



THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT: COMPLIANCE, INCLUSION, AND REASONABLE ACCOMMODATION

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TRAINING AGENDA

- o The ADA
- o The ADAAA
- o Reasonable Accommodation
- o The Interactive Process
- o Mental Impairments
- o Drugs and Alcohol

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Purpose of the ADA (AA)

No employer may discriminate against a qualified individual on the basis of a disability in the terms and conditions of his employment

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Areas of Application

- o Recruiting, advertising, and job application procedures
- o Hiring, promotion
- o Demotion, transfer, layoff and termination
- o Job assignments, classifications
- o Leaves of absence, sick leave or other leave
- o Fringe benefits
- o Selection and financial support for training
- o Employer-sponsored activities
- o Any other term or privilege of employment

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Covered Employers

Any person engaged in an industry affecting commerce, who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.

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"Disability" Defined

A "disability" is:

1. A physical or mental impairment that substantially limits one or more of a person's major life activities;
2. A record of such an impairment; or
3. Being regarded as having such an impairment.

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Associational discrimination

ADA offers protection to individuals discriminated against because of their relationship/association with a person with a disability (e.g., rejected applicant because spouse is disabled)

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"Impairment"

1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; OR
2. Any mental or psychological disorder.

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Things that are NOT impairments

- Homosexuality
- Transvestitism
- Transsexualism
- Voyeurism
- Exhibitionism
- Pyromania
- Kleptomania
- Continuing use of illegal drugs (unless currently in treatment)

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History of the ADA

- Focus was on whether individuals were legally "disabled"
- Not much litigation on whether individuals were impaired; instead, argued about whether the impairment:
 - "Substantially limited" any
 - "Major life activity"
- *Sutton and Toyota*

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Why amend the ADA?

- **Congress intended the ADA definition of disability to be construed broadly but courts were finding too many people outside the ADA's protections**
- **Congress wanted to make it much easier for persons with a wide range of impairments to establish disability without much analysis**

SO: The ADAAA was passed effective 1/1/09.

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Major changes—

- Definition of "disability" has been expanded to include major bodily functions;
- "Major life activities" list expanded and not exhaustive
- Rejects high standards used by EEOC and Supreme Court to define a "substantial limitation"
- Impairment can be a disability even if **episodic or in remission**
- "Regarded as" definition rewritten and expanded
- Mitigating measures no longer considered

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Change to "Substantially Limits"

- Impairment need not prevent, significantly restrict or severely restrict performance of a major life activity
- EEOC Rule: Determination of substantial limitation is a common-sense assessment of person's ability to perform a major life activity as compared to most people in the general population**

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Still not "substantially limiting"

- EEOC Rule says that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities
- Examples: common cold, seasonal or common influenza, sprained joint, minor and non-chronic gastrointestinal disorders, broken bone that is expected to heal completely, appendicitis, seasonal allergies that do not substantially limit person even when active

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"Qualified"

- Person must have the requisite skill, experience, education, licenses, etc. AND
- Be able to perform the essential functions of their job with or without reasonable accommodation**
- Determined based on a person's ability to do the job *at the time the employment decision is made*

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Are there any impairments that will consistently be disabilities?

EEOC Rule identifies the following:

- Deafness, blindness, mobility impairments requiring use of a wheelchair, mental retardation, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

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"Regarded as" disabled

If employer makes employment decision (e.g., hiring, demotion, promotion, discipline, annual evaluation, compensation, termination) *based on individual's actual or perceived impairment*, employer has regarded individual as having a disability and must defend its actions

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Goal of all of these changes is to broaden definition and make it much easier/quicker to find disability without a demanding analysis

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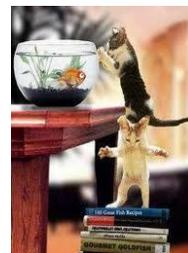
Reasonable Accommodation

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How Requests for Accommodation Should Be Handled ...

With the employee's participation and input, the employer must make a reasonable effort to determine an appropriate accommodation!

The Goal: To be able to show a good faith effort was made by the employer.



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Keep in mind...

Employer is not obligated to seek out or guess at possible disabilities and/or accommodations.



Employee has an obligation to make the disability and the need for accommodation known.

EXCEPTION: If an employer is going to take an adverse job action based on a **perception** that the person is physically or mentally unable to do the job.

NOTE: No magic words are required. An employee only must make the employer aware of a difficulty or conflict between the employee's medical condition and the employer's rules, requirements, and job expectations.

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"Reasonable Accommodation"

Any modification or adjustment:

1. To the job application process that enables a qualified individual with a disability to be considered for an employment position;
2. To the work environment or the manner in which the job is performed that enables a qualified individual with a disability to perform the essential functions of the position;
3. That would enable an employee with a disability to enjoy **equal** benefits and privileges of employment as a similarly situated employee without a disability

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Examples of "Reasonable Accommodations"

- Making existing facilities readily accessible for use by disabled employees
- Job restructuring
- Part-time and modified work schedules
- Re-assignment to a vacant position
- Acquisition or modification of equipment or devices
- Adjustments of exams, training materials, and policies

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When Reasonable Accommodations Are Not Required:

Employers do not have to make an accommodation if it will create an undue hardship on the operation of the business.

- Factors in determining if an undue hardship exists:
 - Nature and net cost of accommodation
 - Financial resources of the employer
 - Number of employees
 - Number of facilities
 - Accommodation's impact on employer's operations and other employees

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What accommodations are not reasonable?

