

THE AMERICANS WITH DISABILITIES ACT: PRACTICAL GUIDANCE FOR EMPLOYERS

Jennifer Cluverius, Esq. and Kamri Barber, Esq.

October 26, 2022

AGENDA

- What constitutes a disability under the ADA?
- ADA requirements/legal framework
- Reasonable accommodations
- Accommodation documentation
- Mental health accommodations
- Pregnancy related accommodations
- Return to work/fitness for duty
- Case examples/recent EEOC press

ADA REQUIREMENTS

- The Americans with Disabilities Act (“ADA”) is a federal statute that protects “qualified individuals with a disability” from discrimination in employment opportunities.
- **ADA requirements**: An employer can violate the ADA by:
 - Making inappropriate “disability-related inquiries” and requiring medical examinations at improper times;
 - Discriminating on the basis of a disability (including individuals with a “record” of a disability or who are “regarded” as disabled);
 - Failing to provide “reasonable accommodations” to qualified individuals with a disability.



WHAT CONSTITUTES A DISABILITY UNDER THE ADA?

- A physical or mental impairment that “substantially limits” a “major life activity” compared to the rest of the population. Referred to as an “actual disability”
- “Major life activities” include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
- “Minor” or “transitory” conditions are not disabilities



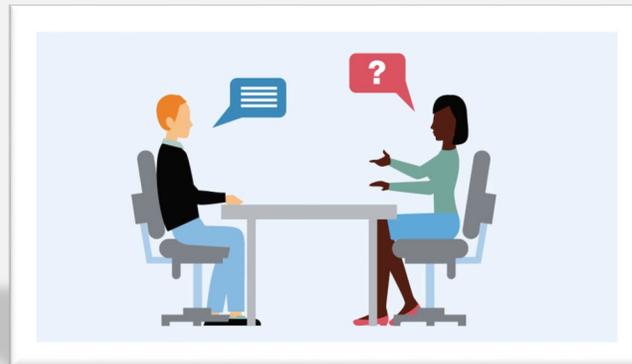
DEFINITION OF A DISABLED PERSON

- A disabled person is one who:
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment
- “Record of” means the individual has a history of, or has been misclassified as having a mental or physical impairment that substantially limits one or major life activities, even though the person does not have a current disability.
- “Regarded as” means someone has an actual or perceived impairment that is not transitory or minor



LIMITATIONS ON DISABILITY-RELATED INQUIRIES

- Limitations based on the time the question is asked.
- A “disability-related inquiry” can be anything that would elicit information regarding a disability.
- **Pre-offer:** no disability-related inquiries allowed (but you can always ask about ability to perform job functions)
- **Post-offer, pre-employment:** inquiries allowed, but if info screens out an applicant, must be “job-related and consistent with business necessity” (i.e. fitness for duty)
- **During employment:** no inquiries unless “job-related and consistent with business necessity”

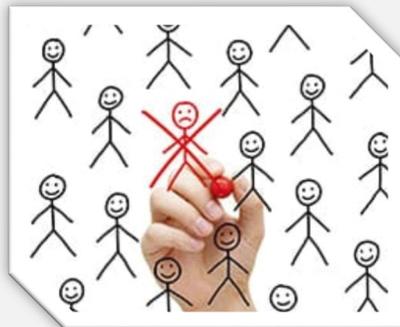


DISABILITY-BASED DISCRIMINATION

- The burden shifting analysis for disability-based discrimination claims is outlined *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny.
- Step 1: A team member bringing a discrimination case must show that:
 - ✓ He is a member of a protected class;
 - ✓ He suffered an adverse employment action;
 - ✓ He met his employer's legitimate performance expectations at the time the adverse action occurred;
 - ✓ He was treated differently than employees outside his protected class.
- Step 2: The burden shifts to the employer to produce:
 - ✓ A "legitimate and nondiscriminatory reason for the termination"
- Step 3: The burden shifts back to the employee to show that:
 - ✓ The employer's legitimate and non-discriminatory reason is a "pretext for unlawful discrimination."

