



NEURODIVERSITY IN THE WORKPLACE: LEGAL CONSIDERATIONS AND BUSINESS STRATEGIES

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WHAT IS NEURODIVERGENCE?

- First used in the 1980s.
- Cleveland Clinic: The term “neurodivergent” describes people whose brains develop or work differently for some reason.
- Stanford School of Medicine “a concept that regards individuals with differences in brain function and behavioral traits as part of normal variation in the human population”.
- There is a spectrum of what is considered “typical”.

EXAMPLES OF NEURODIVERGENT CONDITIONS

Several terms are generally included in discussions of neurodivergence:

- Autism spectrum disorder
- Attention-deficit hyperactivity disorder (ADHD)
- Dyslexia
- Dyscalculia
- Dyspraxia
- Obsessive-compulsive disorder
- Sensory processing disorder
- Tourette's syndrome

WHY ARE DISCUSSIONS OF NEURODIVERGENCE IMPORTANT NOW?

1. Changing demographic makeup of the workforce.
Survey – reported asking for an accommodation:

42% Gen Z **COMPARED TO:** **27%** Millennials **21%** Gen X **13%** Boomers

Bloomberg Law's 2023 Law School Preparedness Survey – asked law students and practicing attorneys whether they identify as neurodivergent:

25% students said yes **WHILE ONLY:** **7%** practicing attorneys said yes

2. Increased diagnosis and therefore increased awareness.
3. Experiment of remote work during COVID (benefits for some populations).
4. Increasing legal challenges: EEOC data from 2023 (most current year) showed there were 488 autism related ADA charges compared to 53 in 2013.



INCREASED AWARENESS

- Greater awareness of neurodivergent conditions among Gen Z workers.
- “ADA Generation” has more of a baseline expectation of inclusion and accommodation.
- Gen Z more likely than any other generation to report having learning and thinking differences.
- Increase in adult diagnosis of neurodivergent conditions.
- COVID-19 and move to remote and hybrid work.

LEGAL OBLIGATIONS

ADA and Other Relevant Statutes:

- Neurodivergent conditions often meet the ADA definition of disability.
- Employers must engage in the interactive process to explore accommodations.

Reasonable Accommodations:

- Examples: Flexible work schedules, modified break times, noise-canceling equipment, written instructions, job coaching.
- “Reasonable” means accommodations that do not impose undue hardship on the employer.

Confidentiality and Sensitivity:

- Medical or diagnostic information shared must be confidential.
- Counsel and HR should ensure all discussions and records comply with privacy regulations.

ADA: KEY ISSUES

- The ADA prohibits discrimination in hiring, promoting, and employment practices for qualified individuals with disabilities and requires reasonable accommodations for individuals with a disability.
- Key terms for analysis:
 - Disability
 - Reasonable Accommodation
 - Essential Functions
 - Undue Hardship

These obligations begin in the hiring process and apply to applicants as well as employees.



DEFINITION OF A DISABILITY

A person with a disability is someone who:

