

The Victorious Employer:

EMPLOYMENT AND LABOR NEWS FOR WINNING IN THE WORKPLACE

REASONABLE ACCOMMODATION AND THE “Interactive Process” UNDER THE ADA

Employers are required under the Americans with Disabilities Act (ADA) to provide disabled employees with reasonable accommodations in the workplace. Simply put, this means employers cannot discriminate against an employee because of a disability. In fact, it’s the duty of the employer to help provide an accessible working environment that allows a disabled employee the same opportunities to succeed and advance just as employees without disabilities. There is a wide range of perceptions and misconceptions of what a disability is and what must be done to accommodate a person with a disability.

Over the last year, our firm has fielded a number of questions from employers regarding their obligation to provide “reasonable accommodations” to individuals with disabilities under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008.

The most common question we get from employers regarding the ADA is a variation of this one, *“My employee has requested that we accommodate his permanent work restrictions. What must we do to respond to the employee’s request?”*

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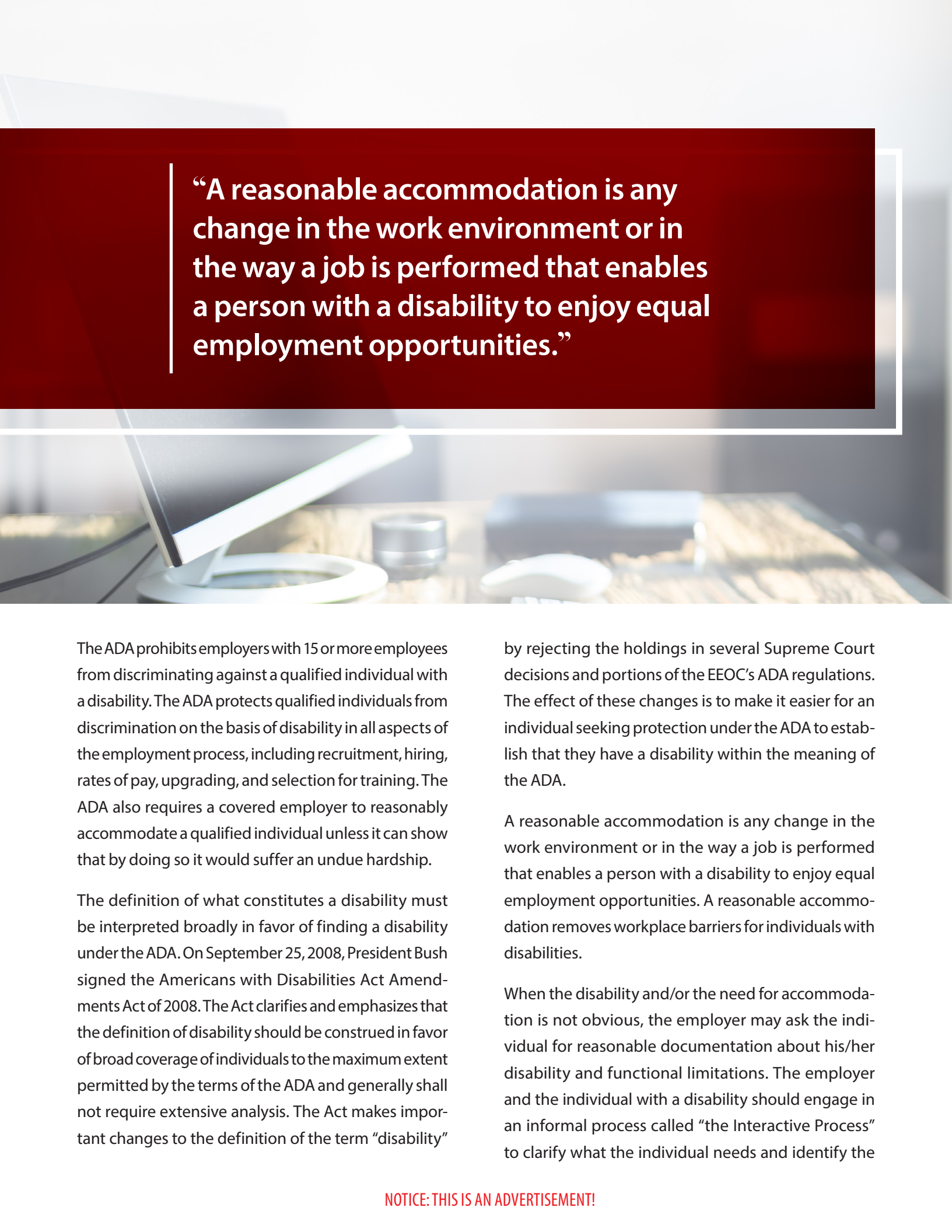
We are pleased to present Issue Six of The Victorious Employer, our periodic employment law newsletter. This and future issues will cover a range of topics of interest to those with an interest in employer/employee interactions.

