

HR'S TOP 10 ADA/REASONABLE ACCOMMODATION MISTAKES AND HOW TO AVOID THEM

2016 Labor & Employment Law Conference

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TOP 10 ROADMAP

- ADA Fundamentals
- Enter the ADAAA
- The Interactive Process
- David Letterman Time

ADA FUNDAMENTALS

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ADA FUNDAMENTALS

- Employers with 15 or more employees prohibited from discriminating against otherwise qualified employees or applicants with a “disability” in hiring, firing, compensation, training, or other terms/conditions of employment

ADA FUNDAMENTALS

- Definition of a “disability”
 - Physical or mental impairment which substantially limits one or more major life activities
 - Having a record of such an impairment
 - Being regarded as having such an impairment

ADA FUNDAMENTALS

- Definition of a “qualified employee”
 - A person who can perform the essential job functions or requirements with or without a reasonable accommodation

ENTER THE ADA AAA

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ENTER THE ADAAA

- How the ADAAA changed the landscape
 - 2008 Amendments Act overturned several U.S. Supreme Court decisions which narrowly interpreted “disability”
 - “Substantially limits” no longer needs to severely or significantly restrict a major life activity; temporary conditions greater than six months can qualify

ENTER THE ADAAA

- How the ADAAA changed the landscape (cont.)
 - “Major life activities” now includes operation of major bodily functions, like digestive & immune systems rather than just walking, breathing, working, etc.
 - Mitigating measures (except glasses) don’t matter; Medication side effects do

ENTER THE ADA

- The bottom line
 - Because ADA broadened meaning of the term “disability”, focus no longer on whether employee has one, but instead on reasonable accommodation
 - EEOC/Court reinforcement

THE INTERACTIVE PROCESS

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THE INTERACTIVE PROCESS

- Generally, once an accommodation is requested (or obvious), working together with your employee in good-faith by having an interactive, back-and-forth exchange about his or her limitations and needs in order to determine whether or not a reasonable accommodation exists for the employee to work in his or her present job, or possibly another position

THE INTERACTIVE PROCESS

- Step – by – step
 1. Understanding limitations/restrictions
 2. Obtain employee input
 3. Examine essential/non-essential job functions
 4. Discuss review/conclusions with employee, documenting your message and providing opportunity for response

DAVID LETTERMAN TIME!

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#10 – THINKING YOUR EMPLOYEE DOESN'T HAVE A DISABILITY



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- ADAAA & EEOC regulations broadened Act coverage
- Analysis still needs undertaken
- Close calls aren't likely to go your way
- Emphasis on whether employee is "qualified" and on essential functions

#9 – NOT GETTING DOCTOR APPROVAL OF ESSENTIAL JOB FUNCTIONS



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- Send the job description to the employee's medical professional
- Be specific about authorization needed for essential day-to-day job functions

#8 – NOT HAVING A PROPER JOB DESCRIPTION TO RELY ON



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- *Remember:* You need not change essential job functions when providing accommodations
- Without a job description where essential job functions are clearly (and accurately) identified, you are making it easier for the employee to claim a right to an accommodation

#7 – FORGETTING MENTAL HEALTH CONDITIONS ARE DISABILITIES TOO



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- According to the National Alliance for Mental Health, depression is the leading cause of disability for people between 15-44 in the U.S.
- Expansion of recognized conditions under DSM V
- EEOC and Courts generally support coverage for anxiety and related mental health conditions

#7 – FORGETTING MENTAL HEALTH CONDITIONS ARE DISABILITIES TOO

- Tips on Managing
 - Consider them as seriously as you do physical disabilities
 - List less tangible functions like interpersonal communication, team-work & attendance among essential job functions

#6 – OVERLOOKING YOUR RIGHTS IN THE INTERACTIVE PROCESS



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- What employers DON'T have to do
 - Create a position for the employee
 - Move other employees
 - Violate seniority/other CBA rules
 - Hire others or work them harder/longer

#6 – OVERLOOKING YOUR RIGHTS IN THE INTERACTIVE PROCESS

- What employers DON'T have to do (cont.)
 - Grant the employee's preferred accommodation
 - Change, alter or eliminate essential job functions
 - Accommodate in cases of direct threat or undue hardship

#5 – OVER-RELYING ON UNDUE HARDSHIP



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- Undue hardship requires “significant difficulty or expense” considering nature/cost of business resources, etc.
- EEOC interprets this narrowly, and \$\$ is rarely sufficient to justify reliance
- Focus operationally, if used at all

#4 – TREATING PREGNANCY LIKE A SECOND CLASS DISABILITY



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- EEOC/Supreme Court
 - EEOC: Two recent guidance documents (why?)
 - You must treat employees temporarily unable to perform job due to pregnancy the same as other temporarily disabled employees (PDA)
 - Pregnancy-related impairments can be disabilities/need accommodation (ADA)

#4 – TREATING PREGNANCY LIKE A SECOND CLASS DISABILITY

- State Law
 - No Pennsylvania state law
 - Pittsburgh (work for the city)
 - Philadelphia (in the city)

There's One Safe Approach

#3 – NOT KNOWING WHEN WORK-FROM-HOME IS AN ACCOMMODATION OPTION



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- *EEOC v. Ford Motor Co.* leading case in this area
 - Employer business judgment
 - In-person attendance
 - The virtual workplace

#3 – NOT KNOWING WHEN WORK-FROM-HOME IS AN ACCOMMODATION OPTION

- Considerations:
 - What does your job description say about face-to-face interaction, attendance and other intangibles as essential job functions?
 - Can the employee be supervised remotely?
 - What about your technology?

#2 – ASSUMING YOUR LEAVE POLICIES END ADA COVERAGE



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- Employees with disabilities must be provided access to same leave as similarly-situated, non-disabled workers
- In some cases, unpaid leave must be extended beyond policy allowances specifically for disabled employees as a reasonable accommodation
 - How long?

#1

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#1 – DON'T BE LEFT HOLDING THE BAG



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- Each interactive process is independent
- It involves back-and-forth, and reasonableness is a touchstone of your decision-making
- Deliberate on as many of the accommodations offered as possible, and communicate results

Loose ends don't pay dividends!

QUESTIONS?



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THANK YOU

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