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According to a recent study cited by the EEOC, U.S. companies employ nearly a third of the 2.5 million individuals in this country who have intellectual disabilities. New guidance from the EEOC addresses the unique challenges employers face in hiring, accommodating, and preventing harassment of such employees to comply with the Americans with Disabilities Act.

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EEOC Issues New Guidance on Hiring Workers with Intellectual Disabilities

By Rod Fliegel, Stacey Calvert and Kimberly Owens

In October of this year, the Equal Employment Opportunity Commission (EEOC) published new guidance addressing the issues employers face in hiring, accommodating, and preventing harassment of employees with intellectual disabilities. The new guidance is a project undertaken by the EEOC to advance the goals of the Bush administration's "New Freedom Initiative" announced in 2001. The goals of the program include expanding educational and employment opportunities for individuals with disabilities.

The EEOC defines the term "intellectual disability" to include individuals with:

- 1) an IQ below 70-75;
- 2) significant limitations in adaptive skill areas (basic skills needed for everyday life); and
- 3) a disability that originated before the age of 18.

Employers should also note that such disabilities will not necessarily be obvious from an individual's appearance. While the guidance emphasizes that individuals with intellectual disabilities often have other impairments as well, such as cerebral palsy, seizure disorders, and hearing and vision impairments, such impairments must be considered in isolation as well as in combination with the intellectual impairment to determine whether they rise to the level of a disability under the Americans with Disabilities Act (ADA).

Protected Individuals

The ADA protects job applicants and employees when they have an intellectual disability that "substantially limits" one or more major life activities by itself or in conjunction with another disability. Examples from the EEOC guidance are as follows:

An individual with an intellectual impairment is capable of living on his own, but requires frequent assistance from family, friends, and neighbors with cleaning his apartment, grocery shopping, getting to doctors' appointments, and cooking. He is unable to read at a level higher than the third grade, and so needs someone to read his mail and

help him pay bills. This individual is substantially limited in caring for himself and therefore has a disability under the ADA.

An employee has a mild intellectual disability and a mild form of ADHD. Neither impairment, by itself, would significantly restrict any major life activity. Together, however, the two impairments substantially limit the employee's ability to concentrate, learn, and work.

The ADA also protects individuals with a record or history of a substantially limiting intellectual disability. This would include, for example, an individual who was erroneously diagnosed as having an intellectual disability that substantially limited his ability to learn when he was attending high school.

The ADA also protects individuals who are "regarded" as disabled. This would include, for example, an unsuccessful secretarial applicant with a facial deformity that affects her speech who is rejected because the interviewer believes she has an intellectual disability or assumes the condition will make her unable to communicate with clients effectively.

Hiring Workers with Intellectual Disabilities

The EEOC cautions that employers may not ask during the hiring process, prior to making a job offer, whether an applicant has an intellectual disability, takes medication, has been hospitalized, or is currently receiving psychiatric treatment. Nor may an employer ask a third party, such as a family member, social worker, or job coach, any questions it could not ask the applicant directly. Of course, it is acceptable to ask at the interview stage whether a candidate can perform specific, job-related tasks.

After an offer of employment is made, the employer may ask questions about the applicant's health or disability and may require a medical examination, as long as all applicants are treated the same in this regard. During employment, employers must keep medical information regarding the person's intellectual disability confidential.

Accommodating Workers with Intellectual Disabilities

The EEOC also notes that persons with intellectual disabilities may need reasonable accommodations of various types in order to apply, interview for, or perform a job. Accommodations might include:

- altering the interview process to allow a candidate to demonstrate skills he/she may not be able to describe verbally;
- reading or interpreting application materials for a person with limited ability to read or understand complex information;
- exchanging non-essential job functions between employees;
- providing additional time and/or guidance for skills to be learned during job training;
- allowing the employee to use a job coach who provides monitoring, training and support to the employee; encourages appropriate social interaction; and assists the employer and employee in determining an appropriate reasonable accommodation;
- modifying work station placement to maximize the employee's ability to concentrate;
- provide help in understanding job evaluations by allowing the employee to bring another person along to a job evaluation or disciplinary meeting to assist with understanding the result of or the purpose of the meeting.

