

The Interactive Process: Spotlight on Multi Family

- *Reigning in Runaway Leaves
- *Establishing Undue Hardship
- *Transfer as a Form of Accommodation

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Reigning in Runaway Leaves

- SCENARIO: The Community Manager has been out on leave for 9 months; the Regional is frustrated because the CM keeps extending the leave and the Regional is having trouble finding consistent coverage for the property. After the FMLA expiration, three leave extensions were granted based on doctor's notes. The Company has never called the leave extensions an accommodation. Now, the CM has requested yet another leave extension, this time for two more months. The Regional wants to deny the request and replace the CM.

Reigning in Runaway Leaves

- Assume that the Community Manager has terminal cancer. What should you do?
- Assume that the Community Manager has bipolar disorder. What should you do?
- Assume you are in California and you don't know the Community Manager's medical condition. What should you do?

Reigning in Runaway Leaves

- Clear and direct communication about the role of a leave of absence in the context of disability accommodation is critical.
- A leave of absence is a reasonable accommodation when the leave will enable the employee to return to work and perform the essential functions of the job, with or without reasonable accommodation at the end of the leave.
- There is NO rule or safe harbor re length of the leave.

Reigning in Runaway Leaves

- To help avoid runaway leaves and appropriately (and legally) set expectations, tell the employee in every written communication that ***leaves of absence are provided as a form of accommodation in order to enable the employee to return to work and perform the essential functions of the job, with or without reasonable accommodation.***
- Encourage employees in writing to work with their health care providers to evaluate whether there are accommodations *other than* a leave of absence that would get the employee back to work.

Reigning in Runaway Leaves: Undue Hardship v. Not Reasonable

- Does it matter whether you deny the leave extension request because it is an undue hardship v. not a reasonable accommodation?
- Evidentiary burden: Employer must provide undue hardship.
- Case law is not always clear on the difference.

Reigning in Runaway Leaves: Not Reasonable

- A request for an indefinite leave is not a reasonable accommodation. What is indefinite?
 - An up front statement that the leave is indefinite?
 - Repeated leave extensions?
 - Repeated requests for leaves after short returns to work.
 - Lack of certainty around the return date? Leave until “further notice” or until “at least X date”?
 - Intermittent leaves for chronic conditions?
 - Inability to provide return to work date with any reasonable medical certainty after several leave extensions?

Establishing Undue Hardship

- Reminder: Employer bears the burden of proving an undue hardship.
- Financial considerations are rarely sufficient (e.g. picture yourself trying to explain to a jury why you pay for certain benefits (club memberships) but refuse to pay the additional cost of a temporary employee).
- Significant adverse affect on co-workers and tenants may be sufficient.
- Is an accommodation that would require other employees to work harder and more overtime an undue hardship?

Establishing Undue Hardship

- EXAMPLE:
 - There have been significant personnel issues during Community Manager's continued absence that have been exacerbated by the lack of consistent leadership. LIST THEM
 - Having both the CM and ACM out at the same time for three and one-half months caused issues during transitions of move-ins, paperwork, rent processing, resident matters not handled, loss of historical knowledge, etc. All of this plus the other items outlined in this document, required more time and strain on the RM, RSM, PMP, and Acting CMs. We recently received a resignation letter from the FT Leasing Associate because he had anxiety about the future of the CM position.
 - We value our staff, and cannot afford to lose any more employees from that property. Staff turnover not only creates the burden of having to hire and train new individuals, but results in the loss of historical knowledge, and has a negative impact on customer service and operations at the property.

Establishing Undue Hardship (example continued)

- The turnover of the CM position significantly impacts the residents. From their perspective, there is no consistent CM who has the history, knowledge, and authority to address their concerns.
- We have concluded that we cannot manage the situation by bringing in another Acting CM. The situation is tenuous; we need a strong manager.
- We do not have an available internal resource who we could relocate for this purpose. Thus, we would be required to look outside the Company and train a temporary replacement in our systems, policies and practices, all at a time when the property and its employees and residents are struggling. It is very difficult to find this caliber of CM in the market when the position being offered is temporary.

