WORKPLACE ACCOMMODATIONS
Annual Employment Law Conference
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Technical Assistance for Employers

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Agenda

- The Basics
- Disabilities
- Injured Workers
- Family Leave
- Pregnancy
- Religion
- Victims of Domestic Violence, Sexual Assault, Stalking or Harassment
- The Interactive Process
- Undue Hardship

Objectives

- Be aware of your legal obligations under the anti-discrimination laws
- Know where to go to get assistance
- Realize that when an employee requests an accommodation, your next steps are critical
- Consider that these laws are rooted in removing barriers and stigmas for people who have protected status
Three Types of Claims

- Failure to Reasonably Accommodate
- Disparate Treatment
  - Protected class status
  - Adverse employment action because of that status
- Harassment/Retaliation
  - Conduct relating to an employee’s protected status
  - That is severe or pervasive
  - Unwelcome to the employee and
  - A reasonable person would also find it unwelcome

Fundamentals

- A qualified individual is entitled to a reasonable accommodation under the law if the accommodation does not pose an undue hardship for the employer (and for the employee with a disability, if he or she does not pose a direct threat which cannot be mitigated by a reasonable accommodation).

I. Disability Issues

- Americans with Disabilities Act Amendments Act
- Prohibit discrimination and/or harassment on the basis of disability, perceived disability or record of a disability
- Require employers to accommodate a qualified individual with a disability - employees and applicants with certain limited exceptions
What is a disability?

- A physical or mental impairment
- That substantially limits someone in a major life activity
- Approximately 16% of the adult working age population has a disability
- This could be none (or all) of us today but it could be any of us tomorrow!

Define a physical impairment

- Physiological disorder or condition
- Cosmetic disfigurement
- Anatomical loss

Affecting one or more of the following body systems:

- Neurological
- Musculoskeletal
- Respiratory
- Cardio-vascular
- Reproductive
- Digestive

Note: These are also “Major Life Activities”
Define a mental impairment

- Cognitive Impairment
- Traumatic brain injury
- Emotional or mental illness
- Specific learning disabilities

What is a “major life activity”?

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Thinking
- Communicating
- Working
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Major bodily functions

What does “a record of an impairment” mean?
What does “regarded as having an impairment” mean?

An individual is protected from disability discrimination in employment if:

- He or she has a disability,
- Is qualified, and
- Can perform the essential functions of the job, with or without reasonable accommodation

ESSENTIAL FUNCTIONS
Tasks that are fundamental and not marginal
The position exists to perform that function
A limited number of employees is available to carry out the essential function
The function is highly specialized: the person is hired for the expertise or ability required to perform the function
ESSENTIAL FUNCTIONS

In determining whether a function is essential, courts consider things such as:

- Time spent performing the function
- Consequences of the function not being completed
- Number of people available to perform function
- The employer’s judgment
- Written job descriptions

Triggers

- Employee request (plain English)
- Employee illness
- Employee performance or attendance issues
- Workers’ compensation claim (whether allowed or denied)
- FMLA/OFLA request/expiration of leave
- Known off the job injury
- Changes in attitude or behavior
- Tension in the workplace

“Direct Threat”

- An employer need not accommodate if placing the individual in the job would result in a direct threat to himself/herself or others
- Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk by reasonable accommodation.
Medical inquiries
Three stages of employment

- **PRE-OFFER:** No questions regarding disabilities or medical conditions
- **POST-OFFER, PRE-EMPLOYMENT:** OK to require a medical exam, as long as this is required of all entering employees in the same job category and the medical information is kept confidential
- **ONCE JOB HAS COMMENCED:** Inquiries or medical exams permitted only if "job-related and consistent with business necessity."

Medical Certifications

- If we require a doctor's note or a medical verification under OFLA/FMLA or a fitness for duty certificate because it is "job-related and consistent with business necessity"
  
  **THEN**

- We must pay the out-of-pocket costs associated with that certification. ORS 659A.306

People First Language

- Appropriate designation is individual with a disability or individuals with disabilities
- "Handicapped" is outdated and should not be used
- Referring to someone as “retarded” is never appropriate
- Vision-impaired, hearing-impaired, cognitive disabilities. Blind and deaf still used.
Managing Disability Issues

- Do not ask applicants for medical info or ask about a disability unless they request accommodation for the application/interview process. Ask if they can perform the essential functions of the job, with or without an accommodation: refer to job descriptions.
- Contact BOLI or an outside attorney/HR consultant for assistance with difficult issues.
- Actively pursue the interactive process – might be ongoing; both sides must act in good faith.
- Check in with the employee periodically and document what was discussed.
- Rely on medical information from the employee’s doctor.

More Tips

- Get a medical release signed by the employee; get a form from an attorney.
- Do not “diagnose” employees.
- Maintain confidentiality of medical information:
  - Separate files, lock and key, encrypted and password protected.
  - You may inform the supervisors or managers of necessary restrictions on the work or duties of the employee and necessary accommodations. Do not discuss the diagnosis or even the type of doctor; refer to the “provider”.
  - You may inform first aid and safety personnel, when appropriate, if the disability might require emergency treatment.

Things to Avoid

- Statements like these:
  - “You must be able to perform 100% (or all) of your job duties.”
  - “You must bring in a full release before you may return to work.”
  - “You must be completely released before you return to work.”
II. A Word about Workers’ Compensation

- 3 Basic Protections:
  - No discrimination (including applicants) and no retaliation (employers of 6 or more)
  - Re-Employment rights to available/suitable light duty (employers of 6 or more)
  - Reinstatement to the job at injury (employers of 21 or more)
- Leave may be up to 3 years from the date of injury!

