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ACC AMERICA
Association of Corporate Counsel
Wesley Chapter

Understanding Disabilities And Reasonable Accommodations Under Federal Law – ADA, ADAAA & FMLA



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Agenda

- Understanding disabilities
- Understanding accommodations, the interactive process and the interplay of ADA, FMLA and other leaves
- Practical steps to addressing potential disability and accommodation issues
- Understanding your role in this changing environment

Disability – 60% Increase!

BASIS OF CHARGE FILING	FY 2006	FY 2008	FY 2010
RACE	27,238	33,937	35,890
RETALIATION	22,555	32,690	36,258
SEX/GENDER	23,247	28,372	29,029
AGE	16,328	24,682	23,264
DISABILITY	15,575	19,453	25,165
NATIONAL ORIGIN	8,327	10,604	11,304
RELIGION	2,541	3,273	3,790
TOTAL CHARGES	75,768	95,402	99,922

Significant Changes Imposed By ADAAA

The New Amendments:

- Expand definition of “major life activities”
- Redefine “regarded as”
- Lower “substantially limits” threshold
- Exclude consideration of mitigating measures = evaluate as if untreated
- Allow conditions that are episodic/in remission to qualify in certain circumstances

Overall Impact Of ADAAA / EEOC Regulations

The focus for employers is no longer on the threshold question of *whether* a disability exists but on engaging in the interactive process and providing reasonable accommodations.

What Is A “Disability”?

Three possibilities:

- (1) Actual impairment:
 - Substantially limits major life activity; OR
- (2) Record of:
 - Such an impairment; OR
- (3) Regarded as:
 - Having such an impairment





New Meaning Of "Substantially Limits"


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- Impairment no longer has to "prevent or severely restrict" an individual (effectively writes the word "substantially" out of the law)
- Impairment need only substantially limit one major life activity, even if it has no limiting effect on other major life activities
- Even an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

New Meaning Of "Major Life Activities"

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Basic activities that most people in the general population can perform with little or no difficulty



Examples Of "Major Life Activities"

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<ul style="list-style-type: none"> • Sleeping • Eating • Breathing • Walking • Hearing • Reading • Concentrating • Thinking • Seeing 	<ul style="list-style-type: none"> • Speaking • Learning • Performing manual tasks • Personal care • Working • Standing • Lifting • And now...Interacting with others
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Corrective Measures Don't Count

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Under the ADA, determination of whether an impairment is a disability is to be made without regard to mitigating measures (except ordinary eyeglasses or contacts), such as:


- Medications
- Medical supplies
- Prosthetics
- Mobility device
- Auxiliary aids or services
- Psychotherapy, behavioral therapy

Understanding Accommodations And The Interactive Process

Breaking It Down


What is a reasonable accommodation?

One that allows performance of essential job functions



A Job Function Might Be "Essential" If....

- The job exists to perform it
- The employee spends a significant amount of time performing it
- Its duties cannot be reassigned to another employee without changing the fundamental nature of the job




A Job Function Is Not “Essential” If...

The employee never or rarely actually performs it

Job Descriptions Help

- Look to them first to determine essential job functions
- But conduct a “reality” check
- Are the functions still “essential”?
- Enlist supervisors’ assistance to keep updated job descriptions



Is this a request for an accommodation?





When Is A Request For Accommodation Made?

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- Do not need to use magic words
- Do not have to submit in writing
- Other people may seek accommodation for disabled individual

Types of Reasonable Accommodations





What Is "Reasonable"?

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- Need only provide effective accommodation (one that enables person to perform essential functions)
- No requirement to provide every accommodation requested or the "best" accommodation
- Need not change essential job functions
- Requested accommodation that results in undue hardship is not reasonable
- May seek medical information when disability is not obvious or when not sure if disability requires requested accommodation

This May Include:

- Providing special equipment
- Modifying work schedule
- Restructuring job duties
- Removing barriers to performance
- Reassigning non-essential tasks
- Exchanging assignments with other employees
- Redesigning procedures

For as long as employee is disabled and requires accommodation

Examining Types Of Reasonable Accommodations



Reasonable Accommodation: Leave Of Absence

- May be required to permit the use of additional leave as a form of reasonable accommodation
- EEOC says additional unpaid leave = reasonable accommodation
- But many courts say coming to work is an essential job function so need for leave is not reasonable accommodation

**Reasonable Accommodation:
Job Restructuring**

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- **Not required to eliminate essential functions**
- May require employee to take on other marginal functions he or she can perform
- May be required to alter when and how a function, either marginal or essential, is performed

So You've Got An Accommodation Request... What Now?

The Interactive Process



What Is The Interactive Process?

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Individualized process involving:

1. Exchanging information about employee's work restrictions
2. Identifying the appropriate workplace accommodations
3. Reaching a mutually satisfactory decision about the reasonable accommodation to be provided

Inform Employee Of Disability Status Determination Schedule Meet & Confer Session

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If Determined Disabled:

- Meet with the employee to discuss accommodation options. The employee should be contacted to arrange a convenient time & date.

If Determined Not Disabled:

- Send notice letter to employee
- Invite to send additional information

Short List of Tips Under ADAAA Final Rule

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1. Be prepared to expand your definition of "disability." This will impact who you need to make sure you reasonably accommodate and engage in the interactive process with.
2. Make sure you know when to ignore "mitigating measures" and when to take them into account.
3. Do accurate job descriptions re each position's "essential functions."
4. Make sure that you have non-discriminatory reasons for employment decisions.
5. Recognize that you have the right, when an individual requests an accommodation, to request supporting medical information (unless the disability and/or need for accommodation is obvious or already known). Comments to Final Rule.
6. Hone your understanding of what you must do under the interactive process.
7. Hone your understanding of what you must do as far as reasonable accommodation.

New World Under ADAAA – Practical Tips

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- need to focus primarily on nondiscrimination, interactive process, and reasonable accommodation
- days of "severely restricted" are gone –**Never assume that an individual will not be considered disabled and, thus, not protected under the ADA.**
- Document the interactive process –ability to show what efforts were taken to engage in the interactive process will be critically important.

Thank You

Question & Answer



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