Establishing Undue Hardship (example continued)

- We are approaching the busiest time of year, which will continue for 4-5 months. We expect higher than normal loss of rent due to vacancy loss and the resulting lack of ability to grow rents; increased expenditures because there is no regular oversight from a CM to focus on finances and lead the maintenance team to make good financial decisions; potential staff turnover due to leadership turnover and a lack of attention to associates; reduced employee morale due to the inability to resolve disputes quickly and to provide the expected level of training, management, guidance and mentorship, and reduced resident satisfaction because there is no CM on site to handle their issues, which can lead to turnover and a negative reputation. All of these issues can potentially have a lasting effect on the property.

Transfer as a Form of Accommodation

- Transfer must be considered as a form of accommodation if the employee cannot be accommodated in the current role.
 - Do not have to promote.
 - Must consider demotion if no other options.
 - Pay and benefits can change.
 - Bumping not required.
 - Need not ask for volunteers.

Transfer as a Form of Accommodation

- Are disabled employees entitled to preferential treatment? In other words, do you have to slot them in an open job for which they are qualified or must they compete for the job with other qualified candidates?
 - Collective bargaining agreement.
 - Nondiscrimination policies.
 - Seniority policies.
- Employers must locate open positions during a reasonable period of time and affirmatively evaluate whether the disabled employee is qualified for the job. Cannot simply direct disabled employee to Company job listings.

Transfer as a Form of Accommodation

- What does it mean that the disabled employee is qualified for an open job?
 - Meets listed minimal qualifications v. best qualified candidate.
 - Consider revising minimal qualifications to reflect actual requirements for the job.
 - If training is available to other candidates, training must be made available.

Transfer as a Form of Accommodation

- Watch out for stereotypes.
- EXAMPLE: Belief that maintenance staff are not qualified for leasing or customer service roles.
- Must ask disabled maintenance staff about prior job history/experience and review resume/application to determine if he/she meets the minimal qualifications for an open leasing position.

QUESTIONS?

“Banning the Box” and Beyond:

Using Background Checks in the Employment Process

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November 19, 2014
National Multifamily Housing Council
Human Resources Forum



The “Box”

HAVE YOU EVER BEEN CONVICTED OF A CRIME? (A conviction includes a plea, verdict or other finding of guilt, as this question includes any conviction for which you have received a pardon.)

Check one: YES NO

Arguments For and Against

- Why BAN the Box?
 - Disparate impact concerns;
 - Remove applicant fears of rejection based solely on the answer to this question;
 - Provide increased opportunities for those trying to reintegrate after release from incarceration.
- WHY KEEP the Box?
 - Statutory mandates;
 - Sensitive nature of certain positions;
 - Economy: Why go through full process if candidate is not qualified?

Where Has the Box Been Banned?

Public & Private Employers

- Hawaii
- Rhode Island
- Minnesota
- Massachusetts
- Seattle, WA
- Buffalo, NY
- Philadelphia, PA
- Newark, NJ
- San Francisco, CA
- Washington, DC

Public Employers & Their Contractors/Vendors

- Detroit, MI
- Compton, CA
- Atlantic City, NJ
- Richmond, CA
- New York City, NY

Disparate Impact Analysis

- Plaintiff or EEOC:
 - Must demonstrate that a *facially neutral policy* has a statistically significant disparate impact on a protected group.
 - Technology has changed everything—and the EEOC knows it.

Establishing Business Necessity

- Burden shifts to employer to show the policy is job related and consistent with business necessity.
- Employer must show that it considered three factors in making its decision:
 1. The nature and gravity of the criminal offense(s);
 2. The time that has passed since the conviction and/or completion of the sentence; and
 3. The nature of the job held or sought.
- Targeted screen should be narrowly tailored.