III. A Word about OFLA/FMLA

- An eligible employee who works for a covered employer is entitled to protected time off (or modified employment) for certain qualifying conditions
- Eligibility:
  - OFLA - 180 days of employment plus (usually) 25 hours/week worked on average in the 180 days preceding leave
  - FMLA - 1 year of employment plus 1,250 hours worked in the year preceding leave plus 50 employees within a 75 mile radius

Resources

- Job Accommodation Network (JAN) provides free consulting services for all employers, regardless of the size of an employer’s workforce.
  - https://askjan.org/empl/index.htm
- Northwest ADA Information Center
  - http://nwadacenter.org
  - 800/949-4232
More OFLA/FMLA

- Covered employers:
  - OFLA - 25 or more employees in Oregon
  - FMLA - 50 or more employees in the US

- Qualifying Circumstances:
  - OFLA – Serious Health Condition of Employee or “Family Member”, Bonding time with a New Child, Sick Child Leave, and Bereavement Leave
  - FMLA – Serious Health Condition of Employee or Parent, Spouse or Child, Bonding Time with a New Child, Military Caregiver Leave and Qualifying Exigency Leave

IV. Pregnancy

- EEOC Guidance: adverse treatment arises from assumptions about a woman’s capabilities and commitment to the job
- Evaluate capabilities just as you would for non-pregnant workers with health conditions: based on their ability or inability to work
- Would you provide a reduced schedule or light duty to an injured worker but not a pregnant woman? This might be a problem!

More Pregnancy Stuff!

- “Maternity Leave” is an imprecise term under an OFLA analysis because a woman who takes any pregnancy disability leave (any incapacity due to pregnancy or childbirth, including routine prenatal visits) is entitled to an additional 12 weeks for any OFLA purpose.
- Communicate with the employee to find out when the incapacity ends and the bonding time begins
Rest Periods for Expression of Breast Milk

- All nursing mothers are entitled to reasonable breaks to express breast milk and accommodations to (1) do so in a private location and (2) store it in an ice chest or freezer.
- Oregon has more specific requirements: a 30-minute break for every 4-hour work segment or the major portion of 4 hours.
- Federal: 1 year; Oregon: 18 months.

V. Religious Accommodation

- These cases can be VERY expensive:
  - Muslim truckers awarded $240,000 because their beliefs prevented them from transporting alcohol. (October, 2015)
  - Evangelical Christian mine worker awarded nearly $600,000 after being forced to retire for refusing to submit to a biometric hand scanner (August 2015)
  - Dentist in Bend ordered to pay $348,000 for imposing religious beliefs on an employee (BOLI 2012)

Religious Accommodation

- A claim for failure to accommodate will prevail if:
  - An employee has a sincerely held religious belief.
  - Which conflicts with job requirements.
  - And the employer does not provide a reasonable accommodation unless it is an undue hardship to do so.
Religious Accommodation

- What is a “sincerely held religious belief”? 
  - Very broad: Not necessarily traditionally religious (so long as moral or ethical as to right or wrong and held with the strength of traditional religious beliefs), needn’t be widely held; needn’t be logical
  - Examples include vegetarianism, veganism, international church of body modification, wicca, druidry, satanism, etc.
- Three types of claims: failure to accommodate; disparate treatment; harassment

VI. Reasonable Workplace Safety Accommodations

- Victims of Domestic Violence, Sexual Assault, Stalking or Harassment have 3 protections under Oregon law:
  - Anti-discrimination
  - A reasonable amount of time off
  - A reasonable workplace safety accommodation

VII. The Interactive Process

- What an employer does when an employee says he or she cannot do certain tasks, or discloses to the employer a need for an accommodation.
- No magic words are required
- This is an invitation to engage...and to document that engagement
A Meaningful Interactive Process
- An informal process between an employer and an employee (or applicant in the case of a disability) in an effort to find a reasonable accommodation.
- This may be a series of structured communications as the situation evolves.
- Explore options in good faith and document your efforts if you can or cannot meet the employee’s needs.

VIII. Reasonable Accommodation
- Are facilities readily accessible to and usable by individuals with disabilities?
- Can the job be restructured?
- Can the work schedule be modified?
- Is there a vacant position?
- Can we acquire or modify equipment?

A Reasonable Accommodation
- May or may not be the accommodation the employee requests.
- Can include equipment, schedule modification (allowing extra leave, tardies, absences) and/or a facilities change, etc.
- Can include reassignment to different position if no accommodation possible in current position.

Does Not Include:
- Eliminating essential functions.
- Lowering production standards (compare “workload”).
- Providing personal use items: hearing aids, glasses, prosthetic limb, etc.
Accommodation/Interactive Process

- HR or manager initiates process with employee to determine accommodation
- May require input from care provider
- May require research regarding cost/impact
- Obligation to engage in good faith, but the employer doesn’t necessarily have to adopt the employee’s requested accommodation…but should consider it!
- Is ongoing – if change in condition, request for change, or accommodation not working, must re-engage in process

Steps in the Interactive Process

- Trigger
- Employee fills out request form or makes supervisor/HR aware of need for accommodation
- Meet with employee
- Notify supervisor (no unnecessary detail)
- Generate/gather information and documentation
- If a disability, involve medical provider
- Discuss with management and HR
- Back and forth
- Prepare written plan (letter, email, document)
- Closure letter or email to employee with cc to manager and HR

Obligation to Accommodate Ceases

What is an "Undue Hardship"?
- Require significant difficulty or expense, or
- Fundamentally altering the nature of the company or agency
- Depends on all facts and circumstances: size and financial resources, nature and structure of the business, geographic separateness of employees, effect on operations and processes, shut-down and start-up of equipment, perishable nature of goods, health and safety of employees and the public, etc.
THANK YOU FOR COMING!

On behalf of BOLI Technical Assistance, ...

THE END