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New EEOC Guidance re Selected Disabilities:

On May 15, 2013, the Equal Employment Opportunity Commission (“EEOC”) updated its Guidance regarding cancer, diabetes, epilepsy, and intellectual disabilities. In so doing, the EEOC has acted aggressively to remove barriers to employment and misperceptions regarding the capabilities of employees in these (and other) protected classifications. The new Guidance also incorporates the expansive definition of “disability” in the ADA Amendments Act of 2008 (the “ADAAA”), which, inter alia, clarified that individuals with the above-noted impairments are considered “disabled” under the ADA.

The Guidance, provided in a Q&A format, contains instructions about an employer’s ability to obtain, use, and disclose medical information from an applicant or employee throughout the hiring process and during employment, describes various types of reasonable accommodations employers can provide to individuals with these particular disabilities, explains when it is appropriate to ask an individual whether an accommodation is needed, and details the many circumstances in which medical inquiries are prohibited.

Overview of Selected Changes in the Updated EEOC Guidance:

The Guidance updates the EEOC’s previous (2011) guidance, and provides a litany of instructions to employers on such topics as the following:

- what an employer may (or may not) ask or request from an applicant pre-offer, post-offer, prior to the start of employment, and during employment;
- whether and when an employer may ask an employee if performance problems are caused by a disability or other medical condition.
- the process to pursue legitimate employer concerns regarding safety and application of the “direct threat” standard, while prohibiting employer actions based on “myths, fears, or stereotypes”;
- appropriate employer responses to voluntary disclosures of disabilities;

- guidance in implementing workplace accommodations to the effect that employers should ask the employee what is needed to perform the essential functions of the job;
- providing examples to enable employers to better understand what the ADA permits and requires.

Obesity:

It is noteworthy that the new EEOC Guidance removed a statement from its prior guidance that previously denied that simple obesity (without any accompanying or underlying medical condition(s)) could be considered an ADA-recognized disability. Note: The American Medical Association (AMA) now officially recognizes obesity as a disease. The AMA's designation will likely make it easier for an obese person to maintain a viable disability discrimination claim based on obesity alone, and/or to claim that (s)he was "regarded as" disabled in violation of the ADA.

Disability Leaves of Absence:

The Guidance takes the position that an employer generally may not simply deny an open-ended leave request, and states that "granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation." While much current case law suggests that requests for totally open-ended leaves are not reasonable accommodations, EEOC recommends that employers communicate with an employee during an open-ended leave to secure "periodic updates" "and the need for continued leave beyond what originally was granted." In the event that such leave has been extended multiple times, the Guidance indicates that the employer could then attempt to prove that providing further leave would work an "undue hardship" (e.g., significant difficulty or expense) on the employer.

Accommodating Diabetes and Epilepsy:

The Guidance suggests a number of possible accommodations for employees with diabetes or epilepsy, in various contexts. For epilepsy, the EEOC suggests, for example, that an employee may need a rubber mat in the event of a fall, as well as work schedule adjustments, and breaks to take medication or to rest after a seizure. For diabetes, the EEOC suggests providing a stool if the employee cannot stand for extended periods, and also providing breaks to test blood sugar levels, administer injections or medication, or to rest.

Light Duty:

If an employer has only temporary light duty jobs, the Guidance suggests that the employer need not create a permanent light duty position for an employee with a disability-related injury.

Occupational Injury:

The Guidance suggests that an employer is not required to provide an accommodation to an employee with an occupational injury that is not a “disability” under the ADA.

Diabetics seeking/holding driver positions:

The Guidance takes the position that applicants and employees with diabetes may be qualified for positions operating commercial motor vehicles, even where the U.S. Department of Transportation (“DOT”) requires minimum physical standards, in reliance on the fact that DOT issues exceptions (“waivers”) to certain individuals with diabetes who want to drive CMVs.

Intellectual Disabilities:

The Guidance issued analogous guidelines barring inquiries regarding intellectual disabilities in various contexts, while requiring reasonable accommodation to enable an applicant or employee with an intellectual disability to perform the job tasks at issue.

The issuance of the Guidance coincided with the May 18, 2013, release of the American Psychiatric Association’s (APA’s) *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (“DSM-5”), which classifies and describes mental disorders. A major modification in DSM-5 is a change from the previously categorized disorder of “mental retardation” to the diagnosis of “intellectual developmental disorder.”

DSM-5 also changed the process through which mental disorders are assessed, retaining IQ test scores in the assessment process but removing them from the diagnostic criteria. This appears to be an effort by the APA to ensure that practitioners do not overemphasize IQ scores as a defining factor of an individual’s overall ability.

The release of DSM-5 is relevant to the EEOC’s interpretation of the ADA because, in prior guidance documents interpreting the ADA with respect to psychiatric disabilities, the EEOC previously cited DSM-4 as a relevant tool in determining what constitutes a mental impairment.

Going Forward:

In view of the new EEOC Guidance and related developments, employers should take the following actions:

- Review the Guidance and become familiar with the EEOC’s expansive views on employer obligations under the ADA, which will guide the EEOC’s ADA enforcement efforts.

- When an applicant or employee seeks an accommodation due to cancer, diabetes, epilepsy, intellectual disabilities, or obesity, review the types of accommodations that are proposed in the Guidance, because they represent a panoply of what EEOC expects an employer to offer to an applicant/employee with one of these disabilities.
- Ensure that supervisors are trained to understand the “interactive process” and to recognize accommodation requests, even when the word “accommodation” is not used in a request.
- Remind supervisors to contact Human Resources for assistance in determining whether a suitable reasonable accommodation is available in any particular situation.
- Recognize that the duty to accommodate is a continuing obligation. If a particular accommodation fails or is ineffective, the employer must consider whether any other reasonable accommodation(s) may be available.
- When a position actually requires physical presence and regular attendance at an employer facility, make sure that such needs are clearly (and accurately) stated as essential functions in the particular job description.
- Do not presume that conditions such as obesity are not ADA disabilities; rather, proceed from the assumption that they may well be considered as such, and explore possible reasonable accommodations.

Feel free to call if you have any questions about the new EEOC Guidance or other ADA compliance issues or concerns.