CLIENT ALERT

The EEOC's New ADA Guidance: A Mixed Bag For Employers

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There is something curious about federal administrative agencies: they always want to expand their jurisdiction and authority to get into your business. The Equal Employment Opportunity Commission is no different. With a statute and regulations already on the books, it recently published "Enforcement Guidelines" for its prosecutors under the Americans With Disabilities Act ("ADA"). It is no surprise that the Guidelines suggest an expansive enforcement posture that will readily take the Agency beyond the strictures of the law itself. Forewarned is forearmed!

A sampling of the issues addressed by the Guidelines include:

How Does An Employee Make A Request For Reasonable Accommodation?

Generally speaking, an individual with a disability must inform his or her employer that an accommodation is needed. The Guidelines make it clear, however, that a request for accommodation need not be explicit or take any particular form. Indeed, an employee need not refer to the ADA or use the words "reasonable accommodation" or disability to trigger an employer's obligations under the ADA. An employee who tells her supervisor "I am having difficulty commuting to work because of my back and I wish I could just work from home" would be considered to have made a request for accommodation in the EEOC's view.

The Right To Demand Proof Of An Employee's Disability And Need For Accommodation

The Guidelines confirm that an employer **may not** ask for documentation concerning a disability when (1) the disability and the need for reasonable accommodation are "obvious" or (2) the individual has provided information sufficient to substantiate the existence of the alleged disability and the need for the requested accommodation. The Guidelines, however, do not attempt to define the type or amount of information that would be deemed sufficient to substantiate a disability and need for accommodation. Moreover, continued efforts to obtain additional information or require an employee to undergo an examination by the employer's doctor may be found to be retaliatory if the employee has already provided documentation that the Agency deems sufficient to establish the existence of a disability and need for accommodation.

The ADA And Employer Leave Policies

Many employers still retain "no fault" leave policies under which employees are automatically disciplined or even terminated after they have been out of work for a given period of time regardless of the reason for their absence. Although such policies may provide ease in administration, the Guidelines confirm that they are likely to be found unlawful as applied under the ADA.

The Guidelines also suggest that an employer would violate the ADA by penalizing an employee for missing work in connection with a leave granted under the ADA. For example, suppose an employer grants a salesman with cancer six months of leave to undergo medical treatments as a reasonable accommodation. Would the employer violate the ADA if it disciplined the employee under a uniformly applied policy of disciplining or terminating salesmen who fail to reach certain minimum annual sales targets?

The Guidelines say "yes," because disciplining the employee would effectively penalize him for using the reasonable accommodation.

Overlapping Obligations Imposed By The ADA And FMLA

The Guidelines highlight an employer's overlapping and conflicting obligations under the ADA and the Family and Medical Leave Act and prescribe one rule for resolving such conflicts -- employers must comply with each and every requirement under both statutes. A sampling of the conflict areas include: an employee with a serious health condition under the FMLA is only entitled to 12 weeks of leave during a 12-month period. This same employee may be entitled to additional leave as a reasonable accommodation if his serious health condition also constitutes a "disability" under the ADA. The ADA similarly requires an employer to continue an employee's health insurance benefits during a leave period only if it does so for other employees who take leave. Consistent with this rule, an employer would be permitted to discontinue an employee's paid health insurance coverage where, because of his requested accommodation, (i) the employee moved to a part-time schedule, and (ii) the employer's standard benefit policies do not extend health insurance coverage to part-time employees. This discontinuation of coverage, though permissible under the ADA, may well violate the FMLA's express mandate that employers continue an employee's health insurance coverage during the 12-week leave period afforded by the statute.

Does An Accommodation That Violates A Collective Bargaining Agreement Impose An Undue Hardship?

The answer is decidedly no under the Guidelines. Indeed, the EEOC explicitly rejects the rule, adopted by several federal courts of appeals, that an accommodation which violates the seniority provisions of a collective bargaining agreement is an undue hardship. In lieu of such a rule, the Guidelines state that "the ADA requires an employer and a union, . . . to negotiate in good faith a variance to the CBA so that the employer may provide a reasonable accommodation, except if the proposed accommodation unduly burdens the expectations of other workers." The Guidelines offer no hint as to whether any particular accommodation would "unduly burden the expectations of other workers."

Conclusion

Though meant to assist employers and employees to determine when and what reasonable accommodations must be provided under the ADA, the EEOC's Guidelines raise about as many questions as they answer. Unfortunately for employers, additional litigation of ADA cases may be the only way to further clarify employers' obligations under this complex statutory scheme.

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