

### **EEOC's Disabilities Guidance Updates Coincides with the APA's Manual of Mental Disorders Update and the AMA's Recognition of Obesity as a Disability— What Does This All Mean for Employers?**

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On May 15, 2013, the Equal Employment Opportunity Commission (“EEOC”) updated its prior guidance regarding [cancer](#), [diabetes](#), [epilepsy](#), and [intellectual disabilities](#), so as to clarify employers’ obligations under the Americans with Disabilities Act (“ADA”). According to the EEOC, this updated guidance (“Guidance”) is meant to incorporate changes made to the definition of “disability” by the ADA Amendments Act of 2008, which, in part, broadened the definition of “disability” and clarified that individuals with these impairments are, indeed, “disabled.” In a [press release regarding the Guidance](#), the EEOC stated that an update was required because of the frequent questions posed by employers about how the ADA applies to individuals with these disabilities. Interestingly, the EEOC also removed a statement from the Guidance that previously denied that simple obesity (without any accompanying or underlying medical condition(s)) could be considered a disability.

The Guidance, which is in the form of a series of Q&As, contains information about an employer’s ability to obtain, use, and disclose medical information from an employee or applicant throughout the hiring and employment processes. Also, the Guidance gives direction on what types of reasonable accommodations employers can provide individuals with these specific disabilities, as well as when it is appropriate to ask an individual if an accommodation is needed.

#### **Specific Changes in the Guidance**

Before this current update, the EEOC’s most recent update to the guidance documents had occurred in early 2011. The EEOC’s current changes attempt to create more useable documents for employers. Specific changes in the Guidance include:

- more information regarding what an employer may ask or request from an applicant who has been offered a job but before the applicant has accepted the job;

- a more detailed description of when an employer may ask an employee if performance problems are caused by a disability or some other medical condition; specifically, regarding workplace accommodations, the Guidance states that employers should ask the employee (or person acting on the employee's behalf) what he or she needs in order to do the job; and
- new examples to help employers understand what is allowed and required by the ADA.

### **Other Notable Items**

Among other notable items, the Guidance takes the position that an employer generally may not simply deny an open-ended leave request. While existing case law remains relatively consistent that open-ended leaves are not reasonable accommodations, the EEOC recommends that employers should communicate with an employee during an open-ended leave to secure updates. Even the EEOC, however, concedes that if leave has been extended multiple times, an employer may be permitted to reconsider whether further leave is an undue hardship.

Also, the Guidance suggests several possible accommodations for employees with diabetes or epilepsy. For the latter, the EEOC suggests that an employee may need a rubber mat in case of a fall. For diabetes, the EEOC suggests providing a stool if the employee cannot stand for extended periods of time.

In addition, the Guidance:

- states that if an employer has only temporary light duty jobs, it need not create a permanent light duty job for an employee with a disability-related injury;
- finds that an employer is not required to provide an accommodation to an employee with an occupational injury that is not a disability under the ADA; and
- takes the position that even applicants and employees with diabetes may be qualified for positions operating commercial motor vehicles, even where the U.S. Department of Transportation ("DOT") requires [minimum physical standards](#) because of the DOT's waiver programs.

### **Updates from the APA and AMA**

It appears that the EEOC is not the only entity thinking about the classification of mental and other disabilities. Interestingly, the Guidance coincided with the May 18, 2013, release of the American Psychiatric Association's ("APA's") *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* ("DSM-5"), which classifies and describes mental disorders. This is the first substantial update of the manual since 1994. The DSM-5 reorganizes the classification system and changes the names of some disorders to simplify diagnostics for practitioners. One of the major modifications in the DSM-5 is a

change from the previously categorized disorder of “mental retardation” to the diagnosis of “intellectual developmental disorder.”

The DSM-5 also changed the process through which mental disorders are assessed, keeping IQ test scores in the assessment process but removing them from the diagnostic criteria. This appears to be an effort by the APA to ensure that practitioners do not overemphasize IQ scores as a defining factor of an individual’s overall ability. The release of DSM-5 is particularly relevant because, in some of its [guidance documents](#) relating to the ADA and, in particular, with respect to psychiatric disabilities, the EEOC previously cited to the DSM-4 (the latest edition at that time) as a relevant tool to be used in determining what qualifies as a mental impairment.

Finally, the American Medical Association (“AMA”) has now officially recognized obesity as a disease, in an attempt, some say, to focus more attention on the condition. In an [AMA press release](#), Dr. Patrice Harris, a member of the AMA’s Board, noted, “[r]ecognizing obesity as a disease will help change the way the medical community tackles this complex issue that affects approximately one in three Americans.” In any event, such a designation by the AMA will likely make it easier for an obese person to bring a viable disability discrimination claim based on obesity alone, or at least a claim that he or she was “regarded as” being disabled.

### **What Employers Should Do Now**

In light of the Guidance regarding cancer, diabetes, epilepsy, and intellectual disabilities, as well as the AMA’s designation of obesity as a disability, employers should consider taking the following actions:

- Review the Guidance and become familiar with the EEOC’s expansive views on employers’ obligations under the ADA, as they will guide the EEOC’s ADA enforcement efforts and may be given some deference by certain courts.
- When an applicant or employee seeks an accommodation due to cancer, diabetes, epilepsy, or intellectual disabilities, or due to obesity, review the types of accommodations suggested in the Guidance, as this will likely indicate what the EEOC would expect an employer to offer to an applicant or employee with one of these disabilities.
- Ensure that supervisors are trained to recognize accommodation requests even when the word “accommodation” is not specifically used. Remind supervisors to contact Human Resources for assistance in determining whether there is a reasonable accommodation available.
- Remember that the duty to accommodate is a continuing one, and that, if an accommodation fails, an employer must consider whether any other reasonable accommodations may be available.

- When a job really requires physical presence and regular attendance at the employer's facility, make sure that these needs are spelled out as essential functions in the job description.
- Do not assume that conditions such as obesity are not disabilities—rather, assume that they may be, and take appropriate actions (such as considering possible reasonable accommodations) as a result.

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