Diabetes Liability Issues in the Workplace

By Mark A. Lies II and Karen M. Osgood

INTRODUCTION
According to the Centers for Disease Control, diabetes affects 8.3% of the U.S. population. In 2010, 1.9 million adults aged 20 years or older were newly diagnosed with diabetes, and between 2005–2008, it is estimated that 35% of U.S. adults aged 20 years or older had pre-diabetes. Diabetes can lead to serious health complications, including but not limited to kidney failure, non-traumatic lower-limb amputations, blindness, heart disease and stroke, and it is the seventh leading cause of death in the United States. It is also well recognized that obesity is identified as a leading factor in the development of this disease. This article will discuss this disease in the context of the workplace and how it may require an employer’s response under several state and federal laws.

DIABETES
Initially, most food we eat is turned into glucose, or sugar, that our bodies use as fuel. The pancreas is an organ that creates insulin, which helps glucose penetrate cells in our bodies. A person who has diabetes either does not make enough insulin, or does not utilize insulin as well as the individual should, resulting in high levels of blood glucose.

In addition, there are various forms of diabetes:

• Type I diabetes develops when the body’s immune system destroys cells that produce the hormone insulin. Risk factors for Type I diabetes are autoimmune, genetic or environmental. Type I diabetes accounts for approximately 5% of all diagnosed cases of diabetes, and usually strikes children and young adults;

• Type II diabetes usually begins with insulin resistance. As the need for insulin rises, the pancreas gradually loses its ability to produce it. Type II diabetes accounts for about 90–95% of all diagnosed cases in adults, and is associated with older age, obesity, family history of diabetes, history of gestational diabetes, impaired glucose metabolism, physical inactivity, and race/ethnicity; gestational diabetes is a form of glucose intolerance during pregnancy; and, other types of diabetes that result from specific genetic conditions, surgery, drugs, malnutrition, infections, and other illnesses, and account for 1–5% of all diagnosed cases.

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MEDICAL TREATMENT
To survive Type I diabetes, patients must deliver insulin by injection or a pump. Those with Type II diabetes may be able to control the disease through diet, exercise, losing weight, and taking oral medication, which requirements may frequently change. Some individuals may need insulin to control their glucose levels. Women with gestational diabetes must be treated during pregnancy and potentially alter their diets. After pregnancy, 5–10% of women with gestational diabetes develop Type II diabetes. It is incumbent on any diabetes patient to live a healthy lifestyle, such as eating well, being active, and monitoring their blood sugar levels. Many individuals with diabetes have additional health issues that require treatment, such as blood pressure and cholesterol irregularities.

Medical expenses for people with diabetes are twice as high as those without diabetes, and according to the Centers for Disease Control, direct medical costs per year in the United States are estimated at $116 billion.

EMPLOYER RESPONSE
An employer may employ a person with diabetes without ever knowing it. However, for some individuals their diabetes may constitute disability under the Americans with Disabilities Act (ADA), that requires a reasonable accommodation. For others, they may need time off from work in the form of leave under the Family and Medical Leave Act (FMLA). There are additional concerns under the Occupational Safety and Health Act, as well as state Workers’ Compensation laws. The following discussion highlights an employer’s general obligations under these applicable statutes.

A. Family and Medical Leave Act. Under the FMLA, an employer that is subject to the Act and whose employees qualify for leave under the Act, may be required to provide an employee up to twelve (12) weeks of unpaid leave for the employee who has developed a “serious health condition” as a result of diabetes or to allow that employee, based upon a physician’s certification, leave to provide care and support to an immediate family member who has developed a “serious health condition” resulting from diabetes. In that case, the employer must comply with the Act regarding appropriate notifications and documentation, particularly relating to return to work. A qualified individual entitled to leave may take it in blocks of time, on a reduced schedule, or intermittently. Employees who exercise these rights may not suffer adverse action for utilizing such leave.

Americans with Disabilities Act. Under the ADA, a qualified employee with a “disability” constituting a significant impairment of a major life activity cannot be discriminated against in his/her employment. This protection includes an employee who currently has a disability, has a history of a disability or is perceived by the employer to have such a disability. Thus, even if an employee currently has his or her diabetes under control and there are no present serious side effects, the condition may still be a disability since it was substantially limiting in the past.

