

# Strategy & Insights

## EEOC Updates Its Guidance On Hiring And Employing Individuals With Cancer, Diabetes, Epilepsy And Intellectual Disabilities

On May 15, 2013, the EEOC updated its Americans with Disabilities Act guidance on hiring and employing individuals with cancer, diabetes, epilepsy and intellectual disabilities. These updates address the changes to the ADA by the ADA Amendments Act. The four separate Q & A-style documents can be found at the EEOC's website.

<http://www.eeoc.gov/laws/types/cancer.cfm>

<http://www.eeoc.gov/laws/types/diabetes.cfm>

<http://www.eeoc.gov/laws/types/epilepsy.cfm>

[http://www.eeoc.gov/laws/types/intellectual\\_disabilities.cfm](http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm)

The updated guidance hits home points the EEOC has been emphasizing for years: avoiding inappropriate medical inquiries, maintaining confidentiality and accommodating disabled employees. Below is a summary of the updated guidance and some practical pointers for employers.

The EEOC presumes that each of these medical conditions - epilepsy, diabetes, cancer or intellectual disabilities - is a disability. As for epilepsy, the guidance provides that individuals with epilepsy "should easily be found to have a disability" because they are "substantially limited in neurological functions and other major life activities (for example, speaking or interacting with others) when seizures occur." According to the EEOC, it is irrelevant that an employee's epilepsy is fully controlled by medication or eliminated altogether by surgery. Diabetics "are substantially limited in the major life activity of endocrine function." Again, this is regardless of how well the diabetes is controlled or even eliminated. The EEOC goes so far as to say that an individual with past diabetes, including gestational diabetes, is disabled. Individuals with cancer or who have had cancer are substantially limited in the major life activity of normal cell growth. Individuals with intellectual disabilities are substantially limited in brain function and other major life activities, such as reading, learning and thinking. Employers should operate under the presumption that these conditions constitute disabilities under the ADA.

### Medical Inquiries

The guidance relating to medical inquiries is consistent with prior EEOC statements and applies regardless of the nature of the disability:

- Employers may not ask an applicant about a medical condition.
- Applicants need not disclose an impairment unless they need a reasonable accommodation during the application process.

Of course, these prohibitions do not prohibit an employer from asking whether the applicant can perform the essential functions of the job, with or without a reasonable accommodation.

Once the applicant has received an offer, but before she starts working, the employer has more leeway in making inquiries. For example, with respect to an individual with epilepsy who has disclosed his or her condition, the employer may inquire whether the employee takes medication, still has seizures, what type of seizures and how long it takes to recover from the seizures. As for diabetes, employers may inquire whether the employee uses insulin or oral medication, how often he experiences hypoglycemic episodes, and whether and what type of assistance the employee may need during a hypoglycemic episode. With cancer, an employer may ask the individual about treatment and whether it or side effects will interfere with the employee's ability to perform the essential functions of the job, with or without a reasonable accommodation.

Once an employee starts working, if an employer notices performance issues, it may ask disability-related questions or require a medical examination if it knows about the employee's medical condition, has observed performance problems, and reasonably believes the problems are related to the condition. The employer may also make a medical inquiry if it has received reliable information from someone else that the employee may have a medical condition. Otherwise, where an employee is having performance issues, the employer should simply ask the employee why his performance has declined and handle the performance deficiencies through its regular performance management process according to its policies.

There are additional circumstances where employers may inquire about an employee's medical condition, including:

- To support the employee's request for a reasonable accommodation;
- To verify the employee's use of sick leave (so long as the employer requires all employees to do so); and
- To enable the employee to participate in a voluntary wellness program.

## Confidentiality

The guidance reiterates the limited circumstances under which an employer may disclose that an employee has a disability, like epilepsy, diabetes, cancer or an intellectual disability:

- To supervisors and managers if necessary for implementing a reasonable accommodation or work restriction;
- To first aid and safety personnel if necessary for emergency treatment or other assistance;
- To individuals investigating compliance with the ADA or comparable state or local laws (such as the EEOC, itself); and
- For workers' compensation or insurance purposes.

Employers are not permitted to tell an employee's co-workers that an employee is receiving a reasonable accommodation. This is true even if a co-worker asks why an employee is receiving preferential treatment or expresses concern about noticeable changes in an employee's health. This is also true even if an employee has a medical emergency or situation at work, such as an insulin reaction or epileptic seizure. The EEOC suggests that the employer "focus on the importance of maintaining the privacy of all employees and emphasize that its policy is to refrain from discussing the work situation of any employee with co-workers." Employers should explain it is a confidential matter that is being handled.

## Accommodations

Again, the principles relating to reasonable accommodations are universal regardless of medical condition and are consistent with previous EEOC statements on accommodation. The EEOC reiterates in its updated guidance that there are no "magic words" an employee must use to request a reasonable accommodation. And a request may come from a family member, friend, health care professional, or other representative. If an employer knows that the employee has a disability and knows or has reason to know that the employee is experiencing work place problems because of the disability, and the

disability prevents the employee from making such a request, the employer must ask the employee whether a reasonable accommodation is needed.

