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EMPLOYMENT PRACTICES HOTLINE

## Demonstrating Good Faith Helps Buyers Avoid, Win Suits By Disabled Workers

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Even though an employer takes the necessary steps to reasonably accommodate a disabled employee, litigation is often the result of a disgruntled worker who believes that he or she has been treated unfairly or differently than what was expected.

Lawsuits involving the Americans With Disabilities Act can be avoided when employers take the steps necessary to ensure that an employee with a disability is treated fairly and consistently in the reasonable accommodation process.

In essence, it is in an employer's best interests to exercise the utmost good faith possible in determining whether or not, and in what manner, to provide a reasonable accommodation.

This process, which must be an individualized approach, should include the following steps:

- Generalizations and stereotypes must play no part in the process of determining an appropriate reasonable accommodation. The inquiry should not be on how people with a particular type of disability might be able to perform the job. Because every employee and every disability is different, a reasonable accommodation should be tailored to the individual in question and the essential functions of his or her job.

- Before an employer can decide upon the appropriate reasonable accommodation, the employer must assess the specific job at hand. The

specific purpose as well as the essential functions of the job must be evaluated, considered and documented.

- An employer must consider the specific abilities and functional limitations of the employee requesting the reasonable accommodation. The employee in question must be consulted, for an employer may not know all the relevant information about an individual's disability or the limitations that disability imposes upon the job performance. Moreover, the employee is often the best source for ideas as to what would be the most effective and simplest accommodation.

In legal terms, this is called the "interactive process." In practice, it requires management to engage in a good faith dialogue with the employee.

The employer need not defer to the employee's choice, but it would

be difficult to demonstrate good faith in a subsequent lawsuit if an employer had never bothered to consult with the employee at question about a potential reasonable accommodation. Moreover, an employee often will suggest a simpler, less costly alternative than the employer may have thought necessary at first.

In the reasonable accommodation process, an employer should always request backup documentation regarding the employee's disability, including any reports by physicians, rehabilitation therapists or other professionals with knowledge of the employee's functional limitations.

Employers should also take a conservative view of the undue hardship exception.

There may well be situations where an employer believes that the cheapest and most effective reasonable accommodation is nonetheless one that will impose an undue financial hardship on the business. This is the one defense under the ADA to refusing a reasonable accommodation.

Given the legal risk and exposure presented by denials of a request for a reasonable accommodation, an employer must take a very hard look at whether or not the situation at hand falls within the defense of "undue hardship."

The financial costs of accommodations are not limited in any respect under the ADA by the amount of the disabled employee's wage rate or salary. Instead, the relevant focus centers on assessing whether the costs of the accommodation impose an undue hardship based on the resources of the employer.



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Therefore, before denying a reasonable accommodation based on the "undue hardship" defense, an employer should make a thorough financial analysis of whether the accommodation would impose a true financial burden.

This will require consultation with high-level decision-makers and corporate officials responsible for budgets and finances. An employer must analyze whether federal tax credits, tax deductions or other sources of financing are available to pay for or reduce the cost of the accommodation.

Furthermore, the Equal Employment Opportunity Commission's regulations contemplate that an employer should check with the employee as to whether or not they would be able to provide the accommodation themselves or pay the portion of the cost of the accommodation which would constitute the undue hardship to the employer.

Until all of these steps are taken, an employer should not deny a request for a reasonable accommodation on the basis of undue hardship.

Employers should also create a

good-faith file to document the reasonable accommodation process.

To prevent a later challenge to the employer's decision, the process of deciding upon the reasonable accommodation should be documented in a thorough fashion. Care should be taken to create documentation that will stand up in court and demonstrate an employer's good faith in reaching its decision.

If an employer can demonstrate its good faith, the potential for damages in any ADA lawsuit will be reduced substantially. 