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January 2012 Volume 4, Issue 1

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Employment Law Newsletter

EEOC Discusses How Not Being Able to Graduate from High School Could Be Considered a Disability

By Anthony E. Cooch, Esquire

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals with disabilities. The act was amended by the ADA Amendments Act (ADAAA) of 2008 with final regulations being issued in March 2011. A significant change in the ADAAA was an expanded definition of "disability."

For an impairment to be considered a disability under the pre-amended ADA, it had to prevent or severely restrict a person from performing activities central to most people's daily lives. With the enactment of the ADAAA and its subsequent regulations, it is now much easier for an impairment to be considered a disability. To qualify as a disability, the impairment is only required to substantially limit one major life activity with life activities including reading, concentrating, communicating, working and thinking.

In November 2011, the Equal Employment Opportunity Commission (EEOC) issued an "informal discussion letter" regarding their interpretation of disability and employer requirements under the ADA. The letter addressed the question of whether an employer could violate the ADA by requiring that employees possess a high school diploma to qualify for a job when the applicant was unable to earn a high school diploma due to a learning disability. The EEOC's answer was "yes."

Under the ADAAA regulations, qualification standards, employment testing and other selection criteria violate the ADA if two things are true:

> An employer requires that the standards or testing be met in order to qualify for a job, AND
>
> The standards screen out individuals with a disability.

The exception to the rule is that if an employer can show that the standards are job related and consistent with a business necessity it will not be considered as violating the ADA.

In the case of a high school diploma requirement, the EEOC is of the opinion that an ADA violation could occur when an employer requires that a job candidate possess a high school diploma if:

> An employer requires a high school diploma for a job;
>
> An individual who has a learning disability that prevents him or her from graduating from high school is screened out because he or she does not have a high school diploma; AND
>
> An individual's learning disability is considered a "disability" for ADA purposes.

The ADA would allow the high school diploma requirement to stand as long as it is related to the job and consistent with business necessity. However, even this exception is overridden if the essential functions of the job could be performed easily by someone without a high school

diploma or the candidate shows he or she can perform based on prior job performance of demonstration to the potential employer. Essentially, the EEOC interpretation of the ADA translates as follows: if certain qualifications or tests are required to obtain a job, to withstand challenge they must be absolutely necessary for the employee to be able to perform the job.

This "all inclusive" definition of disability provides a great deal of uncertainty to employers. With the expansive definition of what is considered a disability potentially attacking job requirements that were previously acceptable, employers now face having to review and redraft job descriptions and position requirements to avoid or defend potential challenges.

Practice Pointers

> Job qualifications, requirements and testing should be related to the job the candidate is expected to perform and consistent with the needs of the business. In other words, if you need the skill or qualification to do the job, leave it in, but if not, consider removing it.
>
> If a candidate or employee discloses a disability, have steps in place to handle the situation. Disclosure of a disability does not always automatically require an accommodation. It does start a due diligence requirement.
>
> Train your HR Staff so that if an applicant discloses he or she has a disability your staff knows how to handle the situation.

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Complying with the District of Columbia's Accrued Sick and Safe Leave Act

by Arianna S. Gleckel, Esquire

For employers located in the greater Washington, DC metro area, keeping up with multiple states' employment law requirements can be challenging. Virginia and Maryland closely track the federal laws that govern employers on issues such as the Family Medical Leave Act and the Americans with Disabilities Act, with only some minor variations.

However, the District of Columbia has implemented more stringent requirements for employers to comply with under several employment laws. In this month's article, I will focus specifically on one law the District of Columbia has passed that Virginia and Maryland do not have and how employers can comply with it.

The District of Columbia's "Accrued Sick and Safe Leave Act" (the "Act") requires employers who have employees working in the District of Columbia (regardless of where the employer's other offices or headquarters are located) to provide paid sick days for their employees who work in DC (regardless of what state the employee resides in).

