



EEOC Issues Guidance for Medical Employers with Disabled Employees

By Evin Dyess and Ann Bittinger*

The Equal Employment Opportunity Commission on February 26, 2007 released “Questions and Answers about Health Care Workers and the Americans with Disabilities Act” to address the issues surrounding health care employers related to disability claims made by their employees. The publication of this document is noteworthy because it is the first time that the EEOC, which enforces federal laws prohibiting job discrimination, has provided guidance to the medical community about discrimination against disabled employees in health care companies. The guidance can be found at http://www.eeoc.gov/facts/health_care_workers.html. The Americans with Disabilities Act (“ADA”) applies only to employers of 15 or more employees.

The EEOC sought to address the ADA as applied to the health care industry because it is the largest industry in the American economy and has a high rate of occupational injury and illness. Health care workers also confront a greater range of workplace hazards, including airborne illness and infectious disease, as well as other physical demands.

The guidance discusses several topics, including:

- 1. When someone is an “employee” covered by the ADA (as opposed to an independent contractor).** Whether a health care worker is an “employee” under the ADA depends on a variety of factors. Many health care workers are referred to as independent contractors because they work through staffing agencies for temporary placement. The ADA does not cover independent contractors. However, a worker is not an independent contractor simply because he or she is designated as so. There must be a fact-based and case-specific analysis to determine an employee’s status.
- 2. When someone is an “individual with a disability” under the ADA.** A person is an individual with a disability under the ADA when he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of a substantially limiting impairment; or (3) is regarded (treated by an employer) as having a substantially limiting impairment. Major life activities are basic activities that the average person can perform with little or no difficulty, such as walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, eating, sleeping, performing manual tasks, caring for oneself, learning, thinking, concentrating, interacting with others, and working. The article goes on to provide several examples of what does and does not constitute a disability.
- 3. How to determine if a health care applicant or employee with a disability is qualified for ADA purposes.** To be qualified to perform a job under the ADA, an individual must satisfy the requisite skill, experience, education, and other job-related requirements (“qualification standards”) of the position held or desired, and be able to perform the job’s essential functions with or without a reasonable accommodation. Essential functions are the basic job duties that an employee must be able to perform, based on factors such as the reason the position exists, the number of other employees available to perform the function or among whom performance of the

function can be distributed, and the degree of expertise or skill required to perform the function.

If a job requirement excludes a health care worker from a position due to a disability, the requirement must be job-related and consistent with business necessity. Some requirements will obviously meet this standard, such as licenses required by state and/or local governments for doctors and other health care professionals. In other instances, however, an employer may need to consider whether the standard that is excluding an individual with a disability from employment accurately predicts the individual's ability to perform the job's essential functions.

4. What types of reasonable accommodations health care workers with disabilities may need and the limitations on a health care employer's obligation to provide reasonable accommodation. Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. The following questions address the extent of a health care employer's obligation to make reasonable accommodations and the limitations on this obligation; requests for reasonable accommodation and the interactive process for determining an appropriate accommodation solution; and types of reasonable accommodations that health care job applicants and employees may need.

Generally, an employer does not have to provide a reasonable accommodation unless an employee asks for one. An applicant or employee (or a doctor, family member, or other representative on his or her behalf) requests reasonable accommodation by either orally or in writing asking for some change relating to work due to a medical condition. This requires no "magic words" such as "ADA" or "reasonable accommodation."

The accommodation does not have to be made, however, if it poses an undue hardship on the employer. Examples of how the EEOC analyzed undue hardship in the guidance are as follows:

Undue Hardship: Mary is a clerical staff member in a busy private medical practice that has 25 employees. Her duties include preparing patient bills and preparing submissions to insurance companies and Medicare. Due to a mobility impairment that substantially limits her ability to stand or walk, Mary is having difficulty commuting to work, and she asks to work from home two days per week. She proposes to bring home the patient files she will need to work from on the two telecommuting days, and then enter necessary information into the office computer system on her days working in the office. If this proposed accommodation would jeopardize the confidentiality or security of patient files, or inhibit the ability of the other staff to access files in the office as needed, the proposed accommodation would pose an undue hardship.

