



Employment Law Note

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EEOC's Updated Guidance on Disabilities Provides New Information and Reminders for Employers



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On July 26, 2023, the EEOC issued updated guidance about the Americans with Disabilities Act (ADA) and employees and applicants with visual disabilities. The advice follows the EEOC's updated guidance regarding hearing disabilities issued last January. The publications provide information about visual impairments and hearing conditions as disabilities under the ADA, outline best practices for employers in dealing with confidential medical information and accommodations for applicants and employees, and address employer concerns about safety. The recent guidance also includes suggestions for using new technologies as reasonable accommodations and cautions employers about the use of Artificial Intelligence (AI) when making employment decisions.

Here are the key takeaways from the updated guidance.

Visual and Hearing Disabilities

Many types of visual impairments and hearing conditions may be considered disabilities:

- "Visual disabilities" may include vision-related conditions such as blindness, low vision, limited visual fields, photosensitivity, color vision deficiencies, and night blindness. While a determination of a disability must ignore the positive effects of mitigating measures, not everyone who wears glasses is an individual with a disability under the ADA. If using ordinary eyeglasses or contact lenses does not substantially limit a major life activity, the individual's vision impairment does not constitute a disability.
- "Hearing disabilities" may include hearing conditions such as deafness, being hard of hearing, tinnitus, and sensitivity to noise.

Applicants

Employers generally should not ask job applicants questions about visual or hearing impairments or related treatment before making a conditional job offer. For example, employers should not ask applicants whether they have had medical procedures related to their vision or hearing, whether they use hearing aids or prescription medications, or whether they have a condition that affects hearing or vision. However, employers may ask questions about the applicant's ability to perform the job, such as whether the applicant can read labels or instructions, can inspect small components for quality control, can respond quickly to instructions in a noisy work environment, or has good communication skills, if those are part of the job.

The applicant is not required to disclose a disability before accepting a job offer unless they seek a reasonable accommodation for the application process. An employer must provide an applicant with an accommodation during the application process even if it believes it cannot provide the applicant with a reasonable accommodation to perform the job for which the applicant is applying.

Employers should not ask applicants with obvious visual or hearing impairments questions about the impairment, such as its nature/severity, whether it will progress, or how the applicant manages the impairment. However, employers may ask applicants with obvious impairments, or applicants who disclosed such impairments, whether the applicant will need an accommodation and, if so, what type, if the employer reasonably believes that an accommodation will be needed to perform the job. Employers may also ask such applicants to demonstrate how they will be able to perform certain essential functions of the job. However, employers must provide the applicant with reasonable accommodations during the demonstration and should not reject them for an inability to perform nonessential functions.

Post-offer, but before employment begins, the employer may ask questions to determine what limitations the offeree has and what accommodations they may need to perform the job. An employer cannot withdraw a job offer if the offeree can perform the essential functions of the job with or without a reasonable accommodation.

Employees

Although employers should generally avoid asking employees disability-related questions, there are exceptions. For example, an employer may inquire about an employee's condition when the employer knows about a particular employee's medical condition, has observed performance problems, and reasonably believes the problems are related to a medical condition. Further, employers may ask disability-related questions to support an employee's request for a reasonable accommodation related to the impairment, to comply with federal safety statutes or regulations, or to enable the employee to participate in a voluntary wellness program.

Keeping Medical Information Confidential

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. Telling coworkers that an employee is receiving a reasonable accommodation amounts to a prohibited disclosure that the employee has a disability. Under certain circumstances, however, an employer may disclose that an employee has a visual or hearing condition. For example, such information may be shared with supervisors if necessary to provide a reasonable accommodation. In situations where the impairment raises safety concerns, employers should obtain the employee's consent to share information as necessary.

Accommodating Applicants and Employees

The ADA requires employers to provide reasonable accommodations in three aspects of employment: (1) ensuring equal opportunity in the application process; (2) enabling a qualified individual with a disability to perform the essential functions of their job; and (3) making it possible for an employee with a disability to enjoy equal terms, conditions, benefits, and privileges of employment. The EEOC's new guidance advises employers to consider a wide range of potential accommodations during the

interactive process, including by utilizing new technology. Below are a few examples of possible accommodations:

- For visual disabilities: assistive technology (e.g., text-to-speech software); accessible materials (e.g., braille or large print); modification of policies (e.g., allowing the use of guide dogs in the work area), testing or training; ambient adjustments (e.g., brighter office lights); or sighted assistance or services (e.g., a qualified reader).
- For hearing disabilities: a sign language interpreter; assistive technology (e.g., a hearing aid-compatible telephone headset); a video relay service or video remote interpreting service; emergency notification systems (e.g., strobe lighting on fire alarms or vibrating pagers); equipment used for hearing protection to block noise; augmentative communication devices (e.g., iPad that allow users to type words that are then translated to a simulated voice); or work area adjustments (e.g., a desk away from a noisy area).
- Requesting accommodations: There are no "magic words" that an individual must use when requesting a reasonable accommodation. An individual simply must tell the employer that they need an adjustment or change at work because of an impairment. If an employer requires more information about the disability and why an accommodation is needed, it should engage in an "interactive process" to obtain information that will help the employer appropriately handle the request.
- Requesting documentation: When an individual's visual or hearing disability and/or need for accommodation is not obvious or already known, the employer may ask the individual to provide documentation about how the condition limits the function of the eyes, ears, or other major life activities and why a reasonable accommodation is needed.
- Granting or denying an accommodation request: An employer does not need to provide an accommodation if doing so would be an undue hardship (e.g., the accommodation would result in significant difficulty or expense). Nor does an employer have to eliminate an essential function of a job as a reasonable accommodation, tolerate performance that does not meet standards, or excuse violations of job-related conduct rules that the employer applies consistently to all employees. If more than one accommodation would be effective, the employer may choose between accommodations if both are effective in meeting the individual's needs.

Safety Concerns

Employers should be careful not to act on the basis of myths, fears, or stereotypes about vision impairments or hearing conditions. Instead, employers should evaluate an individual's skills, knowledge, experience, and, if any, their disability-related limitations.

Artificial Intelligence (AI)

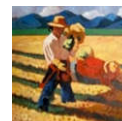
The EEOC guidance briefly addresses AI and advises employers to ensure they do not screen out applicants with disabilities when relying on software that uses algorithms or AI as decision-making tools. The guidance also suggests that employers inform applicants and employees how the employers' technology evaluates applicants and employees (thus alerting those with disabilities that the technology might not accurately assess their qualifications) and provide instructions for how to seek a reasonable accommodation. For example, an employer uses an algorithm that measures its employees' average number of keystrokes per minute to evaluate their productivity. If the employer does not inform its employees that it is relying on the algorithm, an employee who has a vision

impairment and uses voice recognition software instead of a keyboard may be rated poorly and lose out on a promotion as a result. However, if the employer informs its employees that they will be assessed partly on keyboard usage, that same employee would know to request an alternative means of measuring productivity—perhaps one that considers the use of voice recognition software rather than keystrokes—as a reasonable accommodation.

Key Takeaways

Employers should assess their technology and application processes to ensure that individuals with visual or hearing disabilities have access to the tools needed to effectively apply for employment and perform essential job functions once hired. In addition, employers should ensure that managers who participate in the hiring process receive training on what they can and cannot ask during interviews, and that all managers and supervisors receive training on disability accommodations and the interactive process. In particular, they should be trained to interpret requests for help or assistance as potential requests for reasonable accommodations and to get HR involved when in doubt.

For more information about this month's Employment Law Note
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