As Seen In Long Island BusinessNEWS Sept. 25-Oct. 1, 2009

LIFOCUS
LI Lawyer

New law amending the ADA broadens definition of disability

Certain employment practices can lower the risk of litigation

By BERNADETTE STARZEE


Bob Giglione

Moritt Hock's Jonathan Trafimow counsels employers to honor reasonable requests for accommodations.

Last year, the Americans with Disabilities Act was amended, and the new federal law, known as the ADA Amendments Act of 2008, went into effect Jan. 1.

Under the new law, the definition of a disability – a physical or mental impairment that substantially limits one or more major life activities – is expanded, and the list of major life activities has increased. As a result, the number of disabled individuals covered by the law has grown.

Previously, an employee was not considered disabled if the impairment was corrected by measures such as hearing aids, medications or prosthetic limbs. Now impairments must be evaluated without regard to the effects of such measures. (Ordinary eyeglasses and contact lenses are excluded.)

In New York, the impact on employers is expected to be minimal because the state law is already stringent and gives impaired individuals broad protection against disability discrimination. However, it is still unclear how courts will interpret the new legislation.

Plaintiffs can file claims under both the ADAAA and state law. As remedies under the federal statute are greater than

those under state law, an employer's financial risk associated with a violation has now increased.

There are several employment practices companies can adopt that will minimize their exposure to litigation.

If an individual with a disability is qualified to perform a job but requires a reasonable accommodation to do so, the employer must be willing to work with the individual. "Accommodations may include specialized equipment, facility modifications, job restructuring and adjustments to work schedules, as well as a whole range of other creative solutions," said Joni Haviva Kletter, an associate in the labor and employment law practice of Meyer, Suozzi, English & Klein in Garden City.

It's an interactive process, noted Andrew A. Kimler, a partner at the Lake Success law firm of Vishnick McGovern Milizio. "Companies get into hot water when they just disregard a request," he said. "They should make a good-faith effort to meet requests for accommodations or explore additional possibilities. An open discussion can lead to a creative solution that is satisfactory to both sides."

For instance, a company on an upper floor of a walk-up building might acquire another company and relocate those employees to its headquarters. In the case where one of the employees uses a wheelchair, it may be cost-prohibitive for the company to alter its headquarters to make it accessible to the individual, who performed the job satisfactorily at the previous location. "In such a case, the company should explore other options such as telecommuting," said Jonathan Trafimow, the partner in charge of the employment law practice group at Moritt Hock Hamroff & Horowitz in Garden City.

According to Trafimow, there isn't a hard and fast rule for determining what is a reasonable accommodation. "The courts will balance the effectiveness of an accommodation against its cost," he said.

"If an employee requests something simple and inexpensive such as a special keyboard, that's the kind of accommodation an employer is strongly encouraged to consider," Trafimow said.

COMPANIES GET INTO HOT WATER WHEN THEY JUST DISREGARD A REQUEST

In discrimination cases, the courts will consider the size of a company when determining hardship. "If a mom-and-pop shop has a stock clerk who hurts his back and can no longer lift boxes, the shop stills need to get its boxes shelved," said Scott Michael Mishkin, an attorney with an employment discrimination practice in Islandia that bears his name. "The court would view this company differently from a Staples, who could more easily provide the employee with another position."

Companies can also get into trouble by asking the wrong questions on job interviews. "You can't ask about the nature or severity of a disability, but you can ask about the person's ability to perform aspects of the job," Kimler said.

"During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether he or she needs a reasonable accommodation for the job, except when the disability is obvious or the applicant has voluntarily disclosed the information, and the employer could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions," Kletter said. "If the applicant replies that he or she needs a reasonable accommodation, the employer may inquire as to what type."

Employers should have policies in place that include clear job descriptions and qualifications for each job, said Richard Timo, associate director of Family Residences and Essential Enterprises Inc., an Old Bethpage nonprofit that provides services for individuals with disabilities. "The company should have in place procedures for making accommodations, including training frontline supervisors so that when a request for an accommodation is made, they will know how to respond," he said.

FREE has made accommodations for employees as needed, Timo said. "For instance, for employees with life-threatening illnesses we provided flexible work schedules and locations and time off to rest due to fatigue caused by chemotherapy treatments," he said. "If you have someone qualified to do the job, it's every employer's responsibility to do what it can to make it work."