DISABILITY-BASED RETALIATION

- A team member can also bring a retaliation claim if he or she has engaged in some protected activity and was subsequently subjected to an adverse employment action.
- A team member can establish a claim of retaliation by proving the following:
 1. She engaged in protected activity;
 2. She suffered an adverse action;
 3. A causal link exists between the protected activity and the adverse action.
- Documentation is necessary to refute any allegations that an employment decision was made because the employee engaged in protected activity.



FAILURE TO ACCOMMODATE

- To establish a *prima facie* failure to accommodate claim under the ADA, an employee must establish that:
 - (1) he was a qualified individual with a disability within the meaning of the ADA;
 - (2) the employer had notice of his disability;
 - (3) he could perform the essential functions of his position with reasonable accommodation; and
 - (4) the employer refused to make such accommodations.
- Documentation is essential to show the employer engaged in the interactive process and offered a reasonable accommodation (& to demonstrate undue hardship).



REASONABLE ACCOMMODATIONS

- Employers have a duty to make “reasonable accommodations” for “qualified individuals” with a disability who need them to perform their jobs.
- May include “modifications or adjustments” that would enable the person to perform essential functions
- Goal is to provide opportunities to attain the same level of performance and allow the disabled person to enjoy equal benefits and privileges of employment



THE INTERACTIVE PROCESS

- Interactive, ongoing process between employer/employee
- The applicant or employee starts the process by expressing a need for an accommodation- use of phrase “reasonable accommodation” not required
- Duty to engage in process may also arise during the discipline process if performance-related issue appears related to a medical condition
- Process can involve obtaining medical certification
- Whether an accommodation is “reasonable” can depend on cost, business operations, and the nature of the job
- Employer does not have to provide employee’s choice of accommodation, but can provide any accommodation that enables the employee to perform essential functions
- It is never “reasonable” to remove an “essential function”
- If available, accommodation must be provided unless it would present an “undue hardship”



REASONABLE ACCOMMODATION EXAMPLES

- Making facilities readily accessible
- Restructuring a job by reallocating or redistributing marginal job functions
- Altering when or how an essential job function is performed
- Part-time or modified work schedules
- Obtaining or modifying equipment or devices
- Modifying examinations and training materials
- Reassignment to a vacant position
- Additional job-protected leave time even if FMLA is exhausted/unavailable

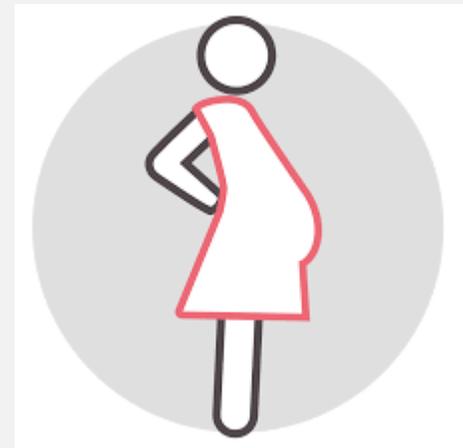
MENTAL HEALTH ACCOMMODATIONS

- Like physical impairments, mental health conditions such as PTSD, major depression, bipolar disorder, schizophrenia, obsessive compulsive disorder, and other mental and emotional illnesses are covered under the ADA.
- Employees with mental health conditions that would, if left untreated, “substantially limit” their ability to concentrate, interact with others, communicate, eat, sleep, care for themselves, regulate their emotions, or do any other major life activity may be entitled to a reasonable accommodation.
- Types of accommodations for employees with mental health conditions
 - Telecommuting
 - Part-time hours
 - Breaks during the day
 - Permitting food and beverages at work stations
 - Making work area modifications such as offering private offices
 - Removing non-essential job functions



