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ACT NOW ADVISORY

New Disability Discrimination Guidance Sheds Light on New York City's "Cooperative Dialogue" Requirements

September 14, 2018

By Susan Gross Sholinsky, Joshua A. Stein, Nancy Gunzenhauser Popper, Amanda M. Gómez, and Alison E. Gabay*

The New York City Commission on Human Rights ("Commission") recently issued a 146-page guide titled "Legal Enforcement Guidance on Discrimination on the Basis of Disability" ("Guidance"), to educate employers on their responsibilities to job applicants and employees with respect to both preventing disability discrimination and accommodating a disability. The Guidance also addresses the new law on "cooperative dialogue" ("Law"), which goes into effect on October 15, 2018.

The Law amends the New York City Human Rights Law ("NYCHRL") to require covered entities—including employers and public accommodations—to engage in a cooperative dialogue with individuals who may be entitled to a reasonable accommodation under the NYCHRL.[1] Under the Law, a person may require an accommodation related to religious needs; a disability; pregnancy, childbirth, or a related medical condition; or the needs of a victim of domestic violence, sex offenses, or stalking.

Under the Law, employers must engage in a cooperative dialogue within "a reasonable time" with a person who has requested an accommodation or "who the [employer] has notice may require such an accommodation." The term "cooperative dialogue" means the process by which a covered entity and an individual who may be entitled to an accommodation exchange information to identify the individual's needs, his or her requested accommodation(s), and potential alternatives to the requested accommodation(s).

What Does a "Cooperative Dialogue" Entail?

The cooperative dialogue may take place in person, in writing, by phone, or through electronic means, and it must be conducted in good faith and in a "transparent and expeditious manner." An employer may request additional information about the

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[1] For more information about the "cooperative dialogue" law, please see the Epstein Becker Green *Act Now* Advisory titled "New York City Employers Will Be Required to Engage in Reasonable Accommodations Dialogue."

employee's specific impairment if the employer does not have sufficient information to understand or evaluate the employee's need for an accommodation. Further, an employer need not agree to the requested accommodation if the employer can propose a reasonable alternative that meets the specific needs of the employee.

A cooperative dialogue is considered ongoing until either (i) a reasonable accommodation is granted or (ii) the employer concludes that:

- there is only one accommodation that is reasonable and will not result in undue hardship for the employer, but the applicant or employee refuses to accept that particular accommodation;

- the employee or applicant has refused the less expensive of two reasonable accommodations;[2] or

- no accommodation exists that will allow the applicant or employee to perform the essential functions of the job or that will not impose undue hardship.[3]

At this point, the employer must notify the employee, in a timely manner and in writing, of its decision, in a final determination identifying any accommodation that is either granted or denied. Importantly, the determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue. In other words, *even if there are no reasonable accommodations available, the request cannot be denied until after the cooperative dialogue has taken place.*

Keep in mind that employers must engage in the cooperative dialogue process each time an employee (or applicant) makes a new request for an accommodation.

Importantly, the Guidance advises employers on the criteria that the Commission will consider in evaluating whether an employer has engaged in good faith in a cooperative dialogue with an individual requesting an accommodation. These factors include whether the employer:

- has a policy that informs employees how to request accommodations,

- responded to the request in a timely manner given the urgency and reasonableness of the request, and

[2] The Guidance makes clear the following: "If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the covered entity may choose the less expensive or burdensome accommodation."

[3] A request for accommodation also may be denied where (i) the individual's request for an accommodation is determined not to be related to a disability or other covered matter, (ii) the individual requesting the accommodation fails to provide adequate documentation of the need for the accommodation (where applicable), or (iii) accommodation would pose a direct threat to the health or safety of the individual or others.

- attempted to obstruct or delay the cooperative dialogue to intimidate or deter the request.

The Guidance strongly encourages employers to include information on its cooperative dialogue and reasonable accommodation policies and processes in an employee handbook.

Model Documents

The Guidance contains an appendix with sample documents on a variety of topics, including:

- **Reasonable Accommodation Request Form** (for use when an applicant or employee requests a reasonable accommodation).

- **Grant or Denial of Reasonable Accommodation Request Form** (for use by the employer to notify an applicant or employee once it has decided whether to grant or deny a request for a reasonable accommodation).

