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25 Years of the ADA: Five Tips for ADA Compliance

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Last week – July 26, 2015, to be precise – marked the 25th anniversary of the passage of the ***Americans with Disabilities Act***. The anniversary kicked off celebrations of, according to the U.S. Department of Justice, the nation's commitment "to eliminating discrimination against people with disabilities." And while even this employer advocate lauds the purposes behind the ADA and the ways it has improved the lives of individuals with disabilities, it is also hard to argue with the argument that ADA has had its fair share of hiccups and generated lawsuits many believe constitute abuse of the ADA for personal gain, particularly in California (including by one individual who does not even reside in California, but reportedly makes an annual trip to the Golden State for the purpose of filing shakedown ADA lawsuits).

Within the employment sphere, the ADA has certainly had a significant impact in the last quarter-century, and the anniversary offers a good moment for employers to consider their approach to compliance. For the first decade and a half or so, many issues arising from the ADA revolved around whether an individual was a "qualified individual with a disability," and much litigation, including several Supreme Court cases, analyzed the meaning of that phrase and to whom it applied. All that changed with the passage of the *Americans with Disabilities Act Amendments Act (ADAAA*) in 2008, which significantly expanded the meaning of a "qualified individual with a disability." This change intentionally shifted the emphasis from whether an employee has a qualifying disability to the interactive process and the efforts employers take to explore reasonable accommodation with employees. That is where the focus remains today.

With a quarter-century of ADA now behind us, augmented by seven years of ADAAA experience, several common guidelines have emerged for covered employees (those with over 15 employees) to keep in mind whenever an employee mentions a potential disability or the circumstances suggest a potential need for accommodation. Consider these five suggestions:

- **Everyone (Well, Almost Everyone) has a Disability**

Okay, while that may be a bit of dramatic exaggeration, from a compliance perspective, under the ADAAA, employers are much safer working from the position that an employee may be a qualified individual with a disability (although they also want to be careful to avoid immediately treating that same employee as clearly disabled to avoid "regarded as disabled" issues). This is not to say an employer should go to ADA DEFCON 3 every time someone calls in sick, but it is to say that if an

employee starts mentioning a mental health or physical condition affecting their ability to work, it is wise to work from a perspective of potential disability over an assumption that the employee's circumstance is no big deal. Better to start interacting with the employee than shutting down the process before it has a chance to start.

- **The Process Matters as Much as (and Perhaps More Than) the Result**

By substantially expanding the definition of "qualified individual with a disability," Congress sent a clear message of what it considered important: efforts to ensure employees with disabilities had legitimate opportunities to obtain jobs and keep working in their current jobs or at their current employers. The paramount focus then is on the interactive process with the goal of identifying reasonable accommodation. This is where the amended ADA wants employers to focus, to the point that undertaking a legitimate, thorough and good-faith interactive process with employees is now at least as important, if not more so, than whether the employee and employer successfully identify a reasonable accommodation.

- **Jump Through Hoops, Not to Conclusions**

An expanded disability definition emphasizing the importance of the interactive process means not only engaging in the interactive process, but demonstrating engagement in the interactive process. In other words, show your work, even if your situation is akin to subtracting 99 from 100 (the answer final answer may be obvious, but show you borrowed from the tens column to get the answer to the ones column). Even where it is clear that reasonable accommodation is not possible –we could take an extreme example of a dumbbell quality control technician restricted from lifting more than five pounds – it's important to run the process and show your work. Communicate with the employee and show that you either reached agreement on the restrictions or obtained supporting medical documentation. Show that you explored with the employee and his/her supervisor the possible reassignment of non-essential tasks. Show you assessed the employee's qualifications and looked at every open job for which he/she qualified to assess a potential transfer. Show you had a final conference with the employee before concluding reasonable accommodation is not possible.

With the ADAAA shifting the statutory focus to the interactive process, a court will be far less likely to second-guess an employer's conclusion that reasonable accommodation was not possible when it has a record of the good-faith steps of how the employer arrived at that conclusion. As we counselors love to say – document everything, including the thought process leading up to all conclusions reached, and the fact that you did not reach the final conclusion until after completing all steps in the process.

- **One Size Never Fits All**

A shifted focus to efforts to identify legitimate opportunities also means an increased premium on flexibility and not rigid application of any step-by-step policy regarding the interactive process. While employers of course want to consistently perform the same kinds of steps from situation to situation, it is equally important to take each accommodation inquiry and each employee's unique circumstances on their own merits. It will be the exception, rather than the rule, that multiple employees will present with the same limitations and the same medical diagnoses, restrictions, and prognoses regarding the various essential functions of the job. Because few accommodation inquiries

will be the same, an employer's approach to the interactive process should allow for flexibility. A flow chart of steps rigidly applied to each circumstance will likely result in a less defensible conclusion when the employer determines reasonable accommodation is not possible.

- **Remember the FMLA and Workers' Compensation**

The ADA's requirements do not exist in a vacuum – it regularly integrates with both the Family and Medical Leave Act and state workers' compensation requirements. If an employee cannot return at the expiration of FMLA leave for his or her own serious health condition, the employer runs a serious risk of terminating the employee without first conducting an independent ADA analysis and assessing whether additional leave or moving the employee into a different position conforming with their restrictions. The same applies after an employee receives a permanent and stationary workers' compensation diagnosis with restrictions that preclude maintaining him or her in the same position. State workers' compensation requirements may not require an employer to take further steps in such a circumstance. The ADA does.

Many employers feel the ADA, particularly with the increased emphasis on the interactive process, is burdensome, and the foregoing tips may do nothing to change that belief. But that burden is the reality, and while employers focused on compliance need not necessarily embrace the burden, they do have to accept their responsibility to meet it.

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