

Americans with Disabilities Act

Title I Employment Guidelines

ADAOnline2020 Series
May 12, 2020

PRESENTER:

Julie Ballinger, Southwest ADA Center Affiliate
505.797.8612 juliedballinger@outlook.com

The information herein is intended solely as informal guidance and is neither a determination of legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA or any other law.

1



- **The Southwest ADA Center** (www.southwestada.org) is part of the ADA National Network and serves NM, TX, AR, LA, and OK.
- Each Regional ADA Center focuses on its region's unique needs.
- To find and contact YOUR regional ADA Center:
 - ✓ Go to www.adata.org
 - ✓ Call 1-800-949-4232

The ADA National Network is funded by the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR).

2

Handouts

1. *Title I Employment Guidelines PowerPoint Presentation*
- 1a. *Best Practices Regarding Medical Inquiries In Order To Determine Reasonable Accommodation*
- 1b. *Employee Accommodation Request Form*
EXAMPLE

3

Job Accommodation Network's *Workplace Accommodation Toolkit*

Free online workplace accommodation toolkit provides employers with the tools needed to create a more disability-inclusive and compliant workplace.

- <https://askjan.org/toolkit/index.cfm#>

JAN homepage: www.askjan.org

4

Agenda

- Title I – Employment components
- Who is protected under the ADA
- Important EEOC guidance documents
- Three stages of employment and disability inquiries
- The reasonable accommodation (RA) process
- Determining if you have an ADA issue
- Interactive process
- RA inquires
- Satisfying the RA process requirements
- Direct threat and RA
- Reasonableness vs. undue hardship
- Reassignment and leave as RA
- Qualification, performance, and conduct standards

5

Appendix

- ✓ Types of RA
- ✓ RA P&P Model
- ✓ RA P&P Ingredients
- ✓ Disaster Readiness Planning
- ✓ ADA Technical Assistance Resources

6

Title I – Employment Components

- Who is Protected Under the ADA
- What Entities are Covered by the ADA
 - Employers with 15 or more employees (check for more stringent state/local laws)
 - No discrimination through contract
- Disability Inquiries: Pre-Employment, Post Offer-Pre-Employment, Employment, and Medical Examinations
- What Constitutes a Qualified Individual with a Disability
- Essential **and** Marginal Job Functions and How They Relate to the ADA
- Reasonable Accommodations (Application & Employment)
- Undue Hardship
- Qualification, Performance and Conduct Standards
- Direct Threat

7

Due to only 1.5 hours of training that includes Q&A time:

- ✓ Briefly covering who is protected under the ADAAA but includes great EEOC extensive resources.
- ✓ Limited in covering disability inquiries and the 3 stages of employment but includes a great EEOC extensive resource.
- ✓ Briefly covering qualification, performance & conduct standards but includes a great EEOC extensive resource.

8

Definition of Disability - ADA Amendments Act

Signed September 25, 2008 / Enacted January 1, 2009 / Regulations Effective May 24, 2011
Negates US Supreme Court Rulings that narrowed the definition of disability

The ADAAA retains without amendment the existing definition of the term “disability” **but** clarifies the key words and phrases in the definition. The term “disability” means, with respect to an individual

↗ **who has a physical or mental impairment that *substantially limits* one or more major life activities; or**

↗ **has a record of such an impairment; or**

↗ **is regarded as having such an impairment-even if he or she does not, in fact, have such an impairment (perceived) or the impairment it is minor**

Also covered are individuals who are discriminated against due to their association with a person with a disability.

9

ADAAA - Who is protected?

- The definition of disability = broader coverage & major life activities now includes bodily functions.
- “Substantially limits” to be interpreted consistently with the ADAAA (rejects “prevent or severely restrict” = too demanding).
- Substantially limits = only one major life activity has to be limited.
- Episodic or in-remission impairments covered if substantially limits a major life activity when active.
- Transitory **and** minor = not covered
- Eliminates ‘mitigating measures’ test.
- Individuals who are otherwise qualified and **can prove discrimination** are entitled to relief.

