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Briefly

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ACCOMMODATING OPIOIDS IN THE WORKPLACE: EEOC ISSUES GUIDANCE

Mary C. Moffatt.....

Rosalia Fiorello....

"[I]t is vital to tread carefully when handling an employee's on-going, legal use of opioids."

On August 5, 2020, the Equal Employment Opportunity Commission (EEOC) issued two guidance documents regarding the interplay between the legal use of opioids and the employer's obligations under the Americans with Disabilities Act (ADA). While the two guidance documents are directed towards employees and their healthcare providers, employers may be impacted by the guidance in responding to reasonable accommodation requests from employees and health care providers.

A. Use of Codeine, Oxycodone and Other Opioids: Information for Employees

In this guidance, the EEOC acknowledges that current illegal drug use is not considered a covered disability, but goes on to note that employees who are using opioid medication lawfully, are receiving medication-assisted treatment (MAT) for opioid addiction, or have recovered from their opioid addiction, are protected from disability discrimination under the ADA. Likewise, in Tennessee, these individuals would be protected from discrimination under the Tennessee Disability Act. The EEOC presents information to assist employees in requesting reasonable accommodations and maintaining employment when they are legally using opioids or are in an opioid addiction treatment program or have a history of using opioids. The purpose of the document is to explain the ADA nondiscrimination and reasonable accommodation provisions for individuals who are not engaged in illegal use of drugs and are qualified for employment. (To view this guidance, go to: www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees)

B. How Healthcare Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed

This EEOC guidance provides basic information to healthcare providers regarding reasonable accommodations under the ADA, with emphasis on educating providers on the issues faced by employees who legally use prescription opioids or who have been addicted to opioids in the past. However, the documentation goes further than simply providing education with respect to the ADA. For example, in a question-and-answer format, the EEOC states that "opioid use disorder (OUD) is itself a diagnosable medical condition that is likely to qualify as an ADA disability." Of course, the guidance goes on to state that "there is an exception for people who are using heroin or opioid medication without a valid prescription – the ADA doesn't stop employers from firing employees, denying employment to job applicants, or taking other negative employment actions based on the current illegal use of drugs." Clearly, one of the purposes of the guidance is to encourage and assist healthcare providers in advocating for reasonable accommodations on behalf of their patients by giving examples of reasonable accommodations, outlining the circumstances where a reasonable accommodation might be necessary for an employee, and providing examples of certain documentation that would be of assistance to an employee in requesting a reasonable accommodation from his or her employer.

The Guidance also addresses safety concerns, but indicates it is not enough for a healthcare provider to provide the employer with restrictions such as "no operating heavy machinery." The EEOC further notes that for an employer to decide whether an employee poses a direct threat, the employer needs information to assess "the level of the risk posed by a disability, taking into account the probability that harm will occur, the imminence of the potential harm, the duration of the risk, and the severity of the potential harm."

Continued on page 4

TENNESSEE EMPLOYER RESPONSIBILITIES FOR PREGNANT WORKERS ARE EXPANDED

Kelly A. Campbell

"Prudent Tennessee employers should review and revise their policies and practices regarding hiring, accommodation, and leave to include provisions in compliance with [this new law]."

On 06/22/2020, Governor Lee signed into law the Tennessee Pregnant Workers Fairness Act, which will go into effect on 10/01/2020. This new law is very similar to the Federal Pregnant Workers Fairness Act bill introduced in the U.S. House of Representatives in the Spring of 2020.

Under this new State law, all employers having fifteen (15) or more employees are required to provide reasonable accommodations to applicants and employees for medical needs arising from pregnancy, childbirth, or related conditions, unless such accommodation would impose an undue hardship on the employer. Undue hardship is defined as "an action requiring significant difficulty or expense."

The Act lists the following as possible reasonable accommodations that may be provided:

- Making existing facilities used by employees readily accessible and usable;
- Providing more frequent, longer, or flexible breaks;
- Providing a private place, other than a bathroom stall, for the purpose of expressing milk;
- Modifying food or drink policy;
- Providing modified seating or allowing the employee to sit more frequently if the job requires standing;
- Providing assistance with manual labor and limits on lifting;
- Authorizing a temporary transfer to a vacant position;
- Providing job restructuring or light duty, if available;
- Acquiring or modifying of equipment, devices, or an employee's workstation;
- Modifying work schedules; and
- Allowing flexible scheduling for prenatal visits.

