

# **Employer Responsibilities Under the Americans With Disabilities Act**

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# What we will cover

- Overview of the ADA:
  - Who is a covered employer?
  - Who is a qualified individual?
  - What is an actual disability?
- How to engage in the interactive process to determine if accommodation is reasonable.
- How to identify and prevent discrimination and harassment.

# Essential terms

- Covered Employer.
- Disability.
- Limits major life activities.
- Qualified individual.
- Essential job functions.
- Reasonable accommodation.



# Who is a covered employer?

- All employers with 15 or more employees.
- Includes private sector, local and state governments, employment agencies, and labor unions.



# Application process

- ADA prohibits employers from—
  - Asking applicants if they have a disability or asking questions about the severity of a disability.
  - Requiring a medical examination BEFORE extending a job offer.

# Medical examinations

- May NOT require applicants to undergo medical examinations until after a job offer is extended.
- May require medical examinations IF everyone working in that job classification is required to undergo a medical examination.
- If withdraw offer based on medical examination, must show that reasons were job related and supported by business necessity AND that no reasonable accommodation existed.
- May NOT require current employees to undergo medical examinations unless job related and supported by business necessity.
- All medical information must be kept confidential.

# What is a disability?

- With respect to an individual—
  1. A **physical or mental impairment** that **substantially limits** one or more **major life activities** of such individual;
  2. A **record** of such an impairment; or
  3. Being **regarded** as having such an impairment.



# Is the individual a person with an actual, current disability?

1. Does the person have a **physical or mental impairment**?
2. Does the impairment affect one or more of his or her **major life activities**?
3. Is the effect a **substantial limitation**?



# Major life activities

ADA creates two lists of “major life activities.”

1. General list.
2. Major bodily functions.

**Statute requires a broad interpretation.**

**“Includes but not limited to” language in both.**



# General list of major life activities

- Caring for oneself.
- Performing manual tasks.
- Seeing.
- Hearing.
- Eating.
- Sleeping.
- Walking.
- Standing.
- Lifting.
- Bending.
- Speaking.
- Breathing.
- Learning.
- Reading.
- Concentrating.
- Thinking.
- Communicating.
- Working.



# Major bodily functions

- Immune system.
- Normal cell growth.
- Digestive.
- Bowel.
- Bladder.
- Neurological.
- Brain.
- Respiratory.
- Circulatory.
- Endocrine.
- Reproductive functions.

# One “major life activity” is enough

- A person’s impairment meets the definition of disability if it substantially limits person in **just one major life activity**.
- The person is not excluded from coverage simply because person is **not** substantially limited in **other** major life activities.
  - In other words, a person still has a disability even if he or she is able to do many other things.



# Substantially limits

- Old standard was “significantly restricted.”
- Congress decided that was too narrow.
- Changed new standard to “substantially limits.”



# Substantially limits

- The individual must be substantially limited as compared to most people in the general population.
- Should be construed broadly in favor of expansive coverage.
- Involves fact-specific analysis.



# Substantially limiting

- “Episodic” or cyclical impairments, or impairments that go into remission.
  - Are considered disabilities if they would substantially limit a major life activity **when active**.
  - Examples: cancer, epilepsy, depression, bipolar disorder, post-traumatic stress disorder (PTSD), other psychiatric conditions.



# Mitigating measures

- Congress **explicitly rejected** Supreme Court's holding that mitigating measures must be considered in determining substantial limitation.
- Under ADA, employers must consider how the impairment affects the person **before** or **without** the mitigating measure.



# Exception

- You **shall** consider the effect of **ordinary eyeglasses and contact lenses**.
  - Defined as “lenses that are intended to fully correct visual acuity or eliminate refractive error.”
  - If the employee can’t see well without them but can see well with them, then vision impairment is not “substantially limiting.”
- These are distinguished from **low vision devices**, defined as “devices that magnify, enhance, or otherwise augment a visual image.”



# Flip side of mitigating measures

- Employer or employment agency **cannot** consider an applicant's uncorrected vision as a job qualification.
  - In other words, must consider the applicant's vision **with** glasses or contacts **unless** the requirement is “job related and consistent with business necessity.”



# Is the individual a person with a record of a disability?

- Past history of a genuine disability.
- Misclassified as having a disability.
- The record or misclassification has to meet the three elements of an actual disability: impairment, major life activity, substantial limitation.