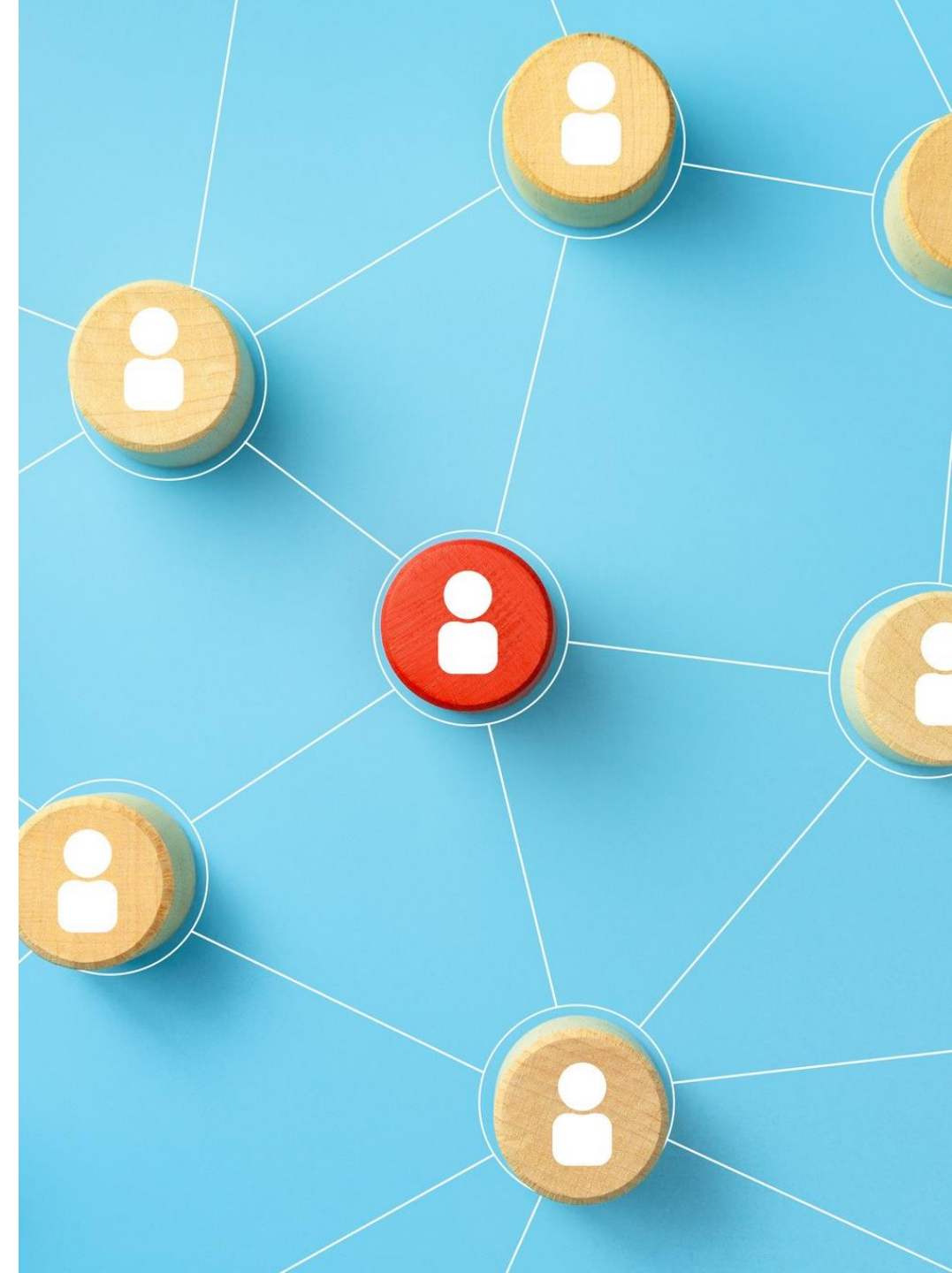
- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such impairment;
- Is regarded by others as having such an impairment;
- To be construed broadly; and
- A mental impairment includes a “mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” ADA regulations include dyslexia, ADHD, and specific learning disabilities as examples.

REASONABLE ACCOMMODATION

- A change to an application or hiring process, the job itself, the way the job is done, or the environment to allow a qualified individual to perform the essential functions of the job.
- An accommodation will be considered reasonable if it does not create an undue hardship or a direct threat.
- Reasonable accommodations include: “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices...and other similar accommodations[.]” 42 U.S.C. § 12111(9).
- Accommodations are not just related to changes in the essential functions of the job. At least one case has examined whether the accommodation (a service dog) mitigated the effects of the employee’s disability by “reducing the pain and hardship of his disability while at work.” Alonzo-Miranda v. Schlumberger Tech. Corp., No. 5:13-CV-1057, 2015 WL 13768973, at *2 (W.D. Tex. June 11, 2015).

ESSENTIAL FUNCTIONS OF THE JOB

- “Qualified” means the employee can perform the essential functions of the job with or without a reasonable accommodation.
- Essential functions are tasks that are fundamental to the role:
 - Whether the position exists to perform these essential functions
 - the number of other employees who are available to perform these duties
 - expertise or skills required
- Employers do not need to eliminate essential functions. If an employee cannot perform the essential functions, the employee is not qualified.





UNDUE HARDSHIP

- “Significant difficulty and expense” to the employer:
 - Not only cost, but changes that are unduly extensive, substantial or disruptive, or would fundamentally alter the nature of the business.
- Undue hardship factors:
 - Nature and cost
 - Financial resources of the facility/size/impact on the facility or covered entity
 - Type of operation (composition, structure, location, workforce)

NEURODIVERGENT CONDITIONS AND THE ADA

- We also know that “neurotypical” vs. “neurodivergent” is a spectrum – there is no one-size-fits-all approach.
- Many neurodivergent conditions will qualify as disabilities under the ADA.
- Employers have a duty to engage in the ADA interactive process and provide reasonable accommodations.
- The conditions are not always visible and will take more awareness to properly address.



