

# ***Managing Disabilities and Accommodations in the Workplace***

*A Key to Helping Prevent  
Disability Discrimination Claims*

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# Current Focus on Compliance

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- The ADA applies to both applicants and employees
- The ADA requires reasonable accommodations to allow a qualified individual with a disability to perform the essential functions of his or her job, as long as the reasonable accommodation does not create an undue hardship.

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- Will **failure** to use an **interactive process** be actionable separately? It already is in **California**.

# Qualified Individuals and Interactive Process

- A **qualified individual** is one who satisfies the requisite skill, experience, education and other job-related requirements of the position, and who, with or without reasonable accommodation, can perform the essential functions of the job
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# Emphasis on Essential Job Functions

- A job function is essential because:
  - ▶ The reason the job exists is to perform that function
  - ▶ There are a limited number of employees available among whom the performance of that function can be distributed
  - ▶ The function is highly specialized

# Emphasis on Essential Job Functions

- Employers are the best judges of whether an function is essential, but the best time to do it is before a disability claim.
- Take control by updating job descriptions and other materials defining essential functions (requisitions, advertisements, postings, handbooks and rules, contribution guides, performance evaluations).

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# Job Descriptions as a Source of Essential Functions

- Job descriptions are not required, but...
- Properly drafted, pre-existing job descriptions will be considered evidence of essential job functions and the starting place for determining whether accommodations are reasonable.
- Consider not only job requirements and hard skills such as experience and education, but also production standards, environmental and safety factors, communication, and “soft skills” such as working with others, teamwork, service-orientation, and job presence, and other skills.

# Essential Function Analysis

- Essential vs. marginal job function analysis
  - ▶ Amount of time spent performing the function
  - ▶ Consequences of not performing the function
  - ▶ How past incumbents worked in same job
  - ▶ Experience of current incumbents in same or similar jobs
  - ▶ Essential job functions for the same position may vary depending on the location or business unit where the individual works

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# Disability Definitions

- A disability is a physical or mental impairment that substantially limits a major life activity
  - ▶ Whether the impairment is due to a work-related injury or impairment is irrelevant
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# Disability Definitions

- Regulations pre-ADAAA defined “substantially limits” as prohibiting or significantly restricting an individual’s ability to perform a major life activity as compared to the ability of the average person in the general population
- Under ADAAA, the level of limitation necessary to obtain coverage is definitely lower

# EEOC Further Expands Listed Major Life Activities

concentrating thinking *working*  
**speaking** standing reading *learning*  
eating interacting with others seeing  
bending communicating  
*sleeping* breathing  
seeing performing manual tasks  
caring for oneself *reaching*  
*hearing* walking **sitting** *lifting*

