



WHAT WOULD YOU DO? EXPLORING BEST PRACTICES FOR THE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES

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Lynn Clements, as Director, Regulatory Affairs for Berkshire, oversees Berkshire's audit defense practice, helping clients respond to hundreds of government investigations since she joined the consulting firm in 2014.

With over 20 years of EEO/AA experience, Lynn also serves as a strategic advisor to clients with respect to EEO/AA and pay equity issues and regularly helps clients develop robust compliance and diversity programs through client training and policy and program development.

Prior to joining Berkshire, Lynn was a partner at a management-side law firm and served in several senior policy development roles at the Equal Employment Opportunity Commission and the Department of Labor, including as the Acting Director of Policy at the Office of Federal Contract Compliance Programs.

A frequent speaker to HR professionals of all levels at national and local events, Lynn has testified before Congress on EEO and pay equity issues, regularly assists industry organizations, including SHRM and CUPA-HR, in understanding and responding to regulatory proposals.



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Agenda

- The Impact of the Current Health Crisis
- Evaluating Job Qualifications
- Processing Accommodation and Leave Requests
- Requesting Appropriate Medical Documentation
- Managing Performance of an Individual with a Disability

EEOC Resources on Health Pandemic

- Recorded webinar addressing common questions at <https://www.eeoc.gov/coronavirus>
- Two new updated resource documents
 - What You Should Now About COVID-19
 - Pandemic preparedness guidance document

Managing ADA Compliance During COVID-19

- Is COVID-19 a Disability?
- Medical Exams and Inquiries
- Medical Confidentiality
- Excluding Workers From Workplace
- Reasonable Accommodations During and After the Pandemic

Managing ADA Compliance During COVID-19

- ADA continues to apply during the health pandemic
 - Conduct individualized assessment using best available medical guidance
 - Direct threat and undue hardship may be easier to establish given current circumstances
 - Be careful about making paternalistic assumptions to “protect” employees
- ADA is one piece of compliance puzzle; employers must monitor state and other requirements

What Would You Do?

- Employer ABC has a job opening for an administrative assistant. The essential functions of the job are administrative and organizational. Some occasional typing has been part of the job. Two applicants have made it to the final interview. One has a disability that makes typing very difficult, the other has no disability and can type. **Can the employer refuse to hire the applicant because of her inability to type?**
 - Yes
 - No
 - Not Sure

Evaluating Job Qualifications

- What are Job Qualifications?
 - Job requirements for educational background, experience, skills, licenses, etc.
 - Must be job-related and consistent with business necessity, i.e. the qualification standard is an accurate measure of a person's ability to perform a specific job.
 - Even if job-related and consistent with business necessity, employer must consider if individual with a disability could meet the standard with a reasonable accommodation.

What Do You Think?

- Is a lifting requirement a job qualification standard or an essential function?
 - Qualification Standard
 - Essential Function
 - Both
 - Not Sure

How Will OFCCP Review Compliance?

- **OFCCP Section 503 regulations:** "The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity."
- **OFCCP Scheduling Letter:** "Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-300.44(c), including the schedule for the review and any actions taken or changes made as a result of the assessment."

How Will EEOC Review Compliance?

- **United States v. York County, South Carolina (2019)** –settlement of claim that County used an employment qualification standard (driver’s license) to unlawfully screen out an individual with dwarfism for a Purchasing Manager role
- **Gilberto S. v. Department of Homeland Security, Customs and Border Protection (Federal Sector 2014)** - working rotating shift was a qualification standard, not an essential function, because requirements related to when a person performs a job are qualification standards
- **Gwendolyn G. v. U.S. Postal Service (Federal Sector 2013)** – 70-pound lifting requirement was not carefully tailored to measure [an individual's] actual ability to [perform] the essential function of the job because evidence showed that employees only “frequently” lifted packages between twenty and thirty pounds

Best Practices

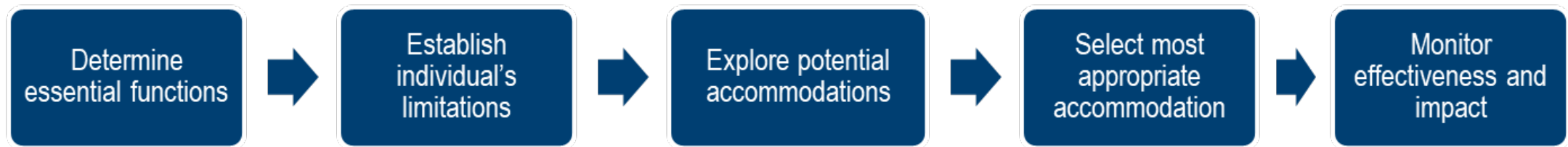
- Develop a schedule for reviewing all mental and physical qualification standards
 - Start with high volume roles
- Complete reviews when
 - a new job is created,
 - a job is posted, or
 - accommodation is requested
- Determine how you will document reviews

What Would You Do?

