ADA and ADAAA Training for Human Resources

Presented by Renee Culotta, JD

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ADA AND ADAAA TRAINING

For HR Managers and Legal Administrators

Renee Culotta
Frilot LLC
EEOC Total Charges Filed (2005-2015):

Objectives

• To understand basic provisions of the ADA/ADAAA

• To ensure compliance with the ADA/ADAAA

• To be able to assist applicants/employees requesting reasonable accommodation

• To engage in the interactive process with applicants/employees requesting reasonable accommodation

• To provide fair, consistent, and nondiscriminatory treatment
ADA and ADAAA

• ADA and ADAAA make it unlawful to “discriminate against a qualified individual on the basis of disability”
• Failure to make a reasonable accommodation is a prohibited form of discrimination
• Employees must engage in interactive process with applicant/employee
• Retaliation against employee/applicant asserting rights under ADA is a violation

Does the ADA Apply to Your Firm?

• The ADA applies to employers with 15+ employees
Counting Employees

– Counting employees– Number of employees on the payroll for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.

– Do you count Staff, Associates, Non-Equity Partners and Equity Partners?

Be Prepared

• Adopt an ADA policy
• Have forms ready
• Designate point person
• Train supervisors/ attorneys on ADA and FMLA
ADA Policy

• State the Firm does not discriminate on the basis of disability status

• Inform employees that a requirement of the ADA/ADAAA is that both the employee and the Firm communicate in good faith regarding reasonable accommodations

• Explain the interactive process

• Invite employees to request reasonable accommodation as needed

DEFINING DISABILITY
“Disability”

• **Actual Disability** – Physical or mental “impairment” that “substantially limits” a “major life activity”

• **Regarded As Disability** – Believed to have a disability that is not transitory (less than 6 months) and minor

• **Record Of Disability** – History of disability (such as cancer in remission)

Actual Disability

“Impairment” is any physiological disorder or condition; cosmetic disfigurement; anatomical loss; or mental or psychological disorder
Actual Disability

“Substantially Limited”

- Requires individualized assessment
- May consider “condition, manner or duration”
- May consider scientific, medical or statistical evidence
- Substantially limited as compared to most people

Actual Disability

“Major Life Activity”

Caring for Oneself  Standing  Working
Performing Manual Tasks  Sitting  Breathing
Seeing  Reaching  Learning
Hearing  Lifting  Concentrating
Eating  Bending  Thinking
Sleeping  Speaking  Communicating
Walking  Reading  Interacting with Others
More “Major Life Activities”

**Major Bodily Functions, including:**

– Immune System
– Normal Cell Growth
– Digestive, Genitourinary, Bowel, Bladder, Neurological, Brain, Respiratory, Circulatory, Cardiovascular, Endocrine, Hemic, Lymphatic, Musculoskeletal, and Reproductive Functions
– Operation of an individual organ (e.g., kidney, liver, or pancreas)

**Per Se Disability**

Always Considered a Disability by the EEOC:

- Deafness and Blindness
- Missing Limb
- Mobility impairment requiring a wheelchair
- Autism
- Cancer
- Diabetes
- Epilepsy
- HIV
- Multiple Sclerosis
- Muscular Dystrophy
- Bipolar Disorder
- Mental Retardation/Intellectual Disability
- Major Depressive Disorder
- Obsessive Compulsive Disorder
- Schizophrenia
The EEOC states:

“The determination of disability should not require extensive analysis.”

Disabled?
Individuals with Episodic Conditions?
Helen was diagnosed five years ago with multiple sclerosis that causes chronic, intermittent weakness. Every few months Helen has a flare up and is unable to stand or walk, lasting several days to weeks, during which time she must use a walker or a wheelchair. Is Helen “disabled” even during the time she is not affected?
Episodic Conditions

Yes

Helen is disabled because she is substantially limited in the major life activity of walking or standing when her condition is active.

Disabled?

Individuals with medical conditions in remission?

Stephen applied for a paralegal position. The Firm makes him a job offer and then requires him to complete a post offer medical history. Stephen’s medical history includes a two year period he was unable to work at all because of complications from AIDS. However, with new medications he has been able to work successfully for the past 5 years.
Conditions in Remission

Yes

Stephen is disabled as he has a “record of” disability, even if the condition is in remission. If the condition would be a “disability” in its active state, it is a “disability” even when in remission.

Disabled?