10

For additional information and detail guidance on the ADAAA go to www.eeoc.gov:

Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008

www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Fact Sheet on the EEOC's Final Regulations Implementing the ADA

www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

Final Regulations Implementing the ADA

www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as

The ADA Amendments Act

<http://www.eeoc.gov/laws/statutes/adaaa.cfm>

**Important
EEOC Technical Assistance Guidance**

- **Reasonable Accommodation and Undue Hardship Under the ADA**
www.eeoc.gov/policy/docs/accommodation.html
- **Pre-employment Disability-Related Questions and Medical Examinations**
www.eeoc.gov/policy/docs/preemp.html
- **Disability-Related Inquiries & Medical Examinations of Employees Under the ADA**
www.eeoc.gov/policy/docs/guidance-inquiries.html
- **The ADA: Applying Performance & Conduct Standards To Employees With Disabilities**
www.eeoc.gov/facts/performance-conduct.html
- **EEOC - Employer-Provided Leave and the ADA**
www.eeoc.gov/eeoc/publications/ada-leave.cfm

COVID-19 Pandemic EEOC Resources

UPDATED TECHNICAL ASSISTANCE

[“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”*](#)

- Expands on a previous publication that focused on the ADA and Rehabilitation Act, and adds questions-and-answers on testing, medical exams, and essential workers.

All EEOC materials related to COVID-19: www.eeoc.gov/coronavirus

- Included is a pre-recorded webinar addressing questions arising under any of the EEOC Laws and the COVID-19 pandemic.

[*\(https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=\)](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

13

Is there a disability? How do you know?

3 Stages of Employment & Disability Inquiries

1. Application
2. Post-offer - Pre-employment

EEOC ADA Enforcement Guidance: [Preemployment](#) Disability-Related Questions and Medical Examinations (slide 12)

3. Employment

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of [Employees](#) Under the ADA (slide 12)

We will cover medical inquiries around reasonable accommodations

Confidentiality Requirements - Disability/medical info separate from personnel file

RA Policies & Procedures address each of these 3 stages?

14

Creating A Successful RA Process

Reasonable Accommodations

*EEOC Enforcement Guidance on Reasonable Accommodation and
Undue Hardship Under the ADA*

www.eeoc.gov/policy/docs/accommodation.html

15

The ADA requires reasonable accommodation in three aspects of employment

1. To ensure equal opportunity in the **application process**
2. To enable a qualified individual with a disability to **perform** the **essential functions** of a job
 - ✓ A note regarding **marginal functions elimination**
3. To enable an employee with a disability to enjoy equal **benefits and privileges** of employment

❖ **Handout:** *Employee Accommodation Request Form* **EXAMPLE**

16

Determining If You Have an ADA Issue

Relevant portions of the ADA require:

- ✓ a covered employer;
- ✓ to provide reasonable accommodation;
- ✓ to otherwise qualified individuals;
- ✓ with disabilities;
- ✓ who are employees or applicants for employment;
- ✓ to perform essential job functions or apply for a job;
- ✓ unless to do so would cause undue hardship or is unreasonable.

17

For Each Employee Go Back to the Basics!

- Does the individual have a **Disability**?
- Is the individual otherwise **Qualified**?
 - Meets skill, experience, education & can perform the "essential functions" with or without reasonable accommodation
- Is the accommodation needed **Reasonable** or an **Undue Hardship** to do the essential job functions or to apply for the job?
- Does the accommodation **Remove** application or employment barriers?
- Is the accommodation made being monitored to make sure it **Remains Effective**?

18

Interactive Process

- According to EEOC guidance and case law, the ADA generally requires the employer and employee to engage in a flexible, interactive process in order to identify a reasonable accommodation.
- The employer's obligation to do so is normally triggered by an accommodation request.
- **Courts often rule in favor of the party who tried to engage in this process in good faith, and against the party who did not.**

19

The Interactive Process

- **RA Policies & Procedures**
 - Make sure to include a process to monitor how accommodations are working and how leave as an RA interacts with FMLA.
- Individual **must let employer know** that an adjustment or change is needed for a medical condition.
 - Employer is not required to assume disability.
- Not **obligated to observe** an employee for any behavior that may be disability related, and then decide the employee is disabled.