In the context of diabetes, the employer can have several potential liabilities under the ADA. Initially, the employee’s diabetes could require the employer to accommodate the employee with leaves of absence for treatment, or to entertain requests for modifications to work activities because of the employee’s inability to perform certain work functions or need for accommodations to perform the essential functions of his job (e.g., allowing the employee to take frequent breaks to test their insulin levels, keeping food at their workstations, or even working from home). Such requests for accommodation must be entertained as part of the “interactive process,” and must be given if reasonable. An employer who believes a request is not reasonable would have to show that the request poses an undue hardship. There are no mandatory accommodations under the law, however, each request must be considered on a case-by-case basis determined on the facts and circumstances particular to that employee’s situation.

An employer who has knowledge that an employee has diabetes generally may not ask the employee about his medical condition or require the employee to have a physical examination, unless the employer reasonably believes that diabetes is affecting the employee’s ability to do his job, or that the employee may pose a direct threat to safety of the employee or other employees.
because of the condition. For example, if the diabetes has affected the employee’s vision and the employee can no longer safely operate a forklift, the employee may no longer be qualified to operate the equipment and could pose a safety hazard to the employee and to co-employees, that is, a direct threat.

In addition, the employer could be at legal risk if the employee were to claim that the employer refused to hire the employee, terminated or otherwise took an adverse employment action, or failed to provide other employment benefits to an existing employee because the employer was aware of the employee’s history of a diabetes-related disability or a perception of a disability related to diabetes when no such disability in fact existed.

B. OSHA. OSHA has no regulation that specifically deals with diabetes. However, OSHA requires employers to protect employees against hazards likely to cause serious injury or death. While OSHA does not permit employers to require screening for diabetes, it does suggest that voluntary disclosure is permissible if an employee’s diabetes might be aggravated by safety hazards that may exist in certain classifications for jobs. Since, under OSHA, the employer has a duty to protect employees against safety and health hazards, to the extent that the diabetes-related health conditions may prevent an employee from safely engaging in work activities that require compliance with certain OSHA regulations, the employer may not permit the employee to continue to engage in such work.

C. Workers Compensation. Under workers’ compensation laws, the employer is legally responsible to provide benefits to an employee who sustains an injury or illness that “arises out of and in the course of employment,” or where a non-work related pre-existing condition is aggravated by a work-related injury. Since diabetes is not typically a hazard that “arises out of the employment,” the employer would in most cases not be responsible for worker’s compensation benefits if an employee develops diabetes in the course of their employment. However, if the working conditions aggravated an employee’s pre-existing diabetes by working in certain environments (e.g., extreme heat) or in jobs requiring strenuous physical exertion and the employee sustained a work related injury, there is potential liability. Such a claim would need to be established through expert testimony.

CONCLUSION

If the employer becomes informed of the facts relating to an employee’s diabetes and responds in a reasonable manner as outlined above, the employer will be able to properly respond to this condition to enable an employee to perform the essential functions of their job, as well as to limit its potential legal liability. The following recommendations should be considered:

• develop written employment law policies that clearly identify that the employer is aware that employees may have such health conditions and that the employer will be responsive to employee requests for leave, assistance or accommodations or other benefits that may arise under the FMLA, ADA, OSHA, worker’s compensation and other laws
• conduct documented training for supervisory employees to be aware of these employee rights and to communicate employee requests for leave, assistance or accommodations or other benefits that may be made to appropriate Human Resource representatives in a timely manner for response
• conduct documented training for employees to make them aware of their rights under these laws and how to communicate their requests for leave, assistance or accommodations or other benefits to their supervisors in a timely manner
• when issues arise whether an employee is entitled to leave, assistance or accommodations or other benefits that such requests are considered on a case-by-case basis through the interactive process with the employee and the process is documented
• where issues arise as to whether an employee is no longer “qualified” to perform his job duties because of a health condition or whether the employee may constitute a “direct threat” to his safety or that of other employees, that a timely investigation of all the facts and circumstances is conducted, together with the interactive process, with appropriate documentation, to ensure that the employee has not been subjected to adverse action in violation of these employment laws.


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