# Has the person been regarded as having a disability?

- Either the individual has an impairment, but—
  - Impairment doesn't substantially limit a major life activity, **or**
  - Impairs a major life activity because of other people's attitudes, **or**
  - Doesn't have an impairment, but is treated as having one.



# Has the person been regarded as having a disability?

- An employee must prove—
  - The person was subjected to adverse treatment.
  - Treatment was because of a physical or mental impairment, regardless of whether—
    - Impairment is actual or perceived (whether or not it really exists).
    - Impairment limits or is perceived to limit a major life activity.



# Has the person been regarded as having a disability?

- Exception: Impairments that are minor and transitory (6 months or less).
  - Example: common cold
- An individual who is “regarded as” a person with a disability is not entitled to reasonable accommodation.
- Limited to prohibition on discrimination and harassment.



# What about mental impairments?

- Irritability?
- Depression?
- Stress?
- Bi-polar disorder?
- Attention deficit disorder?
- Sleepiness?



# Mental impairments

- Court have ruled these as mental impairments:
  - Mental illness.
  - Intellectual disability.
  - Depression.
  - Bipolar disorder.
  - Post Traumatic Stress Disorder (PTSD)
  - Generalized anxiety.
- EEOC guidance indicates **stress alone** does not qualify as impairment.



# If there is a disability, what then?

- Determine if the employee is a qualified individual.
- Identify whether a reasonable accommodation exists.



# Qualified individual

- Can perform **essential functions** **with** OR **without** reasonable accommodation.
- Has skills, education, experience, or other job-related requirements of employment.



# Essential job functions

- Employer's judgment to be considered.
- Job descriptions (written before interviewing or hiring).
- Reason job exists is to perform that function.
- Limited employees available to perform that function.
- Function is highly specialized and employee was hired to perform that function.



# Essential job functions (cont.)

- Amount of time spent on the job performing that function.
- Consequences of not requiring the disabled employee to perform the function.
- Terms of a collective bargaining agreement.
- Work experience of past employees in the job.
- Work experience of current employees in the job.



# Qualified issues

- *Carroll v City of Stone Mountain*, 544 Fed. Appx. 926 (11th Cir. 2013)
  - Court held that police officer was—
    - Suffering from PTSD and could not yet return to work.
    - Not capable of meeting essential function of job and therefore was not “qualified.”
  - Termination was not discriminatory.
  - Eleventh Circuit affirmed grant of summary judgment in favor of employer.

# Qualified issues

- *Stragepede v. City of Evanston, Ill.*, --- F.3d --- (7th Cir. July 31, 2017)
  - Court held that employee of water works was—
    - Suffering from traumatic brain injury.
    - Returned to work, but employee had difficulty completing tasks and locating houses.
    - Fact issue existed as to whether employee was capable of meeting essential function of job and therefore was “qualified.”
    - Jury returned \$225k verdict in favor of employee.
  - Seventh Circuit affirmed jury verdict.

# Essential job functions for MOST jobs

- Physical attendance.
- Arriving at work on time.
- Ability to handle reasonably necessary stress.
- Work reasonably well with others.
- Ability to work independently.
- Ability to stay awake.



# Other essential functions

- Ability to work full-time or overtime.
- Ability to work a specific shift.
- Ability to work rotating assignments.
- Ability to travel.
- Standing or walking.
- Oral communication skills.
- Lifting.
- Manual dexterity.

Note: With physical “essential functions,” employer may rely on doctors’ notes that show limitations considered “essential” to employer.



Employee is a qualified individual  
with an actual disability.

**Now what?**



# Response to request for accommodation

- Generally prompted by request from employee.
- ADA does not require employers to speculate about accommodation needs.
- EEOC guidance suggests accommodation should be provided **without** a request if employer:
  - Knows employee is disabled.
  - Knows employee is experiencing workplace problems due to disability.
  - Knows disability prevents employee from requesting a reasonable accommodation.

# Interactive process

- Appropriate accommodation may be clear and obvious in certain situations.
- If not obvious, employer must engage in informal “interactive process” to identify whether there is a reasonable accommodation.
- Once put on notice that individual has a disability, duty to engage in interactive process is triggered.
- Intended to be a dialogue between employer and employee to identify a reasonable accommodation.
- Failure to engage in the interactive process—even if there is no reasonable accommodation—may violate ADA.

