ADA Best Practices For Employers Engaging in an Interactive Process Conversation with Employees

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The Americans with Disabilities Act (ADA) continues as a significant area of liability for employers. The EEOC received 26,379 charges in fiscal year 2012 and The Act continues to present complex requirements for employers in working with and managing employees with disabilities. We will publish a series of articles that address employer exposure to the ADA and provide best practices regarding how to engage in an interactive process conversation with employees, evaluate situations where the ADA overlaps with the state Workers’ Compensation Act or other leave laws, and manage those sticky situations where an employer must discipline an employee with a disability based on job performance issues.

First, we are considering the interactive process. This is the name given to the process that an employer utilizes in order to determine the appropriate reasonable accommodation that will enable an
employee with a disability to perform the essential functions of the position. The requirement for the interactive process is in the appendix to the administrative rules to the Americans with Disabilities Act. See, 26 CFR part 1630 Appendix. In addition, the Ninth Circuit has made it very clear that participating in a good faith interactive process dialogue is an absolute requirement under the ADA. Employers who fail to do so will be liable for failing to provide a reasonable accommodation. See, e.g., Barnett v. U.S. Air, Inc. 228 F.3d 1105, 1112 (9th Cir 200), rev’d on other grounds, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed. 2d 589 (2002).

First, a disclaimer. This post will provide suggestions for best practices. This is not legal advice. If you have specific questions related to an ADA issue, please consider obtaining legal advice specific to the situation.

So, what must an employer do to engage in a good faith interactive process? By following the best practices outlined in the steps below and training supervisors and managers, employers will demonstrate good faith efforts to engage in the interactive process that will reduce liability in failure to accommodate claims.

**Step 1 – Create a policy.** Don't hide your interactive process requirement, rather publicize it. Inform your employees that a requirement of the ADA is that both parties communicate in good faith regarding reasonable accommodations. A good idea is to include a discussion of the interactive process as part of your ADA policy. At a minimum, tell employees that if they request an accommodation, you will review their job description with them, determine the difficulties that their disability causes in their performance of the essential job functions, and brainstorm over accommodations that you can provide to assist them. When you do your next handbook review, include this on the list of updates.

**Step 2 – Review your job descriptions.** We will cover how to draft a good job description in a future blog post, stay tuned. For our purposes here, check that you have accurately described the essential job functions in both your job description and any advertisement or job posting for the position. The ADA regulations provide the following considerations in determining whether a job duty is essential:

- The reason that the job exists is to perform that duty;
- A large percentage of work time is spent performing the duty;
- There are no (or a limited number of) other employees available to perform the duty;
- The worker is hired for his or her expertise and the work is highly specialized;
- The employer judges the job duty to be essential to performing the job;
- Serious consequences would occur if the duty were not performed;
- The job duty is required by the terms of a collective bargaining agreement; and
- Individuals in that job in the past performed the duty.

**Step 3 – Train your supervisors to recognize an accommodation request.** Accommodation requests are not always obvious. There is no requirement that an employee request an accommodation in writing. A statement by an employee that he or she is having a problem performing their job because of a medical
condition is likely sufficient to constitute an accommodation request. It is best practice to train your supervisors to act on this. The EEOC provides the following examples of accommodation requests:

An employee tells his supervisor, "I'm having trouble getting to work at my regularly scheduled starting time because I am undergoing medical treatments."

A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.

However, a simple request for a new chair, or some other request, without information that the need is related to a medical condition is probably not sufficient to be an accommodation request.

Also train your supervisors not to ask questions about the medical condition or disability at issue.

**Step 4 – Arrange a personal meeting with the employee.** This is the heart of the interactive process. There may not always be the necessity for a lengthy meeting. If the supervisor who is asked for an accommodation can easily provide one, then he or she should do so as soon as possible. However, to establish that you have engaged in good faith in the interactive process, best practice is to schedule a meeting with the employee, the employee's supervisor and someone from HR. A primary goal of this meeting is to determine what problems the employee is having in performing their job tasks because of a disability. This entails soliciting ideas from the employee about what you could provide that would enable the employee to perform his or her job duties. In addition to soliciting ideas, you may also suggest solutions. The purpose of this brainstorming meeting is to come away with suggestions to enable the employee to continue working. A couple of suggestions:

- If the employee has a work-related injury, consider involving your workers' compensation carrier to determine whether there are any monies from your state workers' compensation division to assist you in making workplace modifications. In Oregon, such funds may be available through the employer at injury program.
- If you are not sure of an accommodation, consider calling in an expert. This can be accomplished through a phone call to the Job Accommodation Network (JAN), or you can locate a vocational rehabilitation specialist to assist.
- If you do consult an outside resource, like JAN, be careful about ensuring confidentiality. Do not disclose the employee's name and identifying information.
- Keep an open mind.
- In choosing the accommodation, it is a good idea to understand the employee's preference, but the employee does not get to choose the accommodation – the employer does. The law requires only that the accommodation be reasonable. Eliminating the requirement to perform an essential job function is not a reasonable accommodation. The employee must still be able to perform the essential job function with an accommodation. Examples of reasonable accommodations include:
  - Job restructuring
● Equipment (i.e., sit stand desks, lifting mechanisms, carts, new chairs, modified work stations, etc...)
● Leave of absence
● Change in work schedule
● Job reassignment to an available and suitable job
● Modified workplace policies

**Step 5 – Consider whether you need information from the employee’s physician.** Depending on the complexity of the issue, you may want to communicate through the employee with their physician to obtain information about the restrictions caused by the medical condition and any suggested accommodations. In any such communication be sure to include the safe harbor language required by the Genetic Information Nondisclosure Act (GINA), and limit your request to information that is required as a matter of business necessity. You may consider conferring with counsel regarding the content of the letter.

**Step 6 – Continue the dialogue.** The interactive process does not end with the interactive process meeting. Once you have found and implemented a reasonable accommodation, best practice is to follow up with the employee on a regular basis to ensure that the accommodation is effective. It is often common that the first accommodation will not be effective and you need to try something else. Your workplace policy should inform the employee that they must inform their supervisor if the accommodation is not effective.

**Document the process.** Document every step throughout the interactive process. Even though documenting short conversations between the supervisor and the employee may seem trivial, when it comes to defending a claim that you did not provide a reasonable accommodation this information is crucial. Document every conversation and the entire process. Keep the documentation in the employee’s confidential medical file, not the personnel file.

To conclude, the interactive process is an important and often missed obligation within the ADA. Employers who follow these suggested steps and best practices and who document their process will be in a better position if they are subject to an administrative charge or suit for failure to accommodate. Please visit our blog, http://employmentupdate.schwabeblog.com/ for a discussion of how to develop ADA compliant job descriptions.