

Cooley

May 30, 2012

With millions of service members home from Iraq and Afghanistan and 1 million still yet to return, employers should consider whether their treatment of disabled and returning veterans comports with the requirements of the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The EEOC recently issued guidance on the ADA and USERRA. The guidance is particularly timely for firms doing business with the federal government. The Office of Federal Contract Compliance Programs (OFCCP) has proposed a new rule that would, if adopted, require federal contractors and subcontractors to set a goal of having at least 7% of their respective workforces consist of persons with disabilities. With a large number of disabled service members returning to the civilian job market, and a proposed rule requiring increased employment of individuals with disabilities, it is more important than ever for employers to understand the legal landscape concerning the ADA and USERRA.

EEOC's Updated Publications Regarding Disabled Service Members

On February 28, 2012 the EEOC updated its publication entitled "Veterans and the Americans with Disabilities Act (ADA): A Guide for Employers." This guide helps employers understand veterans' rights under both the ADA and USERRA, including how the protections under each act differ.

The publication addresses several topics, including the following:

- What protections the ADA provides to veterans with disabilities;
- When a veteran with a service-connected disability is protected by the ADA;
- Whether an employer may ask an applicant if he or she is a "disabled veteran," if the employer is affirmatively seeking to hire someone with a disability;
- The steps employers should take when asking an applicant to self-identify as a "disabled veteran" for affirmative action purposes;
- Whether federal agencies may give special consideration to veterans with disabilities who are seeking employment with the government;
- Whether private employers may give preference in hiring to disabled veterans over other applicants;
- Steps employers may take to recruit and hire veterans with disabilities;
- The types of reasonable accommodations disabled veterans may need during the application process or during employment;
- How employers can know when a veteran with a disability needs an accommodation;
- Whether an employer may ask a veteran with a disability whether he or she requires a reasonable accommodation, if none has been requested; and
- How the ADA differs from USERRA.

Most important for employers to understand, however, are the key protections afforded by both the ADA and USERRA. Under the ADA, employers are prohibited from treating an applicant or employee unfavorably in all aspects of employment, including hiring, promotions, pay, job assignments, termination, and all other terms or conditions of employment, because the individual in question has a disability, a history of having a disability, or simply because the employer regards him as disabled.

If a disabled veteran requests an accommodation—regardless of whether the veteran is an applicant or employee—the employer must provide a reasonable accommodation unless doing so would cause the employer to suffer an undue hardship. Note, as discussed below, that a veteran returning to work who is eligible for reinstatement under USERRA is considered an employee, and not an applicant, and the employer should conduct the accommodation process as though the veteran is currently in the position to which he or she is eligible to be reinstated. The EEOC's guide offers suggested accommodations for disabled veterans (which must be based on each veteran's individual need), including physical modifications to a workplace to accommodate a wheelchair or other mobility aide, the provision of written materials in accessible formats, granting permission to work from home, granting leave for treatment, recuperation, or training related to the individual's disability, allowing a modified or part-time work schedule, providing a job coach who could assist a veteran who has difficulty learning or remembering job tasks, or reassigning the veteran to a vacant position if providing an accommodation in the veteran's current position would result in an undue hardship.

The ADA's Interactive Process

An accommodation should fit the service member's particular circumstances. Employers should engage in an "interactive process" with each individual requesting an accommodation in order to determine the most appropriate course of action. The interactive process should begin when an employer receives a request for an accommodation. As part of the interactive process, the employer should: (1) analyze the particular job at issue and determine its essential functions, (2) communicate with the individual to learn more about his or her disability-related limitations, (3) work with the individual to identify particular accommodations that might permit the individual to perform the essential functions of his or her position, and (4) select the accommodation that is most appropriate for both the individual and the employer.

Employers' Obligations Under USERRA

USERRA provides protections similar to those the ADA, but focuses on the reemployment of individuals returning to their jobs after serving in the military. Under USERRA, employers must make reasonable efforts to assist veterans who are returning to civilian employment to become qualified for a job, whether or not the service member has a disability. More specifically, USERRA requires employers to restore returning service members to the job and benefits they would have attained if they had not been absent due to military service. USERRA also prohibits discrimination against employees or applicants on the basis of their military status or military obligations.

What If the Service Member Returns with an Impairment?

With the return of millions of service members from Iraq and Afghanistan, employers are increasingly faced with a particularly sensitive problem: how to treat a returning service member who has a disability incurred in or aggravated by his or her military service. If the veteran requests an accommodation, the employer should engage the individual in an interactive process, as described above, to try and make it possible for the individual to perform the position he would have held if his employment had not been interrupted by his service. If, despite reasonable accommodation efforts, the individual is no longer qualified for that position, he should be employed in another position of equivalent seniority, status and pay, so long as the individual is qualified to perform the job duties with reasonable efforts by the employer. If such a placement is not possible, the employer must place the individual in the next-closest position in terms of seniority, status and pay, consistent with the individual's own circumstances.

Conclusion

Employers should review their policies and procedures regarding the recruitment and employment of individuals with disabilities to make sure they are compliant with the requirements of the ADA and USERRA. They should also provide training and education to individuals responsible for implementing the policies, such as human resources representatives and hiring managers. While these steps are advised for all employers, they are particularly important for those anticipating the reemployment of returning service members, and those doing business with the federal government.

If you have any questions about the ADA, USERRA, or the employment of disabled or returning service members, please contact one of the attorneys listed on this page.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.

