

Question & Answer Summary

April 22, 2010 Webinar

Disability Discrimination: Avoiding Bias and Managing Accommodations

On April 22, 2010, Miller Law Group presented our webinar on “Disability Discrimination: Avoiding Bias and Managing Accommodations.” We examined the ADA Amendments Act and the Equal Employment Opportunity Commission’s proposed regulations, as well as recent cases and best practices regarding the interactive process and reasonable accommodations. In addition, we focused on managing absenteeism, employee alcoholism, and handling pre-employment inquiries and medical examinations without violating disability laws. The following are answers to frequently asked questions by webinar attendees.

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Q. IF A PERSON HAS A DISABILITY, BUT THERE IS NO IMPACT ON THE JOB AND NO REQUEST FOR ACCOMMODATION, WHAT, IF ANYTHING, SHOULD EMPLOYERS BE CONCERNED ABOUT?

A. If a disability has no impact on an employee’s ability to perform the job, then an employer has no obligation under the Americans with Disabilities Act (ADA) or the California Fair Employment and Housing Act (FEHA) to make a reasonable accommodation. But even in this situation, employers should be alert to other issues that could arise, such as harassment or discrimination. For example, it would be illegal for a manager to exclude the disabled employee from certain activities because the manager is uncomfortable with the disability, or to terminate an employee because the manager assumes that the employee will not be able to perform the job.

Q. MAY SOMEONE OTHER THAN THE DISABLED EMPLOYEE REQUEST A REASONABLE ACCOMMODATION ON THE EMPLOYEE’S BEHALF?

A. Yes. A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an employee with a disability. For example, if a disabled employee’s doctor sends the employer a letter stating that the employee may perform the job but with certain work restrictions, the letter would constitute a request for reasonable accommodation. Similarly, if an employee’s spouse calls the employee’s supervisor to inform her that the employee had a medical emergency due to a disability, needed to be hospitalized, and thus requires time off, this discussion would constitute a request for reasonable accommodation.

Q. IS AN EMPLOYER REQUIRED TO PROVIDE THE SPECIFIC REASONABLE ACCOMMODATION THAT AN INDIVIDUAL REQUESTS?

A. No. As the Equal Employment Opportunity Commission (EEOC) has stated, the employer may choose among reasonable accommodations as long as the chosen accommodation is effective. For example: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which the employee often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The employer asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

Q. IN CONSIDERING REASONABLE ACCOMMODATIONS, CAN AN EMPLOYER REFUSE TO REASSIGN AN EMPLOYEE OR CHANGE AN EMPLOYEE'S SHIFTS BECAUSE DOING SO WOULD VIOLATE THE RULES OF A SENIORITY SYSTEM?

A. The EEOC's position is that, generally, it is "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system. This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement and shifts give employees expectations of consistent, uniform treatment -- expectations that would be undermined if employers deviated from the seniority system to accommodate a disabled employee. The EEOC notes, however, that if there are "special circumstances" that undermine the employees' expectations of consistent, uniform treatment, it may be a reasonable accommodation, absent undue hardship, to reassign a disabled employee despite the existence of a seniority system. For example, special circumstances may exist where an employer retains the right to alter the seniority system unilaterally and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system. In this situation, one more exception (*i.e.*, providing the reassignment to a disabled employee) may not make a difference. Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting that seniority does not automatically guarantee access to a specific job.

Q. MUST AN EMPLOYER CHANGE AN EMPLOYEE'S SUPERVISOR AS A FORM OF REASONABLE ACCOMMODATION?

A. No. The ADA does not require an employer to provide an employee with a new supervisor as a reasonable accommodation. On the other hand, the ADA may require an employer to alter supervisor methods -- for example, communicating instructions in writing rather than orally, or having the supervisor give three days notice, instead of one, of upcoming team meetings -- as a form of reasonable accommodation.

