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New "It's the Law" Poster Issued by Dept of Labor

On February 12, the U.S. Dept of Labor issued a new "It's the Law" OSHA poster.



Employers do not need to replace previous versions of the poster, however, all covered employers are required to display and keep displayed, a poster prepared by the U.S. Department of Labor informing employees of the protections of the Occupational Safety and Health Act and its amendments. The new poster is available for download at the following:

English

(<http://www.osha.gov/Publications/osh3165.pdf>)

Spanish

(<http://www.osha.gov/Publications/osh3167.pdf>)

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REGULATION HIGHLIGHT

Reasonable Accommodation under ADA

Title I of the Americans with Disabilities Act of 1990 (the "ADA") requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.

Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include: making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

There are several modifications or adjustments that are not considered forms of reasonable accommodation. An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the

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COMPLIANCE UPDATE

EEOC Issues New Title VII Enforcement Guidelines

The EEOC recently issued Section 15 of their new Compliance Manual on Race and Color Discrimination. The Manual Section provides guidance on analyzing charges of race and color discrimination under Title VII of the Civil Rights Act of 1964 for EEOC Investigators.

Title VII prohibits employer actions that discriminate, by motivation or impact, against persons because of race. The EEOC enforces the provisions of Title VII through both direct actions and "Right to Sue" letters. Employers should be aware of these provisions and actively work to prevent harassment and discrimination of employees protected by Title VII.

Ideally, situations should not escalate to the point of requiring EEOC investigation and/or enforcement.

Employers' interests are better served through prevention and prompt corrective action rather than EEOC enforcement or litigation.

Title VII's prohibition of race discrimination generally encompasses:

Ancestry: Employment discrimination because of racial or ethnic ancestry. Discrimination against a person because of his or her ancestry can violate Title VII's prohibition against race discrimination. Note that there can be considerable overlap between "race" and "national origin," but they are not identical.

Physical Characteristics: Employment discrimination based on a person's physical characteristics

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Reasonable Accommodation (con't)

essential functions, with or without reasonable accommodation, is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards — whether qualitative or quantitative — that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations they are specifically designed or required to meet job-related needs.

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.

EEOC Issues New Title VII Guidelines (con't)

associated with race, such as a person's color, hair, facial features, height and weight.

Race-linked Illness: Discrimination based on race-linked illnesses. For example, sickle cell anemia is a genetically transmitted disease that affects primarily persons of African descent. Other diseases, while not linked directly to race or ethnicity, may nevertheless have a disproportionate impact.

Culture: Employment discrimination because of cultural characteristics related to race or ethnicity. Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech.

Perception: Employment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.

Association: Employment discrimination against an individual because of his/her association with someone of a particular race.

Subgroup or "Race Plus": Title VII prohibits discrimination against a subgroup of persons in a racial group because they have certain attributes in addition to their race.

"Reverse" Race Discrimination: Title VII prohibits race discrimination against all persons, including Caucasians. A plaintiff may prove a claim of discrimination through direct or circumstantial evidence. Some courts, however, take the position that if a White person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

① For further information on the EEOC's Compliance Manual, go to (<http://www.eeoc.gov/policy/compliance.html>).

CASE REVIEW

U.S. Department of Labor Sues Rife Industrial Marine to Recover Nearly \$2 Million for Overtime Back Wages and Recordkeeping Violations

The U.S. Department of Labor has sued Rife Industrial Marine for alleged violations of the overtime and recordkeeping provisions of the federal Fair Labor Standards Act (FLSA), after an investigation by the department's Wage and Hour Division found that welders working offshore had been improperly classified as independent contractors.

Back wages are expected to total almost \$2 million. The complaint was filed in the U.S. District Court for the Eastern District of Texas, Beaumont Division against Rife Industrial Marine Inc. and Rodney Rife, president of the company.

The Wage and Hour Division's investigation found that the company considered welders who were working offshore to be independent contractors when in fact there was an employment relationship, making these workers eligible for overtime

compensation. Additionally, the company failed to properly pay overtime to its regular employees or to maintain accurate records of employees' wages and hours of work.

The FLSA requires that covered employees be paid at one and one-half times their regular rate of pay for hours worked more than 40 per week. The law also requires that accurate records of employees' wages, hours and other conditions of employment be maintained. For purposes of the FLSA, there are a number of factors for determining whether an individual is an independent contractor or an employee. In this case, the Wage and Hour Division found that company's workers did not meet the legal factors for independent contractor status.

① For further information on this Department of Labor case, go to (<http://www.dol.gov/opa/media/press/esa/ESA20062024.htm>).