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Electronic Alert

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The Americans with Disabilities Act Turns 30: A Few Reminders About Employer Obligations Under the Law

By Nicole Elgin & Bruce Garrett

July 2020 marks the 30th anniversary of the Americans with Disabilities Act (ADA). The monumental civil rights legislation ensures equal opportunity for disabled Americans in many facets of life—Title I of the Act addresses employment. The Oregon Fair Employment Practice Act (OFEPA) provides many of the same employment protections for disabled workers that the ADA does with one major exception: the ADA applies to employers with 15 or more employees; whereas the OFEPA applies to employers with just six or more employees. Both the ADA and OFEPA make it unlawful for employers to discriminate against applicants or employees who have disabilities.

The ADA defines disability broadly!

Under the ADA, disability is defined as a physical or mental impairment that substantially limits one or more major life activities of the individual. The law's definition of "disability" also includes a person with a record of such impairment or a person who is regarded as having such an impairment. Courts have consistently interpreted this definition broadly, to include disabilities such as alcohol use disorder. However, while an employee may have a medical diagnosis of alcohol and/or drug use disorders, employers are allowed to hold people with drug and alcohol use disorders to the same performance standards as other employees. Moreover, the Oregon Supreme Court has held that an employer is not required to accommodate an employee's use of medical marijuana, but may be required to provide an alternative reasonable accommodation.

What is a reasonable accommodation and when are employers required to provide one?

A reasonable accommodation is an adjustment that an employer makes to its existing business practices in order to allow a disabled applicant or employee to have the same opportunity that a non-disabled applicant or employee enjoys. Employers are required to provide reasonable accommodations unless doing so would create an "undue hardship" or a "direct threat." The law defines undue hardship as "an action requiring significant difficulty or expense" in light of the cost of the accommodation, and the size and overall financial resources of the employer. A direct threat is defined as a "significant risk to the health or safety" of the individual requesting the accommodation or others in workplace. Both the "undue hardship" and "direct threat" exceptions to providing a reasonable accommodation can be very difficult for an employer to establish and we advise employers to consult with counsel before denying an accommodation on these grounds.

Be careful with medical inquiries and exams.

According to the Equal Employment Opportunity Commission, employers may not ask job applicants about "the existence, nature or severity of a disability," but employers may ask the applicant if they can perform a specific job function. Employers cannot ask disability-related questions or require medical examinations until after a conditional job offer. Even then, there are significant restrictions on an employer's ability to submit an applicant to a medical exam. The medical examination must be job-related and consistent with business necessity. Keep in mind that asking an employee questions about their disability (rather than how it impacts job performance and the accommodations the employee needs due to their medical condition) could lead to liability for employers.

COVID-19 and the ADA

Many believe that COVID-19 could fall the ADA's broad definition of disability. Courts are just starting to look at the issue, but the Equal Employment Opportunity Commission (EEOC) released some helpful guidance that is available here. Worth noting, the EEOC said that in light of *current* public health guidance, temperature checks and testing are permitted under the ADA if they are administered consistent with the ADA's medical exam requirements. But requiring antibody testing before allowing employees to re-enter the workplace is not permitted under the ADA because the testing, at this time, is not "job-related and consistent with business necessity." The guidance is constantly changing and employers must stay apprised of the latest local, state, and federal guidance on the ADA's interactions with the pandemic.

Seek guidance!

The ADA created a plethora of litigation over the past three decades as courts have wrangled over what exactly constitutes a disability, a reasonable accommodation or direct threat, or when an employer's medical inquiries or examinations run afoul of the Act.

If you have questions about requests for accommodations from applicants or employees, contact Nicole Elgin at nelgin@barran.com or (503) 276-2109.