Hospitality ASAP

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The EEOC issues guidelines for food service industry employers outlining the basic requirements for applying the ADA and providing examples of commonly encountered compliance issues.

ADA Compliance: A Guide for Restaurants & Other Food Service Employers

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Based upon the premise that restaurants and other food service employers have difficulty following the employment portion of the Americans with Disabilities Act (ADA) while maintaining compliance with federal, state and local public health rules, on October 29, 2004, the Equal Employment Opportunity Commission (EEOC) issued guidance on the basic rights of disabled food service employees and applicants under the ADA. Using a question and answer format punctuated by examples and citations to materials available on the internet, the EEOC attempts to provide basic education to food service employers on the application of the ADA to their industry.

ADA: Brief Overview

The ADA prohibits employers from discriminating against qualified persons with disabilities. The EEOC enforces Title I (the employment portion) of the ADA, which applies to employers who have 15 or more employees. If an employer has separate sites that are centrally managed, then the employees are counted from each site to determine if the employer has a total of 15 employees. The text of the ADA does not contain a comprehensive list of disabilities. Rather, an individual is said to be disabled under the ADA if she has an impairment (e.g. hearing impediment, loss of limb or illness) that substantially limits a major life activity (e.g. walking, eating, breathing, caring for oneself, thinking or performing manual tasks). To be qualified for a position, a disabled person must be able to perform the essential functions of the job with or without a reasonable accommodation. Reasonable accommodation is discussed more fully below.

ADA & Food Borne Illnesses

The FDA Food Code, which is available electronically at http://www.cfsan.fda.gov, has regulations that apply to food service establishment employees. To protect the public from diseases transmissible through food, the Centers for Disease Control (CDC) identifies in the Food Code the "Big 4" pathogens (virus or other substance that causes disease) that can be transmitted through food: Salmonella Typhi; Shigella ssp., Shiga toxin-producing E-coli, and Hepatitis A virus.

A food service employer may not initially ask an applicant if she has one of the Big 4, but may inquire once a conditional offer is made, meaning the employer has concluded that the applicant can fulfill the essential tasks. An employer who asks one applicant about the Big 4 must ask the question of all applicants. If an applicant for a position involving food service is disabled from having one of the Big 4, the employer may rescind the conditional offer if no reasonable accommodation would eliminate the risk of transmission.

Exclusions & Restrictions

In addition to questioning applicants, the employer may also question and require a current employee to report symptoms and/or a diagnosis of a Big 4 pathogen. The ADA recognizes the importance of protecting coworkers and customers of food service establishments and permits such questioning. If the employee reports Big 4 or other gastrointestinal illness symptoms, (e.g., diarrhea, fever or vomiting), an employee must be restricted from performing food handling tasks until the symptoms disappear.

If the symptoms result in an actual diagnosis, the employee must be excluded from the

establishment and cannot return until the employer obtains approval from the appropriate regulatory agency (e.g. local health inspector) and a doctor's note stating the employee no longer has the pathogen. Normally, contracting a Big 4 illness is temporary, thus not a disability requiring an accommodation. If the employee is disabled, then the ADA permits the employer to deny the employee a food handling position unless an accommodation exists that would eliminate transmission via food. Once the employee is free from the pathogen, she may return to his/her position, unless it was an undue hardship to keep it open, in which case the employer must try to locate an equivalent position.

It should be noted that the employer may not publicize the name of an employee who contracts a Big 4 pathogen; however, the employer may announce that someone has contracted such disease, and the remaining employees should be tested. Additionally, the employer must maintain these medical records separate from an employee's personnel records and restrict access.

The ADA and Job Applicants

The rules pertaining to job applicants are the same in the food service industry as they are in other contexts. Thus, an employer may have to accommodate an applicant in the application process if requested. An employer may not ask an applicant about her health, or otherwise require or conduct a medical examination until after the employer has already made a conditional job offer. If an applicant has an obvious disability that may prevent her from performing a portion of the job, the employer may ask the applicant to demonstrate how she would perform that job function. After a conditional job offer has been made, the employer may conduct medical exams and/or ask about the applicant's medical and workers' compensation history as long as it does so for everyone in the same job category. Thereafter, the employer may require follow-up medical examinations of particular applicants if the exam is medically related to the basic information already obtained in the first inquiry or exam.

If a medical examination shows that an applicant has a disability, including HIV, an employer may not revoke a job offer. Instead, it is the employer's obligation to determine whether the duties of the position may be performed with reasonable accommodation and without imposing a direct threat or an undue hardship.

Reasonable Accommodation in the Food Service Industry

The rules of reasonable accommodation — which is a change to the application process, in the way a job is done, or to other parts of the job that enables an otherwise qualified disabled person to have equal employment opportunities — are also the same in the food service industry as they are in other settings. Generally, an employee must make some form of a request for an accommodation, unless the need is obvious, in which case the employer should initiate discussions. Note that the accommodation must be reasonable; an employer need not provide an accommodation that poses an undue hardship to the business. That said, the employer should not summarily conclude that it would be impossible to accommodate certain disabilities or that certain accommodations would be inappropriate. For example, an employer may not automatically reject the use of a service animal as an accommodation. To the contrary, just as a food service business is obligated to accommodate customers who use service animals, the FDA Food Code specifically allows employees to use service animals so long as those animals are not permitted in areas used for food preparation and the employees take certain steps with respect to hand-washing after handling their service animals. Other types of reasonable accommodation may also be appropriate, depending on the particular circumstances.

Impact of the ADA on Employee Discipline

The EEOC warns employers not to ask routinely for medical information from employees. Instead, requests for medical information should be made only if the employer has reasons to suspect, based upon objective facts, that the employee's condition may be causing her poor performance. Recent case law suggests that a policy that requires employees to provide a doctor's note for all claims of sick leave may violate the ADA, unless the employer has a legitimate business reason (i.e. safety issues, history of leave abuse) to do so.

The EEOC instructs employers that they may take adverse employment action (i.e. suspension or termination) against employees whose poor performance may be caused by a disability, as long as the employer did not know that the disability at issue was the source of the poor performance. Although it is true that employees who suffer from a disability may be disciplined for not performing their essential job duties, employers must be careful in walking the fine line between respecting an employee's privacy as to personal medical issues and ignoring signs of an employee's potential disability to avoid having to discuss or provide a reasonable accommodation. In the event an employee's disability is known (or clearly visible), the EEOC warns employers of the duty to protect disabled employees from all harassment from coworkers, or face liability.

Complaints Against Employers

After a summary explanation of how an employer may respond to a charge of discrimination filed by an employee with the EEOC, the EEOC warns employers to avoid adverse employment action that appear to be payback against an employee who files a complaint with the EEOC or who participates in an investigation as a witness, because this would constitute unlawful retaliation. The EEOC rightly warns that it is not uncommon for a court to find that retaliation occurred even if the employer never discriminated against the employee.

Text of the full Guidelines as well as additional examples for complying with the ADA can be found at www.eeoc.gov/facts/restaurant_guide.html.

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