



LABOR AND EMPLOYMENT

BALCH & BINGHAM LLP BULLETIN August 2, 2004

Alabama • Georgia • Mississippi • Washington, D.C.

Equal Employment Opportunity Commission Explains How Disabilities Act Might Apply to Job Applicants and Employees with Epilepsy

On July 28, 2004, the EEOC issued guidance for employers regarding the ADA and epilepsy. The guidance addresses coverage under the ADA, reasonable accommodation, safety concerns, reassignment, and other issues raised by epilepsy in the workplace.

Epilepsy, a general term that includes various types of seizures, affects an estimated 2.3 million Americans. Epilepsy is a protected disability under the American with Disabilities Act (ADA) when one or more of a person's major life activities has been, or currently is, substantially limited. Major life activities are basic activities that an average person can perform with little or no difficulty, such as walking, seeing, hearing, speaking, breathing, performing manual tasks, caring for oneself, learning, and working. Major life activities also include thinking, concentrating, interacting with others, reproduction, and sleeping. Such limitations may occur as the result of seizures or side effects from medication. Epilepsy is also a disability if the employer treats an individual as if the epilepsy significantly affects that person's everyday activities, even if it does not.

An employer may not ask questions about an applicant's medical condition or require an applicant to take a medical examination before it makes a conditional job offer. This means that an employer cannot ask an applicant questions such as: (1) whether she has epilepsy or seizures; (2) whether she uses any prescription drugs; or (3) whether she ever has filed for workers' compensation or was injured on a job. After making a job offer, an employer may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants the same.

The ADA does not require applicants to disclose that they have epilepsy unless they will need a reasonable accommodation for the application process. In addition, an individual may request an accommodation after becoming an employee, even if he did not ask for one when applying for the job. Once an applicant discloses that he has epilepsy the employer may only ask whether he needs a reasonable accommodation, and if so, what type. Employers must provide the accommodation unless doing so would result in significant difficulty or expense. If an employer has a legitimate reason to believe that epilepsy may be affecting an employee's ability to do his job, or do it safely, the employer may ask questions or require the employee to have a medical examination. Safety concerns must be based on objective evidence and not

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general assumptions. The employer should evaluate: 1) the individual's present ability to safely perform the job; 2) the duration of the risk; 3) the nature and severity of the potential harm; 4) the imminence and likelihood of the potential harm; and 5) whether any reasonable accommodation would reduce or eliminate the risk.

An employee with epilepsy who can no longer perform his job, even with reasonable accommodation, should be reassigned to an equivalent position, if it can be done without undue hardship to the employer.

The new guidance makes clear that there are no per se disabilities but that with respect to epilepsy, an employer should assume a court will find a disability exists. Accordingly, in determining what actions to take regarding an epileptic employee (such as providing reasonable accommodation, etc...), the safest route is to assume the ADA applies.

More questions and answers about epilepsy in the workplace and the ADA can be found at: <http://www.eeoc.gov/facts/epilepsy.html>

And, to learn more about the ADA and reasonable accommodations, register for Balch & Bingham's upcoming Labor & Employment Seminars, to be held in Birmingham, AL on October 6-7, and Biloxi, MS on October 28-29. Click here to register.



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