- **Letter to Employee on Leave** (sent towards the end of an employee's leave to determine if the employee (i) is returning to work when the leave expires, (ii) will be requesting additional leave, and/or (iii) will be requesting a different workplace accommodation).

- **Service Animal One-Pager** (provides permissible questions that an employer may ask in response to an accommodation request regarding a service animal).

What Employers Should Do Now

- Review current policies and practices to ensure that they are consistent with the procedural and documentation requirements set forth in both the Law and Guidance.

- Update employee handbooks, as appropriate, to reflect any modifications made to company practices and policies as a result of the obligations imposed by the Law.

- Train human resources staff and supervisors on the requirements of the Law and company procedures, including:

    - the elements of a "cooperative dialogue";

    - the need to engage in this dialogue prior to making a determination about a requested accommodation; and

    - upon making a final determination, the necessity of providing a written response to the employee who requested the accommodation.

- Ensure that human resources and supervisory personnel understand the interplay of the Law with another recently enacted statute—the Temporary Schedule Change for Personal Events Law," which became effective on July 18, 2018.[4] Many requests for workplace accommodations involving shifts in working time and/or locations will implicate both laws.

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[4] For more information about the law, please see the Epstein Becker Green *Act Now* Advisory titled "New York City Gives Employees the Right to Change Work Schedules Temporarily for "Personal Events."

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ACT NOW ADVISORY

New York City Employers Will Be Required to Engage in Reasonable Accommodations Dialogue

January 24, 2018

By Susan Gross Sholinsky, Nancy Gunzenhauser Popper, Ann Knuckles Mahoney, and Amanda M. Gómez*

On January 19, 2018, New York City enacted Int. No 804-A ("Bill"), which will amend the New York City Human Rights Law ("NYCHRL") to require covered entities—including employers and public accommodations—to engage in a cooperative dialogue with individuals who may be entitled to a reasonable accommodation under the NYCHRL. The term "cooperative dialogue" means the process by which a covered entity and an individual who may be entitled to an accommodation exchange information to identify the individual's needs, his or her requested accommodation(s), and potential alternatives to the requested accommodation(s). The Bill becomes effective on October 15, 2018.

When Will Employers Be Required to Engage in a Cooperative Dialogue?

Under the Bill, employers will not be allowed to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable timeframe with a person who has requested an accommodation—"or who the [employer] has notice may require such an accommodation"—related to:

- religious needs;
- a disability;
- pregnancy, childbirth, or a related medical condition; or
- such person's needs as a victim of domestic violence, sex offenses, or stalking.[1]

The Bill will require employers to provide the individual requesting an accommodation a written final determination identifying any accommodation that has been either granted

[1] With regard to public accommodations, an entity's obligation to engage in a cooperative dialogue with a customer or other member of the public appears to be limited to only the situation in which an accommodation has been requested, or the entity has notice that an accommodation may be required, *due to a disability*.

or denied.[2] Importantly, the Bill states that "the determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question *may only be made after* the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue" (emphasis added).

What New York City Employers and Public Accommodations Should Do Now

The Bill will go into effect on October 15, 2018. In the meantime, covered entities operating in New York City should do the following:

- Review and, if necessary, revise existing accommodation policies and procedures to ensure compliance with the Bill, specifically with respect to the elements of a "cooperative dialogue"—i.e., how you will determine whether a requested accommodation is reasonable and, if it is not, that you will consider whether an alternative reasonable accommodation is feasible.

- Train human resources staff on the requirements of the Bill, including:

    - the nature of a "cooperative dialogue";

    - the need to engage in this dialogue prior to making a determination about a requested accommodation; and

    - for employers, the necessity of providing a written response to the employee who requested the accommodation.

- Keep in mind that an individual need not request an accommodation to trigger the obligation to engage in, or attempt to engage in, a cooperative dialogue; the obligation to do so also arises when the covered entity has "notice" that an accommodation may be required. The Bill does not define "notice," but it may include (in the employment setting) a job applicant in a wheelchair or (in a public accommodation) a person walking with a guide dog. Accordingly, employees should be trained in how to properly identify and respond to such situations.