This new Tennessee law does not provide any protections greater than those afforded to other employees needing accommodation, as it states that the following actions are not required unless the employer does or would do so for another employee or a class of employees that need a reasonable accommodation:

- Hire new employees that the employer would not have otherwise hired;
- Discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;
- Create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee;
- Compensate an employee for more frequent or longer break periods, unless the employee uses a break period that would otherwise be compensated; or
- Construct a permanent, dedicated space for expressing milk.

Under the Tennessee Pregnant Workers Fairness Act, employers are also prohibited from requiring pregnant workers to take leave if a reasonable accommodation can be provided which would enable them to continue working. In addition, employers are prohibited from taking adverse action against employees for requesting or using a reasonable accommodation related to pregnancy, childbirth, or related medical conditions. Employers are specifically prohibited from counting an absence related to pregnancy under no fault attendance policies.

Employers may require pregnant employees to provide medical certification to support the request for accommodation, if the employer requires other employees seeking accommodation to provide medical documentation. The Act states that during the time period that an employee is attempting to obtain medical certification, the employer must engage in a good faith interactive process with the employee to determine if a reasonable accommodation can be provided absent undue hardship. Employers are also prohibited from taking adverse action against the employee related to the employee's need for accommodation while the employee is engaging in good faith efforts to obtain medical certification.

Any person alleging a violation of this new law may file suit directly in chancery or circuit court for the county in which the alleged violation occurred, or an action in Davidson County pursuant to the Uniform Administrative Procedures Act, within one year of the date of the adverse employment action. Possible relief includes back pay, compensatory damages, prejudgment interest, reasonable attorney's fees, and any other appropriate legal or equitable relief.

The requirements of this new Tennessee State law are very similar to existing Federal law requirements. Most Tennessee employers are subject to the Federal Pregnancy Discrimination Act, which makes it illegal for an employer with 15 or more employees to discriminate against pregnant workers.

The 2008 Americans with Disabilities Act Amendments Act, also applicable to employers with 15 or more employees, expanded the scope of the ADA to require employers to provide necessary accommodations to pregnant employees with pregnancy-related conditions that meet the definition of disability.

In addition, the Affordable Care Act amended the Fair Labor Standards Act (FLSA) in 2010 to require employers to provide "reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion

Continued on page 4

Philip Lawson – *IN MEMORIAM*

Dear Friends,

Sadly, this message is to let all of our friends in the Wimberly Lawson family know of the death of our great friend and name partner, Phil Lawson. Being a founding member of the firm, Phil Lawson was a man of vision and built Wimberly Lawson from the ground up – a lasting legacy to his leadership. He passed away on Saturday, August 29, 2020.

Phil attended the Greenbrier Military School during his high school years. After receiving his college degree in 1965 from ETSU, Phil began working at SESCO Management Consultants. While working at SESCO he attended the University of Tennessee Law School and graduated in 1975. He was admitted to the Tennessee Bar in 1976, the U.S. District Court in 1977, and the U.S. Court of Appeals, Fourth Circuit in 1985.

As a founding member of Wimberly Lawson, his business acumen was evidenced by profound management skills and a marketing strategy that made the firm very successful. Phil specialized in Labor and Employment Law, and helped his clients implement innovative approaches to employee relations management. Phil was a thoughtful and far-sighted businessman, and a great mentor to many of us at the firm.

Phil served many years as a hearing committee officer of the Board of Professional Responsibility of the Tennessee Supreme Court, and he also served as an arbitrator/mediator with the American Arbitration Association. Phil lectured and taught widely on a variety of aspects of Labor and Employment Law, and leadership, and wrote a column called "The Eagle's Nest" for *The Liaison*, a publication of The Smoky Mountain Paralegal Association. Phil was a founding member of the Knoxville Fellowship Luncheon, and always pursued and developed personal relationships with the speakers he was responsible for scheduling.

Phil valued deep faith in God, perseverance, and hard work. He expressed the principles of his faith in everything he did, from caring for exotic animals on his farm, to caring for disadvantaged children in third world countries. Phil Lawson was truly a good man. The values he espoused underpin everything we do as a firm, even today. He will be greatly missed.

