

Navigating the Interactive Process: Best Practices for Complying with the ADA

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Four recent lawsuits filed by the Equal Employment Opportunity Commission (“EEOC”) against health care employers underscore the federal agency’s intent to continue to ensure that employers are complying with the Americans with Disabilities Act’s (“ADA”) mandate to reasonably accommodate workers with disabilities.

EEOC v. Wesley Health System, LLC (S.D. Miss.)

In July 2017, the EEOC filed suit against Wesley Health System (the hospital) for allegedly refusing to provide a reasonable accommodation to a registered nurse who required a lifting restriction following a three-month leave of absence. According to the EEOC, the hospital refused to allow the nurse to return to work and terminated her employment without first engaging in the interactive process to determine whether the nurse was qualified to do her job. Thereafter, the nurse applied for an open position that did not require heavy lifting for which she purportedly was qualified, but the hospital selected another candidate.

EEOC v. Senior Care Properties Inc. (E.D.N.C.)

In September 2017, the EEOC filed suit against Senior Care Properties Inc., a residential rehabilitation facility, alleging it denied a reasonable accommodation for a certified nursing assistant (“CNA”). The complaint alleges that the CNA suffered an arthritis flare up and, as a result, required light duty for four weeks. Instead of providing the employee light duty, the complaint alleges, the employer placed the CNA on an unpaid leave, offered no other accommodations, and fired the CNA at the conclusion of the leave -- despite the CNA’s ability to return to work full duty -- for exceeding the Company’s two-week leave policy.

EEOC v. St. Vincent Hospital and Health Care Center, Inc. (S.D. Ind.)

In September 2017, the EEOC filed suit against St. Vincent Hospital for allegedly failing to accommodate an employee’s indefinite lifting restrictions. Specifically, the complaint alleges that the hospital failed to transfer an employee to a vacant position for which she was qualified and, instead forced her to take a leave of absence and ultimately terminated her employment.

EEOC v. Prestige Senior Living, LLC (E.D. Cal.)

Among the four cases is the EEOC’s lawsuit against Prestige Senior Living, LLC, an assisted living facility, for allegedly maintaining a policy requiring employees to be 100% healed/100% fit for duty before returning to work in violation of the ADA.

In light of the recent lawsuits filed by the EEOC, health care employers should follow these strategies for effectively navigating the interactive process in compliance with the ADA:

Formalize the Accommodation Process: Create a written policy and process for requesting



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accommodations. A formal policy and process will demonstrate an employer's commitment to accommodating individuals with disabilities and should provide for a consistent approach when requests are made. The policy should instruct employees to direct accommodation requests to Human Resources professionals, who have more experience with the ADA and better understand the employer's process.

Train Supervisors: Even with a formal policy and procedure in place, employees will inevitably speak with their supervisor when seeking a reasonable accommodation. Make sure your supervisors understand the requirements of the ADA and know how to recognize a request, or a demonstrated need, for a reasonable accommodation. Employers should instruct supervisors to immediately report all accommodation requests to HR, not to make any inquiries, comments, or decisions about an employee's request, and to maintain the confidentiality of all employee medical information.

Take a measured approach: Never say never when initially presented with a request. Even if the request is unreasonable, employers should gather and consider all the relevant facts before making a decision and responding to the employee.

Communicate: The interactive process requires an employer to engage in an open and meaningful dialogue with the employee requesting an accommodation. To fully understand an employee's request and limitations and identify possible accommodations, it is best to speak with the employee, preferably in person, instead of communicating in writing. Keep in mind that you likely will need to have multiple conversations with an employee during the interactive process. That said, all communications should be documented by memorandum or follow-up email.

Make an Individualized Assessment: One size does not fit all when providing a reasonable accommodation. What might be reasonable for one employee may not be reasonable for another. Also, just because you have not provided the accommodation requested in the past does not mean it cannot be a reasonable accommodation. Each request will present different factors that must be considered, including an employee's essential and non-essential job functions. This analysis should not be limited to an employee's job description, but should include a discussion with the employee's supervisor, and possibly a co-worker who performs the same job, to fully understand the frequency and importance of the duty(ies) at issue. In addition, employers are entitled to, and should require, medical documentation to understand the employee's impairment, the nature, severity, and duration of the impairment, and any resulting limitations. Requests for medical information should be limited to the information truly needed to assess the accommodation requested. Finally, policies or practices that impede the interactive process, including 100% healed policies, will be found to violate the ADA.

Be creative and flexible: Keep in mind that you do not need to provide the accommodation requested by the employee, an alternative accommodation may be provided so long as it is effective. In addition, even when an employee does not propose an accommodation, the employer still has an obligation to engage in a meaningful dialogue with the employee to determine whether a reasonable accommodation can be made. Finally, as demonstrated by the EEOC's recent lawsuits, when it is determined that an employee cannot perform the essential functions of the employee's current job, employers should consider transferring an employee to a vacant position for which he or she is qualified or provide an employee a leave of absence as a reasonable accommodation. Employers should exhaust all possibilities before terminating an employee who requests an accommodation.

Thoroughly analyze undue hardship: Employers relying upon the undue hardship defense as a basis for denying an accommodation must affirmatively show that the requested accommodation will create significant difficulty or expense for the employer. Factors that should be analyzed include loss of productivity, increased workload on co-workers and management, impact on patient care and safety, and increased costs for the organization. In most circumstances, cost alone will not constitute an undue hardship. Employers who conduct a cursory review of the potential undue hardship factors are inviting EEOC scrutiny.

Document the process: Be sure to document the employee's request and all steps taken and communications had in response to the request, including the accommodation offered and provided, the reasons for denying the accommodation request, and/or the undue hardship analysis. The documentation serves as a personnel record and will also be critical in defending any future claims.

Follow-up: After providing an accommodation, check in with the employee and supervisor to understand if the accommodation provided is working.

Health care employers who take the time and effort to follow these practices will be better equipped to handle accommodation requests and will be in a better position to defend failure to accommodate claims.

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