

# AVOIDING ADA DISPUTES

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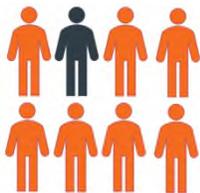
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## AMERICANS WITH DISABILITIES



Estimated that more than **1 out of 8** Americans have a severe disability

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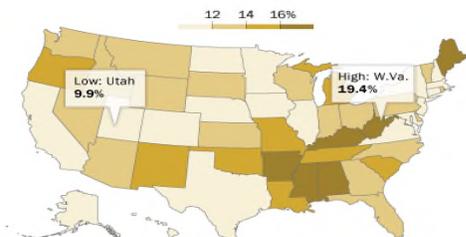
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## AMERICANS WITH DISABILITIES

% of the population reporting a disability



Source: U.S. Census Bureau 2015 American Community Survey.  
PEW RESEARCH CENTER

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### AMERICANS WITH DISABILITIES



Over 3 out of 10 Charges of Discrimination filed with EEOC alleges disability discrimination in employment

*Second Most Filed Type of Discrimination*

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### AMERICANS WITH DISABILITIES



46% of EEOC disability discrimination claims allege issues with Reasonable Accommodations.

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### GOALS

1. Key Definitions Under the Americans with Disabilities Act
2. Reasonable Accommodations & the Interactive Process
3. Undue Hardship



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## AMERICANS WITH DISABILITIES ACT (“ADA”)

- Coverage
  - Private Employers with 15 or More Employees
  - All State & Local Government Employers
- Special Note: Pregnancy Discrimination Act

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## KEY DEFINITIONS UNDER THE ADA

- “Disability”
  - A person who has a physical or mental impairment that substantially limits one or more major life activities;
  - A person who has a record of such an impairment; or
  - A person who is regarded as having such an impairment.

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## KEY DEFINITIONS UNDER THE ADA

- Major Life Activities
  - Caring for Oneself
  - Performing Manual Tasks
  - Seeing
  - Hearing
  - Eating
  - Sleeping
  - Walking
  - Learning
  - Reading
  - Standing
  - Sitting
  - Reaching
  - Lifting
  - Bending
  - Speaking
  - Breathing
  - Interacting with Others
  - Communicating
  - Concentrating
  - Bodily Functions

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### KEY DEFINITIONS UNDER THE ADA

- ☐ ADA Amendments Act of 2008 (“ADAAA”)
  - Terms are to be construed in favor of broad coverage.
  - “Substantially limits” does not require the impairment to *severely* or *significantly* restrict a major life activity.
  - Do not consider mitigating measures, except eye wear.
  - Whether an impairment exists requires an individualized assessment.

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### KEY DEFINITIONS UNDER THE ADA

- ☐ “Qualified Individual”
  - Employee or applicant meets the requisite knowledge, skill, and experience of a position; and
  - Can perform the “essential functions” of the position *with or without* reasonable accommodation.

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### KEY DEFINITIONS UNDER THE ADA

- ☐ “Reasonable Accommodation”
  - Any change to a job, the work environment, or the way things are usually done that allows an individual with a disability to apply for a job, perform the essential job functions, or enjoy equal access to benefits available to other individuals in the workplace.

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### KEY DEFINITIONS UNDER THE ADA

- ❑ “Essential Function”
  - The position exists specifically to perform that function;
  - There are a limited number of other employees who could perform the function; or
  - The function is specialized and an individual is hired based on his or her ability to perform it.

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### KEY DEFINITIONS UNDER THE ADA

- ❑ Essential Functions
  - Courts and EEOC considers employer's judgment as to what functions of a job are essential.
  - If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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### GOALS

1. Key Definitions Under the ADA
2. Reasonable Accommodations & the Interactive Process
3. Undue Hardship



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## REASONABLE ACCOMMODATION



Employers are required to provide reasonable accommodations to qualified disabled employees or applicants, unless the accommodation would impose an undue hardship.

