

Americans with Disabilities Act Family Medical Leave Act and Medical Marijuana

BERNSTEIN SHUR

COUNSELORS AT LAW

Ron Schneider

Issues

- ADA
 - *Reassignment*
 - *Interactive Process*
- FMLA
 - *Return to Work*
- Medical Marijuana

ADA -- Reassignment

- Reasonable accommodation includes “reassignment to a vacant position.”
- Must be provided to an employee who can no longer perform the essential functions of her current position because of a disability unless undue hardship exists for employer.
- Accommodation of last resort.

ADA – Reassignment – last resort

- Reassignment required only after:
- (1) determined that no effective accommodations that will enable employee to remain in current position;

OR

- (2) all other reasonable accommodations would impose undue hardship.

ADA -- Reassignment

- Employee must be “qualified” for the position.
- Qualified means:
 - (1) employee satisfies requisite skill, experience, education and other requirements for the job; and
 - (2) can perform the essential functions of the new position, with or without a reasonable accommodation.

ADA -- Reassignment

- Employee is not required to compete for the job. If qualified, employee supposed to be reassigned.
- Position must be equivalent in terms of pay, status, benefits and geographical location ---- unless not available, then come close.
- If only lower level position available, employee does not have to be paid at current higher level.

ADA -- Reassignment

- “Vacant” means that the position is available --- even if posted --- at time accommodation requested or will become available within a reasonable amount of time after accommodation sought.
- Generally, employer need not reassign employee if doing so would violate a seniority system.
- Not required to bump another employee or create a new position.

ADA – Undue Hardship

- The nature and cost of the accommodation;
- The employer's and/or facility's overall financial resources;
- The number of employees;
- The effect on company expenses and resources;
- The type of operations of the employer, including structure and workforce functions;
- The impact on the particular facility.

ADA --- Interactive Process

- Must engage in interactive process whenever the an accommodation is requested or whenever the need is obvious.
- If disability is obvious – deafness, wheelchair, blindness --- do not be afraid to engage in the interactive process at your initiative.
- Under ADA, failure to engage in the interactive process can violate the law.

ADA --- Interactive Process

- Be objective and honest about the essential functions of the job.
- Make sure the functions are really essential.

FMLA --- Return to work

- Generally, when returning to work, employee is entitled to be returned to the same position that the employee held when leave commenced --- or to an equivalent position.
- If employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain benefits and to restore the employee cease.

FMLA --- Return to work

- Fitness-for-duty certification may be required only:
- If employer has policy or regular practice; and
- If employer notifies employee of need for fitness-for-duty certification on the the designation of FMLA leave form.

FMLA --- Return to work

- Certification usually speaks only to ability to resume work.
- If employer wishes certification as to ability to perform essential functions, employer must provide employee with list of essential functions at the time of designation of FMLA leave.

FMLA then ADA

- If employee fails to provide certification or fails to seek additional leave at the time that FMLA leave ends, the employee may be terminated.
- But, once FMLA leave ends, employee might be eligible for additional leave under the ADA.
- Employer may seek medical information and examination at employer's expense - must be job-related and consistent with business necessity.

FMLA then ADA

- Be objective and honest about whether employer can actually function without employee for some additional time.

Maine Medical Use of Marijuana Act Restrictions on Employer

- Employer
- May not refuse to employ or otherwise penalize a person
- ***Solely***
- Because of that person's status as a registered patient or a registered primary caregiver
- Unless failing to do so would put the ... employer ... in violation of federal law or cause it to lose a federal contract or funding.

Maine Medical Use of Marijuana Act Accommodations?

- The law does not require the employer to accommodate
- The ingestion of marijuana in any workplace or
- Any employee working while under the influence of marijuana.

Medical Marijuana

- If employer has drug-free workplace policy that is compliant with State and Federal law, employer can probably terminate employee that fails test if such action is consistent with policy.
- If employer does not have drug-free workplace policy, employer can probably prohibit use of medical marijuana during break and lunch and for some reasonable time before work.

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