"ACCOMMODATING OPIOIDS IN THE WORKPLACE" continued from page 1

Adding to the complexity already present in the conundrum faced by employers with respect to reasonable accommodation requests under circumstances involving the ongoing use or previous of opioids, the EEOC guidance concludes by noting that "where relevant, consider and assess any risks your patient's condition may present in light of the type of work your patient performs … the type of equipment he or she uses, his or her access to harmful objects or substances; any safeguards in place at the worksite; the type of injury or other harm that may result if one of the identified medical events or behaviors occurs; and the likelihood that injury or other harm would in fact occur as a result of the event or behavior. If you don't have this information but think you need it to make an accurate assessment, you should ask the employer for it." (To view this guidance, go to: www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids)

While these documents do not have the force and effect of law, they clearly provide guidance to employees with respect to requesting reasonable accommodation, working with their healthcare provider to provide medical support for an accommodation, and the interplay between the ADA and various types of reasonable accommodations. For example, in responding to the question of *"If I need a reasonable accommodation because of an ADA disability, does the employer have to give it to me?,"* the EEOC answers this question as follows: "If a reasonable accommodation would allow you to perform the job safely and effectively, and does not involve significant difficulty or expense, the employer must give you one. If more than one accommodation would work, the employer can choose which one to give you. The employer is not allowed to charge you for the accommodation."

An interesting scenario arises for employers involved in drug-free workplace programs and the interplay with workers' compensation claims. A staggering 38% to 50% of all workers' compensation claims are related to substance abuse in the workplace. (See: *'Working Partners', National Conference Proceedings Report: Sponsored by U.S. Dept. of Labor, the SBA, and the Office of National Drug Control Policy.*) To combat the use of drug-related injuries in the workplace, many states have enacted Drug-Free Workplace Programs to promote safe worksites and increase productivity.

Tennessee, for example, has threshold limits for marijuana, cocaine, phencyclidine, amphetamines, Codeine / morphine, heroin, hydrocodone / hydromorphone, oxycodone / oxymorphone, and alcohol an individual can have in their system at the time of a work-related accident. If an employee tests above the threshold limits during a post-accident drug screening, employers receive a shift in the burden of proof in workers' compensation claims involving a positive alcohol or drug test. This means it is presumed that the drugs or alcohol were the proximate cause of the injury, and benefits can be denied. There is also a presumption that the discharge or discipline of an employee, or the refusal to hire a job applicant, who is found to be in violation of the employer's Drug-Free Workplace Program will be considered done for cause. This poses problems with the EEOC's guidance as it pertains to maintaining employment for employees who legally use opioids but who, upon post-accident testing, test above the allowable threshold limits.

If your organization is part of a Drug-Free Workplace Program, work closely with your employment law attorney as there are many possible twists and turns, and receipt of good legal advice along the way can be invaluable. Whether an employer participates in the Tennessee Drug Free Workplace Program or not, it is vital to tread carefully when handling an employee's on-going, legal use of opioids.

Bottom line, when addressing the use of opioids in the workplace, employers would be wise to seek guidance from an employment law attorney to assist in navigating through these challenging issues.

"TENNESSEE PREGNANT WORKERS FAIRNESS ACT" continued from page 2

from coworkers and the public, which may be used by an employee to express breast milk." These provisions apply to all employers subject to the FLSA.

Employers may also recall that the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance in 2014 regarding the rights of pregnant workers. Under that guidance, the EEOC clarified that employers must treat women affected by pregnancy or related medical conditions in the same way that they treat other employees who are similar in their ability or inability to work. For example, if an employer provides workplace accommodations, such as disability leave or light duty assignments, to employees who have non-pregnancy related work limitations, the employer must offer those same accommodations to pregnant employees. In 2015, the U.S. Supreme Court affirmed these employer obligations in the case of *Young v. UPS*.

What should employers do in response to this new Tennessee Law? Prudent Tennessee employers should review and revise their policies and practices regarding hiring, accommodation, and leave to include provisions in compliance with the Tennessee Pregnant Workers Fairness Act. In addition, training is essential so that management and Human Resource professionals are fully versed regarding compliance and responsibilities under this new State law as well as existing Federal laws. It is anticipated that the Tennessee Commissioner of Labor will promulgate rules to effectuate this law soon, which should provide further clarification on employer obligations under this new law.