



To Accommodate or Not To Accommodate? Americans with Disabilities Act Update

Speakers



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Is this a Big Deal? Yes

- White Collar: 30% have disability (includes mental health and chronic disease)
- 62% of employees with disabilities have “invisible disabilities”
- 21% of employees with disabilities disclose them to their employers’ HR.

ADA Overview

- The ADA protects a “**qualified** individual with a disability who can perform the **essential functions** of the job with or without a **reasonable accommodation**”
- Applies to **applicants** and **employees**

Job Descriptions

- Every job should have a description.
- EEOC/State Agencies always request.
- Must list the essential functions.
- Periodic updates to reflect reality.
- If no job description, the employee gets deference on what the job entails.

Job Descriptions

- Always ensure the job descriptions are ADA/ADAAA compliant:
 - Stationary position v. “stand or sit”
 - Move, traverse v. “walk”
 - Operate, activate, use, prepare, inspect
 - Transport v. “carry weight”
 - Frequency of task—occasionally, seldom, frequently, constantly

What is a Disability?

- Physical or mental impairment that substantially limits one or more major life activities
- “Regarded as” having such an impairment
- “Record of” such an impairment



Actual Disability

- What is a physical or mental impairment
 - Permanent
 - Temporary
- “Substantially” limits
- Major life activities
 - Walking, seeing, hearing, speaking, breathing, performing manual tasks, caring for oneself, etc.



The Gray Areas

- Regarded as disabled
- Record of disability
- Should you ask?



Employer's Obligations

- The employer has two main duties:
 1. Engage in the interactive process
 2. Provide reasonable accommodations



Request for Accommodation

- No magic words or process
- Buzz words?
- Issue spotting
- What do I do if I think someone needs an accommodation, but they do not ask?



Issue Spotting

- I'm late because I have medical treatments
- I need time off because of a back problem
- I can't see that small print on the screen

VS.

- I need a new chair
- My schedule is not working for me
- I need more breaks

Interactive Process

- What does this mean?
 1. Recognize the request
 2. Gather information
 3. Explore accommodations
 4. Agree to an accommodation
 5. Implement the accommodation
 6. Monitor the accommodation
- Individualized inquiry
- Confidentiality
- What should you document?
Everything



What is a Reasonable Accommodation?

- Changes to the work environment
- Enables performance of essential functions
- Enables participation
- Individualized assessment
- Variety of options



Reasonable Accommodation Examples

- Acquiring or modifying equipment
- Job restructuring
- Modifying work schedules
- Working remotely
- Reassignment
- Modifying examinations, training materials, or policies
- Providing readers and interpreters
- Making the workplace readily accessible
- Leave of absence

What is NOT Reasonable?

- Causes an undue hardship
 - Cost of the accommodation
 - Employer's size
 - Employer's financial resources
 - Nature and structure of employer's operation
 - Case by case determination
- Eliminating essential functions
- Indefinite request for leave



Leave as an Accommodation

- What if FMLA (or other job protected leave) expires? Can I terminate?
- Additional leave as an accommodation
 - How long is too long?
 - When can I fill the job?
- When can I terminate and how do I mitigate the risk?

Pregnancy

Pregnancy is a disability under the ADA.

TRUE OR FALSE?



FALSE

Does this mean that employers do not have a duty to accommodate pregnant employees?

Pregnancy

- Absolutely not.
- The ADA intersects with the Pregnancy Discrimination Act (“PDA”) and the Family and Medical Leave Act (“FMLA”).

Pregnancy and the ADA

- While pregnancy is not a disability in and of itself, there are several impairments often caused by or related to pregnancy that courts and the EEOC have found are covered by the ADA:
 - Gestational diabetes
 - Preeclampsia
 - Anemia
 - Sciatica

Pregnancy and the ADA

- Common accommodations for pregnant employees with a temporary disability caused by pregnancy:
 - **Light duty** (a nurse excused from lifting patients while pregnant)
 - **Unpaid leave** (if the employer provides these options to other employees with other types of temporary disabilities)
 - **Option to sit** while working (for standing jobs)
 - **Work from home**
 - **Time off to see the doctor**

ADA Interactive Process for Pregnant Employees

Is a pregnant employee without a pregnancy-related impairment entitled to enter into the ADA interactive process?

ADA Interactive Process for Pregnant Employees

- Technically—NO.
- In practice? It is not a bad idea—particularly in light of the Pregnancy Discrimination Act (“PDA”).
- Start the interactive process.
- It is ok to request documentation of disability if it is not obvious (diabetes, preeclampsia, sciatica)
- Find out what the employee needs to be able to perform essential functions.
- Apply the same procedure to ALL employees without variation.