PREGNANCY RELATED ACCOMMODATIONS

- Pregnancy Discrimination Act prohibits employers from discriminating against women based on past, current, or future pregnancy or pregnancy-related medical conditions.
- While pregnancy itself is not a disability, pregnancy-related conditions such as gestational diabetes, hypertension, and other conditions that constitute a disability under the ADA.
- Like any other individual with a qualifying medical condition, employers must provide pregnant employees with reasonable accommodations for any pregnancy-related disability.
- Some reasonable accommodations for pregnancy-related conditions could include:
 - Allowing the employee breaks to sit or rest
 - Temporarily reassigning the employee to other tasks
 - Permitting the employee to telecommute
 - Modifying the employee's schedule to attend appointments



REASONABLE ACCOMMODATION SCENARIOS

Did the associate request a reasonable accommodation under the ADA?

- “I will not be in for at least three days because I have a raging cold.”
- “I need to be out of work for the next two weeks because I have been diagnosed with pneumonia.”
- “I am on crutches due to a sprained ankle and will not be able to come to work for at least a week.”
- “I’m having trouble getting to work at my scheduled start time because of treatments I’m getting from my doctor.”
- “I need six weeks off to get treatment for a back problem.”
- “I am having difficulty getting to work on time due to morning sickness as a result of pregnancy.”
- “I need to get a new chair because my current chair is uncomfortable.”

UNDUE HARDSHIPS

- Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.
- Undue hardships can arise where there is a financial difficulty on part of the employer, or where the accommodation is unduly extensive, substantial, or disruptive to the business
- Undue hardships are to be assessed on a case by case basis.



RETURN TO WORK/FITNESS FOR DUTY

- When an employee takes leave under the Family and Medical Leave Act (FMLA) as their reasonable accommodation, an employer can require that the employee submit a fitness for duty certification in order to return to work.
- An employee is considered “fit for duty” when they are able to perform their essential job functions, whether that be with or without a reasonable accommodation.
- A fitness for duty certification can be obtained from the employee’s treating physician.
- An employer may require that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job.



FITNESS FOR DUTY EXAMS

- Because fitness-for-duty exams may reveal an employee's disability, they are regulated by the ADA.
- Under the ADA, an employer may only require a fitness for duty exam if the exam is job-related and consistent with a business necessity.
- Typically, this standard is met where an employer has a reasonable belief that (1) the employee's condition may prevent the employee from performing the job's essential functions, or (2) the employee poses a direct threat to his or her own safety or to the safety of others.
- In determining whether there is a "direct threat" employers should factors including the duration of the risk, the nature and severity of the harm, and the likelihood that the harm will occur.



APEDJINOU V. INOVA HEALTH CARE SERVICES

United States District Court, E.D.Virginia (Dec. 2018)

- Plaintiff was a nurse for a large health care system. At the job, she felt a sharp pain in her right arm while helping a patient into an upright position. When she returned to work, plaintiff submitted a “return to work status form,” which said she could not lift or carry anything weighing more than five pounds, and she could not use her right arm, which was in a sling.
- Plaintiff’s unit could not accommodate those restrictions because that unit provided inpatient care. For the safety of the patients and the nurse, a nurse providing inpatient care must be able to use both arms freely and lift more than five pounds.
- Employee Health was tasked with searching for “light-duty assignments” for plaintiff until she could return to her regular position. The first light-duty assignment was a thirty-day assignment in the Medical Library. Plaintiff agreed to follow up with Employee Health and provide documentation of her work status after medical appointments.
- Because the Medical Library’s assignment was available only for the first thirty days, Employee Health found a second light-duty assignment in the Pre-Surgical Services Department. However, plaintiff was sent home because she had worked overtime that week.
- Because plaintiff was sent home, the Employee Health located a third light-duty assignment as a telesitter, in which plaintiff would monitor patients via computer. Plaintiff accepted the assignment for thirty-six hours a week and reaffirmed her responsibility to follow up with Employee Health and provide documentation of her work status after medical appointments.
- However, plaintiff also started to be both argumentative and rude in her interactions, and started missing shifts, and repeatedly failed to follow up with Employee Health.

