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Lawfully Managing an Aging Workforce

As many American workers delay retirement and remain in the workforce into their later years, employers are increasingly faced with challenges associated with managing this cohort. One particular issue that can arise is handling a worker whose physical or mental ability to perform the work declines, but whose motivation to stay on the job remains high. Several laws come into play with this scenario. For starters, it is unlawful to discriminate against workers based on age under the federal Age Discrimination in Employment Act (ADEA) and the New York State Human Rights Law (NYSHRL). This means that you cannot make employment decisions based on assumptions associated with age.

Additionally, when medical-related issues arise, the Americans with Disabilities Act (ADA) and the disability discrimination provisions of the NYSHRL dictate what an employer can and cannot say and do. The ADA restricts employers from asking disability-related inquiries unless they are job-related and consistent with business necessity. What is a disability-related inquiry? It is any question that is likely to elicit information about a disability covered by the ADA, even indirectly. What does it mean to be “job-related and consistent with business necessity?” Among other things, this means the employer has a reasonable belief, based on objective evidence, that the employee’s ability to do the job is impaired by a medical condition, or that the employee poses a direct threat to himself or others because of a medical condition.

With these rules in mind, here are some guidelines for managing a worker with declining capabilities:

Be Wary of Medical Discussions; Focus on Performance.

If a supervisor notices that an older worker is having increasing difficulty with a particular task, he or she may be tempted to assume there is a medical problem and launch into a line of questions about the employee’s possible ailments. The supervisor may just be trying to be helpful. But medical discussions—especially when based on assumptions—are an employment law minefield. Train your supervisors to resist the urge to play doctor; instruct them to partner with HR when those concerns arise so that you can carefully assess the situation and strategically plan your communications.

Even if you have suspicions that the performance issue might be medical related, treat the conversation like any other performance conversation. Focus on concrete events and not suspected causes. For example, say “You did not complete as many assemblies as you typically do,” and not “It seems like you are having trouble with your dexterity.” Then ask, “What can I do to support you in this area?”

Be Attuned to Accommodation Requests

The ADA and NYSHRL require that employers grant reasonable accommodations to employees with disabilities that will enable them to perform their job. The burden is typically on the employee to ask, but the employee is not required to say “disability” or “accommodation” or any other magic words to trigger the employer’s duty to respond. The employee need only say something to indicate he/she needs a change or assistance because of a medical reason. These subtle requests may sometimes go unnoticed by supervisors as accommodation requests. Therefore, train supervisors that when anything medical arises, involve HR.

Know When You Must Initiate the Accommodation Conversation

With some disabilities associated with aging, an employee may not recognize his or her own need for help. According to the EEOC, it is up to employees to ask for help, and employers are generally not required to ask an employee if he/she needs an accommodation. However, the rule is different if the employer has reason to know that a disability exists and the disability is preventing the employee from asking for help. This may occur with the onset of a mental disability, such as dementia. For example, if an employee shows increasing signs of forgetfulness and this is impacting his/her ability to do the job, HR should step in and ask if the employee needs an accommodation.

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