ADA and Employment

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Ten ADA Centers
Funded by the National Institute on Disability and Rehabilitation Research

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Agenda

- Structure of the ADA
- ADA definition of disability
- Pre employment, pre-offer do’s and don’ts
- Reasonable accommodation
- Undue hardship
- Legal trends
- Resources
Structure of the ADA

Title I: Employment

*Applies when business/organization has 15 or more employees.*

Title II: State and Local Governments

Title III: Private Entities

Title IV: Telecommunications

Title V: Miscellaneous

*Plus, many states have comparable laws, that apply when a business/organization has fewer than 15 employees*
Definition of Disability

An individual who

- has
- has a record of
- is regarded as having

a physical or mental impairment that substantially limits a major life activity
ADA
Examples 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
More Major Life Activities

Major bodily functions

• Functions of the immune system
• Normal cell growth
• Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
Substantial Limitation of Major Life Activity

Is major life activity \textit{substantially} limited?

- Compare with “most people”
- Should not require extensive analysis
- Congress wants broad coverage
Scenario

Mr. J has cerebral palsy
It takes him about two hours to walk a mile
He is able to walk with no pain

Does he have a disability under the ADA?
Ms. A has diabetes.

The condition requires her to follow a strict regimen.

She must adhere to a stringent diet, eat meals on a regular schedule, and ensure a proper balance between her caloric intake and her level of physical activity.

Does she have a disability under the ADA?
Scenario

B is diagnosed with depression.

They will be fine for months but once or twice a year they becomes severely depressed and has difficulty sleeping and concentrating.

The depression usually lasts a week.

Does B have a disability under the ADA?
ADA and Mental Disorders

One in four adults.

Most common: depression, bipolar disorder, panic, obsessive-compulsive, post-traumatic stress, generalized anxiety, schizophrenia, eating disorders, attention deficit hyperactivity disorder, autism, and Alzheimer’s disease.
The ADA Protects People who have a Record or a History of a Disability

- X was diagnosed with bi-polar disorder when she was in college. She spent two months in a hospital.
- Five years later she applies for a job.
- The employer knows about her medical history and doesn’t hire her because of concerns about absenteeism and insurance premiums.

*X is protected under the ADA*
Before a Job Offer

Disability-related questions are prohibited:

• On application forms
• In job interviews
• In background or reference checks
Before a Job Offer

Questions are prohibited regarding:

- Nature or severity of disability
- Condition causing disability
- Prognosis
- Treatment
Focus on applicant’s ability to perform the job!
Permissible Interviewing Inquiries

Please describe how you would do the job tasks.

Please demonstrate doing the job tasks.

*Ask all applicants in the job category to do this…except*
Permissible Interviewing Inquiries

- Employer may ask a particular applicant with a disability to describe or demonstrate how he would perform a function even if don’t ask other applicants.

- If employer could reasonably believe that person will have difficulty performing job function because of known disability.
How is a Disability “Known”

- It’s obvious (person uses a wheelchair).
- Person shares the information.
Permissible Interviewing Inquiries

- Whether an applicant can meet the employer's attendance requirements.

- About applicant’s illegal use of drugs. (But **not** legal use of drugs, e.g. legal medication.)
Permissible Pre-offer Inquiries

- May ask applicants to voluntarily "self-identify" as individuals with disabilities for purposes of the employer's affirmative action program.
Natasha, it’s nice to meet you. Thanks for your interest in the job. It wasn’t on your job application but when you came in with your seeing eye dog I realized you are blind…..(cue the questions)…
During a Job Interview

I have a few questions:

1. Are you blind from birth or is it more recent?
2. Can you see at all or are you fully blind?
3. Do you expect that your sight will improve?
4. How will you get to work?

Not okay to ask these questions.
I have a few questions:

1. Please describe how you will perform the work duties that are on the job description.

2. The job requires a lot of computer work, will you need any particular software or equipment?

Okay to ask these questions.
When to disclose that you have a disability?

- Not required to unless you need a reasonable accommodation.

- Suggestion: On the job….request an accommodation before work performance slips. Employer does not have to rescind discipline.
... Reasonable Accommodation

Modifications or adjustments

1. Job application process.
2. The work environment, or the manner, circumstances under which the position is performed.
3. That enable equal benefits and privileges of employment.
Mr. G is deaf. He applies for a job and is granted an interview.