As with other disabilities under the ADA, an employer is required to initiate a discussion about the need for an accommodation if the employer **1)** knows that the employee has an intellectual disability; **2)** knows, or has reason to know, that the employee is experiencing workplace problems because of that disability; and **3)** knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

These circumstances may be particularly present with respect to intellectually disabled individuals. The Q&A offers the following example:

A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it

would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

Deteriorating job performance may also be a sign that accommodation is needed. But poor job performance, without more, does not allow an employer to request information about the employee's disability. The EEOC suggests that poor job performance should be addressed according to the employer's performance policy. A supervisor who notices performance problems may ask the employee why his or her performance has deteriorated, but may not assume that the performance problems are related to a disability. The supervisor should consider initiating the interactive process if information disclosed during that discussion indicates that it is appropriate to do so.

Safety Concerns and Conduct Problems

The guidance notes that people often misperceive that workers with intellectual disabilities are more susceptible to workplace accidents and pose an increased safety risk. However, employers may not refuse to hire a disabled person unless the person in fact poses a direct threat to his/her own health or safety or that of others in the workplace. An employer's assessment of "direct threat" must be based on objective evidence and not fears, myths, or stereotypes. An evaluation of objective evidence could include an examination of: **1)** the duration of the risk; **2)** the nature and severity of the potential harm, **3)** the likelihood that it will occur, **4)** the imminence of the potential harm, and **5)** whether a reasonable accommodation will reduce the risk of harm. Mere speculation is insufficient.

Harassment

A large percentage of ADA discrimination claims brought by persons with intellectual disabilities allege harassment based on disability. Acts of harassment may take the form of verbal abuse, graphic and written statements, or physically threatening or humiliating conduct that are sufficiently severe or pervasive as to be subjectively hostile to the recipient and to a reasonable person.

For example:

A fast food restaurant worker with an intellectual disability is often yelled at by the restaurant's assistant manager. The assistant manager calls her derogatory names that specifically relate to her disability. Specifically, the assistant manager constantly refers to her

Job Coach as her "nanny" and yells in front of her coworkers, "Hey, where's your nanny, you stupid baby?" The assistant manager also treats her in a disparaging manner, for example, by making her eat her lunch away from everybody else in the break room. The manager's statements and behavior are actionable disability-based harassment.

The familiar liability standards apply: an employer must take appropriate steps to prevent and correct harassment by maintaining and enforcing a policy against harassment and responding promptly and effectively to complaints of harassment.

Conclusion

In sum, accommodating intellectually disabled individuals poses some fairly unique issues for employers, particularly with respect to the interactive process. The EEOC's Q&A offers useful general guidance concerning these and related issues, but each situation should be assessed on an individualized and fact-specific basis. Additionally, HR professionals should:

review job descriptions — to ensure they list all of the essential functions, including intellectual abilities, as appropriate;

review the company's accommodation protocols and policies — to ensure they comply with applicable law and incorporate "best practices";

review anti-harassment and discrimination policies — to ensure they include as "protected traits" mental and physical disabilities; and

provide appropriate training regarding these and related issues.

Employment counsel can help you comply with the ADA and related state laws, and can help you implement ADA policies, revise job descriptions, conduct training and evaluate the risks of potential liability.

Text of the full, 20-page guidance, including additional examples of conduct the EEOC would determine to be discriminatory, can be found on the EEOC's website at http://www.eeoc.gov/facts/intellectual_disabilities.html.

Rod M. Fliegel is a shareholder in the San Francisco office of Littler Mendelson, P.C. Stacey Calvert is an associate in the Dallas office, and Kimberly Owens is an associate in the San Francisco office, of Littler Mendelson, P.C. With nearly 400 attorneys in 28 offices nationwide, Littler Mendelson is the largest law firm in the United States practicing exclusively in employment and labor law, representing management.
