EEOC Issues New Fact Sheet Regarding Health Care Workers with Disabilities

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Posted By: Daniel T. Dennehy

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A recent Equal Employment Opportunity Commission (EEOC) question-and-answer fact sheet addresses the application of the Americans with Disabilities Act (ADA) to employees and job applicants in the health care industry. Many of the issues in the fact sheet are consistent with previous enforcement guidance, but there are some areas addressed in the publication that are new interpretations of the ADA applicable to various health care settings, such as public and private hospitals, nursing care facilities, and doctors' offices. The following includes the unique disability issues for health care workers discussed in the fact sheet.

Job Descriptions and Essential Functions
To be qualified to perform a job under the ADA, an individual must have the requisite skills, experience, education, and other job-related requirements and be able to perform the job's essential functions with or without a reasonable accommodation. Determining whether a job duty is an essential function is fact-specific, and includes the actual work experience of present and past employees, the consequences of not performing a function, the time spent on that function, etc. An employer should review job descriptions to ensure that the essential functions of the job are included, but a written job description is not dispositive. For example, if lifting is only done occasionally, or is typically done by two people at a time, be cautious in disqualifying an individual with lifting restrictions. On the other hand, an infrequently performed duty may be an essential function if only a limited number or type of employee can accomplish the task, such as delivery of medicine by a pharmacy technician.

Reasonable Accommodations
A reasonable accommodation is any change or adjustment to a job or work environment permitting a qualified applicant or employee with a disability to participate in the application process, perform the essential functions of a job, or enjoy the benefits and privileges of employment equal to those enjoyed by non-disabled individuals. Generally, an employer does not have to provide a reasonable accommodation unless requested to do so by the employee. Examples of reasonable accommodation are changes to workplace facilities, acquiring or modifying equipment or devices, job restructuring, reassignment, or a change in job schedule. For instance, a health care employer may be required to purchase a "portable mechanical lifting device" as an accommodation to an employee with lifting restrictions to enable her to perform the essential function of lifting patients. The EEOC takes the position that the costs of the device and the associated training do not pose an undue hardship on large hospital employers, based on the cost of the accommodation, the employer's size and financial resources, and the structure of its operations. An example of an undue hardship would be allowing a clerical staff member in a medical office to take patient files home to work on as part of a telecommuting arrangement, because the proposed accommodation would jeopardize the confidentiality and security of patient files and inhibit the ability of other staff members to access files when needed. Employers are encouraged to engage in a good-faith discussion with the employee about his or her requests and any reasonable alternatives.

Direct Threat to Safety
Employment in health care facilities raises unique safety questions involving exposure to bio-hazardous materials, medical protocols, and infectious diseases. Under the ADA, an employer may exclude an applicant or employee with a disability from a position if that individual would pose a direct threat to health or safety. When determining if a direct threat exists, health care employers should conduct an individual assessment, including obtaining medical documentation from the employee's own health care provider, and avoid making decisions based solely on the supervisor's perception of needed accommodation. The decision must be based on a reasonable medical judgment. For example, the Centers for Disease Control and Prevention have advised that HIV-positive health care workers who follow universal precautions and who, except in specified circumstances, do not perform specially-defined exposureprone invasive procedures, do not pose a safety risk in their employment based on HIV infection. However, in a New York district court decision, a physician's prior history of undetected drug and alcohol abuse rendered him a direct threat to safety.

Wisconsin Disability Law
We would remind Wisconsin employers that in dealing with a legally disabled employee, under Wisconsin law, there are no essential functions – the employee only needs to adequately do his or her job. In *Crystal Lake Cheese Factory*, the Wisconsin Supreme Court said doing two of the four major functions of the employee's job was adequate for a paraplegic individual to be given reasonable accommodations to do her factory job. Wisconsin employers should still consider "essential functions" for ADA purposes, but they need to do further analysis of situations involving legally disabled employees when Wisconsin law may apply.

The EEOC's Q&A fact sheet provides health care employers with an opportunity to review ADA procedures and compliance. Other topics discussed in the fact sheet include the distinction between an employee covered by the ADA and an independent contractor; when someone is an "individual with a disability" under the ADA; and when an employer may ask health care applicants or employees questions about their medical conditions or require medical examinations. In addition the fact sheet contains several practical examples that have been decided by the courts or settled by the EEOC.

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