He asks the employer to provide a sign language interpreter for the interview.

Is this the employer’s responsibility?
RA Examples

• Provide qualified readers and interpreters
Sign Language Interpreting
Look at person who is deaf (not interpreter!)

Interviewer (Hearing)

Interpreter

Applicant (Deaf)
Sign Language Interpreting
Look at person who is deaf (not interpreter!)

Interviewer (Hearing)
Interpreter
Applicant (Deaf)
Sign Language Interpreting in Group

Interpreter

Applicant (Deaf)
Using Video Remote Interpreting

Interviewer (Hearing)  Interpreter  Applicant (Deaf)
Using Video Remote Interpreting

Interpreter

Applicant (Deaf)
RA Examples

• Provide qualified readers and interpreters

• Obtain or modify equipment
Telephone Hands-free Headset

Enlarger
Assistive Listening Devices
Amplify Sound for an Individual
More RA Examples

- Provide qualified readers and interpreters
- Obtain or modify equipment
- Part-time or modified work schedules
Ms. M has a history of depression. She’s been hospitalized in the past. She’s able to do her job but is struggling privately.

Her psychiatrist wants to see her twice a week for monitoring and medication fine-tuning.

The only times available are Tuesdays and Thursday at 2:30 pm.

Ms. M tells her supervisor she’ll come to work early, stay late or do some of the work at home on weekends.

What issues does this raise?
More RA Examples

• Provide qualified readers and interpreters
• Obtain or modify equipment
• Part-time or modified work schedules
• Modify policies
ABC Agency has a “no pets” policy.

An employee with a epilepsy has a seizure alert dog. Does the employer need to modify its policy?
More RA Examples

- Provide qualified readers and interpreters
- Obtain or modify equipment
- Part-time or modified work schedules
- Modify policies
- Leave
Complications Concerning Leave as a Reasonable Accommodation

1. Is the leave needed so the person can continue working in the future?

2. Will the leave be an “undue hardship” for the employer.

3. How much time must the employer provide?
Complications Concerning Leave as a Reasonable Accommodation

4. Employee or representative must request the leave (or request more leave).

5. Employee or representative should maintain on-going communication with employer, do not drop the ball!

More RA Examples

• Meet with supervisor more frequently
• Structured feedback
• Partitions/work station set up
• Organizational tools (lists, post-it notes, highlighter pens, etc.)
RA Examples During Employment

• Reallocate **marginal** job functions

• Employee must be able to do “essential job functions”
What makes a job function “essential”?

- Person was hired to perform that task (magazine editor must be able to edit, bus driver must drive)
- Percentage of time on the function
- Consequence of not performing the task
- Number of employees available who could do the task
Undue Hardship

An employer does not have to provide an accommodation that would be an “undue hardship.”

What the heck does that mean?
Undue Hardship

An action that is unduly

- Costly (equipment)
- Extensive (indefinite leave)
- Substantial
- Disruptive (modify work schedule)
But if we allow one employee to do it then everyone will ask for it

Make an individual assessment of

1. this person’s disability
2. need/request
3. employer’s resources/situation

at time of request
How to communicate concerning reasonable accommodation

- Usually the person with the disability makes the request

- The person with the disability and employer together identify an appropriate accommodation - *informal interactive process*

- The accommodation must be effective, not necessarily the one the person requested
How to communicate concerning reasonable accommodation

Be positive!

- I’m really enjoying my job, I would be more productive if .....  
- Emphasize benefit to employer as well as yourself  
- Have ideas and suggestions
Can Employer Require Documentation of a Disability?

Yes - when

1. The disability is not obvious
   and/or
2. The need for the accommodation is not obvious
Scenario

An employee tells her employer that she has asthma and needs an air filter.

Can the employer request that the employee provide documentation?
Scenario

Yes, the employer can request documentation that the person has asthma and whether it is a disability (substantially limits the major activity.)

The documentation should identify the problem in the workplace that requires an air filter or any other reasonable accommodation suggestions.
Job Performance Issues

An employer is not required to lower quality or production standards because of an employee’s disability.