20

Also - The Interactive Process

- The Request (**No Magic Words**) is the First Step in the **interactive** process between the individual and employer.
 - Can be made **by others** (family member, friend) or by employer or other employee observation.
- Does **not need to be in writing** to start the process.

NOTE: If employer knows RA is needed, even when employee does not identify or ask, then initiate – why? Because you know that you know.....

21

Reasonable Accommodations Inquiries

- The employer is **entitled to know** that an employee is covered under the ADA
- When the **disability** or the **need for the accommodation is NOT known or obvious**
- Can ask an employee for **reasonable documentation** about disability and its functional limitations as it **relates** to the reasonable accommodation and job

❖ **Handout:** *Best Practices Regarding Medical Inquiries In Order To Determine Reasonable Accommodations*

22

RA Example

An employee requests a RA of having her office florescence lights replaced with lighting that is more natural because the florescence lighting gives her migraine headaches, especially when the lights flicker. This employee also makes it clear that sun light would be the best solution, so she wants to be moved to an office with windows.

23

Not obvious and how barrier will be removed

- Because this employee's disability (migraines) is not readily obvious, as well as how the requested RA is related to her disability, the employer may make disability-related inquiries and require the employee to provide, from her **appropriate** health care provider, disability documentation and how the RA request will remove the workplace barrier.

24

Medical Inquiries

In Order To Determine Reasonable Accommodations

- Employer can know enough about the disability/medical condition to know they are soliciting information from an **Appropriate Professional**
- The employer can require the professional to have at least an **adequate expertise** in the employee's specific condition(s).

25

Information Solicited Should be Narrow in Scope

- All the employer needs to learn from the professional is the following when the disability/medical condition or the need for the accommodation is **NOT known and/or obvious**.
- Is the employee **protected** under the ADA?
- When the manifestations or symptoms of the medical condition/disability **comes into contact** with the **job's essential function**(s) WHAT **BARRIERS** are created?

26

All the employer needs to know is:

- What is the **duration** of the impairment?
- What **specific** disability **symptoms** are involved?
- What **essential functions** are involved?
- What are the particular **barriers** that are created?
- What barrier **removal** (reasonable accommodation) suggested solutions can be implemented?

27

Let the professional know

- That, if at all possible, solutions should allow the employee to do the job. Solutions that will fundamentally alter the job should be of last resort.
- if a leave of absence is required would it be continuous and/or intermittent (specify when and estimate how long leave will be needed).
- **Do NOT ask for unrelated documentation!**

28

Documentation is sufficient if it

1. describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and,
2. substantiates why the requested reasonable accommodation is needed.

29

What Satisfies Accommodation Requirements?

- **Don't have to** give accommodation requested by employee* but the accommodation must be **EFFECTIVE** (removes the workplace barriers)
 - must enable the employee to perform the **essential functions** of the job
 - must enable applicant with a disability to have an equal opportunity to participate in the **application process**
 - must enable employee to enjoy **privileges and benefits** of employment
- *If more than one RA is effective, the preference of the individual with a disability should be given **primary consideration**

30

Steps - Reasonable Accommodation Process

1. Covered by the ADA
2. Need for barrier removal
3. Identify the barriers (interactive process)
 - i. can do medical documentation
4. Find and implement RA solutions (interactive process)
5. Monitored the RA to make sure it remains effective

DON'T SKIP STEPS!

31

Direct Threat & Reasonable Accommodations

- If an individual poses a Direct Threat
 - significant risk of substantial harm to the health and safety of the individual or others
 - the employer must **determine whether a reasonable accommodation** would either eliminate or reduce the risk to where substantial harm no longer exists

32

Reasonableness & Undue Hardship

- In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Supreme court declared that the reasonable accommodation and undue hardship concepts are distinct. Under Barnett, the plaintiff bears the burden of showing that the accommodation is reasonable on its face, that is, ordinarily or in the run of cases. After that, the employer bears the burden of showing “special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”
- In *US Airways, Inc. v. Barnett*, the Supreme Court held that it was unreasonable, absent “special circumstances,” for an employer to provide a reassignment that conflicts with the terms of a seniority system.

