

# ADA Reasonable Accommodations & Your Interactive Process



Presented By:



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# AGENDA

- ❖ Overview of the ADA
- ❖ Reasonable Accommodations
- ❖ Documenting the Interactive Process
- ❖ ADA and Pregnancy
- ❖ Practical Considerations
- ❖ Action Items

# THE AMERICANS WITH DISABILITIES ACT OF 1990

- ❖ Signed into law by Bush 41
- ❖ Intended to be a Social Security reform law
- ❖ Applicable to employers with 15 or more employees
- ❖ Prohibits discrimination
- ❖ Requires reasonable accommodations
- ❖ Protects confidentiality of employee medical information



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# ADA DISCRIMINATION

## ❖ Pre-employment

- Prohibits discrimination in hiring
- Employers should not request medical information or require a physical unless an offer of employment has been made
- Medical inquiries or physicals must be job-related
- “Are you able to perform the essential functions of the job with or without a reasonable accommodation?”

## ❖ During Employment

- Prohibits discrimination in employment decisions
- Requires reasonable accommodation



# WHO IS PROTECTED AND WHAT IS A “DISABILITY”?

- ❖ **Persons with qualified disabilities**
  - Qualified disabilities are physical or mental impairments that substantially limit one or more major life activities or essential bodily functions
- ❖ **Persons with a record of having once had such a physical or mental impairment**
- ❖ **Persons “regarded as” having such a physical or mental impairment**
- ❖ **Persons related to another person with a disability**

# DISABILITY CHEAT SHEET

*LISTED UNDER ADA AMENDMENTS ACT OF 2008*

- Deafness
- Blindness
- Intellectual Disabilities
- Use of wheelchair
- Missing limbs
- Autism
- Cancer
- Cerebral Palsy
- Schizophrenia
- Diabetes
- HIV/AIDS
- Epilepsy
- Multiple Sclerosis/Dystrophy
- Major Depressive Disorder
- Bipolar Disorder
- PTSD
- OCD



# WHAT ARE 'MAJOR LIFE ACTIVITIES'?

*LISTED UNDER ADA AMENDMENTS ACT OF 2008*

- Walking
- Hearing
- Breathing
- Sitting
- Standing
- Reading
- Performing Manual Tasks
- Concentrating
- Seeing
- Speaking
- Learning
- Working
- Lifting
- Caring For Oneself
- Interacting With Others

# ***WHAT ARE 'BODILY FUNCTIONS'?***

## ***LISTED UNDER ADA AMENDMENTS ACT OF 2008***

- Immune System
- Cell Growth
- Digestive
- Bowl & Bladder
- Brain
- Special Sensory Organs and Skin
- Endocrine
- Circulatory
- Reproductive
- Neurological
- Respiratory
- Cardiovascular
- Hemic
- Lymphatic
- Musculoskeletal



# ADA 'DISABILITIES' ARE ANYTHING MORE SEVERE THAN A:



# REASONABLE ACCOMMODATIONS

**Figure 3.5:** Examples of Reasonable Accommodation under the ADA



3-29



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# REASONABLE ACCOMMODATIONS

## EEOC'S THREE CATEGORIES

- ❖ Modifications to a **job application process** that enable a qualified applicant with a disability to be considered for the position desired
- ❖ Modifications to the **work environment**, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position
- ❖ Modifications that enable a covered entity's employee with a disability to **enjoy equal benefits and privileges of employment** as are enjoyed by its other similarly situated employees without disabilities

# REASONABLE ACCOMMODATION EXAMPLES

- ❖ Modified schedule
- ❖ Modified duties
- ❖ Modified technology or equipment
- ❖ Accessibility to facilities
- ❖ Hiring a helper or assistant
- ❖ Waiving oral communication or providing an interpreter
- ❖ Leave
- ❖ Reassignment
- ❖ Telecommuting/Work-From-Home
- ❖ Scent-free workplace

# REASONABLE ACCOMMODATION EXAMPLES

## LEAVE AS A REASONABLE ACCOMMODATION

Case Study: *Santandreu v. Miami Dade Co. (11<sup>th</sup> Cir. 2013)*:

- ❖ January 2006: Employee requests leave through March 25, 2006. Employer grants request.
- ❖ March 2006: Employee requests leave extended through July 25, 2006. Employer grants request.
- ❖ July 2006: Employee requests leave through January 25, 2007. Employer grants request.
- ❖ January 2007: Employer grants leave through May 4, 2007.
- ❖ May 15, 2007: Employee requests leave through July 25, 2007, without a definite date for return to full time work. Employer refuses and terminates employee.
- ❖ Court concludes: indefinite leave is not a reasonable accommodation



# REASONABLE ACCOMMODATION EXAMPLES

## REASSIGNMENT AS A REASONABLE ACCOMMODATION

- ❖ There is a rebuttable presumption that it is not a reasonable accommodation to require an employer to circumvent a seniority system to place an employee with a disability
- ❖ The EEOC contends—and some federal courts of appeal agree—that it is a reasonable accommodation to place an employee in any vacant position for which he is minimally qualified, circumventing any existing merit system.