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[2] Public accommodations need not provide the final determination in writing.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

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Retail Labor and Employment Law

News, Updates, and Insights for Retail Employers

Seventh Circuit Breaks from the Pack in Holding That Long-Term Leave Is Not a Reasonable Accommodation Under the ADA

By Joshua A. Stein, Nathaniel M. Glasser & Maxine Adams on September 28, 2017

POSTED IN ADA, DISCRIMINATION, EEOC

In a decision that will be celebrated by employers in the Seventh Circuit struggling with employee requests for post-Family Medical Leave Act ("FMLA") leave as an accommodation

under the American with Disabilities Act ("ADA"), the Seventh Circuit in ***Severson v. Heartland Woodcraft, Inc.***, 2017 U.S. App. LEXIS 18197 (7th Cir. Sept. 20, 2017), recently held that an employer did not violate the ADA by firing an employee instead of extending his leave after he exhausted all leave under the FMLA. This holding – finding that extended long-term leave is not a reasonable accommodation under the ADA – is not only contrary to the Equal Employment Opportunity Commission ("EEOC")'s position regarding extended leave as a reasonable accommodation, but also conflicts with several other federal Circuit courts that had previously ruled on the same issue (holding that extended/post-FMLA leave can be a reasonable accommodation under the ADA).

In *Severson*, the plaintiff was diagnosed with back myelopathy, which negatively affected his back, neck, and spinal cord. While plaintiff generally could perform his duties without incident, he did experience several "flare ups" which made it difficult for him to walk, bend, lift, stand, and work. As a result of his disability, plaintiff injured his back and went on FMLA leave, with several continuations of leave, totaling 12 weeks, approved by defendant. After exhausting all FMLA leave, plaintiff informed defendant that he would undergo disc compression surgery and would require at least an additional two months of leave for recovery time. Instead of extending plaintiff's leave, defendant informed plaintiff that his employment would terminate on the date that his FMLA leave expired.

In reaching its holding that leave for an extended period of time is not a reasonable accommodation under the ADA, the Seventh Circuit reaffirmed its analysis in an earlier case – ***Byrne v. Avon Prods., Inc.*** 328 F.3d 379 (7th Cir. 2003) – that a long-term leave of absence could not be a reasonable accommodation under the ADA. Although EEOC guidance "**Employer-Provided Leave and the Americans with Disabilities Act**" states that employers should consider long-term leaves of absence as reasonable accommodations, the Seventh Circuit disagreed, stating that such an interpretation was untenable and would transform the ADA into "a medical-leave statute – in effect, an open-ended extension of the FMLA." (A previous article on the guidance can be found **here**.) Moreover, the Court in *Severson* stated that long-term medical leave does not enable an individual to perform the essential functions of the job and, therefore, cannot be considered a reasonable accommodation because at the time it is required the employee is not a qualified individual with a disability. Finally, the Court noted that the ADA only requires "reasonable accommodations" and not "effective accommodations", finding the a request for extended leave is only the latter. Thus, the Seventh Circuit rejected plaintiff's argument (which had

been joined by the EEOC) that defendant should have granted him a reasonable accommodation of additional leave.

This case represents a stark deviation from both the EEOC's guidance and the rulings of multiple other Circuit courts throughout the country setting forth that employers must evaluate requests for leave (including those extending beyond FMLA leave) under the ADA on a case-by-case basis to analyze whether granting the leave would be an undue hardship, so long as the request is not for indefinite leave. While this may change the way employers in the Seventh Circuit approach their analysis of leave as a reasonable accommodation under the ADA, employers should be careful not to over-extend this ruling:

- First, the *Severson* holding itself does not totally preclude any post-FMLA as an accommodation under the ADA. Indeed, the holding leaves open the possibility that leave spanning a few days or even a couple of weeks could be a reasonable accommodation.
- Second, some state and local laws governing disability discrimination and accommodation may have different language and standards that could result in a contrary decision. (And now, more than ever, state and local laws that are more restrictive than federal law are being passed on a regular basis.)
- Third, employers outside the Seventh Circuit should remain diligent in individually analyzing requests for extended leave as an ADA accommodation, particularly in jurisdictions that follow the EEOC's guidance or where Circuits have expressly ruled contrary to *Severson*.

No matter what jurisdiction an employer operates in, it is always important for employers to communicate with employees regarding expiration of leave and expected return dates while the employee remains out on leave.