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## REASONABLE ACCOMMODATION

### The ADA requires:

- *Reasonable* accommodations, not *all* accommodations;
- *Effective* accommodations, not *preferred* accommodations; and
- Accommodations must not pose an undue hardship to the employer.

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## REASONABLE ACCOMMODATION

- Employers can require that an employee follow an accommodation process\*
- Disability Accommodation Policy should cover:
  - Administration of the Policy
  - Outline Interactive Process
  - Anti-Retaliation

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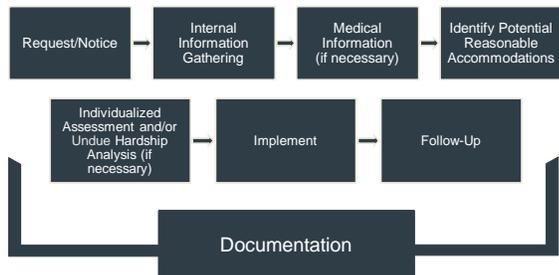
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## INTERACTIVE PROCESS



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## INTERACTIVE PROCESS

- Request / Notice
  - It is the employee's responsibility to make a request or put the employer on notice.
    - Orally or In Writing
    - Plain Language
    - No "Magic" Words
    - This can also come from a third party on individual's behalf.
  - If made to supervisor, employee should be directed to contact a designated ADA Coordinator/Human Resources.
  - Employer must respond to an accommodation request in a timely manner.

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## INTERACTIVE PROCESS

- Request / Notice
  - Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."
  - Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."
  - Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.
  - Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.

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## INTERACTIVE PROCESS

### Internal Information Gathering

- Used to determine what, if any, accommodation should be provided
- Reasonable Accommodation Request Form
- Must communicate:
  - The precise nature of the problem;
  - How a disability is prompting a need for an accommodation; and
  - Potential accommodations that may be effective in meeting an individual's needs.
- Consistent and Timely Communication is Key

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## INTERACTIVE PROCESS

### Medical Information

- Only if the requestor's disability and/or need for an accommodation are not obvious or already known
- Only medical information that is sufficient to explain:
  - the nature of the disability;
  - the individual's need for reasonable accommodation; and
  - how the requested accommodation will assist the individual to apply to a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace.

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## INTERACTIVE PROCESS

### Medical Information

- Information may be obtained from:
  - Requestor
  - Appropriate Health Professional (e.g., doctor, psychological, clinical social worker, physical therapist, or rehabilitation counselor)
- If obtained from health professional:
  - Medical Certification Form with Job Description
  - HIPPA Release
  - GINA Notice

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## INTERACTIVE PROCESS

- Identify Potential Reasonable Accommodations
  - Ask employee and/or physician to assist in identifying potential accommodations
  - Employers do not have to eliminate essential functions or reduce performance standards
  - Accommodation must be effective—that is, it must enable the individual to perform the essential functions
  - Individualized Assessments

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## INTERACTIVE PROCESS

- Examples of Common Reasonable Accommodations
  - Using assistive technologies;
  - Change in schedule;
  - Change in break times;
  - Work from home;
  - Using job aids;
  - Change in work location;
  - Change in work environment;
  - Change in equipment;
  - Elimination or exchange of marginal job tasks;
  - Re-assignment; and
  - Leave.
- Job Accommodation Network (JAN): Free consultant service that helps employers make individualized accommodations.

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## INTERACTIVE PROCESS

- Not Examples of Reasonable Accommodations
  - Indefinite Leave
  - Personal Use Items Needed in Accomplishing Daily Activities Both On and Off the Job
  - Removing Essential Job Functions from the Position
  - Displacing a Fellow Employee

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## INTERACTIVE PROCESS

### Reasonable Accommodations?

- **Example A:** A motor grader operator in the Roads Department has a suppressed immune system. Due to the pandemic, the employee requests an alternative schedule, where he arrives and leaves an hour earlier to avoid interaction with other employees.
- **Example B:** The Deputy County Clerk easily becomes fatigued because of lupus. She requests a stool while attending to the public because sitting greatly reduces the fatigue.
- **Example C:** The cleaning crew rotates staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments.