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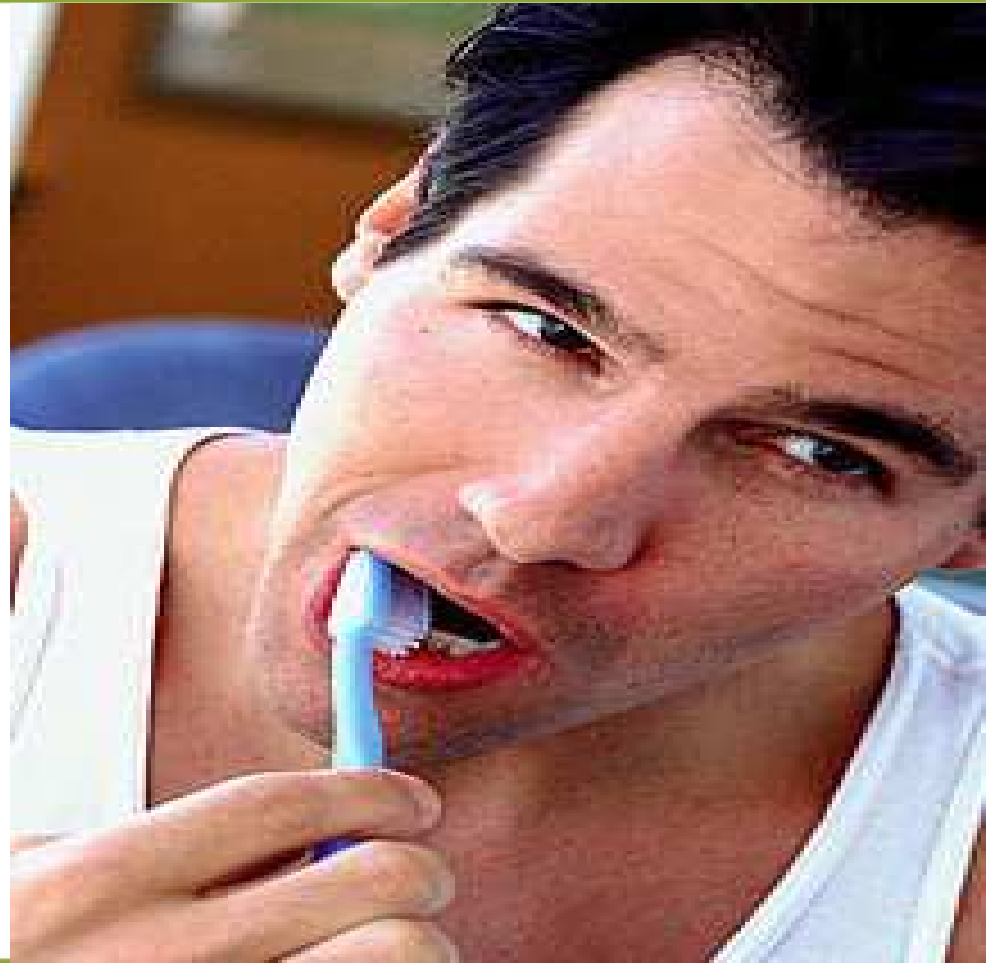
Operation of bodily functions including “the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”

29 C.F.R. § 1630.2(h)(i)

# EEOC Further Expands Listed Major Life Activities

- Whether something is a MLA is not determined by reference to whether it is of “central importance to daily life.”

29 C.F.R. § 1630.2(h)(i)



# Impairment Must Still Be “Substantially Limiting” (at least nominally)



“Substantially limits” must be construed broadly in favor of expansive coverage, NOT a demanding standard.

29 C.F.R. § 1630.2(j)(1)

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Substantially limits  
does not mean  
"significant  
impairment."



# Mitigating Measures Are Irrelevant

- Regulations reject Supreme Court decisions, as did the Amendments Act
- Mitigating measures include medication, medical supplies, equipment, prosthetics, and mobility devices, among other things

29 C.F.R. § 1630.2(j)(1)(vi)



# Mitigating Measures Are Irrelevant

- But not ordinary glasses and contact lenses

- Surgery counts as a mitigating measure only if it “permanently eliminate[s] an impairment”

- 29 C.F.R. § 1630.2(j)(1)(vi)



# Temporary Impairments Can Be Substantially Limiting



- Impairments of limited duration *can* be disabling
- 6-month minimum expressly rejected

29 C.F.R. § 1630.2(j)(ix)

# List Of Impairment Covered In "Virtually All" Cases

cancer

**muscular dystrophy**

**OCD**

missing limbs

*major depressive disorder*

blindness

multiple sclerosis

HIV

schizophrenia

*autism*

bipolar disorder

*deafness*

*use of a wheelchair*

**PTSD**

epilepsy

*intellectual disability*

**diabetes**

# "Record Of" Impairment

- Conditions in remission are covered
- Reasonable accommodation required if needed

29 C.F.R. § 1630.2(k)



# A Record of Disability

- Examples of individuals who have a “**record of**” disability:
  - ▶ An employee who had cancer 10 years ago but is considered cancer free
  - ▶ An employee who had a debilitating back condition that was cured by surgery
  - ▶ a recovering alcoholic who has been sober over ten years and currently uses no alcohol or drugs
  - ▶ an employee who has been returned to full duty after a work-related injury

