



PROGRAM MATERIALS
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An Employer's Obligations in the ADA Interactive Process

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IDENTIFYING EMPLOYER'S OBLIGATIONS AND ENGAGING IN THE INTERACTIVE PROCESS

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Title I of Americans with Disabilities Act

- ❖ Applies to employers with 15 or more employees.
- ❖ Requires employers to provide reasonable accommodations to qualified applicants or employees.
- ❖ A “reasonable accommodation” is a change that accommodates employees with disabilities so they can do the job without causing the employer “undue hardship” (too much difficulty or expense).
- ❖ The focus for employers and courts will be on engaging in the interactive process and providing reasonable accommodations.

Interactive Process

- ❖ In order to determine the appropriate reasonable accommodation, employers and employees must engage in the interactive process.
- ❖ This requires communication and good-faith exploration of possible accommodations.
- ❖ The process is mandatory and both parties have a duty to participate in good faith.
- ❖ An employer who acts in bad faith in the interactive process may be liable if it can be reasonably concluded that the employee would have been able to perform the job with a reasonable accommodation.
- ❖ It's a two-way street: an employee must also make a good faith effort to comply with any of the employer's reasonable requests.

Interactive Process Steps

- ❖ Step 1: Recognize an accommodation request.
- ❖ Step 2: Gather information.
 - ▶ Employee's condition
 - ▶ Limitations
 - ▶ Essential job functions
- ❖ Step 3: Explore accommodation options.
- ❖ Step 4: Choose an accommodation.
- ❖ Document every step!

Step 1: Interactive Process Triggers

- ❖ No magic words!
- ❖ Every time an employee indicates he or she is having a problem and the problem is related to a medical condition, the employer should consider whether that is a request for an accommodation.
- ❖ Other scenarios:
 - ▶ Employee needs to take time off, but isn't eligible for FMLA.
 - ▶ Employee exhausts FMLA leave but needs more time off.
 - ▶ Explanation for absences or performance issues:
 - "I'm sorry I'm making so many mistakes, I'm having a hard time focusing since being on my new medication."
 - "I need to take a lot of bathroom breaks because of my illness, so I'm a little behind on my quota."

Step 2: Gathering Information

- ❖ Employer is entitled to know the individual has a covered disability.
 - ▶ i.e. information that demonstrates employee has a physical or mental impairment that substantially limits a major life activity
- ❖ Employer can require documentation about the disability and limitations from a health care provider.
- ❖ And the duration of any limitations.
- ❖ Review the employee's essential job functions.
- ❖ Employer should specify the information they need from health care providers.

Scenario I

- ❖ Mary tells her manager that she can't work night shift because of a medical condition, but she doesn't want to tell her manager what her condition is.
- ❖ Mary eventually tells human resources she has bipolar disorder.
- ❖ The documentation received from Mary's doctor states "Mary's medication makes her drowsy in the evening and she should not drive until after 9:00 a.m."
- ❖ Mary's doctor refuses to provide the requested information.

Scenario I Con't

- ❖ Interactive process is triggered by Mary informing her manager of a possible need due to a medical condition.
- ❖ Interactive process includes human resources asking for documentation.
- ❖ Here Mary has halted the interactive process.

Scenario II

- ❖ Last year, Joe asked for an accommodation and gave HR a note that he has Parkinson's Disease and the note explained that Joe may have increased dyskinesia due to medication changes, sleep deprivation, etc. Joe again asked for an accommodation due to his Parkinson's Disease, what medical information can the employer ask for?

Scenario II Con't

- ❖ Employer cannot require additional documentation to confirm Joe's diagnosis.
- ❖ But the Employer is entitled to know current functional limitations.
- ❖ If documentation that employer already has does not describe the current functional limitations, can request additional documentation.

Steps 3 & 4: Explore Accommodation Options and Choose an Accommodation

- ❖ Look to past practices.
- ❖ Invite the employee to suggest an accommodation.
- ❖ Ask medical provider for accommodation suggestions.
- ❖ If necessary, conduct an undue hardship analysis.
- ❖ Generally, if more than one effective reasonable accommodation, employer may choose the accommodation, with one exception: leave.

Common Issues:

Drugs & Alcohol in the Workplace

Mental Health

Does the ADAAA Protect Alcoholics?

