

Cancer In The Workplace

It's been 15 years since the passage of the Americans with Disabilities Act (ADA). During that time the courts and the Equal Employment Opportunity Commission (EEOC) have helped to define the reach and substance of the Act. The EEOC has just released a new publication that addresses ADA employment rights of people with cancer. This follows previous EEOC guidelines that have dealt with epilepsy, diabetes, and intellectual handicaps under the ADA.

Since nearly 40% of the 1 million Americans diagnosed with cancer are working-age adults and 10 million more have a history of cancer, it's important to know how the ADA applies to cancer in the workplace. The publication is available at www.eeoc.gov/facts/cancer.html. A few of the key issues are discussed below.

1. When is cancer a disability under the ADA?

Cancer is a disability under the ADA when it or its side effects substantially limit(s) one or more of a person's major life activities. Even if a cancer is treated early and successfully and doesn't limit a major life activity it can lead to other impairments that may be disabilities, including depression. Cancer may also be a disability because it was substantially limiting in the past (an individual has a record of a disability) or even though an individual's disability doesn't limit major life activities he is treated as if it does. For example, an individual with facial scars because of skin cancer surgeries cannot be refused consideration for a receptionist position because it's feared he'd make people uncomfortable or a job offer could not be withdrawn because it's learned that an applicant's genetics increase the chances of cancer.

2. Can an applicant be asked whether she has had cancer or cancer treatment?

No questions may be asked about an applicant's medical condition nor can a medical exam be required before a conditional job offer is made. Once a job offer is made questions can be asked and a medical exam required, as long as applicants for the same types of positions are treated similarly. You can't have an applicant take a medical exam simply because you suspect he may have cancer because you notice hair loss or suspect he's had cancer. Note also that a job offer is not "real" until an employer has gathered and evaluated all readily available non-medical information.

3. What if an applicant voluntarily discloses that he has or had cancer?

In such instances you still can't ask about the cancer, its treatment or prognosis. An exception arises if you reasonably believe that an accommodation will be required to perform the job and then you may ask the applicant if he needs an accommodation and if so, what type. Remember that an individual may request an accommodation after becoming an employee even if he didn't ask for one before being hired.

4. What if you learn that an applicant has or has had cancer after you've offered her the job?

A job offer cannot be withdrawn if the applicant is able to perform the basic duties ("essential functions") of the job, with or without reasonable accommodation and without posing a direct threat to safety (of herself or others).

5. What can you ask a current employee who you know has cancer?

You can ask medical questions or require a medical exam only if you have a legitimate reason to believe that the medical condition may be affecting the employee's ability to do his job or to do so safely. Remember though that poor job performance is typically unrelated to a medical condition and should be treated under your corrective action or coaching procedures.

It's also ok to ask an employee with cancer for information needed to determine a reasonable accommodation, to justify the use of sick leave (doctor's note) as long as other employees are treated similarly, to provide documentation before an employee is allowed to return from a leave, and for periodic leave updates, if the employee is unsure when he will return. The EEOC also makes clear that an employer may call an employee on an extended leave to check on his progress or to express concern for his health.

6. If other employees are concerned and ask about an employee who has cancer or wonder why she is treated differently, what can we say?

Although employees may be concerned about a coworker you cannot reveal that she has cancer, tell them that she has been absent from work because she has cancer, or that she is receiving a reasonable accommodation. With limited exceptions you must keep medical information confidential.

7. What types of accommodations do employees with cancer typically require?

Employers must provide adjustments, modifications or other reasonable accommodations to people with disabilities unless to do so causes an undue hardship. Accommodations must be provided because of limitations caused by the cancer itself, the side effects, or the treatment. Accommodations commonly include leave for doctors' appointments, to recuperate from treatment, breaks to rest or take medication, work schedule adjustments, redistribution of marginal tasks to others, permission to work at home, or reassignment to another job.

Don't forget. You may also have to consider an employee's rights under the Family and Medical Leave Act (FMLA) or state leave laws as they may provide even greater rights.

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