# "Regarded As" Analysis



In general, adverse  
action + actual or  
perceived impairment  
= coverage

1630.15 affirmative  
defense

29 C.F.R. § 1630.2(I)

# "Regarded As" Analysis



Supposedly,  
coverage  $\neq$  liability

No duty to  
accommodate in  
"regarded as"  
cases

•29 C.F.R. § 1630.2(I)



# Association with Disabled Individuals

- The ADA also protects individuals who have **an association** with someone with a disability
  - ▶ Family member has a disability
  - ▶ Individual who works in an AIDS hospice
- There is no specific duty to accommodate an individual who has an association with someone who has a disability...**but**
  - ▶ EEOC has policy on caregivers
  - ▶ Caring for a disabled family member may trigger protected time away from work under FMLA on an intermittent or reduced schedule basis

# Bottom Line for Employers

- Many more individuals covered by new of definition of disability and interpretations
- More requests for accommodation
- **Litigation focus shifts to qualifications and reasonable accommodations**
  - ▶ **whether can perform essential functions with or without reasonable accommodations**
  - ▶ **employers' duty to provide reasonable accommodations unless undue hardship**
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# Three Types of Reasonable Accommodations

- Accommodations to ensure equal opportunity in the hiring process
- Accommodations that allow an employee to perform essential functions of position
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# Keys to Reasonable Accommodations

- Understanding when a reasonable accommodation process is triggered
  - ▶ Family member, friend, health professional, or other representative may ask for a RA on behalf of the associate
  - ▶ Limited circumstances where the employer should initiate RA process “knew or should have known”
  - ▶ Need not be in writing, no magic words
- Making an individualized assessment

# Keys to Reasonable Accommodations

- Having a robust 2-way interactive process to evaluate RA requests
- Communicating a decision and the reasons
- Process of on-going check-ins and adjustments
- Ensuring no retaliation against those who make a RA request

# Simple Words to Initiate an Interactive Process

When a disability comes up in connection with a performance issue:

- “This job requires X”
- “You’ve let me know there’s an issue with your doing X”
- “Let’s work together to resolve it”
- “We’ll get back to you” (when manager needs HR help)

or

- “How can I better understand your situation and help you meet job requirements?”



# Using a problem solving approach

- **Consult** with the individual to ascertain individualized limitations and how to best work with them.
- **Analyze** the particular job, pre-employment process or employment benefit
- **Identify** potential accommodations and assess effectiveness (again, by consulting with the individual and if needed, with an expert)

# Using a problem solving approach

- **Consider** the preferences of the individual (again, by consulting with the individual)
- **Inform** the individual of accommodation options, explaining reasoning
- **Individualized assessment is key, as is a dialog or “back and forth” communication**

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# Interactive Process Documentation Opportunities

- Request for accommodation or employer's reason for initiating process
- Confirmation of accommodation request, request for further information, explanation of process
- Documentation of analysis, including facts gathered, collect other documents such as job descriptions, technical assistance

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# Interactive Process Documentation Opportunities

- Documentation of **potential** accommodations suggested/considered
- Documentation of **subsequent interactive steps** (e.g., request for preferences, consideration of options)
- Documentation of contacts with outside **resources** (if applicable)

# Interactive Process Documentation Opportunities

- Documentation of employer's **decisions** (including reasons if denied)
- Documentation of **communication of decision** to employee (can be e-mail or written confirmation of a verbal conversation)
- Extra: some companies keep an **accommodation log** or database to track and ensure consistency and above steps



# What's better?

#1 Dear Jane Doe,

We reviewed your request for different work hours. After reviewing your request and medical information, we have decided to deny that request and have been unable to identify an alternative accommodation.

#2 Dear Jane Doe,

This letter confirms our discussions on January 5, January 15, and February 1 regarding your request to change your schedule from \_\_\_\_ to \_\_\_\_\_. After discussion, we offer the following alternative accommodations....