# REASONABLE ACCOMMODATION EXAMPLES

## WORK FROM HOME AS A REASONABLE ACCOMMODATION

- ❖ Work from home cases are an action item for EEOC
- ❖ Employer pivot during pandemic demonstrated ability to do it
- ❖ How has the employer established that in-office work is an essential job function and has its track record during the pandemic undermined that?
- ❖ Employers objecting to work-from-home as an accommodation must be able to establish an undue hardship





# REASONABLE ACCOMMODATIONS

## UNDUE HARDSHIP

- ❖ **Too costly** – significant difficulty or expense, relative to the resources and circumstances of the employer
- ❖ **Too disruptive** – unduly extensive, substantial, or disruptive or would fundamentally alter the nature of the business
- ❖ **Too much of a safety risk** – the accommodation would pose an immediate hazard and risk to the safety of others in the workplace





# DOCUMENTING THE INTERACTIVE PROCESS

**IF IT'S NOT  
DOCUMENTED  
IT DIDN'T  
HAPPEN**

# DOCUMENTING THE INTERACTIVE PROCESS

- ❖ Requests for accommodation require **no magic words**
- ❖ **A family member** can make a request on behalf of the employee
- ❖ **Requests do not have to be in writing**, but an employer may ask an employee to write it down, fill out a form, etc.
- ❖ The employer's obligation to undertake an interactive process of discussing reasonable accommodations **begins once a request has been received**

# DOCUMENTING THE INTERACTIVE PROCESS

- ❖ **The interactive process** involves a **written or verbal dialogue** between employer and employee to understand the request and how it helps an employee be better able to perform the essential functions of the job
- ❖ **Employers should not “diagnose” an employee.** Rely on a medical professional for that. You can ask the employee for documentation explaining the accommodation request from the employee’s treating physician at the employee’s expense or you can send the employee to a company selected physician at the company’s expense.
- ❖ **Best Practice:** When requesting a medical opinion, **provide a cover letter to the physician along with a written copy of the employee’s job description.** Explain in the cover letter what the employee has requested and ask the physician to verify the specific condition at issue, its functional limitations, and what accommodations the physician recommends, and the duration.



# DOCUMENTING THE INTERACTIVE PROCESS

- ❖ Discuss with the employee the parameters of the accommodation, its duration, and concerns you have about costs, disruption, or safety risks
- ❖ Document this process as a give and take; save that document in the employee's medical/ADA file
- ❖ Avoid reliance on untested conclusions to reject an accommodation; frequently we can “try it” for a week or two and then re-assess

# THE ADA AND PREGNANCY

- ❖ Since its inception, the **ADA has been inextricably linked with pregnancy issues**:
  - Pregnancy complications and restrictions
  - The physical act of childbirth
  - Post-childbirth recuperation, health complications, and restrictions
- ❖ Prior to the **U.S. Supreme Court decision in *Young v. UPS* (2015)**, EEOC guidance held that pregnancy-related impairments were not disabilities under the ADA and that pregnant employees were not entitled to consideration for light duty and similar programs facially neutral to pregnancy
- ❖ **That all changed with *Young***

# THE ADA AND PREGNANCY

- ❖ A pregnant employee can establish a **Pregnancy Discrimination Act** claim by showing (1) the employer denied a request for a pregnancy accommodation; and (2) the employer accommodated other employees similar in their ability or inability to work. If the employee satisfies this burden, the employer must provide a legitimate, non-discriminatory reason for denying the accommodation
- ❖ The legitimate reason may not be based on the expense or inconvenience of accommodating pregnant employees on similar terms as non-pregnant employees



# THE ADA AND PREGNANCY

- ❖ Although *Young* stopped short of finding that pregnancy was a disability under the ADA or that all employer light duty policies must be open to pregnant employees, it left:
  - unresolved just how an employer could deny light duty to pregnant employees without it being pretext for discrimination, and
  - most employers with the conclusion that pregnancy accommodation requests should be treated the same as disability accommodation requests

# THE ADA AND PREGNANCY

- ❖ Included among the omnibus legislation in the Consolidated Appropriations Act of 2022, Congress codified the principles of *Young* in the **Pregnant Workers Fairness Act**:
  - Statute is modeled after the ADA
  - Applicable to employers of 15 or more employees
  - Prohibits discrimination and requires reasonable accommodation for limitations related to **pregnancy, childbirth, or related medical conditions**.
  - Formally exceeds the boundaries of *Young* by treating these pregnancy and childbirth conditions the same as an ADA disability and requiring employers to provide accommodations.
  - **Took effect on June 27, 2023**



