Making accommodations

What the Amendment Act to the ADA means for California employers

Interviewed by Heather Tunstall

On March 25, 2011, the Equal Employment Opportunity Commission's (EEOC) regulations to implement provisions of the American with Disabilities Act Amendment Act (ADAAA) of 2008 went into effect. The overarching federal law didn't present many changes to the pre-existing California state law, but it did clarify several ambiguous aspects to the ADA, and defined appropriate steps for an employer to take to accommodate disabled employees.

Smart Business spoke with Lisa Aguiar, partner at Ropers Majeski Kohn & Bentley PC, about how businesses can properly adjust to comply with the new regulations.

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What does the Amendment Act mean for employers?

The Amendment Act confirmed in its definition of 'disability' that there are certain conditions that will always be considered a disability no matter what — conditions such as deafness, autism, cancer, cerebral palsy, bipolar disorder, post-traumatic-stress disorder, to name a few. Also, unlike the federal law which requires accommodations be made when a disability *substantially limits* a major life activity, in California accommodations must be made in a disability that *limits* a major life activity, thereby expanding the number of employees potentially eligible for accommodations for their disabilities.

The regulations expanded and clarified the definition of major life activity. For example, if a disability affects sleeping, thinking, interacting with others, or it affects major bodily functions or bodily systems such as the immune system or cell growth, it will be considered a major life activity.

There had been some uncertainty as to how long someone must be afflicted with a condition in order for it to qualify as a disability under the ADA. The amendment clarified that a 'short-term' disability could be a disability requiring accommodation. Employers are now faced with potentially having to accommodate virtually any condition that lasts more than a couple of months.

How can a business ensure it is properly accommodating disabled employees?

Having a policy in place is critical. The law in this area is still developing and it is important that the policy be reviewed by an attorney who has experience in this area, who knows the changes and developments in the law. In addition, that policy should be reviewed on a fairly regular basis — every year or so.

Accommodations are required if an employer knows or should have known that an employee was disabled. Supervisors and managers interacting with employees on a daily basis are in the best position to determine firsthand whether an employee has a potential disability, so ensure that supervisors are trained on the policy and know what to look for, what to do if they suspect that there is a potential disability, whom to talk to, and what the company's steps are in determining whether an accommodation is necessary.

What else should an employer be aware of when determining accommodations?

If an employee brings you a doctor's note, it's important to understand the limits on what information an employer is entitled to receive. In California, there are heightened privacy standards that may not exist in other states. For example, employers are not entitled to know the exact nature of an employee's condition or diagnosis. Unless you have objective evidence that the doctor's note is not accurate, it is generally best to accept the note on face value. However, it is acceptable and oftentimes necessary to contact the employee's doctor in order to determine whether an employee can perform certain job functions or whether certain accommodations would assist the employee in performing the essential function of his or her job.

Be sure to engage in the interactive process, which is simply a dialogue between the employer and the employee. The employer has the right to determine what accommodation the company is able to provide, but it's important to understand that if one accommodation doesn't work, you must look into another accommodation. This interactive process can continue throughout the course of the disability, particularly if someone has a chronic condition. An accommodation on day one of the diagnosis could be very different six months later, and an employer has a continuing obligation to engage in that interactive process.

Dealing with certain types of accommodation may be very difficult and very frustrating for an employer, but the law requires the company to do so unless it can show that accommodating the disability will cause an undue hardship for the company. The standard for undue hardship is high and rarely can a company succeed in its argument that the accommodation causes an undue hardship.

What should an employer do if accused of violating the ADA?

Employers should always document their attempts at engaging in the interactive process. Documentation can be fairly simple, something along the lines of 'I met with employee on this date, he handed me a note that says he requires this accommodation, we discussed these various forms of accommodation, and we decided to do X.' Any documentation related to disability or accommodation issues never goes in the personnel file; it always goes in a separate medical file.

Employees who sue their employers tend to feel like they haven't been heard or treated fairly. Take any complaints seriously, have a meeting, listen to the employee's concerns, and see if there is any way that you can right the perceived wrong. It is when you ignore the complaints, or when you discipline or terminate an employee that complains without adequate, well-documented grounds, that you could have a problem. As long as you're working in good faith to try to resolve an employee's concerns, then you've got a fairly solid defense should an employee decide to make a complaint at a state agency or file a lawsuit. <<

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