PROVIDING REASONABLE ACCOMMODATIONS FOR ATTORNEYS AND OTHER LEGAL PROFESSIONALS WITH DISABILITIES

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Under the Americans with Disabilities Act ("ADA") an employer is prohibited from discriminating against a qualified individual with a mental or physical disability in all aspects of the employment relationship, including the job application process, hiring, advancement, discharge, compensation, job training and any other terms and conditions of employment.

The ADA specifically prohibits (1) limiting, segregating, or classifying an employee in a way that adversely affects the opportunities of the employee because of his or her disability, and (2) failing to make “reasonable accommodations” to the known disabilities of an employee or applicant. This latter requirement holds an employer liable for failure to engage in a timely and good faith, interactive dialogue to determine reasonable accommodations for a qualified individual with a disability, unless the employer can prove that accommodation would cause and undue hardship to the operation of its business. The duty to make reasonable accommodations applies to all aspects of employment and lasts throughout the course of the employment relationship as outlined below. This ongoing duty is triggered each time there is a change to the employee’s disability status or essential job functions.

I. Definition of Disability

Disability is defined as follows:

(1) A physical or mental impairment, disorder or condition that “substantially limits” one or more “major life activities,” such as: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, social activities**

* CA law only requires that the impairment, disorder or condition “limit” a major life activity.

** “Social activities” was added to the definition of major life activities under the FEHA, but is not expressly included under the ADA.

(2) A record of having a physical or mental impairment, including: back injuries, cancer, heart disease, high blood pressure, Lupus, tuberculosis, past drug use

(3) Being “regarded as” having such impairment, even if not impaired, because of particular attributes or conditions.
II. **Definition of Disability** - A physical or mental impairment, disorder or condition means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more major body systems. (Under CA law, this definition expressly includes chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart disease.)

(2) Any mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and learning disabilities. (CA law expressly includes clinical depression and bipolar disorder.)

III. **Who is a “qualified individual with a disability”?**

The ADA only covers a “qualified individual with a disability,” who can perform all of the essential functions of a position, with or without reasonable accommodations. Therefore, the employer need not make a reasonable accommodation for a person who is not “otherwise qualified” or who does not satisfy all the skill, experience, education, and other job-related requirements of the position held or applied for. If the individual cannot perform the essential job functions even with accommodations, then the person is not considered “qualified” under the ADA.

IV. **What is the employer’s duty to provide reasonable accommodation?**

The duty to provide “reasonable accommodation” is based upon the recognition that a “qualified individual with a disability” may need accommodations to receive equal opportunities in all phases of the employment relationship. Therefore, employers are required to engage in an interactive dialogue with an employee or applicant to determine what, if any, form of reasonable accommodation may be necessary. This is an on-going process and the specific accommodation may change as an employee’s job duties or condition changes.

Whether something would constitute a “reasonable accommodation” must be assessed on a case-by-case basis, and often involves a fact intensive inquiry into (1) the individual’s ability to perform the essential functions of his or her particular job, (2) the individual’s functional limitations/work restrictions, and (3) what form of reasonable accommodations are appropriate under the circumstances.
OUTLINE OF INTERACTIVE PROCESS TO DETERMINE REASONABLE ACCOMMODATIONS FOR INDIVIDUALS WITH DISABILITIES

I. What triggers the employer’s duty to engage in a timely, good faith interactive dialogue?
   A. As soon as HR or a manager is on notice of an individual’s disability and need for accommodations
   B. At the request of the employee or applicant for assistance or corrective measures related to a mental or physical impairment
   C. HR or manager observes employee with obvious disability having difficulty performing essential job functions

II. Form of the request
   A. Can be informal verbal request-- no need for employee to put it in writing, use "magic words" or state “I have a disability” or “I need an accommodation” in order for duty to be triggered.
   B. Request can come from employee directly or from employee’s doctor, family member, etc.

III. When is the interactive process not triggered?
   A. The employer has no knowledge and has no reason to know that individual has a disability.
   B. Applicant or employee is not qualified for the position— does not possess the necessary skills, experience, or educational background or meet other job-related requirements.
   C. Employee is currently engaged in the use of illegal drugs or drinking on the job.
   D. Employee poses a direct threat to the health and safety of others in the workplace, including engaging in threats of violence in the workplace.

IV. Engaging In The Interactive Process To Determine Effective Reasonable Accommodations
   A. Meet with the individual who discloses a disability or requests an accommodation in a timely manner, to identify the individual’s job-related limitations and work restrictions, and physical or functional capacities.