- ❖ Under the ADAAA, a person may be considered disabled if the person is:
 - ▶ An Active Alcoholic: not in recovery and actively drinking alcohol; or
 - ▶ A Recovered or Recovering Alcoholic
 - A person with a history of alcohol addiction but one who no longer drinks; or
 - A person in a rehabilitation program
- ❖ Not a “per se” disability. An alcoholic is considered disabled when the condition (i.e., impairment) substantially limits him or her in at least one major life activity.

Does the ADAAA Protect Drug Addicts?

- ❖ The ADAAA does protect an individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs.
- ❖ The ADAAA also protects an individual erroneously regarded as engaging in use although the individual is not engaging in such use.
- ❖ **The ADAAA does not protect a current user of illegal drugs.**

Scenario III

- ❖ Jan is a paralegal reporting to five attorneys. Her job is fast-paced and demanding. Over the last six months, her co-workers and management have noticed a significant change in Jan at work.
- ❖ Jan has lost weight. She appears gaunt, weak and tired. She is often reserved. Her mood and attendance are erratic.
- ❖ Jan receives a negative annual performance review. She becomes defensive during the review. In the following days, she is especially tense and reserved at work.
- ❖ One day when Jan reports to work, she is obviously under the influence of drugs. Management instructs her to go home.
- ❖ Jan returns the following day and states that she has an opioid addiction and knows that she needs to seek help. She asks for time off to seek treatment.

Scenario III Con't

- ❖ ADA and FMLA are likely at issue.
- ❖ Employer is not required under either to forget/forgive performance issue(s) including reporting to work under influence.
- ❖ Termination? Perhaps, but MUST consult state law and your own policies.
- ❖ Can Jan demand leave – under FMLA or ADA? Not likely if the policy violation (and state law) would allow for termination.
- ❖ But, if anticipated discipline under state law or policy is less than termination,
 - ▶ then likely could demand leave for treatment under either FMLA (if eligible)
 - ▶ ADA, however, does not cover “current” user so Jan could not demand leave under ADA – but likely should consider

Potential Accommodations for Recovering Addicts

- ❖ May be entitled to reasonable accommodations:
 - ▶ Leave
 - ▶ Modified schedule to attend self-help meetings
 - ▶ Job restructuring
- ❖ Employer not required to tolerate an employee's use at work, poor performance, poor attendance or other misconduct.

Accommodating Medical Marijuana Users: Do Employers Have to?

- ❖ What is best practice?
- ❖ Would suggest some interactive process:
 - ▶ Anticipate further expansion of legislation.
 - ▶ Case law trending the accommodation direction.
 - ▶ Automatic refusals without the interactive process increases risk under ADA or state law equivalent.
- ❖ Growing trend, even at federal level.
- ❖ Legalization is trending nationwide.

Mental Health Issues as Disabilities under the ADAAA

- ❖ Mental Health disorders like depression, bipolar disorder and anxiety disorders are considered to be disabilities under the ADAAA
- ❖ But what about stress?
 - ▶ Apply the definition of “disability.” Is it a physical or mental impairment that substantially limits a major life activity?

Scenario IV

- ❖ Heather is the Executive Assistant to the ABC Company's CEO.
- ❖ In her role, she is privy to highly confidential and sensitive information of the company as well as the CEO and one of her primary duties is safeguarding that information.
- ❖ One week ago, Heather attempted suicide by taking an overdose of prescription medications.

Scenario IV Con't

- ❖ After a hospital stay, Heather is then admitted to a psychiatric facility.
- ❖ During her stay at the facility, Heather informs the company that she will be released in a week and plans to return to her position as the Executive Assistant to the CEO.
- ❖ Both the company and the CEO are very concerned about Heather's judgment after her attempted suicide and her ability to safeguard information, and they do not want her in that role. So, they decide to terminate her employment based on their belief that she can no longer perform the essential functions of her role.
- ❖ ***HAS THE COMPANY VIOLATED THE ADA?***
- ❖ ***DOES THE COMPANY HAVE ANY OTHER OPTIONS AVAILABLE TO ADDRESS ITS CONCERNS ABOUT HEATHER?***

Scenario IV Con't

- ❖ The company has violated the ADAAA by terminating Heather's employment.
- ❖ Recommendation for Employer: Do nothing unless Employer has proof of prior disclosures or improper use of confidential information.
- ❖ Can offer additional time off.

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