- Jane requests 12 weeks of leave so that she can have back surgery and recover from the surgery. Her employer grants her the leave under the FMLA. Near the end of her leave, Jane lets her manager know that her doctor believes she needs two or three months of additional leave. Jane does not have any additional leave under company policies. **Can the employer deny Jane's request for more leave?**
 - Yes
 - No
 - Not Sure

Processing Reasonable Accommodation Requests

- Employer must engage in a timely and interactive process to respond to a request for reasonable accommodation



How Will OFCCP Review Compliance?

- **Section 503 Regulations:** Contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business . . . The development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations under section 503 and this part.
- **Scheduling Letter:** Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any.

How Will OFCCP Review Compliance?

- **Review of reasonable accommodation process and policy**
 - Review policies/forms/written processes
 - Interview managers managing accommodation process
 - Interview employees who have requested accommodations
 - Timing for decisions
 - Confidentiality
- **Review of personnel activity for employees who requested accommodations**

How Will EEOC Review Compliance?

- \$2.65 million settlement to resolve claim that company refused to allow class of employees who served food samples to customers to sit on stools for more than 10 minutes every two hours, regardless of medical condition
- \$3.3 million settlement to resolve claim that package company failed to accommodate deaf and hard-of-hearing package handlers; agreement to provide access to live and video remote ASL interpreting, captioned videos, and scanning equipment with non-audible cues

Best Practices

- Develop written accommodation policy and procedures
- Train managers and employees on process
- Develop process to track requests and approvals
- Use a centralized process for managing requests
- Develop a centralized budget to pay for accommodations

Disability-Related Inquiries

- May request documentation when disability and/or need for accommodation is not “obvious”
- Request should be limited to condition requiring accommodation and functional limitations
- Don’t forget about GINA
- May contact employee’s health care provider or ask employee to see medical provider of your choice
- May deny requests where documentation is not received timely, and when not complete or sufficient
- Must maintain information in separate and confidential file

How Will OFCCP Review Compliance?

- Ask if there are any medical examinations administered
- Review pre-employment medical inquiry process
- Confirm that disability self-ID and other medical information is kept separate from other personnel files
- Review of pre-screening questions

Tips For Creating Compliant Pre-Screening Questions

- Evaluate pre-screening questions to determine if they tend to screen out individuals with disabilities
- Focus on willingness to perform requirements
- Add reasonable accommodation language
- Monitor responses, particularly for those applicants who self-identify

How will EEOC Review Compliance?

- \$825,00 settlement against automobile part manufacturer who failed to hire predecessor company employees based on the number of sick or FMLA days they had taken
- EEOC challenges to company policies requiring:
 - Notification whenever employee had contact with a medical professional
 - Disclosure of prescribed medications and over-the-counter drugs
 - Disclosure of specific medical illness for excused sick leave absence
 - Suspension of pregnant employees pending receipt of medical release

Best Practices

- Confirm disability self-id and other medical documentation is maintained appropriately
- Refocus pre-screening questions to focus on willingness rather than ability
- Ensure medical inquiries comply with ADA, both in terms of timing and scope – this process deserves compliance attention

What Would You Do?

Andrew is a stellar sales worker, having exceeded his sales quota each of the past 5 years. In February, Andrew's manager Megan notices that Andrew seems distracted and that his sales numbers are poor. By mid-2019, Megan decides that Andrew should be placed on a performance improvement plan (PIP). During the meeting to discuss the PIP, Andrew mentions that he has been severely depressed and started taking a new medicine which has impacted his ability to concentrate. Can Megan move forward with the PIP?

- Yes
- No
- Not Sure

Managing Performance

- **Section 503, 41 CFR 60-741.44(d):** When employee has significant difficulty performing job and it is reasonable to conclude that the performance problem may be related to a known disability, contractor “shall” (1) Confidentially notify the employee of the problem and (2) Ask if the problem is related to the disability, and if accommodation is needed
- **EEOC Guidance on Applying Performance and Conduct Standards:** “Should an employer mention an employee’s disability during a discussion about a performance or conduct problem if the employee does not do so? Generally, it is inappropriate for the employer to focus discussion about a performance or conduct problem on an employee’s disability. . . [E]mphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer “regarded” (or treated) the individual as having a disability.”

Managing Performance

- Be careful when you are managing absences from work
- Audit performance management and termination process and documentation
 - Do not have to lower production standards
 - Do not have to excuse prior misconduct; accommodation is prospective only
 - Focus on performance issue, not medical condition
 - Consider impact on other workers

Questions?

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