# THE ADA AND PREGNANCY

- ❖ In that same 2022 appropriations bill, Congress also expanded the rights of nursing mothers in the workplace with the **PUMP Act**:
  - Expands upon ACA's requirement that employers provide **space, breaks** for nursing mothers
  - Space **cannot be a restroom**
  - Applies to both **FLSA exempt and non-exempt** employees
  - Breaks can be taken whenever needed to express milk for **up to 1 year after birth of child**
  - Employers with fewer than 50 employees **may be able to establish exemption** by demonstrating an undue hardship via significant difficulty or expense relative to the size and financial resources of the employer.
  - Before filing suit for violations of the Act, the nursing mother **must provide notice to the employer and allow 10 days for the employer to correct its compliance**

# PRACTICAL CONSIDERATIONS



# PRACTICAL CONSIDERATIONS

## ❖ Pre-employment medical questionnaires

- Workers' comp carriers introduced
- Unreliable - No one tells the truth
- Making an issue over false medical questionnaire answers invites an EEOC inquiry
- If the health status of an applicant is important to the applicant's ability to perform the essential functions of the job, have a licensed medical professional administer a fitness for duty exam after a conditional offer of employment has been made

# PRACTICAL CONSIDERATIONS

- ❖ **What you do not know about an employee can hurt you**
  - Be respectful, but inquire when an employee is not behaving like him/herself
  - Focus on objective observations
  - “You don’t seem like yourself.”

# PRACTICAL CONSIDERATIONS

- ❖ **Do not diagnose your employees, no matter how certain you think you may be about their ailments**
  - “I see that you are struggling... What’s going on?”
  - “Is there anything we can do to help or anything we can provide to help you do your job?”

# PRACTICAL CONSIDERATIONS

- ❖ **Reasonable accommodation is an interactive process**
  - Not standardized
  - Circumstance specific
  - One failed attempt to accommodate does not get you off the hook
  - Try something else
  - Keep trying

# PRACTICAL CONSIDERATIONS

- ❖ Encourage employees to request reasonable accommodations from HR and not front-line supervisors/managers:

## Reasonable Accommodations

*The company complies with all federal, state, and local laws concerning employment of persons with disabilities, pregnancy, childbirth, or related medical conditions, including the Americans with Disabilities Act of 1990, as amended, the Pregnant Workers Fairness Act of 2022, [and Section 503 of the Rehabilitation Act, as amended]. The company will make reasonable accommodations for qualified individuals with disabilities, pregnancy, childbirth, or related medical conditions. Employees who have questions, concerns, or needs related to specific accommodations should contact HR at (800) XXX-XXXX and HR@XYZcompany.com*

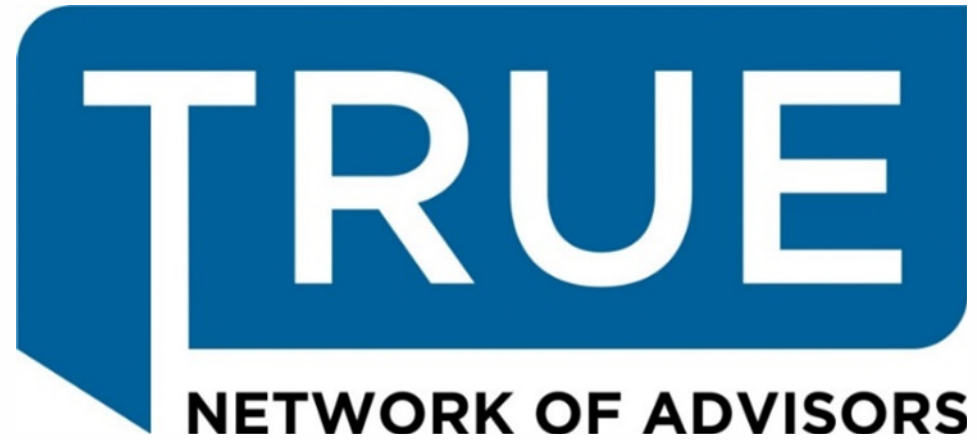
# PRACTICAL CONSIDERATIONS

- ❖ **Are alcohol and drug addiction disabilities under the ADA?**
  - Yes, but they do not require you to accommodate use of alcohol or drugs before, during, or after work
  - Providing **leave or accommodating treatment programs** is a reasonable accommodation for drug/alcohol addiction



# Action Items

1. Update your EEO and Accommodation employment policies to include protected classes for pregnancy, childbirth, and related medical conditions
2. Include a policy provision for PUMP Act compliance
3. Train supervisors and managers to identify and act on (“What’s going on?”) employee medical issues in the workplace, channeling those issues to HR
4. Review job descriptions for in-office vs work-from-home essential job functions and anticipate increasing WFH demands



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