NEURODIVERGENT CONDITIONS ARE NOT ALWAYS OBVIOUS

Invisible Disabilities:

- Many neurodivergent conditions do not present with obvious physical signs.
- Employees often develop coping mechanisms or “masking” strategies to blend in.

Stigma and Disclosure Concerns:

- Fear of bias, discrimination, or misunderstanding can lead individuals to conceal their diagnosis.
- Cultural or organizational norms may discourage open discussion of mental or cognitive differences.

Implications for Employers:

- May impact the hiring process and selections.
- Supervisors or managers may overlook the need for accommodations due to a lack of visible indicators.
- Anticipate potential needs for accommodation in advance.
- In-house counsel should be aware of potential risks if requests for accommodations are not taken seriously.

COMMON WAYS NEURODIVERGENCE MAY MANIFEST AT WORK

Communication Differences

- Challenges reading social cues, difficulties with verbal communication, or preference for written instructions.
- May appear blunt or overly direct without intending disrespect.

Organization and Time Management

- Struggles meeting deadlines or adhering to standard schedules (common in ADHD).
- Difficulty prioritizing tasks or keeping track of detailed project requirements.

Sensory Sensitivities

- Discomfort with bright lights, loud noises, certain fabrics, or strong odors.
- Challenges with office structures like open space or glass offices.
- Possible need for noise-canceling headphones, quiet workspaces, or flexible lighting.

COMMON WAYS NEURODIVERGENCE MAY MANIFEST AT WORK

CONTINUED

Focus and Concentration

- Hyper-focus on specific tasks while neglecting other responsibilities.
- Fluctuating levels of productivity or attention throughout the day.

Emotional Regulation and Stress Response

- Might withdraw in high-pressure scenarios or have visible stress responses.
- Difficulty with rapid task-switching or last-minute changes.



RED FLAGS AND PRACTICAL STRATEGIES

Potential Signs for Employers:

- Frequent requests for clarification or repetition of instructions.
- Unusual patterns of interaction or feedback from team members about communication gaps.
- Difficulty with unstructured meetings or open-plan office settings.

Practical Strategies:

- Encourage open dialogue about work styles and preferences.
- Provide optional “quiet zones” or flexible seating arrangements.
- Use consistent, structured communication channels (email recaps, written agendas.)

PITFALLS AND RECENT CASES

Rising EEOC Charges and Lawsuits:

- 488 autism-related ADA EEOC charges filed in 2023; compared with just 53 filed 10 years earlier
- The EEOC has filed at least 12 ADA cases since 2018 involving neurodiverse conditions
- Common allegations:
 - Failure to accommodate (e.g., additional instructions, modified schedules)
 - Discriminatory terminations or rescinded offers

Employer Wins Are Possible:

- If requested accommodations remove *essential job functions* (e.g., providing personal assistants to perform core duties), courts may find in favor of employer

Subway Settlement Example:

- Lack of specific instructions and follow-ups for an employee with autism and ADHD led to termination and EEOC settlement



BEST PRACTICES

Educate and Train Leaders

- Ensure managers understand their obligations under the ADA and how to spot accommodation needs.
- Provide training for managers on recognizing and accommodating neurodivergent traits.

Engage in a Personalized Interactive Process

- Each neurodiverse employee has unique needs; avoid one-size-fits-all approaches.

Reevaluate Hiring and Performance Assessments

- Focus on actual job competencies rather than traditional social norms or communication styles.

NEURODIVERGENT EMPLOYEES CAN DRIVE SUCCESS AT WORK

WHEN A NEURODIVERGENT CONDITION BECOMES A SUPERPOWER

Innovative
thinking and
creativity

Attention to
Detail and
Accuracy

Deep Focus and
Specialization

Strong Problem-
Solving Skills

Logical and
Analytical
Thinking

Resilience and
Determination

High Integrity
and Rule
Adherence

Unique
Communication
and Perspective

Strength in
Repetitive or
Structured Tasks

Passion and
Deep Knowledge
in Specific Skills

KEY TAKEAWAYS

- There is an increased awareness of neurodivergence at work and elsewhere, as well as an accompanying number of legal claims.
- The need for accommodation is not obvious.
- Employers' responsibilities begin before employment.
- The individualized nature of neurodiverse conditions is highly individualized and requires an interactive process.
- Employers should be proactive in training and education.
- The need to accommodate and understand the conditions is expanding and will continue to do so.

RESOURCES

- *The Neurodiversity Edge*, Maureen Dunne.
- The Autism Podcast.
- The Neurodiversity Podcast.
- “Neurodiversity as a Competitive Advantage,” Harvard Business Review, May 2017.



Q&A DISCUSSION

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