The Act applies to all private and government employers. It does not apply to independent contractors, students, health care workers who choose to participate in a premium pay program or restaurant wait staff and bartenders who work for a combination of wages and tips.

Eligible employees must have worked for the employer for at least one year without a break in service and have worked at least 1,000 hours of service during the previous 12 month period. This definition of employee includes employees who are employed by the employer in more than one location and spend more than 50 percent of his or her working time for the employer in the District of Columbia.

The amount of paid leave required will depend on the number of employees that are employed by the employer in the District of Columbia.

If you employ:

> 24 or fewer employees in the District of Columbia, you must provide 1 hour of paid leave for every 87 hours worked for each employee, not to exceed 3 days of paid leave per calendar year.

25 to 99 employees in the District of Columbia, you must provide 1 hour of paid leave for every 43 hours worked for each employee, not to exceed 5 days of paid leave per calendar year.

100 or more employees in the District of Columbia, you must provide 1 hour of paid leave for every 37 hours worked for each employee, not to exceed 7 days of paid leave per calendar year.

The employee may use the paid leave for physical or mental illness, injury or medical condition or to assist with the medical care of a family member. The Act also allows for the employee to use the paid leave if the employee or the employee's family member is the victim of stalking, domestic violence or sexual abuse.

The Act defines "family member" to include children, grandchildren, foster children, spouses, siblings, siblings' spouses, children's spouses, parents, grandparents and domestic partners (defined as anyone with whom the employee maintains a committed relationship and with whom the employee has lived with for the past year).

The employee may "roll over" any unused sick and safe days into the following year. However, paid leave accrued under the Act that is unused at the termination or resignation of the employee will not be reimbursed by the employer.

The employee should provide 10 days prior written notice to the employer of the employee's intent to use the paid leave if the employee is aware of the need to use the paid leave ahead of time. Otherwise, notice must be given to the employer on the business day following the date on which the employee becomes aware of the need to use the paid leave.

The employer can create a form that the employee can use to request the leave that requires the employee to provide the employee's name, identification number (if any), the type of leave, and the reason for the leave and the dates the paid leave to be taken.

If the employee requests paid leave for 3 or more consecutive days, the employer can require that the request be supported by a reasonable certification that must be provided upon the employee's return to work or within one business day thereafter.

A reasonable certification includes:

A signed document from a health care provider affirming the illness of the employee or the employee's family member;

A police report indicating that the employee or the employee's family member was the victim of stalking, domestic violence or sexual abuse;

A court order indicating that the employee or employee's family member was the victim of stalking, domestic violence or sexual abuse; or

A signed written statement from a victim or witness advocate affirming that the employee or employee's family member is involved in legal action or proceedings related to stalking, domestic violence or sexual abuse.

If you already have a paid leave policy for your employees (for example, paid time off or universal leave) that gives the employee paid leave options to utilize at the employee's discretion and which allows the accrual and usage of leave that is at least equivalent to the paid leave required under the Act, you are not required to modify your existing policy.

The employer must post the Official Notice in a conspicuous location in the employer's places of employment. The notice is available in English and Spanish here.

Failure to post the notice may result in a $100 per day fine, not to exceed $500 per violation. Claims filed by an employee alleging a violation of the Act by the Employer are investigated by the District of Columbia Department of Employment Services. If an employer willfully violates the Act, it will be assessed a civil penalty of $500 for the first violation, $750 for the second violation and $1,000 for the third and any subsequent violations.

If you have employees working in the District of Columbia who meet the requirements for the paid leave under the Act, you should review your current leave policies to determine if you need to modify your existing policy in order to comply with the Act.

For more information on revising your employee handbook policies and employment issues, contact Arianna S. Gleckel at agleckel@beankinney.com. Ms. Gleckel is an associate at Bean, Kinney & Korman, P.C. in Arlington, Virginia practicing in the areas of employment law, commercial and general civil litigation.

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