No Undue Hardship: A nursing assistant at a large hospital injures her back and as a result has a permanent ten-pound lifting restriction. She informs her supervisor that she can nevertheless perform all of her duties except for lifting patients, which is an essential function of her position.

She requests that the hospital purchase a portable mechanical patient lifting device as an accommodation that would permit her to perform this function. The hospital administrator learns that the hospital can acquire the device for approximately \$1500. The administrator also consults with the hospital occupational health and safety officer who informs the administrator that the device can be used safely and appropriately to perform this employee's duties, and that training in using the device properly will be necessary. Purchase of the device and the cost of the associated training would not pose an undue hardship.

5. When an employer may ask health care applicants or employees questions about their medical conditions or require medical examinations. Generally, it is unlawful to ask an applicant any disability-related inquiries or require the applicant to take a medical examination before making a conditional offer of employment. In order to obtain medical information from an applicant, the employer must first have made a "real" job offer, meaning that the employer has

obtained and evaluated all non-medical information. Before making an offer, an employer may ask an applicant questions about ability to perform job-related functions. An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, she will perform job-related functions.

After receiving a request for reasonable accommodation, the employer may ask for supporting medical information to determine that the requestor is an individual with a disability who needs the accommodation, unless this is obvious or already known. In addition, the employer should engage in an interactive process with the requestor to determine what is needed and why.

6. How a health care employer should handle safety concerns about applicants and employees. Under the ADA, an employer may exclude an applicant or employee with a disability from a particular position if that individual would pose a direct threat to health or safety. "Direct threat" is defined as a significant risk of substantial harm to the individual or others in the workplace that cannot be reduced or eliminated through reasonable accommodation. The determination that a particular applicant or employee with a disability poses a direct threat must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job safely. Factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. This standard must be satisfied in all instances where an individual with a disability is not hired or is removed from a position based on concerns about health or safety risks posed by the disability.

Examples of how the EEOC guidance analyzed direct threats are as follows:

Direct Threat: A hospital physician served as Chief of the Department of Internal Medicine. In addition to patient care, his responsibilities included assignment and evaluation of a staff of 150 physicians and others and overseeing departmental quality control. Following a three-month absence for treatment of alcoholism after a hospital employee found him visibly intoxicated while treating a patient, the physician sought to resume his position as chief of internal medicine. The hospital refused based on information that the physician had relapsed after a six-year period of sobriety, and that his prior alcohol abuse, as well as a prior barbiturate addiction, had gone on for many years undetected by his professional colleagues. Under these circumstances, the physician would pose a direct threat even with reasonable monitoring. Moreover, even if the direct threat standard was not satisfied, the employer could discipline the physician -- up to and including termination -- in accordance with any uniformly applied conduct rule that was consistent with business necessity, for example a rule prohibiting drinking alcohol before or during a shift.

No Direct Threat: Ariel, a phlebotomist at a blood bank, is responsible for drawing blood. Lori, a certified nurse's aide in a nursing home, is responsible for dressing and grooming residents, making their beds, and serving their food trays. Both Ariel and Lori are HIV-positive. Since the best available medical evidence at the time of the employer's decision indicates that HIV-positive healthcare workers in these types of positions do not pose a direct threat to the safety of patients if they adhere to universal precautions, neither poses a direct threat in their positions based on their HIV-positive status. Therefore, their HIV-positive status would not justify reassigning these employees to different positions or terminating them.

7. A health care employer may follow the recommendations of the Centers for Disease Control and Prevention guidelines with respect to testing current employees for Tuberculosis without violating the ADA. The CDC's "Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health-Care Settings, 2005," <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5417a1.htm>, recommend instituting particular types and duration of TB screening programs for current health care workers in those settings where a threshold level of risk is indicated pursuant to CDC risk assessment standards. The CDC

guidelines set forth objective measurements based on the number of TB patients treated in the preceding year and other non-speculative risk factors to determine when testing of current employees is recommended. Therefore, testing under the guidelines will only occur where the employer has a reasonable belief based on objective evidence that the employees designated for testing may pose a significant risk of substantial harm to themselves or others.

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