JUST ASK JACOB

Employee's sensitive nose may be a disability

by Jacob M. Monty
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Q *One of our employees has complained about the perfumes in our office and has requested a change in the way she communicates with staff—e.g., e-mails and phone calls versus in-person communication—to avoid the odors. We don't have a fragrance policy. Would it be best to create a one?*

A It depends. If the employee is just very particular about the smells around her and you want to have a fragrance policy, you can implement one. If she has a legitimate chemical or fragrance sensitivity (a medical condition that can cause headaches, nausea, and breathing difficulties), she may qualify as disabled under the ADA Amendments Act (ADAAA), assuming her condition limits one or more "major life activities." In that case, you would be required to provide her a reasonable accommodation.

Under the Americans with Disabilities Act (ADA), what qualifies as a reasonable accommodation and what constitutes an "undue hardship" for the employer are very fact-specific questions. If an accommodation is required, courts generally have held that providing an air purifier and minimizing an employee's need to be in common areas of the workplace are sufficient. But in cases of severe or frequent symptoms, employers have been required to adopt a fragrance-free workplace. It depends on the severity of the employee's condition and the nature of your business.

If a medical condition is causing the employee's concerns, inquire further to assess whether an accommodation is necessary. If she is just particular about smells, there's no harm in providing a way for her to avoid coworkers' fragrances.

Q *We have an employee who is returning after six months of military leave. Do we need to credit her paid time off (PTO) bank for the six months of leave?*

A Yes. The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to all employers and protects servicemembers from the consequences of being absent from their civilian jobs, including the loss of accrual of benefits. There are exceptions to that requirement—e.g., if the employee failed to give you advance notice that she was taking military leave even though it was reasonable for her to do so, she was dishonorably discharged, or she didn't promptly report back to work upon her return. Assuming the employee is an eligible servicemember, you must credit her PTO bank and do whatever else is necessary to place her in the same benefits situation she would have been in had she not taken military leave.

Q *We would like to create an employee recognition program that awards employees points that can be used to purchase company-branded items from an online store. Does the value of items "purchased" by employees need to be added to their gross income for tax purposes?*

A In some cases, yes, depending on the value of the items. *De minimis* fringe benefits qualify for the tax code's exclusion from gross income. *De minimis* means "so small as to make accounting for it unreasonable." Keep in mind that if employees can exchange points for cash, it would be reasonable to account for the cash, which wouldn't be *de minimis.* As far as the company-branded items you refer to, items valued at $100 or less have been recognized as excludable *de minimis* benefits, but if the value is more than that, it needs to be included in employees' gross income.

Q *In our workplace, employees work seven-hour days. We provide 15-minute breaks in the morning and afternoon and one hour for lunch. Some employees have expressed a desire to work through lunch and leave an hour earlier. Is that legal?*

A Under federal law, the answer is yes. Under state law, the answer is maybe. The federal Fair Labor Standards Act (FLSA) does not require employers to offer rest or meal breaks to employees. Therefore, the FLSA is not a barrier to employees working straight through and leaving "an hour early."

However, some states require that employees take a meal break if they work a certain number of hours. Massachusetts, for example, requires a meal break of 30 minutes if employees work six or more hours in a 24-hour period, and they must be relieved of all duties during the break. You aren't required to pay employees during legitimate meal breaks lasting more than 20 minutes. (Note: The FLSA states that since you've elected to provide 15-minute rest breaks, you must pay employees for them.) So it all depends on your state. The U.S. Department of Labor's (DOL) guide to state laws addressing this issue is available at www.dol.gov/whd/state/meal.htm.

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