

First Quarter, 2000

LABOR UPDATE

Recent Developments in Labor and Employment Law

EEOC OFFERS NEW GUIDANCE FOR ACCOMMODATING DISABLED EMPLOYEES

Recently, the EEOC issued comprehensive enforcement guidelines on reasonable accommodations under the Americans with Disabilities Act. The ADA's employment provisions normally require employers with at least 15 employees to provide "reasonable accommodations" to "qualified" employees or job applicants with disabilities. In general, an "accommodation" is a modification to the job, work environment, or in the way things are done, that enables an individual with a disability to perform the essential functions of a job. Accommodation is not required, however, if it is unreasonable or would result in undue hardship to the employer.

The boundaries of an employer's duty to reasonably accommodate disabled employees has led to extensive litigation and disagreement between the EEOC and the courts and confusion for employers. The EEOC's new enforcement guidelines attempt to clarify what reasonable accommodation means, who is entitled to receive it, and how the interactive process of determining and implementing a reasonable accommodation should take place. It offers important explanations relating to such confusing issues as leave, reassignment, accommodating employees governed by a collective bargaining agreement, and disciplining employees as a result of conduct related to a disability.

Although the EEOC's enforcement guidance lacks the force of law, it is often given great deference by federal judges. As such, although an employer may ultimately dispute a position the EEOC has taken on a particular reasonable accommodation issue, the employer should be aware of the risks posed when responding to a disabled employee's request for reasonable accommodation.

The following are some of the highlights from the EEOC's guidelines:

Requesting Reasonable Accommodation

The EEOC guidelines reiterate that an individual who needs an accommodation must advise the employer of that need. Although the employee need not mention the ADA or even use the phrase "reasonable accommodation," the request must make clear that the individual needs an adjustment or modification in the employee's working environment because of a medical condition. The EEOC also emphasizes that a family member, friend or even a physician may request an accommodation on behalf of a disabled employee. Be aware, however, that the EEOC also cautions employers that if the employer knows that an employee is disabled, and knows that the employee is having workplace problems related to that disability, the employer is required to begin the accommodation process. The guidelines also restate that the employer does not need to provide the employee's choice of reasonable accommodation. Rather, the employer may choose from any available accommodation which allows the employee to perform his/her essential duties.

Types of Reasonable Accommodation

Two of the most controversial and problematic reasonable accommodation issues are leaves of absence and reassignment. The EEOC addresses both in its guidelines and specifically disagrees with many recent court decisions that have addressed the boundaries of an employer's obligation to provide these accommodations.

1. Leaves of Absence

The EEOC again states that the use of accrued (paid or unpaid) leave is a form of reasonable accommodation. Despite opposing decisions from several recent courts, the EEOC also states that an employer may not refuse leave as a reasonable accommodation simply because the employee cannot specify when he or she will return. If the employer cannot demonstrate that the indefinite period of leave causes undue hardship, the employer must grant the leave, according to the EEOC. Further, the EEOC would require an employer to modify leave policies and no-fault attendance policies to allow disabled employees unpaid leave over and above the employer's policy. Finally, according to the EEOC, an employer must hold open an employee's position as a reasonable accommodation if the employee is on leave.

2. Reassignment

The guidelines also reiterate that the EEOC considers reassignment a form of reasonable accommodation under the ADA, even though it should be the accommodation of last resort. Although the EEOC concedes that the disabled employee must be qualified for the position to which reassignment is sought, the employee does not need to be the best qualified individual for the position. Moreover, the EEOC would place the burden on employers to identify vacant positions for which the disabled employee might be eligible. It remains to be seen whether courts will follow the EEOC's lead in ADA cases.

Bottom Line: What this Means for Employers

The guidelines are not binding on employers or courts, but are followed by EEOC investigators who will be the first to scrutinize a decision that an employer made when faced with a reasonable accommodation issue. Further, many courts do give EEOC guidelines considerable weight. While the EEOC has helped to clarify what it considers the extent of the employer's reasonable accommodation obligations, many of these issues have yet to be decided. When faced with a complicated reasonable accommodation issue, employers are

advised to seek legal counsel prior to taking action.

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PAID MATERNITY LEAVE – COMING TO A STATE NEAR YOU?

Last month, President Clinton announced a comprehensive proposal that would allow states to subsidize maternity leaves for working parents by using the same system that currently pays temporary unemployment benefits. While the program would be strictly voluntary on a state-by-state basis, several states have expressed an interest in adopting the new program.

Under the present federal Family and Medical Leave Act, employees of companies with fifty or more employees are eligible for twelve weeks of unpaid leave to care for a new baby or a serious health condition of their own or a family member. However, a recent study showed that many working parents are unlikely to take this leave due to the financial hardship an extended, unpaid absence can cause. The same study showed that at least ten percent of those parents who took the unpaid leave ended up on welfare during their time away from work.

Because the proposed program uses state unemployment funds to subsidize maternity leaves, states must voluntarily agree to participate. The President's new proposal would also leave to individual states the terms and duration of subsidized maternity leave. However, the White House backs the proposal due to what it sees as a surplus of unemployment funds due to several years of record high employment rates.

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THE GOVERNMENT'S HAND IN THE COOKIE JAR?

For years, the United States Department of Labor has been investigating, suing and collecting money damages from employers who attempt to evade overtime pay by keeping "official" time records which do not reflect the actual, greater hours worked by the employees. Now, the shoe is on the other foot.

A class action suit is now proceeding in federal court in Washington, D.C. against the Department of Justice. It alleges that for years the Justice Department kept two sets of books on the hours worked by its attorneys. One set was straightforward time sheets, showing forty hours of work each week, which the Department "requested" the workers to sign. The other set of books was reports which the Justice Department sent to Congress, bragging that their lawyers routinely work 50-60+ hour work weeks. Justice is declining to comment on the

case, including whether its team of Department attorneys now defending the case is working 40 or 60 hour work weeks! (For further information see www.dojclass.com)

BITS AND PIECES

Two workers in the medical examiner's office in Milwaukee, Wisconsin, have filed formal complaints about a policy requiring employees to wear neckties.....ALL employees. Two female employees have now sued to have the rule abolished. The policy came about eighteen months ago when union-represented male employees filed a grievance claiming that wearing ties during autopsies could be unsanitary or dangerous. After an arbitrator held that the office could not require only men to wear ties, the chief medical examiner issued the policy requiring all employees to wear ties. A ruling on the complaint is expected early this year.

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A prospective telemarketer with eighteen missing teeth who was discharged by a Chicago publisher after three days of training because he "mumbled" on the telephone is entitled to a trial of his claims under the Americans with Disabilities Act. The federal court of appeals in Chicago pointed out that a jury must decide whether "mumbling" constitutes a substantial limitation of a major life activity within the meaning of the ADA. The Seventh Circuit noted that "unlike [the plaintiff], the Americans with Disabilities Act has teeth".

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In the wake of several high profile court battles over the alleged misclassification of employees as independent contractors, legislation has been introduced in the House of Representatives to clarify the issue. The bill would replace the current twenty point test, long criticized as vague and subjective, with a three part test. This new test presumes that a worker is an employee unless the employer does not exercise control over the worker, the worker makes his or her services available to others and the worker assumes "entrepreneurial risk". While the bill has the backing of organized labor, its passage is in doubt due to strong opposition by business groups.

QUOTABLE

Business is a good game – lots of competition and a minimum of rules. You keep score with money.

Nolan Bushnell

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