When Business Necessity Is Not Enough ...

- Even if the employer proves business necessity, the plaintiff(s) or EEOC may prevail by showing the employer refused to adopt an alternative practice that would satisfy the employer's legitimate interests without having a disparate impact on a protected class.
- Best Practice: Targeted screen followed by an individualized assessment.
 - Consider the totality of the circumstances of the conviction and the position.

Who Should Be Concerned?

- Employers should be concerned if they use criminal background checks and:
 - Use them on a regular basis (“big numbers are bad numbers”).
 - Solicit and maintain race, gender, age, disability or veteran data on applicants – this applies to government contractors and subcontractors in particular.
 - Applicant and/or background check data is maintained by the company or through a vendor.
 - Have a “one size fits all” criminal background check policy.

Be in a Position to Demonstrate Compliance

- Targeted Screens: Use different standards for different positions.
- Avoid policies that indicate automatic exclusions. Instead, “Acme Corp. believes the following crimes are job related – applicants with these offenses will be subject to individualized assessment.”
- Train HR and decision makers to avoid reliance on hard and fast rules—such reliance jeopardizes ability to demonstrate use of individualized assessment.
- Self-audit to root out inconsistencies, e.g. on-line kick out.

Convictions vs. Arrests

- Arrest—as opposed to underlying conduct—should not be considered in making employment decisions.
- It is acceptable to ask about the circumstances of the arrest.
- States may also prohibit use of arrest information.
 - California Labor Code 432.7: Employer cannot ask applicant to disclose or use arrest information that did not result in conviction.

Legal Strategy

- Narrow the scope of the EEOC's claims early in the case.
- Challenge the EEOC's evidence and data supporting its claims of disparate impact including by attacking the "expert" reports.
- Force the EEOC to identify which specific part of the background-check practice causes the alleged disparate impact, and then attack that in pretrial motions.

Recent Cases

- EEOC filed two complaints:
 - Dollar General
 - BMW
- New reported decisions:
 - Freeman
 - Peoplemark

Credit Checks

- Disparate impact
- EEOC's efforts

The FCRA

- Governs the collection, assembly and use of information about consumers by consumer reporting agencies, including:
 - Credit information;
 - Criminal background;
 - Motor vehicle reports (MVR);
 - Other public record information.
- Applies only to “consumer reports.”
 - Excludes information obtained directly from the consumer.
 - Excludes employer direct verification of prior jobs/education.
- An employer is generally not a consumer reporting agency.

Pre-Procurement Requirements

- Requirements for Procuring a Consumer Report:
 - Certification;
 - Disclosure/Notice;
 - Authorization/Consent.
- Clear and Conspicuous Notice.

Pre-Adverse Action Requirement

- Before taking adverse action:
 - Provide Pre-Adverse Action Notice;
 - Provide a copy of the consumer report;
 - Provide a copy of Consumer Financial Protection Bureau's summary of rights;
 - Wait (FTC found 5 business days is reasonable).
- Apply whenever a report is obtained, even if there is independent basis for the decision.

Post-Adverse Action Requirements

- After taking adverse action:
 - Provide notice of adverse action;
 - Provide information on consumer reporting agency and consumer rights.

Be Aware of State Requirements

- States are Limiting Access to Consumer Credit Reports:
 - California Labor Code 1024.5;
 - Illinois Credit Privacy Act.
- State Versions of FCRA:
 - California Investigative Consumer Reporting Agencies Act (ICRAA).

Best Practices

- Consider EEOC Guidance on criminal convictions.
- Remove “box” from application?
- Ask questions later in process?
- Individualized assessment
- Ensure FCRA requirements are incorporated in process.
 - Independent disclosure and authorization.
 - Pre-adverse action letter.
 - Adverse action letter.
- Identify applicable state and local restrictions and requirements on screening.
 - Ban-the-Box “plus” (e.g., DC recordkeeping).
 - Credit report restrictions and requirements.

QUESTIONS?

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