The purpose of reasonable accommodation is to support the employee to do the job.
Job Performance Issues

- An employer may evaluate the job performance of an employee with a disability the same way it evaluates any other employee’s performance.
Performance Issues

- Last year N received an “above average” performance evaluation.
- This year N had to deal with medical issues concerning her disability.
- The quantity and quality of Nicole’s work were not good and she received a “below average” rating.
- Does ABC Agency have to raise Nicole’s rating because the decline in performance was related to her disability?
Direct Threat

- An individual who poses a direct threat to the health or safety of self or others may be excluded
Direct Threat

- Direct threat means “significant risk” of substantial harm that cannot be eliminated or reduced through reasonable accommodation.
Direct Threat

To determine direct threat:

(1) Duration of risk
(2) Nature and severity of potential harm
(3) Likelihood that potential harm will occur
(4) Imminence of potential harm

Is there a reasonable accommodation that will eliminate or reduce the direct threat?
Scenario

Marco has epilepsy. He works at ABC Agency's cafeteria waiting on customers at a counter and transporting baked goods. One day while at the counter Marco “began to feel a seizure coming on.” (his words). He left the sales area and went to the kitchen holding area. During the seizure he knocked a tray of cookies off a cart. After the seizure Marco said he could continue work but his supervisor, Meiying sent him home and told him to take the week off.
Three days later Marco received a letter from ABC Agency “with regret we inform you that your employment is terminated immediately. We can’t take the risk of another incident at the cafeteria. You might hurt yourself and other employees or customers. What if you had a seizure behind the counter and shattered the glass?”

Has the ABC Agency complied with the ADA?
Legal Trends

Failure to engage in interactive process

Equal Employment Opportunity Commission

EEOC v. Bank of America

Alleging BoA violated the ADA by firing a visually impaired worker after one day on the job and did not engage in interactive process to discuss possible reasonable accommodations.
Legal Trends

Leave

EEOC - Sears

- Employer's policy of terminating employees unable to return to work after 12-week workers' comp leave violated RA obligation. Settled for $6.2 million.
Legal Trends

Reassigning Marginal Job Functions

Restructuring Job

EEOC settlement agreement D&H Company

• $190,000 to settle, employee who had seizures requested another worker conduct competitor gasoline price surveys while she handled that employee's in-store duties
Legal Trends

Reassigning Marginal Job Functions

Restructuring Job

AutoZone – federal court jury

- $415,000 verdict, sales manager with back and neck disability required to do cleaning tasks that violated his medical restrictions and resulted in an injury and severe physical pain.
Legal Trends

Restructuring Job/Part-time work

EEOC - National Airline

• $600,000 settlement. Employer required employees who could not work full-time to go out on a leave and then fired them when their leave ran out
Legal Trends

Failure to Transfer to Another Position

EEOC - Apparel Retailer

Employee who worked at storeroom requested transfer to available customer service representative position as a reasonable accommodation due to shoulder injury
Ivana knows that Anna has failing eyesight due to macular degeneration. Anna does not want to acknowledge her vision problem, even though Ivana points out mounting errors that seem connected to the deteriorating vision. Ivana knows Anna is capable of good work, but is uncertain how to handle this situation.

What do you recommend?
Scenario

Berta does not disclose her chronic fatigue syndrome, even when she begins having performance problems. Ivana counsels her about the performance problems, but they persist. Ivana gives Berta a written warning and tells her that if her work does not show improvement within the next month, she will receive a second written warning. At this point, Berta tells Ivana about her chronic fatigue syndrome and asks for the written warning to be rescinded.

Must Ivana rescind the written warning?

What might be reasonable accommodation for this situation?
Scenario

- Darren performs his job well. Over the past month, he is observed talking to himself. He speaks loudly but does not make threats or swear. Some coworkers who are uncomfortable complain to Ivana about Darren’s behavior. Darren’s job does not involve customer contact. Ivana meets with Darren who says that his behavior is a result of a psychiatric illness.

- What are some of the issues here?
Scenario

- Josephine has a mental illness. She has frequent disputes with Ivana. She makes personal phone calls on company time, despite being told to stop. She routinely walks away from the job to smoke a cigarette despite being told that she can do so only on breaks. She taunts Ivana and disobeys her instructions regarding safe use of equipment.

- Ivana suspects that Josephine’s behavior may be the result of a mental illness. May Ivana (ABC Agency) discipline Josephine for insubordination?
Resources

JAN (Job Accommodation Network)
800-526-7234
www.askjan.org

New England ADA Center
800-949-4232 voice/tty
www.newenglandada.org

Equal Employment Opportunity Commission
800-669-4000 voice
800-669-6820 TTY
www.eeoc.gov