

## Service

## Labor &amp; Employment

## Employers' Selection Criteria Must Undergo a Reasonable Accommodation Analysis Even if Justified by Business Necessity

On November 17, 2011, the Equal Employment Opportunity Commission (EEOC) issued an informal opinion letter in response to an inquiry by the State of Tennessee concerning students who cannot obtain jobs requiring a high school diploma or equivalent because of learning disabilities that prevented them from meeting end-of-course assessment standards. The EEOC, citing the Americans With Disabilities Act, As Amended (ADAAA) and its regulations, imposed a two-step process the employer must follow in order to comply with the statute: First, the employer must prove that the high school diploma requirement is justified by business necessity, and secondly, even if it is so justified, prove that the applicant could not perform the job with a reasonable accommodation.

Under the ADAAA and relevant regulations, when any selection criterion results in the exclusion of an individual or class of individuals on the basis of a disability, that criterion must be validated as job related for the position in question and consistent with business necessity, that is, “it accurately measures the ability to perform the job’s essential functions (i.e., its fundamental duties).” The burden is upon the employer to demonstrate the requirement meets this standard. Even if the employer can demonstrate the criterion meets the high standard of business necessity, “an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation. This means that the employer must determine whether a particular applicant can, with or without a reasonable accommodation perform the job’s essential functions. This requirement can be satisfied “ by considering relevant work history and/or by

allowing the applicant to demonstrate an ability to do the job's essential functions." Of course, there is no obligation under the statute to prefer the applicant with the disability over others who are better qualified for the position.

### **What This Means to You**

Although this opinion is consistent with well-established interpretations of the Americans with Disabilities Act and ADAAA, it is a reminder that the ADAAA and the pertinent regulation impose upon the employer the obligation to look beyond its general hiring criteria to examine the impact of those criteria upon a class of individuals. If there is such impact, the employer must demonstrate that the impact is justified by business necessity and then examine in each hiring decision whether the individual at issue is nevertheless qualified with a reasonable accommodation.

### **Contact Info**

Should you have questions regarding this opinion, please contact your Husch Blackwell attorney.

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