10 Reasons For Employers To Be Jolly About The ADA (says the EEOC)

By Robin E. Shea on December 09, 2011

The American Bar Association sponsored a webinar this week on the Americans with Disabilities Act, which was noteworthy for its inclusion of EEOC commissioners Chai Feldblum (Democrat) and Victoria Lipnic (Republican).

I'm usually such a doom-and-gloomer when it comes to the amended version of the ADA.

But *'tis the season to be jolly,* so I have decided to be more positive (just this once, anyway). The EEOC commissioners raised a number of points that work in favor of employers.

Feldblum and Lipnic said that the EEOC is drafting new guidance on reasonable accommodation. The guidance *may* include what an employer can say to resentful co-workers who don't realize that the employee has a disability. Some realistic, practical advice in this area would be most welcome -- as it is now, confidentiality rules prohibit employers from saying anything, even if it might help co-workers understand and be more tolerant.

Regarding leaves of absence and the ADA, Lipnic recommended that the employer contact an employee who is at the end of a medical leave and ask whether the employee needs an accommodation to be able to return to work, or whether some additional leave (a limited amount, we hope) would allow the employee to return. Lipnic believes that this would probably satisfy the employer's obligation to avoid an "automatic" termination when the employee reaches the end of the leave.

Feldblum cautioned that "people who know about the ADA" should make termination decisions when employees reach the end of their medical leaves of absence rather than third-party administrators who may not have ADA expertise.

All right, it's "happy time" now!!! *Fa-la-la-la-la-la-la-la-la.* Here are your rights as an employer under the ADA, straight from the EEOC's mouth:

1. You have the right to make reasonable accommodation decisions as you always have in the past. The ADA Amendments Act changed the definition of who is "disabled" but did not change the employer's reasonable accommodation obligations.

2. You have the right to make reasonable accommodation decisions on a case-by-case basis, and, indeed, you should. In some ways, this is a negative (because you can't just follow a flat policy in all cases), but in other ways it's positive for your business because you can and should consider the employee's job, the employee's specific medical condition, and the specific abilities and limitations of that employee.

3. You have the right to deny reasonable accommodation to an employee who claims only that he or she is "regarded as" having a disability. (Note, however, that a "regarded as" disability can overlap with an "actual" disability. You do have to consider reasonable accommodations for the latter.)

4. In accommodating a job applicant, you must remove barriers to the application process, but you still have the right to hire the most qualified candidate for the job. Yay!!!!

5. As Feldblum noted, an employee must "get the work done" notwithstanding the disability. Thus, even though the employer must "stop, think, and justify" work rules and make changes to the rules where needed, the employer does not have to forgo having the work performed.

6. In most cases, you have the right to do *nothing* until an employee or applicant makes an accommodation request. Generally, it is the employee/applicant's responsibility to request an accommodation unless the disability is obvious. However, the employee may make the request in "plain English" and does not have to specifically mention the "ADA" or "reasonable accommodation."

7. You have the right to request documentation before making a decision on a reasonable accommodation request. As Feldblum said, this is "absolutely legitimate" on the employer's part. In addition, Lipnic said, the employer has to have "a level of awareness" that the individual is requesting a reasonable accommodation. (But see #6.)

8. Although you may have to grant additional leave as a reasonable accommodation (in excess of what is required under the Family and Medical Leave Act, or even your own policies), you do not have to worry about compliance with the FMLA once the 12-week/26-week entitlement has been exhausted. Moreover, in determining whether additional leave would be an "undue hardship," any leave already taken -- including FMLA leave -- should be included.

9. You don't have to specify "essential functions" in a written job description, although it's a nice thing if you can do it. According to Feldblum, failure to put essential functions in writing is "not fatal," presumably because the EEOC and the courts give more weight to the way the job is actually performed, not what's on a sheet of paper.

10. You have the right as the employer to decide which job functions are "essential." (But don't forget that accommodation of "marginal" functions may require you to remove the function completely from the disabled employee's job.)

OK, I realize these are kind of weak, but they're the best we're gonna do. *Strike the harp and join the chorus,* man. *Fa-la-la-la-la-la-la-la-la!*