Individuals who use mitigating measures that work?
Joan, a secretary, had a hearing loss as a child and has always had hearing aids. You wouldn’t even notice them because they are small and Joan never mentions it. Is she disabled?
Mitigating Measures

Yes

Joan is disabled. Must determine whether the individual would be substantially limited in performing a major life activity without the use of the mitigating measure. Focus on what would happen if Joan stopped using her hearing aides.

Disabled?

Individuals who don’t use available mitigating measures?

Marie reveals she has bipolar disorder and experiences mood swings between being manic and depressed. She tells you she’s been to a therapist who prescribed medications for her condition; although the medications work when she takes them, she chooses not to take the medications because they make her sleepy and cause her to feel “spaced out.” She wouldn’t be disabled if she took the meds, so is she “disabled?”
Mitigating Measures

Yes

• Marie is disabled because the employer must look to the underlying condition without regard to available mitigating measures.

• Further, an employer cannot require the individual to use the mitigating measure— in this case, we can’t require Marie to take the medication as a condition of employment.

More On Mitigating Measures

However, an employer can consider the positive and negative effects of mitigating measures when considering “reasonable accommodation” and “direct threat” issues.

And, failure to use a mitigating measure may affect whether an individual is qualified for a particular position.
Disabled?

Individuals who have short term conditions?

Barbara strained her back in a car accident. Her physician states she cannot lift, bend, stoop, push or pull any amount of weight for a period of 3 months. Since the condition is only temporary, is she “disabled” under the ADAAA?

Temporary Conditions

Perhaps

- Even conditions lasting less than 6 months can be a “disability”
- The EEOC excepts transitory and minor conditions from the “Regarded As” prong of “disability”
- An individual who has a temporary but severe condition is “disabled” under the “Actual Disability” or “Record Of” prongs
Disabled?

Individuals who use illegal drugs?

Adam admits he has an opioid addiction and needs to enter rehab. Is he “disabled” because of his current addiction?

Drug/ Alcohol Use

**Maybe**

- The current use or abuse of illegal drugs or alcohol use in the workplace is not a covered disability under the ADA and ADAAA
- Alcoholism is a covered disability under the Act
- An individual who has successfully completed a rehab program or is participating in a supervised rehab program is “disabled”
Disabled?

An individual who is pregnant?

Janine is pregnant with her first child. She reports she needs time off when she has the baby, when she goes to her doctor’s appointments and when she has morning sickness. Is she disabled?

Pregnancy

Maybe

• Normal pregnancy is not an impairment and therefore not a disability

• However, certain impairments resulting from pregnancy may be a disability
REASONABLE ACCOMMODATIONS

Remember

The ADA and ADAAA require *Preferential Treatment* for qualified individuals with a disability.
Reasonable Accommodation

• Involves removal of workplace barriers

• Workplace barriers may be physical obstacles, such as inaccessible facilities or equipment

• Workplace barriers more commonly are procedures or rules such as when work is performed, when breaks are taken, when leave is given

EEOC Guidance:

“It is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.”
Request for Accommodation

• No Magic Language

• Employee might simply state they need a change in working conditions due to a medical condition

• If the Firm is not aware of a disability, then employee’s request for a change in working condition may not require the interactive process

What Triggers a Request

An individual informs an employer an adjustment or change is needed because of a “medical condition”
What Are Some Examples?

“I get migraines and I need a quiet, dark place to go when I get them.”
- **Medical Condition:** Migraines
- **Request:** Quiet/dark room

“I have sleep apnea and I might be late for work periodically.”
- **Medical Condition:** Sleep apnea
- **Request:** Excused tardiness

More Examples

What do you think about these?
An employee tells her Supervisor, “I'm having trouble getting to work at my scheduled starting time”

What about if they say…
“P’m having trouble getting to work at my scheduled starting time because of medical treatment I’m undergoing.”
More Examples

An employee tells his supervisor, “I need six weeks off to get treatment for a back strain.”

• What about if the employee says he needs six weeks off to rest because he’s got a bad back?
• Does the supervisor ask for clarification?

Is this a request for Reasonable Accommodation?
What Does the **Supervisor** Do?

- Document request
- Contact HR immediately

**What Does the **Supervisor** Not Do?**

- Ask medical questions
- Ask for medical paperwork
- Take matters in their own hands
- Agree to accommodations
- State an accommodation isn’t possible
- Make negative comments/communications

What is HR’s Role

- Serves as leader and advisor in interactive process
- Is liaison between employee, managers, and legal
- Facilitates information flow if:
  - Employee does not cooperate
  - Health care provider does not cooperate
- Maintains documentation regarding process and outcomes, including confidential medical information
Developing a Game Plan

The Starbucks Approach

How Can I Help You?

