

The Amended ADA: Actively Discuss Accommodations

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As the impact of the Americans with Disabilities Amendments Act begins to be felt in both workplaces and courtrooms across the country, no one can doubt that effective accommodation dialogues have never been more important. The Amendments Act's regulatory and interpretive directives will more often than not ultimately require employers to set aside questions of whether an employee requesting an accommodation has a disability covered by the ADA and instead collaborate with that employee to identify accommodations that are effective, reasonable and without undue hardship. What follows are some guidelines to help both employers and employees make accommodation dialogues win-win encounters.

The Interactive Process

When the employee's disability or need for an accommodation is not obvious, an employee's request for an accommodation requires employers and employees to engage in what the EEOC terms an "interactive process." The EEOC describes the interactive process as an informal dialogue between the employer and the employee designed to identify the precise limitations resulting from the employee's disability and potential accommodations that could overcome those limitations. Both parties have a stake in getting the interactive process right. An employer's failure to engage in good faith in the interactive process or its premature termination of that process not only could result in the needless loss of a qualified disabled employee but also subject it to liability under the ADA. Similarly, an employee who is responsible for a breakdown in the interactive process will likely lose his or her job and the solicitude of the judiciary and the EEOC. While there is no way to conduct accommodation

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dialogues, effective ones have the hallmark outlined below.

Timely Requests. Serious Responses.

Timely accommodation requests that are taken seriously benefit both employers and employees. An employee who makes an accommodation request only after a negative performance evaluation or disciplinary action becomes imminent risks creating the impression that the request is more of a job protection strategem than an earnest request for accommodation. On the other hand, employers who react stridently to accommodation requests perceived as disingenuous risk creating a perception of unwelcomeness that chills legitimate requests. A welcoming environment permits employers and employees to address potential problems early - something that's as good for employee morale as it is for risk management.

Meet Quickly

Employers and employees should demonstrate their commitment to a successful accommodation dialogue by meeting promptly. The purpose of this meeting should be to establish a cordial tone and to make an initial assessment. Because these meetings can sometimes be emotional and the issues blurry, it's in the best interest of both parties not

to adjourn the meeting until there is a consensus as to open questions and next steps.

Consider Accommodating First

Employers who believe additional information is needed to evaluate an accommodation request should nonetheless consider providing the employee with the requested accommodation on a provisional basis. Though not always appropriate, a provisional accommodation is one answer to the often awkward question of what to do with an employee during the information gathering phase. Both parties benefit if the employee is able to return to work or improve job performance during the information gathering process. Employers that carefully document the provisional nature of the accommodation face little danger of being required to provide the accommodation on a permanent basis solely by virtue of having provided it in the past. For their part, employees should not seek to punish good deeds; instead, they should accept the provisional nature of the accommodations, while moving quickly to provide the information needed for a final decision.

Understand the Job at Issue

The ADA does not require

employers to delete or modify "essential functions" of a job as part of a reasonable accommodation, although the employer may nonetheless choose to do so. In the eyes of the EEOC, a job function is essential if its removal would "fundamentally alter" the position. The EEOC considers many factors - including the employer's judgment - in determining whether a job function is essential. An intellectually honest, wide angle view of a job is the Rosetta Stone that unlocks its essential functions.

Assessing Potential Accommodations

A "reasonable accommodation" is one that is "plausible" or "feasible" and allows the disabled employee to perform the essential functions of the job in question. Examples of potential reasonable accommodations include modifying facilities, job restructuring, schedule modification and time off. While medical information will no longer be as important in determining who's covered by the ADA, it may assume added importance in fashioning accommodations. Given the likely increase in employees entitled to accommodations, employers will now more closely scrutinize the precise limitations imposed by an employee's disability and how those limitations can be accommodated.

If potential accommodations are identified, attempt to achieve a consensus on a particular accommodation. If consensus cannot be achieved, the employer is entitled to implement any reasonable accommodation available, not necessarily the one the employee desires. However, it's always helpful to give the employee's requested accommodation singular and well documented consideration. If there are no reasonable accommodations, the employer should document this fact very carefully and have persuasive evidence to back it up. Handle these situations with empathy and care.

Implementing an Accommodation

Once a reasonable accommodation is agreed upon or chosen by the employer, create an "accommodation plan" or similar document that outlines the accommodation and acknowledges any concerns the employee may have concerning the accommodation. Thereafter, the employer and the employee should work together to monitor the continuing need for and effectiveness of the accommodation.

Complying with the amended ADA makes "actively discussing accommodations" more important than ever. Employers and employees must work together to realize ADA's goal of opening workplaces to qualified individuals with disabilities without requiring businesses to change essential job functions or incur undue hardship. ☺

OTA Scholarship Program: Then and Now

The Ohio Township Association (OTA) Scholarship Program is currently in its sixth year. The program was originally made possible by a donation from former OTA President Paul Smith and his wife. The scholarships are continually funded year to year through personal donations, donations from county township associations and a percentage of OTA merchandise sold.

Two scholarships in the amount of \$1,500 each were offered until 2009, when three scholarships began being offered. In order to continue awarding three scholarships per year, it is crucial that personal donations and county township association donations continue. Each year, as part of the membership process, county township associations are encouraged to donate to the scholarship fund. Most counties donate \$100 or more, and are recognized in OTA publications. Morrow County even passed a resolution stating that \$100 would be donated to the OTA scholarship fund on an annual basis. Personal donations may be made at any time. Simply send a check to the OTA office at 6500 Taylor Road, Suite A, Blacklick, Ohio 43004, indicating that you would like the funds to go to the OTA scholarship program.

As township officials, the OTA also relies heavily on you to distribute the scholarship application to local high schools and other student groups. An average of 150 students apply each year, but the OTA would like to see this number increase, as the number of scholarships being awarded each year has multiplied.

The scholarships are presented in two categories: Local Government Achievement and Academic Achievement. The scholarship application is published in the September/October issue of the "Ohio Township News" each year, as well as on the OTA Web site at www.ohiotownships.org. The deadline is late January and recipients are notified in early May. Applications are examined and finalists selected by the Office of Educational Outreach at Bowling Green State University. Winners are invited to speak at the annual winter conference and profiles are published in the OTA magazine.

To be eligible, students must be high school seniors planning to attend an accredited two or four-year Ohio college or university the following fall. They must also reside in one of Ohio's 1,308 townships. A completed scholarship application, 500-word essay, copy of high school transcripts and ACT or SAT scores, and two letters of recommendation from teachers and/or community leaders are required to be considered. Students may apply for both scholarships but may only be awarded one. The deadline for the 2010 scholarship application is Friday, Jan. 29.

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