33

“UN” Reasonable Accommodation Examples

- Eliminating essential functions of the job
 - *Exception -- Note about “group” essential functions*
- Lowering production standards
- Personal use items (i.e. prosthetic limb, eyeglasses, hearing aids, wheelchair)
- Placing a disabled applicant in a job for which they did not apply
- Placing a disabled individual into a job if doing so would create a direct threat to the health or safety of the individual or others (risk cannot be lowered to acceptable level with reasonable accommodation)

34

More “UN” Reasonable Accommodation Examples

- Maintaining the salary of an employee reassigned from a higher-paying job to a lower-paying one if the employer does not do so for non-disabled employees.
- Creating a job
- Generally-reassignment violating a consistent uniformly applied seniority system
- Bumping another employee from their job
- Changing to a new supervisor
- Medication monitoring

35

Undue Hardship

- An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer.
- Generalized conclusions will not suffice to support a claim of undue hardship.
- Instead, undue hardship must be based on an **individualized assessment** of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

36

Determining Undue Hardship

- The employer is the one who is required to show that an accommodation is an undue hardship.
 - Must consider whether there is an alternative accommodation that would not impose such hardship.
- Employers must determine undue hardship on a case by case basis
 - consider the undue hardship in relation to the size of the employer,
 - the resources available, and the nature of the operation.
 - The employer should also factor in the effect of tax incentives on the cost of an accommodation before making an undue hardship determination.
- Assessment of undue hardship is an ongoing process as resources and as situations change.

37

Reassignment as Reasonable Accommodation

Generally do not have to permanently excuse “essential” job functions. If no accommodation that would allow performing those functions employer must consider reassigning to vacant position.

- Reassignment need not be promotion
- Reassignment generally doesn’t require bumping
- Parties should work together to identify vacant positions
- Reassignment and a seniority system

38

Reassignment

EEOC and case law say actual placement required, not just allowing employee to compete.

- Circuit majority rule now: Second, Seventh, and Eighth originally ruled must compete but the Seventh changed its ruling and the Eighth then relied on the Seventh and the Tenth ruled no compete
- *Before reassignment – dealing with “group” essential functions?*

39

Leave As a Reasonable Accommodation

- Can be one of the most important accommodations
- Generally reasonable, but details may = “undue hardship” defense
 - Fact-specific defense based on individualized assessment
- Allow use of leave benefits first (AL, SL, Long/Short Term Disability) and then generally unpaid - Unless pay provided to others like under a collective bargaining agreement
- Leave as a RA must be considered in addition to FMLA leave, if necessary. BUT the employer, in evaluating undue hardship may consider the impact caused by the initial 12-week absence along with the undue hardship factors specified in the ADA.

EEOC - Employer-Provided Leave and the ADA

www.eeoc.gov/eeoc/publications/ada-leave.cfm

40

Qualification, Performance and Conduct Standards

Qualification / Performance must be:

- Job related and consistent with business necessity
- The qualification standards that are:
 - truly reflected in what is expected,
 - performed in the actual workplace and
 - based on essential job functions only (not marginal functions).

Conduct Standards

- unacceptable workplace conduct can be enforced

EEOC Guidance: The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities www.eeoc.gov/facts/performance-conduct.html

41

Appendix

1. Types of Reasonable Accommodation
2. RA P&P Model
3. RA Policy and Procedure Ingredients
4. Development of Evacuation Plan (lots of resources!) 
5. Resources

42

Types of Accommodations

- Information Technology (conduct web, software, hardware audits)
- Communication (alternative formats, interpreters, phone amplifiers, etc.)
- Assistive Technology
- Modifications to workstations (conduct architectural audits)
- Modifications to schedule / telecommuting
- Structural changes within owned and leased space
- Structural changes to building during renovations
- Reassignment / Leave