   1. Assess individual’s work restrictions and ability to perform essential job functions, but avoid inquiring about diagnosis or genetic predisposition to the disease, disorder or condition, which can be protected by a right to medical privacy under the ADA and the Genetic Information Non-Discrimination Act (GINA).
      • What accommodations will you need to perform the essential job functions?
      • What accommodations did your last employer make?
      • What kind of equipment would you need to enable you to perform the job duties (e.g., use the computer, take depositions, etc.)?
• What structural changes can be made to give you full access to your workstation?

2. Discuss possible accommodations with applicants:
• Holding interviews at fully accessible locations
• Making any pre-employment tests available in alternative means (e.g., Braille)
• Allowing blind applicants to submit application information orally
• Making a sign interpreter available for a person with a hearing impairment

3. If disability is not obvious, can request that employee (and health care provider) complete a Request for Reasonable Accommodations Form which provides information about the employee’s medical restrictions and functional capabilities. If an employee refuses to provide medical documentation of disability and need for accommodation, the employer should document such refusal and explain that the employee has an obligation to provide medical certification regarding his or her functional capabilities and work-related limitations to support need for an accommodation. Failure to provide requested information may result in denial of reasonable accommodations.

B. Analyze the job and determine which functions are essential v. non-essential and consider reassignment of non-essential job functions. The accommodation should enable the employee to perform all essential job functions. Consider the following factors:
1. Review job description for essential functions.
2. Does the position exist in order to perform this function? (e.g., essential functions of a trial attorney position is to be able to prepare trial briefs, make oral arguments, cross examine witnesses, etc., which are different from those of a transactional lawyer who might negotiate deals and never have to set foot in a courtroom)
3. Is the function highly specialized so that only those with particular expertise or skill can perform the function?
4. Are there only a limited number of employees who can perform the same function?
5. Is a lot of time per shift spent on performing this function? (although this alone is not dispositive, e.g., litigators may not frequently go to trial, but the ability to handle a trial would still be an essential function)
6. Can the function be modified or reassigned to another employee without significant work disruption? (If it would not be possible within a smaller firm to reassign an attorney’s trials to other attorneys within the firm who have their own caseloads, without significant work disruption and undue burden on staff, then it might not be feasible or could constitute an undue hardship)
7. Do performance reviews refer to the importance of performing the particular job function?

C. Consider “A Menu Of Possible Options” In Determining Reasonable Accommodations.
1. Document what employee believes that he or she needs in order to perform essential functions of the job and discuss alternatives when a given request seems too burdensome
2. Consider possible accommodations, including:
   - Restructuring a job by assigning marginal (nonessential) job functions to other employees
   - Transfer to an open position for which the employee is qualified
   - Providing a part-time or modified work schedule or flexible work hours
   - Providing a leave of absence
   - Ergonomic adjustments or modifications to work station or equipment
   - Removing physical barriers to allow full access to worksite (e.g., widening a doorway and installing ramp)
   - Providing assistive devices (e.g. phone amplifiers, screen readers and magnification software for visually impaired, etc.)
   - Modification of training materials and policies so that they are available on audiotape or in Braille
   - Telecommuting arrangement

D. Evaluate the effectiveness of proposed accommodations and their impact on overall resources and operational needs of business

1. Evaluate whether each proposed accommodation will enable the employee to perform the essential job functions

2. If the request for accommodation is burdensome, consider whether the proposed accommodation will actually cause an “undue hardship” to a particular office or the law firm or company as a whole:
   - Is it unduly costly - what is the effect of the accommodation on the employer’s expenses and resources?
   - Is it too time consuming to implement?
   - Does it substantially modify the essential job functions?
   - Is it disruptive to the workflow or others’ ability to perform their jobs duties?
   - Does it fundamentally alter the nature or operation of the business?

E. Implement the accommodation that will enable employee to perform all essential job functions and appropriate for employer’s business

F. Review the progress of the accommodation periodically to determine whether accommodation is effective. If accommodation is not effective or is no longer effective, then employer must continue to engage in the interactive process to identify alternative accommodations

G. Watch out for retaliation and harassment

1. Penalizing employee for requesting or receiving an accommodation (e.g., disciplining employee for poor attendance after granting a flexible work schedule or time off for medical treatment; or making employee work harder after returning from a leave of absence to “make up” for lost productivity and billable hours)