# Reasonable accommodations

- Definition:
  - Any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.



# Reasonable accommodations

- Job restructuring.
- Part-time or modified work schedules.
- Reassignment to vacant position.
- Acquisition or modification of equipment or devices.
- Allowing for additional bathroom breaks.
- Unpaid leave.



# General requirements for accommodations

- Employer must know there is a need for accommodation.
- Must allow employee to perform essential job functions.
- If, after the accommodation is made, the employee still can't perform essential job function, then ADA claim fails.
- Must relate to major life activity impaired by disability.
- Employee may offer suggestions, but decision is ultimately up to employer.



# What's reasonable is up to employers

*Stewart v. Happy Herman's Cheshire Bridge, Inc.*,  
117 F.3d 1278, 1286 (11th Cir. 1997).

“A qualified individual is not . . . entitled to the accommodation of his choice, but rather to a reasonable accommodation.”



# Unreasonable accommodations

- Eliminates essential job function from employee's responsibilities.
  - *Woodruff v. School Bd. of Seminole County*, 304 Fed. Appx. 795, 800 (11th Cir. 2008): "An accommodation is not reasonable, and thus, not required, if it does not enable the employee to perform the essential functions of her job."
- Places undue burden on employer (significant expense or difficulty in implementing).



# Eliminating essential functions

- Not required to eliminate **essential functions**.
- Essential functions are fundamental job duties of the employment position the individual with a disability holds or desires.

29 C.F.R. § 1630.2(n)(1).



# Undue hardship exception

- A requested accommodation imposes **undue hardship** when it requires significant difficulty or expense to the employer.
- An employer doesn't have to allow leave when it can demonstrate that the accommodation would impose an undue hardship on the operation of its business.



# Factors to consider

- Cost of the accommodation.
- Overall financial resources of the **facility or entity**.
- Type of operation.
- Effect of the accommodation upon the operation of the facility.

# Unreasonable accommodations

- Directly threatens health or safety of employee requesting it or other employees. 29 C.F.R. § 630.2(r).
- Requires other employees to work harder or requires the employer to “bump” another employee to another position.
- Hiring another employee to perform disabled employee’s job functions.
- Indefinite leave.



# Permanent light duty (or any permanent exemption from work)

- ADA does **not** require permanent light-duty work.



# Telecommuting

- ADA does **not** require permanent telecommuting.
- EEOC guidance acknowledges most jobs have essential duties that can only be performed in the workplace.
- *Credeur v. State of La.*, 860 F.3d 785 (5th Cir. 2017)—telecommuting was not reasonable accommodation for lawyer even though employer allowed telecommuting for several months after kidney transplant.

# EEOC:

## No maximum-leave policies

- Employer has an obligation to assess each requested accommodation on a case-by-case basis.
- EEOC says employers may not apply a policy under which employees are automatically terminated after they have been on leave for a certain period of time, unless—
  - There is another effective accommodation or
  - Granting the additional leave would cause an undue hardship.



# EEOC:

## No-fault policies are problematic

- No-fault attendance policies are those where employees are subject to discipline for reaching a certain number of absences, regardless of the cause of the absences.
  - Verizon paid \$20 million to settle an EEOC lawsuit alleging a no-fault attendance policy adversely affected persons with disabilities.
  - Sears entered into a similar settlement.



# Intermittent leave

- Courts disfavor intermittent leave under the ADA where attendance is important to the employer.
- Courts have addressed the issue of intermittent leave under the ADA by asking whether attendance is an essential function of the job.
- Courts say that an employer who needs reliable workers need not accommodate unpredictable absences by granting unplanned, intermittent leave.

# ADA medical documentation

- ADA allows broader medical certifications than the FMLA.
- ADA also allows fitness-for-duty examinations when the employee appears unfit for work.
- Use a tailored letter for these procedures with a GINA disclaimer.



# ADA medical certifications

- ADA allows inquiries into the nature and extent of a person's condition, provided they are job related, so that employer can determine—
  - Whether employee has a disability.
  - Whether employee is a qualified person with a disability.
  - What, if any, reasonable accommodation employer may need to provide.



# Preventing discrimination and harassment

- Have anti-discrimination and harassment policy in place.
- Train managers and employees on anti-discrimination and harassment policy.
- Know what can be asked during an interview.

# Questions?