# Hallmarks of a good interactive process

- ✓ Timely, no obstruction or delay
- ✓ Good faith
- ✓ Direct exchange between employer and employee or applicant
- ✓ Information gathering

# Hallmarks of a good interactive process

- ✓ Technical assistance secured as needed
- ✓ Preferences considered, alternative or options offered as appropriate
- ✓ Decisions reached and communicated, no guesswork

# Hallmarks of a good interactive process

- ✓ Follow-ups and check-ins to see if accommodation is effective or conditions have changed
- ✓ Time limits on some accommodations where appropriate

# Outer Limits of Accommodations

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# Expense vs. Fundamental Change

Undue hardship based on cost is determined based on the net cost to the employer.

An accurate cost-benefit analysis may be easy to make or very difficult.

A court or regulatory agency is unlikely to find expense is an obstacle with large or wealthy employers.

# Expense vs. Fundamental Change

Where expense is unlikely to be accepted as undue hardship, consider instead at whether the accommodation would be unduly disruptive to other employees' ability to work, whether there is a significant disruption to business operations, or a significant impact on the ability to conduct business.



# Outer Limits of Accommodation

## Direct Threat to Safety

- ✓ can direct threat be eliminated by reasonable accommodations?
- ✓ must be objective
- ✓ cannot be based on stereotype
- ✓ cannot be future risk (must be immediate)
- ✓ increased cost is not sufficient by itself
- ✓ duration, nature, severity, likelihood, imminence
- ✓ threat to self is much harder to win on than safety of others

# Examples of reasonable accommodations

- ▶ Making existing facilities accessible to and usable by individuals with disabilities
- ▶ Job Restructuring
  - Removing an essential job function is never required
  - Removing marginal functions is required
- ▶ Part-time or modified work schedules
- ▶ Unpaid leave of absence (Not indefinite, but over and above FMLA. How long is reasonable?) Caution: a leave of absence should almost never be the only accommodation offered (e.g., in lieu of light duty work).

# More Reasonable Accommodations

- ▶ Reassignment to a vacant position for which the individual is otherwise qualified (last resort)
- ▶ Acquisition or modification of equipment or devices
- ▶ Adjustment or modifications of exams, training materials or policies; additional training
- ▶ Provision of qualified readers or interpreters
- ▶ Working from home?
- ▶ Personal assistants and job coaches?

# Medical Inquiries and the Interactive Process

An employer shall not inquire of an employee as to whether the employee has a disability or the nature and severity of the disability unless the examination or inquiry is shown to be job-related and consistent with business necessity.

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# Medical Inquiries and the Interactive Process

An inquiry is job-related and consistent with business necessity where:

- ▶ an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition or that an employee will pose a direct threat to safety
- ▶ the disability-related inquiries and/or medical examinations follow a request for accommodations where the disability is not known or obvious

# Medical Inquiries and the Interactive Process

**When an inquiry is job-related and consistent with business necessity, the employer may:**

1. Make disability-related inquiries
2. Require documentation from a health care provider

# Uncooperative Employees

- Employees need to cooperate with the interactive process
  - ▶ Emerging development: employers might be required to communicate with a third party
  - ▶ If the employee fails to supply requested medical proof, employer can refuse the accommodation. Confirming requests in writing can help. “Documentation was not provided despite requests on (dates).”
  - ▶ If the news of disability and accommodations request has surfaced for the first time in the context a performance issue, employer can apply an evenly enforced work rule focusing not on the disability, but on the performance, and then start the interactive process



# Lessons and To-Do List

- Review and revise job descriptions and other documents that contain essential job functions and qualifications
- An interactive process (properly documented) is key to lessening exposure
- Apply work rules and performance standards consistently. Too many exceptions can be used to establish lack of hardship, that functions are non-essential, discrimination, and retaliation
- Request medical documentation consistently
- Disability-related inquires should have a reasonable good-faith basis
- Train managers to recognize accommodation requests, to get expert help as needed, and about the interactive process.

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