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# HOW TO ENSURE ADA COMPLIANCE AND STAY OFF THE EEOC'S MOST-WANTED LIST

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Even though the #MeToo movement has rightfully commanded overwhelming attention during the past year or so, supervisors cannot afford to lose sight of their substantial legal duties in complying with the Americans with Disabilities Act (ADA). Managing employees' needs for accommodation, including requests for leave, presents continuous challenges. This is especially true in healthcare, where patient needs demand that employers maintain a fully prepared workforce all the time, every day.

In healthcare, where the medical needs of caregivers can intersect with patients' needs, unique challenges emerge. Although each scenario is different, these situations often raise the same question: how far must you go in accommodating employees' needs while at the same time ensuring that patients receive the care they deserve? While patient safety must be the first priority, a misstep in responding to employee needs can become painful and costly.

## ADA ALLEGATIONS TOP THE EEOC'S "MOST-WANTED LIST"

A quick glimpse of activity by the Equal Employment Opportunity Commission (EEOC) reveals the risks. In a recent sampling of press releases, listing new lawsuits and settlements that the EEOC announced on its website, nine of the first 11 items were ADA cases. One might loosely refer to these announcements as the Commission's "most-wanted list." Your organization—and most importantly, your human

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resources and leadership personnel—cannot overlook this reality.

Familiar themes emerge from this recent sampling of cases. The predominant issue relates to employees' needs for accommodation. Many arise in the form of requests for leave. Claims also flow from employers' alleged failure to consider enough information or to engage interactively with disabled workers before making employment decisions.

At the same time, employers face an insatiable demand—24/7 in many cases—for reliable, highly skilled employees. Hospitals and other healthcare employers must therefore set and enforce attendance and job performance standards, but do so without violating the ADA, the Family and Medical Leave Act (FMLA), or other relevant laws. While dicey, this challenge is not insurmountable. It requires employers to consistently rely on a disciplined process.

## **BUILDING COMPLIANCE BY FOCUSING ON THE BASICS**

Focusing primarily upon accommodation requests, especially requests for leave, an effective process framework rests upon the basic requirements of the ADA. The term “basic requirements” may be misleading, however. Besides prohibiting discrimination, the ADA *requires* you to provide reasonable accommodations to qualified disabled applicants or employees, if such accommodation would enable the individual to perform the essential functions of the job they seek or hold. Although brief, this sentence includes *many* pivotal terms, each of which can make an enormous difference. The application of terms has sparked much litigation.

As an example, an individual who is neither qualified nor disabled (as defined by the statute) will probably not be legally entitled to an accommodation. Following the 2008 amendments of the ADA, however, a substantial portion of today's workforce could establish that they would indeed be considered disabled under the law.

## **FOCUSING ON ESSENTIAL JOB FUNCTIONS AND *REASONABLE* ACCOMMODATIONS**

Accommodations must be reasonable, even if not necessarily preferred or requested by the employee. The ultimate test of a potential accommodation is whether it will

enable the employee to perform the essential functions of the job. This is critical. Hospitals, clinics and other providers usually cannot afford to employ individuals who are unable to perform all their duties. Identifying essential functions of a job can of course be controversial, which requires you to maintain accurate job descriptions.

Once you understand these fundamental concepts, you have established a foundation for a reliable analytical process. To fulfill your legal obligations, you must evaluate these issues on an individualized basis and confer interactively with the employee. Based upon the EEOC's recent announcements, many employers seem to be struggling to show that they have fulfilled these obligations.

## **FOLLOWING AN EFFECTIVE PROCESS TO BUILD A TRACK RECORD OF COMPLIANCE**

When employers cannot demonstrate compliance, the EEOC and plaintiffs' lawyers declare that they relied on assumptions instead of following the process meaningfully. You must, therefore, ensure that you can demonstrate the facts of your individualized analyses and interactive engagement with employees.

This does not require you to sacrifice established performance or productivity standards. But it does require you to be prepared to prove and explain your actions during this process, including your genuine efforts to identify reasonable accommodations that would enable the employee to perform the essential functions of the job.

How important is this step of the process? Calling it "vital" would be an understatement. In almost every case on the EEOC's recent list, solid evidence of completing this step could have enabled employers to avoid costly litigation and settlements. On the other hand, lack of evidence regarding this step has wrecked employers' cases.

Time and again, courts and plaintiffs' lawyers have chastised employers for a variety of easily avoidable ADA sins: apparently "jumping to conclusions" without medical information; "assuming" that an employee could not perform essential functions; failing to consider whether a reasonable accommodation might overcome an obstacle; or refusing to give an employee an additional week or two of medical leave, even when a doctor stated that the additional time

would enable that employee to resume performance of their essential duties.

## **THE PROCESS ITSELF MAY BE AS IMPORTANT AS THE ULTIMATE DECISION**

Again, these requirements do not mean that employees are entitled to unlimited or indefinite medical leave with *carte blanche* reinstatement rights. They simply mean that an individualized, interactive process is necessary. And employers can never forget that there are circumstances when courts would view a modest extension of medical leave as a perfectly reasonable (and probably necessary) accommodation.

Although the U.S. Court of Appeals for the 7th Circuit (covering Illinois, Wisconsin, and Indiana) recently disagreed with the EEOC's position and decided that the [ADA does not always require additional long-term leave after FMLA leave is exhausted](#), the court still recognized that some additional shorter-term leave may be reasonable depending upon the circumstances. Far from creating a bright-line rule that 12 weeks of leave is all that an employee can expect, this decision underscores the need for individualized analysis of each situation, in every circuit in the country.

## **TOP 10 WAYS TO AVOID THE EEOC'S "MOST-WANTED LIST"**

Against this backdrop, what must you do to reduce your risks and ensure that you are following an effective process when dealing with employees' needs for accommodation? Here are the top 10 key elements that can help establish that needed framework:

1. Maintain a policy describing your commitment to accommodating qualified, disabled applicants or employees when a reasonable accommodation would enable the individual to complete the application process and/or perform the essential functions of the job. Besides prohibiting discrimination, your policy should explain how to obtain assistance, encourage employees to ask questions, and prohibit retaliation against anyone who exercises their rights under the policy.
2. Train all managers so they know that your facility has a legal duty to follow this policy and that the related processes are too complex to handle without guidance from HR. Make sure they know that they are required to

involve HR professionals in evaluating and responding to employees' possible disabilities, no matter how obvious or minor the situation may appear to be.

3. Designate and carefully train HR professionals to handle employee leave, accommodation, and documentation processes. This training should emphasize the need to base decisions upon the job requirements and objective medical information, as opposed in particular to perceptions or opinions of those who are not the employee's medical provider.
4. Implement a system to ensure that job descriptions identify essential job functions accurately—perhaps in correlation to the annual evaluation process—and that those job descriptions stay up to date.
5. Establish the specific process for evaluating situations that may require an accommodation, keeping in mind that the duty to consider accommodations may arise without the employee expressly making a request.
6. Establish a process for reviewing, authenticating, and, when necessary, clarifying medical documentation regarding these situations.
7. Establish a system for conferring interactively with the employee during the process of collecting and reviewing documentation—and when evaluating possible accommodations. Key to this process is ensuring that it is individualized to the applicable employee and circumstances.
8. Document consideration of alternatives and the reasons for any determinations.
9. Document communications with the employee throughout the process, which includes explaining requests for documentation and applicable deadlines.
10. Finally, you must be prepared to demonstrate that you held up your end of the deal, maintaining their commitments and meeting their own deadlines.

While each case is a little different, the use of this process framework can go a long way in helping you stay off of the EEOC's "most-wanted list."

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