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5 Tips For Managing The ADA's Interactive Process

By **Ben James**

Law360, New York (April 21, 2014, 10:33 PM ET) -- The Americans with Disabilities Act's requirement that employers engage in an interactive process with disabled workers to figure out accommodations that will allow them to perform their jobs can be a challenge, demanding patience, flexibility and a case-by-case approach.

Bringing an open mind to the interactive process is crucial for companies that want to adhere to their obligations under the ADA and give workers the support they're entitled to, lawyers say. Running afoul of the anti-bias statute can lead to litigation from private plaintiffs and draw scrutiny from an ever-aggressive U.S. Equal Employment Opportunity Commission, they add.

“The interactive process is something that very few employers do well and lots of employers bungle and, whether or not it ultimately lands them in legal hot water, I think it is a significant concern,” said Kelley Drye & Warren LLP's Mark Konkel. “Too many employers come in with too rigid a view of whatever they are willing to accept in a way that can harm them.”

The general goals of the ADA interactive process are clear: a good-faith dialogue that leads to an individualized assessment of a worker's situation and, hopefully, an accommodation that lets him or her work in spite of a disability. But employers don't have much in the way of specifics or bright-line rules to help them steer clear of legal liability, lawyers say.

“Whether liability arises depends on the facts and circumstances of the situation,” said Mayer Brown LLP counsel Maritoni Kane. “The EEOC provides guidance — the general principles you would hope to be able to apply across the board.”

“There's no one-size-fits-all answer,” said BakerHostetler LLP partner Dennis Duffy.

Here are five steps an employer can take to manage the ADA's interactive process in a way that does right by workers and also protects the business's bottom line:

Don't Wait for the Magic Words

Employers should not wait for a worker to specifically invoke the ADA or use the phrase “reasonable accommodation” to launch the interactive process, lawyers say.

“Not all requests for accommodation come in a nicely packaged form,” Duffy pointed out.

A company shouldn't go overboard and look to ferret out potential disabilities in its workforce — the onus remains on the employee to make an affirmative request, Konkel says. But once an employer gets wind that there might be an ADA issue, it should follow up, he says.

“It doesn't need to be a formalized request. Nobody needs to invoke a statute or a legal right,” Konkel said.

If workers start asking for changes to their work environment or schedules to address health issues, lawyers say an employer should take a proactive approach. Under EEOC guidance, an employer is allowed to ask questions that will let it make an informed decision about a worker's request.

“If you're limiting the conversations to issues that they've raised, you should be ok,” Konkel said.

Train Supervisors on the ADA

To be able to identify potential accommodation issues in the absence of any particular buzzwords, front-line supervisors need to be educated on what the ADA requires, according to Mintz Levin Cohn Ferris Glovsky & Popeo PC partner Michael Arnold.

“They don't need to say any magic words,” Arnold said. “This is why you want to have your supervisors, managers and human resources personnel trained properly to recognize a disability disclosure and accommodation request.”

Supervisors also have to be savvy about how to handle disability claims that come against the backdrop of performance issues, Arnold noted.

Accommodation requests are often raised just before or during performance reviews, and while that kind of disclosure doesn't cancel out predetermined disciplinary decisions, it may have to be factored into any performance improvement plan an employee gets put on.

“You cannot ignore it altogether,” he said.

Good training on the ADA process can also help supervisors understand confidentiality issues and the need to limit access to certain information, said Joshua Stein, senior counsel and co-head of the accessibility and accommodations practice group at Proskauer Rose LLP.

“Training in this area is exceedingly helpful,” Stein said. “A supervisor understanding why certain things are happening and the role they're going to be asked to play is important.”

Keep Job Descriptions Current and Accurate

To be covered as a “qualified individual” under the ADA, a worker must be able to perform the essential functions of a given job with or without reasonable accommodation. Having up-to-date job descriptions that lay out the job's essential tasks can help an employer if a dispute arises, while leaving a particular duty out of a job description can undermine any argument that the duty is an essential component of the position.

“Some requests for accommodation may essentially be requests to modify a job's essential functions,

and of course, you're not required to do that. Make sure your job descriptions properly identify the essential functions of the job," Duffy said. "If you're not reviewing them, over time, like any modern workplace, the nature of the job might well evolve."

In the event that an employer ends up facing litigation over the decision to deny an accommodation, an inaccurate job description could complicate efforts to get the case tossed out early in the game, Arnold says.

"If there is a lawsuit down the road, it's going to be very hard to win on summary judgment in the absence of written job descriptions, or if your written descriptions defining the essential job functions are outdated or otherwise inaccurate," Arnold said.

In addition, workers should be held to what their relevant job descriptions say, even when it seems like deviating from the description would be doing a worker a favor. An employer that lets an employee slide on performing supposedly essential functions will have a tough time arguing later that those duties are in fact essential, lawyers said.

"You did something you didn't have to do, and now you painted yourself into a box," Kane said.

Document, Document, Document

Lawyers say across the board that documenting the interactive process is crucial. Having a thorough record of the exchanges between management and a worker can be invaluable for an employer that wants to show it complied with the law, said Stein.

In the event of a legal dispute, those documents could serve as powerful evidence that the employer took every step it was supposed to, Stein says, since relying on people to remember precisely what transpired is a dubious proposition.

"If things are going to go south one day, you want to have documentation that shows that you dotted the i's and crossed the t's," said Stein. "You want credit for the steps you're taking here."

If an employer takes the interactive process seriously, one of two outcomes is likely, Konkel says: Either it will become clear that the accommodation the employee wants is unreasonable, or the worker and the employer will reach a mutually acceptable arrangement.

"If you can't get there, you will have built the record as to why you can't offer the accommodation. In either case, that favors the employer," Konkel said.

Look Before You Make an "Undue" Leap

While the ADA requires employers to provide reasonable accommodations to employees or job applicants, employers have an out if the accommodation at issue would translate to "undue hardship."

EEOC enforcement guidance says undue hardship means "significant difficulty or expense" for the employer. This refers not only to financial costs but to accommodations that would be "unduly extensive, substantial or disruptive," or would fundamentally change the nature or operation of a business.

But employers sometimes fall prey to the mistake of deciding that a given accommodation meets the undue hardship burden without performing the necessary analysis or thinking through what it would have to do to prove that, according to Konkel.

“It simply can't be a knee-jerk reaction," Kane said.”It really has to be a defensible position.”

Businesses sometimes view undue hardship in terms of the psychological burden on the employer or the administrative inconvenience, but that's not really what the term means, Konkel says.

And according to Konkel, the EEOC won't likely pass up the chance to take an employer to task for asserting an undue hardship claim that it doesn't think is up to snuff. Management-side lawyers say the anti-bias watchdog has grown more aggressive under the Obama administration.

“In this enforcement environment, the EEOC is going to take a good hard look at whether any particular accommodation is truly burdensome,” he said.

--Editing by Kat Laskowski and Philip Shea.
