Employers with 15 or more employees are required to comply with the provisions of the Americans with Disabilities Act of 1990 (ADA) that prohibits employment discrimination against qualified individuals with a disability. As part of their obligations under the ADA, employers are required to provide a reasonable accommodation to facilitate employment opportunities for disabled individuals. A reasonable accommodation is usually achieved through what is known as the interactive process, whereby the disabled individual and the employer discuss what type of assistance is needed, and alternatives are implemented. While each employee situation involving the ADA requires an individualized assessment based on the particular facts and circumstances, here are five general traps employers should seek to avoid.
TRAPS

1. Full-Duty Releases

Many employers unsuspectingly set themselves up for potential liability by requiring a disabled employee to present a full-duty release when he or she is cleared to return to work. Say, for example, an employee has been out for back surgery for 10 weeks. When the employee is cleared to return to work, his doctor may impose certain continuing work restrictions, such as the inability to lift more than 20 pounds. If the employer tells the employee he cannot return until he is “all better” or “100 percent healed,” then a violation of the ADA has occurred. The ADA requires employers to provide reasonable accommodations based on the physical or mental limitations of an otherwise qualified employee. Thus, in this circumstance the employer would need to assess the restrictions and determine whether an accommodation could be provided.

2. Fixed Leave Policies

Many employers provide leaves of absence to their employees, whether or not they are legally obligated to do so (i.e., under the Family and Medical Leave Act). But what happens if an employee needs more leave than the employer provides? Employers may not rigidly adhere to a fixed leave policy that states that a maximum amount of time – whether it is 12 weeks, six months or even one year – can be taken as leave for a medical or psychological condition. Even if the employer’s leave policy is uniformly enforced, the ADA still requires that a case-by-case assessment be made to determine if more time is required than the policy allows. While employers are not required to grant indefinite leave under the ADA, some courts have held that ADA leave in excess of one to two years can be appropriate under specific circumstances.

3. Competing for Job Reassignment

If a disabled employee cannot be reasonably accommodated in his or her current position, the ADA allows an employer to reassign that person to another vacant job for which he or she is qualified, even if the job pays less. If this situation arises, employers need to be mindful that the disabled individual does not need to be the best candidate for the job. In short, the disabled employee does not need to compete with other, more qualified, candidates. If the disabled individual is at least minimally qualified, then he or she should be awarded the job. That may not seem fair, but to do otherwise is to risk a potential ADA violation.

4. Implausible Reasonable Accommodations

When employers engage in the interactive process, creativity is critical. Consideration must be given to all possible accommodations that may serve the desired end result of enabling the employee to perform successfully. While nothing should be off limits, a reasonable accommodation needs to make sense. For example, granting unpaid leave as an accommodation may be useful if an employee is recovering from surgery. However, it may not be useful if the employee suffers from a degenerative chronic disorder that will not improve over time. In the latter case, providing leave from work only postpones the inevitable. Similarly, the ability to work from home is a popular accommodation for many employees. To be effective, though, it must be

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FIVE ADA TRAPS FOR EMPLOYERS TO AVOID

feasible. A restaurant food server cannot work from home, nor can a casino dealer. However, other types of jobs may be conducive to that arrangement. It would be a mistake for an employer to not at least consider that alternative.

5. Lack of Documentation

The interactive process often encompasses meetings with the employee and the exchange of documentation to facilitate a discussion of potential reasonable accommodations. The ADA allows employers to request documentation that supports the need for accommodation. Employers should avail themselves of this important opportunity, particularly where there are questions and uncertainties as to what assistance the employee may require. Likewise, employers should maintain records of each substantive discussion with the employee. This documentation is an employer’s best defense to a “failure to accommodate” complaint. Without such documentation, employers must necessarily rely upon the frailties of memory to reconstruct the efforts they made to work with the employee. Even then, a witness account is generally not as persuasive as a written document in the context of a later legal proceeding.

Conclusion

ADA compliance has never been more important for employers. Government agencies like the U.S. Equal Employment Opportunity Commission (EEOC) have recently been increasing their ADA enforcement efforts. At one time, ADA class actions were practically non-existent. Now, however, employer policies and practices impacting ADA issues have come under greater scrutiny, and the EEOC has not been shy about targeting employers and seeking class-wide relief for aggrieved individuals. Employers need to be vigilant to minimize their exposure by not falling victim to some of these common traps.

1. 42 U.S.C. §12101 et seq.
3. 42 U.S.C. §12111(9); 29 C.F.R. Pt. 1630 App. § 1630.2(o).
5. Id.; see also EEOC Guidance, “The Americans with Disabilities Act: Applying


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