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“A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities.”

The ADA prohibits employers with 15 or more employees from discriminating against a qualified individual with a disability. The ADA protects qualified individuals from discrimination on the basis of disability in all aspects of the employment process, including recruitment, hiring, rates of pay, upgrading, and selection for training. The ADA also requires a covered employer to reasonably accommodate a qualified individual unless it can show that by doing so it would suffer an undue hardship.

The definition of what constitutes a disability must be interpreted broadly in favor of finding a disability under the ADA. On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008. The Act clarifies and emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term “disability”

by rejecting the holdings in several Supreme Court decisions and portions of the EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that they have a disability within the meaning of the ADA.

A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. A reasonable accommodation removes workplace barriers for individuals with disabilities.

When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer and the individual with a disability should engage in an informal process called “the Interactive Process” to clarify what the individual needs and identify the



appropriate reasonable accommodation. The employer may ask the individual questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The purpose of the Interactive Process is to determine whether – for employees who, due to a disability, have limitations that prevent them from performing the critical elements of their job – a reasonable accommodation exists which will allow them to be able to perform the critical elements of their job. The following are the six specific questions which the Interactive Process is designed to answer:

1. Does the employee have a disability with which the Americans with Disabilities Act requires the employer to accommodate?
2. What are the critical (as opposed to the non-critical) elements of the employee's job?
3. Does the employee have limitations that result from his/her disability? If so, what are those limitations?
4. Do those limitations interfere with the employee's ability to perform the critical elements of her/his job?
5. Is there a reasonable accommodation which the employer can provide which would allow the employee to perform those critical elements of his/her job?
6. If so, what is that accommodation?

If the employee requests an accommodation, the employee need not use the magic words, "reasonable accommodation" in the request. If an employee says that s/he has a limitation or restriction, treat it as a request for an accommodation. The request need not be in writing. Also, it may come from a family member. If the employee does not request an accom-

modation, but you have knowledge that would put a reasonable person on notice that the employee needs an accommodation, an employer must begin the Interactive Process.

During the Interactive Process, an employer must, as a minimum:

- Analyze the employee's job and determine its purpose and essential functions;
- Consult with the employee to ascertain the precise job-related limitations imposed by their disability, and how a reasonable accommodation might address those limitations;
- Identify potential accommodations and discuss them with the employee; and,
- Select the most appropriate accommodation(s) considering the employee in question.

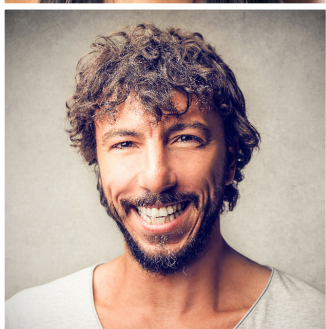
Importantly, employers are prohibited from compelling an employee to identify an accommodation and cannot impose an accommodation upon an employee even if it is believed that the employee needs it. While their input is taken into consideration, the employee and medical provider are not to choose the accommo-

dation. Moreover, the employer is also not obligated to provide the employee's preferred accommodation. The employer may discuss the accommodation with the employee and provide an alternative accommodation that is reasonable and which allows the employee to perform the critical element of her/his job that is in question.

Finally, it should be noted that few jobs, work environments, and/or disabling conditions are entirely static, therefore no grant or denial of an accommodation is eternal. Thus, neither the reasonable accommodation nor the Interactive Process obligations of the employer are satisfied by a one-time participation in the process. The Interactive Process is for that reason, both open and ongoing, and an employer does not meet its obligation to engage in the Interactive Process by simply considering and rejecting the employee's suggestions for a reasonable accommodation. Both supervisor and employee must continue to be open to monitoring, reviewing, modifying, or even terminating an accommodation based upon the experience of how it has worked in the past or is working in the present in light of changed circumstances either in the workplace or with the employee. Each request should be considered on its own merit.

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All that being said, employers never have to provide any reasonable accommodation under the ADA that causes undue hardship to the company. In general, the term “undue hardship” means an action requiring significant difficulty or expense. The ADA contains a detailed set of criteria to consider in determining what constitutes an “undue hardship,” including:

- the nature and cost of the accommodation needed under this Act;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The question of whether an accommodation, such a reassignment, will constitute an “undue hardship” is not addressed by focusing on the actual cost of any one particular accommodation; rather the focus is on the financial impact of a given accommodation on the entire budget of the business. Accommodations must be considered on a case-by-case basis weighing the nature and extent of a disabling condition and the requirements of the job. See, e.g., *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1135-37 (9th Cir. 2001).

In closing, if you have questions about providing reasonable accommodations to an employee with a disability and/or the “Interactive Process,” please contact our Employment and Labor Law team at Hutchison & Steffen. ■

- Jason D. Guinasso, Esq., is the Managing Partner of the Northern Nevada Offices of Hutchison & Steffen. His primary practice area is Employment and Labor Law.

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