchange of information is needed, this too should proceed as quickly as possible.

Similarly, the employer should act promptly to provide the reasonable accommodation. According to the EEOC, unnecessary delays can result in a violation of the ADA depending upon, among other things, the reason(s) for the delay and how much each party contributed to the delay.

Reasonable Accommodation

How is reasonableness measured? In the EEOC's original Enforcement Guidance, "reasonableness" was measured solely by whether the accommodation was "effective," i.e., enabled the individual to perform essential job functions. The updated Enforcement Guidance incorporates the reasonableness standard endorsed by the Court in *US Airways, Inc.* The reasonableness of an accommodation is now assessed with regard to whether it is both effective and "feasible" or "plausible" for the typical employer. Examples include:

- Allowing a hearing-impaired customer service representative to use a TTY—a common device—to relay the conversation between the parties.
- Allowing a cashier with lupus to have a stool to reduce her level of fatigue and thereby complete her shift.
- Allowing a disabled employee to have restructured job duties. For example, a cleaning company rotates its staff to different floors on a monthly basis. A crew member with a psychiatric disability has trouble adjusting to alterations in his daily routine. He proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions.

The update also incorporates the allocation of the burdens of proof endorsed by

the Court in *US Airways, Inc.* The plaintiff must prove that an accommodation is reasonable. Then, the burden shifts to the employer to provide case-specific evidence proving the accommodation would cause an undue hardship.

What are examples of reasonable accommodations? Job restructuring (e.g., reallocating marginal job duties), permitting the use of leave, modified and part-time schedules, reassignment to a vacant position.

What are examples of unreasonable accommodations? Eliminating essential job functions, lowering uniformly applied production or performance standards, providing personal use items, changing a supervisor, monitoring medication, promotions.

Does an employer have to hold open an employee's job as a reasonable accommodation? According to the EEOC, a disabled employee accommodated with leave is entitled to return to his or her position unless the employer demonstrates undue hardship from holding the position open. However, in lieu of providing leave, an employer may offer a temporary on-the-job accommodation, provided it does not interfere with the employee's medical needs. (This is not permitted if the employee is using FMLA leave.)

Does reassignment mean that the employee is permitted to compete for a vacant position? According to the EEOC, the employee gets the vacant position if he or she is qualified for it; the opportunity to compete is insufficient, unless the employee seeks a promotion. Furthermore, the employee does not need to be the best-qualified individual for the position. The employer must provide notice of suitable openings and, absent undue hardship, must consider openings outside of the employee's department or facility, even if the employer's policy prohibits interdepartment or interfacility transfer. However, the employer does not have to assist the individual to become qualified for the

position by, for example, providing training beyond what it normally offers.

Must an employer provide a reassignment if it would violate a seniority system? Absent “special circumstances,” reassignment in violation of a seniority system is not required. Examples of “special circumstances” include: (a) the situation where the employer retains, and has “fairly frequently” exercised, the right to alter the seniority system unilaterally; (b) when the seniority system has exceptions; and (c) when the seniority system has a procedure for making exceptions.

Undue Hardship

Undue hardship means significant difficulty or expense in the particular circumstances. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the employer’s resources, financial and otherwise;
- the type of operation of the employer, including the structure and functions of the workforce; and
- the impact of the accommodation on the operation.

An employer cannot claim undue hardship based on employees’ (or customers’) fears or prejudices toward the individual’s disability. Nor can undue hardship be based on the anticipated negative impact on morale. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees’ ability to work. Examples of undue hardship include:

- A store clerk with multiple sclerosis requests part-time rather than full-time work. The store assigns two clerks per shift, and if the first clerk’s hours are reduced, the second clerk’s workload will increase significant-

ly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security.

- A disabled crane operator asks to start work at 8:00 a.m. rather than 7:00 a.m. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing.

Conclusion

In sum, with the rise of requests for accommodation and increasing focus on the interactive process, HR professionals must familiarize themselves with the updated Enforcement Guidance. HR professionals should also note that:

- The EEOC and courts are likely to consider the accommodations listed in the text of the ADA itself as reasonable per se. Thus, when such accommodations are requested and denied, the employer must establish undue hardship.
- Employers should always coordinate their accommodation, industrial injury, and family and medical leave policies. An employer should determine an employee’s rights under each statute separately, and then consider whether the statutes overlap regarding the appropriate actions to take.

Employment counsel can help you comply with the ADA and other laws, such as the FMLA, and can help you implement ADA policies, conduct training and evaluate the risks of potential liability.

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