

KEEPING UP WITH DISABILITY LAW: ARE YOU PREPARED FOR THE INTERACTIVE PROCESS?

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(As prepared for and published in the PRIME Watch Letter for PennPRIME)

The Americans with Disabilities Act (ADA) was passed in 1990 to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” More recently, Congress decided to amend the ADA in order to provide coverage to a greater number of individuals. The Americans with Disabilities Act Amendments (ADAA), which took effect on January 1, 2009, broadened the definition of “disability” by rejecting more narrow standards established through Supreme Court decisions. For many years, an assessment of whether a person’s condition or impairment amounted to a disability was made with reference to mitigating measures (like medication). Now, mitigating measures (except ordinary eye glasses/contacts) are not to be considered when making this assessment. The amendments also provide less demanding definitions of “substantially limits” and “major life activity” so that more impairments are considered disabling. All of this means that many more individuals are now covered by the expanded definition of “disabled” and municipalities who fail to address accommodation issues effectively run a greater risk of violating the law. Have you taken the steps necessary to comply with the law by updating policies, forms and training?

Employers are required to post a statement of reasonable accommodation. If not already done, you should revise your ADA policies to reflect the new definitions and standards contained in the ADAA. Although the amendments have been in effect for nearly two years, a surprising number of public employers have not updated their policies and forms. This puts the employer at a great disadvantage. If an EEOC investigator or a judge sees that an outdated policy was in place, they will assume that the amendments were not acknowledged, let alone followed. Your policy should provide guidance on all aspects of the ADA, including definitions of disability, accommodations, procedures and medical examinations. Less obvious preparations for the interactive process include having detailed job descriptions that accurately identify essential and marginal functions. Job descriptions are the foundation for discussions about reasonable accommodation, requests for information from physicians, and defenses to claims. The way that you administer leave policies, modified or light duty, discipline, or fill vacancies, will have a major impact on what accommodations are reasonable.

On a functional level, your training and practices should reflect a new reality imposed by the ADAA - employers must be prepared to assume that employees with significant health issues or restrictions are disabled. Between 1990 and 2009, employers often focused (appropriately) on the threshold question of whether the individual had a disability in the first place. This first step may have called for the use of physicians, independent medical examinations and legal review. The ADAA now commands a different approach in most circumstances – employers are to move directly to the question of how to resolve the issue with some form of reasonable accommodation, such as purchasing equipment, rearranging internal spaces, swapping duties, reassigning marginal duties, adjusting work or break times, modifying a work policy, or granting

unpaid leave requests. It is now more critical than ever to understand and utilize the “interactive process” effectively.

The interactive process is a “problem solving approach” used to identify tasks or job functions that limit performance and to identify accommodation(s) that remove barriers to job performance. It is designed to be an informal discussion between the employer and the employee and is always fact specific. This process requires communication once an accommodation is requested or the employer is aware of the need for accommodation. When a disability is obvious, e.g. the employee is wheelchair bound, and the accommodation is to move furniture, the “interactive process” is limited in substance and duration. If the disability is less obvious, like a psychological impairment, the process may require input from a third party to define the limitations and to devise an accommodation. The interactive process may require several meetings and may take time to implement. Communications with medical providers should be clearly set forth in writing or you will not receive responsive and specific information. Recordkeeping of these steps is always prudent. Engaging in a good faith interactive process may be an affirmative defense to a disability claim.

The bottom line is that most municipalities have at least some work to do. If you have not updated policies and forms, you should do so immediately. For those who have updated policies but not conducted training, now is the time to take the next step by providing the necessary guidance to your supervisors and managers. Once these steps are complete, you will be better prepared to engage in the interactive process.