ADA and the PDA

- PDA prohibits employers from discriminating against female employees or job applicants based on pregnancy, childbirth, or related medical conditions.
- PDA requires employers to treat a pregnant worker with a temporary disability the same as the company treats any other employee with a temporary disability.

Young v. UPS (2015)

ADA and the PDA

- Temporary disabilities following pregnancy (like postpartum depression) can be covered by both the ADA and the PDA.
- If the company is subject to the FMLA (over 50 employees) and the employee's FMLA leave is not exhausted, such a health issue can fall under 3 statutes.

In Practice

- There are a lot of important caveats regarding pregnancy. Some practice tips:
 - Error on the side of caution.
 - While you should not assume someone is disabled (regarded as claim?), it is always prudent to follow interactive process.
 - Always important to document everything and keep all communications.
 - Provide training to all supervisors so that they will know how to respond to pregnant employees.

Medical Use of Marijuana

The ADA requires employers to accommodate medical marijuana use by employees?

TRUE OR FALSE?



Medical Use of Marijuana

FALSE

Under the ADA, marijuana is a Schedule 1 drug deemed unlawful under the Controlled Substances Act.

Thus, the ADA provides no protection for marijuana use. This is still even so in the 9th Circuit (*James v. City of Costa Mesa*, 700 F.3d 394, 397-98 (9th Cir. 2012)).

Medical Use of Marijuana

Does that mean you can fire someone for using marijuana??

Medical Use of Marijuana

- Probably?
- But there are multiple other considerations
... three you should carefully consider.

Medical Use of Marijuana

- What is the underlying disability?
 - While medical marijuana use is not protected under the ADA, the underlying disability may be covered, and a Court could find that an accommodation was required.
 - What prompted the drug test? (Was it retaliatory?)

Medical Use of Marijuana

- Is preemption an issue (this argument has been made but rejected in Connecticut—but we will surely see it again).
- Is there a state law that protects a medical marijuana card holder?
 - Know the law in your state (watch out if you are in Connecticut, Massachusetts, or Rhode Island).

Currently

- All but 17 states have legalized medical marijuana use and ten states and the District of Columbia have passed laws legalizing recreational marijuana.
- Federal law classifies marijuana as a Schedule I illegal substance along with heroin, LSD, and ecstasy.
- William Barr, Attorney General, is an outspoken opponent of marijuana.



To Drug Test or Not To Drug Test?

- Some employers where marijuana is legal are deciding not to test for it.
- No national standard, unlike BAC.
- Marijuana metabolizes differently based upon a number of discrete factors.



- How to reconcile *Noffsinger v. SSC Niantic Operating*, No. 3:16-CV-01938, 2017 WL 3401260 (D. Conn. August 8, 2017) with federal law?
- *Noffsinger* allows for a cause of action to be maintained under Connecticut's medical marijuana law for firing or refusing to hire a user of medical marijuana, even where the individual has failed a drug test.
- Employers in Connecticut and elsewhere will need to review their policies on the enforcement of drug use in the work place.

- In Florida, Section 381.986 of Florida Statutes does not limit an employer's right to maintain a drug-free workplace policy.
- Medicinal marijuana use is legal.
- Thus far, there is no case law addressing this issue, but Florida lawyers recognize potential interplay with the Americans with Disabilities Act.

Massachusetts

- Aug., 2017 – Massachusetts' Supreme Court now the highest court in the nation to apply a general disability anti-discrimination protection to medical marijuana use.
- *Barbuto* – Employee with Chron disease fired for failing a mandatory employee drug test.
- Court rules: Requested disability accommodation not *per se* unreasonable just because in violation of federal law.



Rhode Island

- Rhode Island superior court interpreted Rhode Island's medical marijuana law to prohibit discrimination against medical marijuana users on the basis of their off duty medical marijuana use.
- In *Callaghan v. Darlington Fabrics and the Moore Company*, the court held the state's Medical Marijuana Act, which prohibits discrimination against medical marijuana users, also protects the cardholder's **actual** use of marijuana.
 - Refusal to hire case

States with Employee Protections for Medical Marijuana Users

- Arizona
- Connecticut
- Delaware
- Florida
- Illinois
- Maine
- Massachusetts
- Minnesota
- Nevada
- New York
- Pennsylvania
- Rhode Island



State Protections of Medical Marijuana Users

- Most states with these protections prohibit adverse action against medical marijuana card holders.
- Many also prohibit adverse action based on failed drug tests.
- However, majority of these states do allow discipline for at-work impairment or possession.



Best Practices

- If in doubt, always engage in the interactive process.
- Know your state's laws.
- Keep an eye out for a lot of activity in this area.
The US law is changing in this area.

Questions?

