

## JOB ROTATION AND THE ADA

Under the Americans with Disabilities Act (“ADA”), an employer has a duty to provide reasonable accommodation to any “qualified person” with a disability. To be a “qualified person,” the employee must be able to perform the “essential functions” of a position, with or without reasonable accommodation.

One issue that may arise, particularly in the manufacturing area, is whether an employer must excuse a disabled production employee from a job rotation system when the employee can perform some, but not all, of the jobs in that rotation system. Some courts have found that a job rotation requirement is an essential function of the position and have ruled for the employer. However, in a recent decision, *Turner v. Hershey Chocolate USA*, the court found in the circumstances of that case that the issue of whether a job rotation requirement is an essential function should be decided by the jury.

In *Turner*, Janet Turner worked at Hershey’s Reading, PA plant between 1985 and 2001, most recently as an inspector of York Peppermint Patties. During her employment, she began to experience back problems, some of which required surgery. In 2001, in an effort to decrease the likelihood of repetitive stress injuries, Hershey began a rotation system, which required inspectors to change positions hourly, to alternate hourly between sitting and standing, and to use both their left and right arms. After Turner refused to participate in this rotation system because of her back problems, plant management concluded that she could not continue her employment as an inspector because participation in the rotation system was “essential” to preventing injuries to all inspectors. Shortly thereafter, Turner went on disability leave, and was eventually terminated in July 2003 pursuant to the collective bargaining agreement because she had been absent from work for twenty-four consecutive months.

Turner then sued under the ADA, alleging that she could have performed her job if Hershey had exempted her from the rotation system and claiming that Hershey violated the ADA by not offering her that “reasonable accommodation.” Although the trial court found for the employer, the appellate court held that Turner had presented enough evidence to allow the jury to decide whether job rotation was an essential function of Turner’s job. The appellate court relied in particular, on the evidence that (1) the written job description for the position contained no reference to rotation; (2) the collective bargaining agreements made no reference to the “requirement” that employees rotate through job tasks; and (3) that the positions in question did not (initially) require employees to perform the function of rotating.

In a similar decision from 2001, *Kiphart v. Saturn Corp.*, a different appellate court found that a jury could reasonably conclude that job rotation was not an essential function of a job when (1) the rotation requirement was not found in some job descriptions; (2) the job rotation requirement was not contained in the collective bargaining agreement; and (3) the evidence showed that employees frequently did not fully rotate or even swapped tasks among themselves to satisfy personal preferences (with the knowledge of management).

As these two decisions indicate, courts will analyze any job-rotation system on a case-by-case basis to determine whether the rotation is truly an “essential function” of the job. Companies may be able to protect their systems from disability-related challenges by formalizing their systems, incorporating the rotation requirements into job descriptions, including the requirements in any collective bargaining agreement, and enforcing the requirements on a uniform basis. If you wish to discuss this issue further, please contact your VSSP attorney.

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# NEW TRAVEL DOCUMENT REQUIREMENTS ON THE HORIZON

The Intelligence Reform and Terrorism Prevention Act of 2004 mandated that the U.S. Secretaries of Homeland Security and State develop and implement a plan to require United States citizens and foreign nationals to present a passport or other appropriate security, identity or citizenship document when entering the United States. This effort, known as the Western Hemisphere Travel Initiative, is aimed at strengthening border security and facilitating entry into the United States by legitimate travelers. Through this effort, the United States government is also trying to reduce the market in stolen documents, as well as thwart passport identity theft.

## *What is the Western Hemisphere Travel Initiative?*

The Western Hemisphere Travel Initiative will require all travelers, including United States citizens, to and from the Americas, the Caribbean, and Bermuda to have a passport or other accepted document that establishes the bearer's identity and nationality to enter or re-enter the United States. This is a change from prior travel requirements.

## *Who will the Travel Initiative affect?*

The travel document initiative will affect all United States citizens traveling within the Western Hemisphere, who will now be required to carry a passport or other accepted document. It will also affect certain foreign nationals who currently are not required to present a passport to travel to the United States, including Canadian citizens, citizens of Bermuda, and Mexican citizens.

The Western Hemisphere Travel Initiative will not affect travel between the United States and its territories. United States citizens traveling between the United States, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa will continue to be able to use established forms of identification to board flights and for entry.

## *When will the Travel Initiative be implemented?*

As described in the proposed implementation plan, subject to a period of initial public comment, the Initiative will be rolled out in phases. The government's proposed timeline is as follows:

- December 31, 2006 – Passport (or acceptable document) requirement applied to all air and sea travel to or from Canada, Mexico, Central and South America, the Caribbean, and Bermuda.
- December 31, 2007 – Passport (or acceptable document) requirement extended to all land border crossings as well as air and sea travel.

## *How do I get a passport?*

United States citizens can visit the State Department's travel website [www.travel.state.gov](http://www.travel.state.gov), or call the U.S. National Passport Information Center: 1-877-4USA-PPT; TDD/TTY: 1-888-874-7793. You should allow yourself a sufficient amount of time to apply for and receive your passport in advance of travel. Please allow six weeks for processing of your passport application. If you need to travel urgently and require a passport sooner, please visit <http://www.travel.state.gov> for additional information.

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ANY FEDERAL TAX ADVICE CONTAINED IN THE FOREGOING IS NOT INTENDED OR WRITTEN BY THE PREPARER OF SUCH ADVICE TO BE USED, AND IT CANNOT BE USED BY THE RECIPIENT, FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON THE RECIPIENT. THIS DISCLOSURE IS INTENDED TO SATISFY U.S. TREASURY DEPARTMENT REGULATIONS.

**VORYS, SATER, SEYMOUR AND PEASE LLP**

This BULLETIN is provided by Vorys, Sater, Seymour and Pease LLP. For more information, please contact your VSSP attorney or Mary Ellen Fairfield at 614-464-6335, or [mefairfield@vssp.com](mailto:mefairfield@vssp.com).