APEDJINOU V. INOVA HEALTH CARE SERVICES, CONTINUED

- As plaintiff had not given an update on her work status, HR started to draft a letter of warning. Before it was sent, the plaintiff reached out to Employee Health with an update that still put her on restrictions.
- Because of the ongoing issues, HR still sent the previously drafted letter, which advised plaintiff that she had failed to respond to calls from supervisors and from Employee Health and that plaintiff had failed to comply with requirements for light-duty. It also warned plaintiff that it was mandatory that she contact a particular manager to discuss her status by a certain date; otherwise, it would be assumed she did not wish to continue employment.
- Plaintiff failed to meet any of the stated requirements and was terminated.
- She sued under the ADA alleging it (i) denied her reasonable accommodations for her disability, (ii) discriminated against her on the basis of her disability, and (iii) retaliated against her because she requested a reasonable accommodation.
- The case was dismissed on summary judgment. Specifically, the court found that plaintiff did not show that she could perform the essential functions of her job with reasonable accommodation, a necessary element of her claim. The court found that undisputed evidence showed (i) that plaintiff could not lift more than five pounds and could not use her right arm and (ii) that an inpatient nurse on her unit had to be able to use both of her arms and to be able to lift more than five pounds for everyone's safety.
- Plaintiff argued only that the employer could have continued to provide her with light-duty work because light-duty assignments remained available. The court rejected that argument because it was not reasonable to require the employer to “wait indefinitely” for plaintiff to recover.

EEOC PRESS RELEASES

Walgreens Sued by EEOC for Pregnancy and Disability Discrimination (9.28.22)

- The EEOC has filed suit against the pharmacy and retailer, alleging that it violated federal law when it refused to allow a pregnant worker with disabilities to take emergency leave to seek medical attention, forcing her to quit.
- According to the EEOC's lawsuit, a pregnant customer sales associate—who suffered from diabetes and hypoglycemia—was spotting and asked the store manager to allow her to take unscheduled, emergency leave to seek medical attention. Although the store manager and team lead could have covered for her, the store manager told the pregnant employee she could not leave until they found a replacement for her and were unable to find one. The store manager then told the pregnant employee she had already asked for too many accommodations. The customer sales associate had no option but to resign, per her doctor's advice. She miscarried later that day.
- The EEOC contends that such alleged conduct violates Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, which prohibit discrimination on the basis of pregnancy-related conditions and disability, and which also prohibits retaliation.
- “Employers must consider an employee’s request for reasonable accommodation, including a request for leave,” said Rudy Sustaita, regional attorney for the EEOC’s Houston District Office.

EEOC PRESS RELEASES

EEOC Sues Keystone RV for Disability Discrimination (9.29.22)

- The EEOC has filed suit against Keystone RV Company, for failing to accommodate and for firing an employee with a disability.
- Keystone refused to give less than a week of unpaid leave to accommodate an employee with a disability who needed surgery.
- Keystone refused to excuse the employee's absences due to medical appointment he was attending for his upcoming surgery. When the employee exceeded the number of attendance infractions allotted, Keystone terminated him.
- EEOC asserts that the Company's failure to accommodate the employee was intentional and demonstrated a reckless indifference to the employee's federally protected rights.
- EEOC's regional attorney, Kenneth L. Bird, stated "The ADA requires an employer to provide employees with disabilities reasonable accommodations that will allow them to perform their essential job duties. "An employer cannot hide behind its policies, even those concerning attendance, if suspending that policy would permit an employee to do his job without undue burden to his employer."

KEY TAKEAWAYS

- Recognize potential need for an ADA accommodation. Remember the request for an accommodation does not have to be made using any specific language.
- Always keep documentation of any requests or concerns an employee raises with regard to a potential disability.
- Involve Human Resources in the process immediately.
- Be sure to cooperate with any follow-up requests from Human Resources and or the accommodations team.

QUESTIONS?

Jennifer Cluverius, Esq. and Kamri Barber, Esq.

Jcluverius@nexsenpruet.com

Kbarber@nexsenpruet.com