“Interactive Dialog” on ADAAA - Key to Satisfying EEOC

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The **Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”)** created a sea-change for employers regarding the enforcement of employee rights and employer duties arising under the Americans with Disabilities Act of 1990. The EEOC took nearly three years to come up with new regulations governing how it will enforce and interpret the ADA/ADAAA; and the regulations it created pose significant dangers for private and public employers.

Background

The **Americans with Disabilities Act of 1990 (“ADA”)** made it unlawful to discriminate against an employee because of the employee’s disabilities, and required employers to provide “reasonable accommodations” to disabled employees if they were qualified to perform the job they were holding or seeking, or if the reasonable accommodation would make it possible for the employee to perform the “essential functions” of a job with the “reasonable accommodation.” Plaintiffs claimed that the Supreme and Appeals Court decisions interpreted the ADA in such a narrow manner, concentrating their focus in cases on whether the plaintiff was in fact both disabled and qualified for the job, that the ADA was rendered practically useless as a means of protecting job opportunities for disabled persons. In 2008 Congress amended the ADA by passing the ADAAA. This amendment explicitly directed the EEOC and the courts to interpret the ADA as broadly as possible to extend the law’s protection to the widest array of potential plaintiffs. Under the latest EEOC Regulations, the Agency’s investigators and attorneys no longer will focus their inquiries on whether a charging party’s condition makes them eligible for the act’s protections. Rather, according to the EEOC’s new regulations, the Agency investigators will concentrate their examination on whether the employer has met its obligations under the ADA. Of course, this means they will be interested primarily on whether the employer made a reasonable effort to accommodate the charging party/plaintiff’s disability to make it possible for the individual to perform the job he was seeking or looking

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to keep. The “reasonable accommodation” is as much a process as it is a concrete result. The EEOC long has defined that process as one in which the employer engages with the disabled person in an “interactive dialogue” aimed at discovering a change in the manner or method in which the job is performed, or a change in the circumstances in which it is performed, which will enable the disabled person to meet the employer’s requirements and to perform the job’s essential functions.”

EEOC Enforcement Approach

The EEOC will come after any employer who cannot prove that it used an interactive process or dialogue to seek out such solutions with the affected individuals. EEOC investigators want to see evidence of management's one-on-one engagement with the disabled person in seeking solutions which may remove the barriers or overcome the problems that the disability poses to the individual's performance of essential job functions. An “interactive dialogue” means one in which both parties have the opportunity to speak and to listen to the other. The interactive dialogue often requires far more than a single or even a handful of conversations with the employee. It often involves additional persons other than the immediate manager and the affected employee. The overall intent of these conversations is for management to gain an understanding of how the employee’s condition affects the employee’s performance of essential job functions, and to explore possible changes that could enable employees to overcome the barriers that the employee's condition imposes. This requires, obviously, that managers engage in speaking and listening – both to the employee and to the employee’s vocational rehabilitation worker, therapist, counselor, or physician. (Of course, it also requires that management carefully and thoroughly document these conversations too!)

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Tips for Making Accommodations

Be Prepared to Show You Went Through the Process.

The employer must be prepared to demonstrate to an EEOC investigator or a jury that it went through the interactive process. Be sure to indicate that you:

- Asked for the employee's ideas as to what accommodations might work;
- Met face-to-face with the employee to discuss the options;
- Met with other managers and individuals who know the employee’s job, and with the employee’s rehabilitation counselor, or other experts to explore the possibilities for accommodating the employee’s disability.

Don't Use Jargon with Employees.

When talking to employees, it is important to use lay language rather than jargon. Remember your words will be read and interpreted by EEOC investigators who are not familiar with your company or industry, to whom your jargon may have different or no meaning. Don’t fret about using “magic words” or legal terms. For example, instead of saying, “I want to engage in the interactive process to see about reasonable accommodations,” it is better to say “I'd like to talk to you about your options.”

Talk to Supervisor and ….

When considering reasonable accommodations, always talk to someone in addition to the employee’s or applicant’s direct supervisor. Like most of us, direct supervisors resist any changes. They are more likely to respond with a knee-jerk “no” to any employee or applicant accommodation request. This will set a company up for EEOC enforcement action. Management needs to demonstrate that it gave thorough consideration to all reasonable accommodations. Thus the final decision should rarely be left to the line supervisor who most likely is concentrating on meeting production requirements and who does not have the overall wider perspective to consider other factors, such as the employer’s legal duties under the ADAAA.

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Time Off Accommodation? Give Two More Months!

One example of an accommodation that employers consider during the interactive dialogue process in accommodating employees' disabilities is the granting to a disabled person of extra time off as an accommodation. Some attorneys have pointed out that the EEOC always seems to want 2 more months than the employer allows in its leave and attendance policies. Thus, for example if your policy says employees are terminated after being on disability leave for 12 months, as many policies do, the EEOC will ask, why not 14? To deal with this, some clients actually are dialing back their leave policies to allow for only 6-months of leave before termination.

Push Back Against Doctors.

On the other hand (as we pointed out in a recent newsletter article about FMLA leave), employees work for the employer, not their doctors. Employers can push back against doctors, especially those who keep suggesting that the employer should extend an employee's leave even farther. If the doctor can't say that the employee eventually will be able to return to work at some future point, the person may not any longer be a "qualified individual." The employer needs to make this determination including, where necessary, by getting a second medical opinion. If it chooses this, the employer is obliged to pay the cost of the second medical evaluation and opinion.

Make Accommodations Conditional.

When offering an accommodation, such as by adopting new hours or altered duties, or by establishing a new way to allocate job functions, it is best to make the changes conditional. It is better to tell the employee that you are not sure that the accommodation (new hours, new duties, etc.) will work both for the company and the employee, but that you're willing to give it a try. Otherwise, the disabled employee is likely to consider the accommodation to be finally "approved" even if it ultimately turns out to be a productivity-destroyer and profit-drain for the department, once it is put into practice. EEOC Charges and lawsuits often grow out of such misunderstandings.

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