43

Southwest ADA Center's RA Policy and Procedure Models

- If you are interested in obtaining the following P&P models **please email** Julie Ballinger at juliedballinger@outlook.com
 - *Small Business Model Reasonable Accommodation Policy*
 - *Title II State and Local Government Procedures Model Reasonable*

44

RA Policy and Procedure Ingredients

- Clearly state the employer complies with the ADA
- Definition of disability
- Definition of reasonable accommodation

45

More RA Policy and Procedure Ingredients

- **Accommodation process**
 - Training
 - Who is responsible for what (job candidates, employee, supervisors, HR, etc.)
 - How the process is communicated to applicants and employees
 - How the request needs to be made
 - Responding to the request
 - Monitoring the effectiveness of the accommodation given
 - Accommodation rejection
 - Appeal process
 - Documentation of the process

46

Evacuation Planning!

Evacuation plans are for everyone!

- Invite employees with/without disabilities to discuss evacuation strategies/needs-what do they want to do to get down the stairs?
- Meet with fire marshal to determine average response times and their on-site protocol.
- A safe room/area that Fire marshals know about?
- Do research BEFORE purchasing an evacuation chair.
- Provide staff training on evacuation procedures.
- Fire box that has all your important info?



47

EMERGENCY PREPAREDNESS RESOURCES!

- **EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures**
www.eeoc.gov/facts/evacuation.html
- **National Fire Protection Association** www.nfpa.org/safety-information/for-consumers/populations/people-with-disabilities
- **NFPA - Emergency Evacuation Planning Guide For People with Disabilities** <https://community.nfpa.org/community/nfpa-today/blog/2016/05/31/updated-emergency-evacuation-planning-guide-for-people-with-disabilities-is-now-available-online>

48

More EMERGENCY PREPAREDNESS RESOURCES!

- **Stairwell Use During an Emergency (includes people with disabilities)** www.dol.gov/odep/documents/Stairwell.pdf
- **Disaster Readiness Tips for People with Disabilities**
<https://www.cidrap.umn.edu/practice/disaster-readiness-tips-people-disabilities-national>
- **Disaster Readiness Tips for People with Sensory Disabilities**
<https://deldhub.gacec.delaware.gov/pdf/Readiness-Tips-Sensory-Disabilities.pdf>

49

Even More EMERGENCY PREPAREDNESS RESOURCES!

- **Disaster Readiness Tips for People with Developmental or Cognitive Disabilities** www.brainline.org/article/disaster-readiness-tips-people-developmental-or-cognitive-difficulties
- **Disaster Readiness Tips for People with Mobility Disabilities**
www.brainline.org/article/disaster-readiness-tips-people-mobility-disabilities
- **Disasters Readiness Tips for Owners of Pets or Service Animals**
<https://deldhub.gacec.delaware.gov/pdf/Readiness-Tips-Owners-Pets.pdf>

50

Lastly - Even More EMERGENCY PREPAREDNESS RESOURCES!

- **An ADA Guide for Local Governments: Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities**

<https://www.ada.gov/emergencyprep.htm>

- **Emergency Preparedness Publications & Resources**

www.adapacific.org/emergency/federal_pubs.php

51



- **The Southwest ADA Center** is part of the ADA National Network (www.southwestada.org) and serves NM, TX, AR, LA, and OK.
- Each Regional ADA Center focuses on its region's unique needs.
- To contact and find YOUR regional ADA Center:
 - ✓ Call 1-800-949-4232
 - ✓ Go to www.adata.org

52

Job Accommodation Network

800-526-7234 (V/TTY)
www.askjan.org

A free consulting service designed to increase the employability of people with disabilities



53

Equal Employment Opportunity Commission

- The EEOC provides access to Federal employment laws and regulations. The EEOC has publications on the Americans with Disabilities Act which include their policy guidance on various portions of the Act, fact sheets, Q&As, best practices, and other information.
- www.eeoc.gov
- www.eeoc.gov/laws/types/disability.cfm
- 1-800-669-6820 (TTD)

54

Questions?