- Eliminating **essential functions** of job
- Making other employees perform essential functions for employee
- Modifying work schedule if adversely affects other employees' ability to perform jobs
- Changes for the mere convenience or personal benefit of an employee
- Requests for employer to purchase personal items such as eyeglasses, hearing aids and walking canes

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What are "essential" job functions?

- A function is "essential" if:
 - the position exists to perform the function;
 - there are a limited number of employees who can perform the function; or
 - the function is highly specialized.
- Evidence of the essential nature of a function includes:
 - the employer's judgment;
 - the consequence of not requiring someone to perform the function;
 - a written job description;
 - the amount of time spent performing the function; and
 - the work experience of people in that position.

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WARNING!

Additional time off is often a "reasonable accommodation" required by the ADAAA.



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Leave from Work: How Long is Reasonable?

- "There is no bright-line rule defining the maximum duration of leave that can constitute a reasonable accommodation." *Cleveland v. Federal Express Corp.*, 2003 U.S. App. LEXIS 24786 (6th Cir. 2003).
- 6 months leave could be reasonable for a nurse to treat lupus. *Cleveland*, 2003 U.S. App. LEXIS 24786.
- 6 months leave was not a required accommodation for a police officer in a small town. *Epps v. City of Pine Lawn*, 353 F.3d 588 (8th Cir. 1999).
- EEOC says "leave" means holding the job open, unless it would be an undue hardship

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Definite vs. Indefinite Leave

A pattern of continually asking for more and more leave arguably constitutes a request for indefinite leave.

- EEOC's Position: If an employee cannot provide a fixed date of return, the employer can deny such leave **only** if it can show undue hardship **because of this uncertainty**.
- Courts have been a bit more clear, holding that an employer does not have to provide indefinite leave as a reasonable accommodation.

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Light Duty as a Reasonable Accommodation

- *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006):
 - The ADA does not require *creating* a new sedentary position for an employee with a mobility impairment
 - As a result, the ADA does not require an employer to keep an employee in a created light duty position for any longer than it chooses
- But must make temporary status of position clear during interactive process

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Other Possible Accommodations

- o Change in supervisor? Generally not reasonable.
- o Providing an assistant or a job coach? Sometimes reasonable.
- o Rescinding discipline? Generally not reasonable.
- o Working at home? Depends.
- o Modified work schedule? Generally reasonable to an extent.
- o Shift change? Depends.
- o Irritant-free environment? Depends.
- o Parking space / commuting assistance? Depends.
- o Reassignment? Yes, for current employees, not applicants or former employees. However, employer does not have to bump any employee from a job to create a vacancy, promote the employee, or reassign them to a job for which they are not qualified.

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When Responding to an Accommodation Request

- o Document every conversation with the employee about the accommodation, and every option offered
- o Develop a procedure/policy for requesting an accommodation
- o Maintain employee confidentiality...especially with medical information
- o Never say "we can't do that," "we can't afford that," or "we don't make exceptions" without confirmation

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Responding to accommodation requests

- o You **can** ask for the employee's doctor's certification of health-related work restrictions.
- o Make plans based on what the employee tells you.
- o Employee must cooperate in the "**interactive process**" and cannot unreasonably refuse requests for information or accommodations offered.
- o **Document all discussions and options!**

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HR best practices in light of ADAAA:

- o Leave room for exceptions and individual treatment.
- o Educate supervisors and managers on the need to accommodate.
- o Begin interactive process immediately when asked.
- o Review job descriptions.
- o Reconsider past accommodation denials.
- o Make sure there is no retaliation.

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ESPECIALLY DIFFICULT: Mental Impairments:

Defined broadly in regs to include "emotional or mental illness."

Per se disabilities include:

- o Autism
- o Major depression
- o Bipolar disorder
- o PTSD
- o Obsessive compulsive disorder
- o Schizophrenia

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Drugs & Alcohol

"Qualified individual with a disability" does not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

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Drugs & Alcohol

- o **Safe harbor:** "[This provision] shall [not] be construed to exclude as a qualified individual with a disability an individual who—
- o **has successfully completed a supervised drug rehabilitation program** and is **no longer engaging in the illegal use of drugs**, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- o **is participating** in a supervised rehabilitation program and is no longer engaging in such use; or
- o is erroneously regarded as engaging in such use, but is not engaging in such use"

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Drugs & Alcohol

"Whether an employee is drug-free on the day of his termination is not dispositive of whether he has a 'current' addiction."

- o *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 856 (5th Cir. 1999)
- o *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997)
- o *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011) (one month ago too recent)

Question to ask: Was the drug use "sufficiently recent to justify the employer's reasonable belief that drug abuse remained an ongoing problem?"

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Factors to Consider

Per the Fifth Circuit, look at:

- (1) the level of responsibility entrusted to the employee;
- (2) the employer's applicable job and performance requirements;
- (3) the level of competence ordinarily required to adequately perform the task in question; and
- (4) the employee's past performance record.

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Direct Threat

Direct threat means a significant risk to the health, safety or well-being of individuals with disabilities or others when this risk cannot be eliminated by reasonable accommodation.

- o "Qualification standards" for a position may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."
- o Factors to consider include:
 - o the duration of the risk;
 - o the nature and severity of the potential harm;
 - o the likelihood that the potential harm will occur; and
 - o the imminence of the potential harm.

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No Retaliation!

No employee will be retaliated against for complaining in good faith of disability based harassment or discrimination, or for pursuing rights under the ADAAA.

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questions

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