

ALERTS

New Guidance and Proposed Regulations From the EEOC

August 23, 2023

Guidance on Visual Disabilities in the Workplace

On July 26, 2023, the US Equal Employment Opportunity Commission (“EEOC”) released a technical assistance document describing how the Americans with Disabilities Act of 1990 (“ADA”) applies to job applicants and employees with visual disabilities (“Guidance”). The Guidance is one of a series of question-and-answer documents released by the EEOC that address particular disabilities in the workplace.

The Guidance uses the term “visual disabilities” to refer to any disability related to an individual’s vision, and “visual impairments” to refer to various vision-related conditions, including blindness, low vision, photosensitivity and color vision deficiencies. A visual impairment constitutes a visual disability, where such impairment “substantially limits one or more major life activities,” or where the individual with the impairment is regarded as having, or has a record or history of, an impairment that substantially limits one or more major life activities.

The Guidance explains, with instructive examples, when an employer may ask an applicant or employee questions about a visual impairment and how an employer should treat voluntary disclosures of an impairment. For applicants, employers may not ask whether a job applicant has or had a visual impairment prior to making a job offer, but may ask questions pertaining to the applicant’s ability to perform job functions, with or without reasonable accommodations. Similarly, an employer may not ask

an applicant with an obvious visual impairment disability-related questions, but may ask the applicant if they will need an accommodation to perform the job. Employers should further be aware that applicants with visual impairments, like other disabilities under the ADA, may be entitled to a reasonable accommodation to assist with some aspect of the application process.

After a job offer is made, employers may ask questions about an applicant's health (including questions regarding whether the applicant has a disability and the nature and/or severity of the disability), and may require a medical examination, provided, however, that all applicants for the same type of position are asked the same questions and are required to undergo the same examination. If an employer has obtained such basic medical information from all individuals who have received job offers, an employer may then follow up with an individual who has disclosed a disability, such as a visual impairment, to seek additional medically related information.

For employees, the ADA allows employers to ask questions about an employee's medical condition or require an employee to have a medical examination only when an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or that an employee will pose a direct threat at work due to a medical condition. Employers should focus on an employee's actual job performance when determining an employee's ability to perform a job.

The Guidance also references the types of reasonable accommodations applicants or employees with visual disabilities may need, including, screen readers, website modifications, computer screen magnification tools, color identification technology, policy modifications, allowing the use of an assistance animal, remote work, lighting adjustments, and braille labelers and labels that enable individuals to read labels. Building upon the EEOC's recent focus on the use of artificial intelligence ("AI") in employment decisions, discussed here and here, the Guidance clarifies that an employer has an obligation to provide reasonable accommodations to applicants or employees with visual disabilities in connection with the employer's use of software that uses algorithms or AI as decision-making tools.

The Guidance addresses how an employer should handle safety concerns regarding individuals with visual disabilities. The Guidance

explains that an employer may only exclude an individual with a visual impairment from a job for safety reasons when that individual poses a “direct threat,” which is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced through reasonable accommodation.”

As a reminder, all information concerning a disability or an impairment, including reasonable accommodations, should be kept confidential and separate from an employee’s personnel file.

Proposed Regulations Regarding the Pregnant Workers Fairness Act

On Aug. 11, 2023, the EEOC published proposed regulations (“Proposed Rule”) to implement the Pregnant Workers Fairness Act (“PWFA”), discussed here, which took effect on June 27, 2023. The Proposed Rule’s 60-day notice and comment period has begun and will conclude on Oct. 10, 2023. Comments to the Proposed Rule are expected to address the inclusion of abortion as an example of a medical condition related to pregnancy or childbirth.

The PWFA was enacted to fill in gaps in legal protections for workers affected by pregnancy, childbirth, and related medical conditions, even though workers may have certain rights under Title VII of the Civil Rights Act of 1964, the ADA, and the Family and Medical Leave Act of 1993.

The Proposed Rule specifies the kinds of reasonable accommodations that an employee may seek under the PWFA. For example, reasonable accommodations covered by the PWFA may include without limitation: more frequent breaks, part-time or modified work schedules, allowing seating for jobs that require standing or standing in jobs that require sitting, or job restructuring.

The PWFA does not require a covered entity to provide a reasonable accommodation that would cause “undue hardship” to the employer.

A final rule is likely to be delayed due the large number of comments expected to be submitted to the EEOC.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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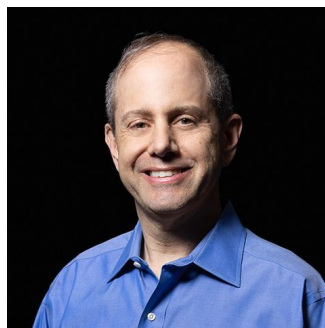
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