

Best Practices in Accommodating Employee Disabilities

By Sarah Hale

As COVID-19 vaccines allow Oregonians to return to a more normal life, employers are preparing to welcome their workforces back to offices and job sites. While many employees are eager to return, there may be some resistance from others, particularly from those whose medical conditions put them at greater risk for complications. Employees may also have new medical conditions that now require accommodations. By reviewing best practices under the Americans with Disabilities Act (ADA) and guidance from the Equal Employment Opportunity Commission, this article provides employers with tips for engaging in an effective interactive process with employees seeking disability accommodations.

The ADA requires employers to provide reasonable accommodations to employees with disabilities as long as doing so does not pose an “undue burden” on the employer (which is generally a high burden for employers to meet). A critical component to these obligations is engaging an interactive process with employees, and often their health care providers, to learn about the nature of the employee’s disability and evaluate what (if any) reasonable accommodations would allow the employee to perform the essential functions of their role. Examples of reasonable accommodations include job restructuring, part-time or modified work schedules, acquiring or modifying equipment (including assistive technologies), and changing tests, training materials, or policies.

When is an employer required to engage in this process? An employee does not need to make a specific request before an employer is obligated to engage in the interactive process to assess what, if any, reasonable accommodations may be provided that do not create an undue hardship. Once an employer becomes aware that a medical condition may be impacting an employee’s performance or workplace problems, they will want to begin the interactive process to identify whether the ADA is implicated (taking into consideration whether to make an appropriate request for medical documentation), and, if so, to implement appropriate accommodations. If an employee does make a request for an accommodation, consider this as triggering your obligation to begin the interactive process.

How do employers obtain information supporting an employee’s need for accommodation?

Engage in an open dialogue with the employee about the reasons why they believe that their requested accommodation will allow them to perform all of the essential functions of their position. It is most effective to begin with expressing a concern for the employee and asking open-ended questions seeking to elicit information about how the company can help the employee be successful. From a compliance perspective, this is the preferred approach because an employee perceived to be disabled qualifies for disability protections, even if they do not actually have a disability. Ensure that this interactive dialogue is being properly documented, including any modifications to the accommodation or follow-up discussions. Using template forms can be a way

to standardize the process and ensure consistent documentation. For example, consider creating a questionnaire to use as a guide for discussions with employees seeking an accommodation to work remotely.

What information can be requested from a medical provider? Employers *may* request sufficient documentation when the disability and/or need for accommodation is not known or obvious, but are not required to do so to provide an accommodation. Use logical judgment in deciding when to request the information, including information from a health care provider. Before requesting the information, be sure to obtain a medical release from the information. Possible questions for the employee and/or their health care provider may include: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether another form of accommodation could effectively address the issue; and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of their position (that is, the fundamental job duties). Be aware that the COVID-19 pandemic has produced a significant strain on the health care system, and employers should be pragmatic and flexible about requesting medical information. Once medical information is obtained, employers should be sure to treat all such documents or information as confidential and store it in a separate medical file.

What if the employee does not participate? Unfortunately, employers do not exhaust their obligation to participate in good faith in the interactive process simply because an employee fails or refuses to respond after one attempt to contact them. Employers should thoroughly document these interactions and make a second or third attempt before concluding that the employee is not cooperating.

What accommodation must the employer choose? An employer need not give an employee their requested or preferred reasonable accommodation; an employer has discretion to choose among effective accommodations. Similarly, an employer need not create a new position tailored to the employee’s abilities or limitations. At times, accommodation requests may overlap with other leave laws. For example, short-term or intermittent unpaid leave is considered to be a reasonable accommodation, even if it causes scheduling issues. Such leave may also qualify as a “serious health condition” under the Family and Medical Leave Act. Consult with legal counsel when in question.

What steps should employers take to prepare for such accommodation requests? Train managers and human resources employees to recognize requests for accommodation (employees often do not make formal requests and they do not need to reference the ADA by name!). Provide training and support for the individuals who are tasked with engaging in the interactive process with employees. Additionally, be sure all positions in your organization have job descriptions with detailed explanations of all essential functions of the role. Now – before you receive an accommodation request – is the best time to ensure all jobs are correctly documented. These job descriptions are critical to the accommodation process as it allows the employee’s medical

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provider to accurately assess whether any reasonable accommodations would allow the employee to perform the essential functions of their job.

For questions regarding employee accommodation requests, contact Barran Liebman attorney Sarah Hale at 503-276-2111 or shale@barran.com. To learn more about other hot-topic employment compliance matters, register for Barran Liebman's upcoming 2021 Annual Employment, Labor, Benefits, & Higher Education Law Seminar.