Employers may request documentation from an employee to support a request for a reasonable accommodation where the disability or the need for accommodation is not known or obvious. Employers are only entitled to documentation that is sufficient to establish the employee's disability and why an accommodation is needed. If the employee's disability is obvious, the employer should request documentation that describes the limitations arising from the disability rather than whether the individual has a disability.

An employer need not grant requests for accommodation if it would result in significant difficulty or expense, eliminate an essential function of a job, tolerate performance that does not meet performance standards, or excuse violations of consistently applied conduct rules "that are job-related and consistent with business necessity."

If more than one accommodation would be effective, employers are not required to provide the employee's first choice of reasonable accommodation, but "should" give it "primary consideration." An employer may be required to provide more than one accommodation to the same person for the same disability.

The updated guidance provides numerous examples of reasonable accommodations: breaks to take medication; leave; a private area to take medication or rest after a seizure; changes to the work environment, such as providing an employee with diabetic neuropathy a stool or an epileptic employee with a rubber mat to cushion a fall; permission to work from home, reallocation or redistribution of marginal tasks; or transferring an employee to a vacant position.

The EEOC provided some additional examples of accommodations for employees with intellectual disabilities. These included: providing someone to read or interpret application materials; demonstrating rather than describing tasks; modifying tests, training materials and policy manuals; replacing a written test with a hands-on interview; giving instructions at a slower pace; allowing additional training time; using charts, pictures or colors; providing a tape recorder for the employee to record directions; providing a job coach; and providing supplemental training.

The updated guidance also provides that a reasonable accommodation could include a leave of absence even if the employee is unable to specify an exact date of return from a leave of absence. The guidance does not go so far as to say that an employer must provide an indefinite leave. Rather, a reasonable leave may include a return "in six to eight weeks" or a couple of extensions. The employer may require the employee to stay in regular communication and provide period updates on the employee's condition and possible date of return.

## Safety

Employers may only refuse to hire, terminate or restrict the duties of a person when the individual poses a direct threat, which means a significant risk of substantial harm to the individual or others that cannot be eliminated through reasonable accommodation. The harm must be serious and likely to occur, not remote and speculative. In terms of epilepsy, an employer may ask an employee who has a seizure at work to submit periodic doctor's notes indicating the epilepsy is under control if the employer has a reasonable belief that the employee will pose a direct threat if he does not regularly see his doctor.

## Practice Pointers

The EEOC's updated guidance affirms many of the rules employers have been following to ensure compliance with the ADA and the ADAAA. Specifically, the following rules are straightforward ways to avoid running afoul of the ADA:

- Do not ask applicants questions that are likely to reveal the existence of a disability before making a job offer. This includes questions like: How many days were you sick last year? Have you ever filed for workers' compensation or been injured on the job? Do you have a disability which would interfere with your ability to perform the job?
- Employers may ask applicants whether they are able to perform the essential functions of the job with or without

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reasonable accommodation.

- If an applicant has an obvious disability, it is appropriate to ask whether the applicant will need a reasonable accommodation to perform any tasks and if the applicant says yes, the employer may ask what type of accommodation is needed.
- Employers may make post-offer/pre-employment medical inquiries so long as the employer asks the same questions of all similarly-situated candidates.
- Limit sharing medical information about an employee to managers or supervisors who need to know, safety personnel if the disability might require emergency treatment; government agencies investigating compliance with the ADA; and third parties for insurance purposes.
- Be aware that an employee does not have to explicitly state, "I need a reasonable accommodation." Rather, employees may make a request for a reasonable accommodation in other ways, such as, "I need help" or "I am having trouble." Likewise, under the EEOC's guidance, employers may be obligated to act even if the employee makes no specific verbal request if the employer knows or should know that the employee needs an accommodation and cannot request it.
- Be certain to engage in the interactive process. Employers should consider the employee's requested accommodation, but may also evaluate other accommodations that may better suit the employer's business needs so long as it meets the employee's restrictions.
- When meeting with the employee to discuss a requested accommodation, the employer should: find out the employee's health care provider-imposed restrictions, determine whether the restrictions are temporary or permanent and, if temporary, how long projected to last; review the essential functions of the employee's position and determine whether the medical restrictions impact the employee's ability to perform essential or non-essential functions; develop suggested accommodations; determine whether the employee has used the accommodation before and how it worked. Employers should document the steps taken as part of the interactive process as well as the final outcome.
- When assessing whether an employee is a direct threat, the employer must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence.

By: *Ellen E. McLaughlin, Tracy M. Billows, Abigail D. Flynn-Kozara and Sara Eber*

*Ellen E. McLaughlin and Tracy M. Billows* are both partners in Seyfarth Shaw's Chicago office. *Abigail D. Flynn-Kozara* and *Sara Eber* are associates in the firm's Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Ellen McLaughlin at [emclaughlin@seyfarth.com](mailto:emclaughlin@seyfarth.com), Tracy Billows at [tbillows@seyfarth.com](mailto:tbillows@seyfarth.com), Abby Flynn-Kozara at [aflynn-kozara@seyfarth.com](mailto:aflynn-kozara@seyfarth.com) or Sara Eber at [seber@seyfarth.com](mailto:seber@seyfarth.com).

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