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## INTERACTIVE PROCESS

### Is Fido a Reasonable Accommodation?

An applicant requested that his emotional support animal be allowed to come to work with him. The employee suffers from PTSD and mood disorder, and his psychiatrist prescribed the emotional support animal to help him cope with his disabilities. The employer revoked his offer of employment, citing its "no pet" policy.

Did the employer violate the ADA?

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## INTERACTIVE PROCESS

### Individualized Assessments

- **Fitness for Duty Testing:** Medical examination of an applicant or employee to determine whether the employee is physically or psychologically able to perform the job duties.
  - **Pre-Employment:** May only be done after a conditional offer of employment and must be required of all applicants.
  - **During Employment:** Must be job-related and consistent with business necessity.
    - Return to Work
    - On the Job Conduct

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## INTERACTIVE PROCESS

### ☐ Individualized Assessments

- **Direct Threat Assessment:** Does employee pose significant risk of substantial harm to the health or safety of self and/or others that cannot be eliminated or reduced by reasonable accommodation?
  - Must be based on reasonable medical judgment and/or best available objective evidence.
  - Factors to be considered
    - Duration of the risk;
    - Nature and severity of the potential harm;
    - Likelihood that potential harm will occur; and
    - The imminence of the potential harm.

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## INTERACTIVE PROCESS

### ☐ Individualized Assessment Example

A physician/employee revealed to his employer that he was treating chronic neurological and musculoskeletal problems with legally prescribed drugs. The physician/employee supplied a doctor's note explaining that he was being treated for chronic pain with the prescribed medication, and further explaining that he was subject to urine tests and monitoring by the State Board of Pharmacy to ensure compliance with his treatment plan. The employer/medical center terminated the employee because it assumed the medication rendered him unable to meet his job requirements.

Did the medical center violate the ADA?

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## INTERACTIVE PROCESS

### ☐ Implementation and Follow-Up

- If multiple effective accommodations are available, employers do not have to select the employee's preferred accommodation.

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## DOCUMENTATION

- Documentation
  - Overarching and ongoing process.
  - Medical information must be kept confidential and separate from the employee's personnel file.
  - Accommodation information is shared on a need-to-know basis.
    - Including information regarding applicants for positions.
  - Human Resources should securely store all medical information.

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## GOALS

1. Key Definitions Under the ADA
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3. Undue Hardship



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## UNDUE HARDSHIP



Employers are required to provide reasonable accommodations to qualified disabled employees or applicants, unless the accommodation would impose an **undue hardship**.

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## UNDUE HARDSHIP

- Definition
  - Employer would incur significant difficulty or expense in providing a certain reasonable accommodation.
  - Considered in light of statutory factors.
- Determination Made on Case-By-Case Basis

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## UNDUE HARDSHIP

- Factors Considered
  - the nature and cost of the accommodation;
  - the overall financial resources of the facility;
  - the number of persons employed at the facility;
  - the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

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## UNDUE HARDSHIP

- Factors Considered
  - the overall financial resources of the entity;
  - the overall size of the business of the entity with respect to the number of its employees;
  - the number, type, and location of its facilities;
  - the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; and
  - the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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### UNDUE HARDSHIP

- Cannot Consider:
  - Employees' or customers' fears or prejudices toward the individual's disability
  - Negative impact on the morale of other employees

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### UNDUE HARDSHIP

#### *Example*

Karen has breast cancer and is undergoing chemotherapy. As a consequence of the treatment, she is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the County transfers three of her marginal functions to Rodger for the duration of the chemotherapy treatments. However, Rodger is unhappy at being given extra assignments, but the County determines that Rodger can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner.

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### UNDUE HARDSHIP

#### *Example*

- An experienced prosecutor requests leave for treatment of her disability but cannot provide a fixed date of return. The County can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, an attorney/prosecutor of this caliber. Moreover, it leaves the County unable to determine how long it must hold open the position or to plan for the prosecutor's absence. Therefore, the County can deny the request for leave as a reasonable accommodation.

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**THANK YOU!**



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