Q. IF WE GIVE AN EMPLOYEE AN UNPAID LEAVE AS A REASONABLE ACCOMMODATION, HOW LONG OF A LEAVE PERIOD ARE WE REQUIRED TO PROVIDE TO THE EMPLOYEE?

A. While unpaid leave may be a form of reasonable accommodation, the question of how much leave an individual must be given as a reasonable accommodation will be very fact-specific, depending upon, among other things, whether a particular amount of time imposes an undue hardship on the employer and whether the individual is still considered "qualified" (*i.e.* will s/he be able to perform the essential functions of the job at the end of the leave). The undue hardship standard will be more easily established by a small business that is less likely to have other employees who can perform the absent employee's job duties, particularly if the absent employee is performing specialized work or is a high-level employee. Additionally, the undue hardship standard is more likely to be met where the employee is unable to provide a fixed date of return to work. In this situation, the EEOC has noted, undue hardship may derive from the disruption of the employer's operations that occurs because the employer can neither plan for the employee's return nor permanently fill the position. The lack of a fixed date of return, however, does not automatically mean a leave can be denied on undue hardship grounds. Rather, the employer is required to evaluate whether it can grant leave at that time. An employer can require, as part of the interactive process, that the employee provide periodic updates on his condition and possible date of return. After receiving these updates, the employer may reevaluate whether continued leave amounts to an undue hardship.

It is also important to note that if the employer and employee are also covered by the Family Medical Leave Act (or similar state laws), the employee may be entitled, at a minimum, to an unpaid leave of a certain duration -- typically 12 weeks -- under those laws. If an employee exhausts her FMLA leave entitlement, but still needs more time off work, then the employer should undertake a reasonable accommodation analysis rather than assume it has satisfied all of its legally mandated leave obligations.

Q. MAY AN EMPLOYER TELL A DISABLED EMPLOYEE'S COWORKERS THAT THE EMPLOYEE IS RECEIVING A REASONABLE ACCOMMODATION?

A. No. An employer may not disclose to coworkers that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. In particular, the ADA specifically prohibits the disclosure of medical information except in certain limited situations, such as to supervisors and managers who need to know the necessary restrictions on the employee's duties and necessary accommodations.

The EEOC advises that if a coworker questions why an employee is receiving what is perceived as "different" or "special" treatment the employer may certainly respond by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the individual asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask for some kind of workplace change for personal reasons. It is imperative that managers be trained about how to respond to such questions because it is reasonable to assume they may be asked questions by an employee's coworkers.

Q. MUST AN EMPLOYER ACCOMMODATE AN EMPLOYEE SUFFERING FROM ALCOHOLISM BY ALLOWING THE EMPLOYEE TO COME IN LATE TO WORK DUE TO HIS DRINKING THE NIGHT BEFORE AND RESULTING HANGOVER?

A. No. The ADA does not require an employer to provide an accommodation that simply enables the individual's alcohol addiction. So, for example, an employer need not provide a schedule to accommodate weekend drinking. Similarly, employers may enforce rules concerning alcohol in the workplace. The ADA specifically permits employers to take the following actions: (1) prohibit the use of alcohol in the workplace; (2) require that employees not be under the influence of alcohol in the workplace; and (3) hold an employee with alcoholism to the same standards for employment or job performance and behavior to which the employer holds other employees, even if unsatisfactory performance or behavior is related to the alcoholism.

Q. DOES THE ADA COVER A PERSON WHO IS ILLEGALLY USING DRUGS?

A. Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Thus, an employer will not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs. However, an individual who no longer engages in the illegal use of drugs could meet the definition of having a “disability” if s/he: (1) has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully; or (2) is participating in a supervised rehabilitation program (e.g. alcoholics or narcotics anonymous). Assuming a recovering addict is protected by the ADA (*i.e.*, he is not currently using drugs), he may be entitled to a reasonable accommodation, such as time off to attend counseling meetings or appointments.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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