New Disability Law

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This year Governor Gray Davis signed AB2222 which amends California's civil rights statutes. This legislation, which becomes effective January 1, 2001, substantially changes employer's obligations to employees and applicants who have a known disability.

One of the most significant changes is that if an employer fails "to engage in a timely, good faith, interactive process to determine effective reasonable accommodations, if any, at the request of an employee or applicant with a known disability," that employer will be liable. In simple terms, if the employer does not talk to an employee or applicant who has a known disability about reasonable accommodations, that employer would violate California's new disability law and could be liable for damages. Not only that, but it appears under this statute that, even if the employer talks to an employee or applicant about accommodations, but fails to do so in a timely manner or fails to do so in "good faith" the employer will still be liable.

What Should Employers Do

1. Document when the disability becomes known. An employer will be liable for failing to provide reasonable accommodations if it knows of a disability. Therefore, it is extremely important to document when the employer becomes aware of any type of disability. Managers and supervisors should be advised and trained as to how to discuss accommodations and when they should have those discussions. They should also be instructed to bring these issues immediately to the attention of human resources.

2. Document when the employee requests accommodations. If an employee requests an accommodation, the employer should document the date of that request. An employer's obligation to provide accommodations is based entirely upon its knowledge of a disability. Also, since the employer must engage in a "timely" discussion about accommodations, documenting when an accommodation is requested is vital.

3. Document every conversation (telephone, voicemail, electronic mail) regarding the need for accommodations. The purpose of this new statute is to require employers to have discussions about reasonable accommodations as soon as possible. Since the burden is on the employer to show that it complied with this statute, if an employer fails to document such communications, it will be difficult to prove that it engaged in a "timely, interactive process."

4. Document all efforts to provide accommodations. The employer should try to provide accommodations to any employee with a known disability. Since the employer must provide reasonable accommodations, it is essential for the employer to show all efforts to accommodate the employee. Even if the accommodations requested could not be provided, all efforts to provide those accommodations must be documented.

5. Reasonable accommodations. Employers must not only discuss accommodations, but do so in good faith. Since the burden is upon the employer to prove that reasonable accommodations cannot be provided, the employer must do whatever it can within reason to accommodate the employee. The state of the law currently requires an employer to demonstrate that it exhausted the universe of possible accommodations. When an employee or applicant alleges that the employer failed to accommodate, the employer has the burden of proving that it tried to accommodate the disability and that despite its efforts, there was no reasonable accommodation.

If the employer-offered accommodations are refused by the employee or applicant, the employer should explore other accommodations and use its best efforts to try to accommodate. However, if the refusal of the offered accommodations is based upon legitimate reasons, the employer probably has not satisfied its obligations under the law, because the offered accommodations must be reasonable. More importantly, under the new law, the employer must engage in a "good faith" discussion, and if the offered accommodations are not "reasonable," then an argument can be made that the employer was not acting in good faith.

The major problem facing employers is that every situation is different and the employer must exhaust its efforts in order to accommodate. At the very least, employers should consider and discuss with an employee or applicant the following possible accommodations:

a. Job restructuring.
b. Part-time work.
c. Modified work, modified scheduling.
d. Reassignment or transfer.
e. Leave of absence.
f. Modification of equipment or devices.
g. Elimination of non-essential job functions or duties.
h. Retraining.

6. If the employer cannot provide the requested accommodations, document the reasons why. Under the new law, it is even more important to document all efforts and conversations about accommodations, since the employer must engage in a timely, good faith, interactive process. If the employer comes to the conclusion that reasonable accommodations cannot be provided, the reasons, including any costs associated with the requested accommodations must be documented. If accommodations cannot be provided, the employer will have to prove that the requested accommodations caused an undue burden, which can be economical, financial or not practical or feasible.

7. Consult legal counsel. Every disability situation is different. If two employees have the same disability, the accommodations for one may not be reasonable for another. Therefore, employers should consult legal counsel when dealing with disability issues and reasonable accommodations.

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