The Interactive Process

Requires “expeditious” interactive process, but results need not to be immediate
Interactive Process

- Must be used to learn employees’ limitations and what accommodations would be effective

- Most important aspect is communication, through letters, emails, in-person meetings

- Firm is not engaging in the interactive process if it denies a request without a meaningful dialogue…or if it grants request without meaningful dialogue?

Employers:
- May ask job-related questions only
- May require medical documentation
- May consult accommodation resources
- Must respond thoughtfully, after careful individualized consideration
- May propose alternatives
- Must remain open to ongoing dialogue
- Must maintain documentation confidentially, apart from personnel record
Medical Documentation
• When disability is not obvious, employer may ask for reasonable documentation about disability and functional limitations
• Cannot ask for unrelated documentation
• Employee can be asked to sign limited release
• Cannot ask for medical documentation if employee has previously provided

Healthcare Provider Questionnaire
Healthcare Provider answers:
• Whether employee has a physical or mental impairment
• Whether impairment restricts ability to perform job (per job description)
• Identifies specific restriction
• States how long the employee will be restricted
Healthcare Provider Questionnaire

- What if not fully completed?
- What if not signed by healthcare provider?
- What if answers are unclear?
- What if answers are inconsistent?
- What if answers are unclear?

Document Everything

Document, Document, Document!!!!

- Document each step taken, include dates and times
- Document every call and meeting with employee
- Document all research
- Document all accommodations offered to employee
- Document if employee refuses to accommodation for any reason
Reasonable Accommodation
May Include

• Acquiring or modifying equipment or devices
• Job restructuring
• Part-time or modified work schedules
• Reassignment to a vacant position
• Adjusting or modifying examinations, training materials or policies
• Providing readers and interpreters
• Making the workplace readily accessible to and usable by people with disabilities
• Extended leave

Reasonable Accommodation Resources

• Employee’s suggestion/request

• Equal Opportunity Commission (EEOC)
  www.eeoc.gov

• Job Accommodation Network (JAN)
  www.jan.wvu.edu

• State/Local Vocational Rehabilitation Agencies
Reasonable Accommodation?
Firm policy prohibits employees from eating at their workstation. Vinny explains he has diabetes and in order to avoid going into insulin shock, he sometimes must immediately eat a candy bar; he requests permission to keep candy at his work station, eat candy when his insulin level necessitates and bring a small refrigerator to keep in his work area to store medications that must be taken during working hours.

Reasonable Accommodation?
Sharon, a legal assistant, tells her Supervising Attorney she has ADHD and needs to have her own office because she cannot concentrate when she is in a group setting.

“Teacher says I don’t pay attention, I have no retention but I’m great at detention.”
Molly Migraine

Molly reveals she has a severe allergy to certain chemicals— including many fragrances. She asks you to tell her office mates to stop wearing perfume as the scents triggers migraines. Alternatively, she asks for a fragrant free environment, such as an isolated office on a floor by herself.

How do you handle this request?

Reasonable Accommodation?

The Firm requires all attorneys and staff to be available to work overtime in the event of trials or client deadlines. Erin, a paralegal, submits documentation from her physician requesting she be exempt from working overtime hours, including nights and weekends, because management of her disability requires that she keep a regular schedule that allows her to get to bed and get up at the same time every day.
Let’s Discuss…

Meddling Mother

The mother of Associate Elle calls the Firm’s administrator and asks her to periodically remind Elle to take her medication every 3-4 hours. What should the Administrator do?
Reasonable Accommodation?

Greg suffers from osteoarthritis in his knee, limiting his ability to walk long distances from the parking garage. He requests a free, reserved parking spot in front of the building. The Firm doesn’t pay for anybody’s parking and does not manage the parking garage.

Reasonable Accommodation?

Everyone knows Partner Pat is a tyrant – he demands perfection, jumps to conclusions and screams and shouts whenever he perceives a mistake has been made (even when later proved there were no mistakes). Steve, an associate in Partner Pat’s section, states he suffers from stress, anxiety and depression, and Pat’s constant berating worsens his symptoms. As an accommodation, Steve requests to be reassigned to a different supervisor.

“I have a note from my doctor. I’m allergic to criticism.”
Reasonable Accommodation?

Saul is the Firm’s court runner, copy guy and handyman. He injures his back and files a workers’ compensation claim. While the claim is pending, Saul is placed on “light duty” performing sedentary office work—answering phones and filing. He settles his comp claim, but he is still cannot drive, lift, push or pull. He is willing to continue in the light duty job, but the Firm’s policy is that the light duty job is reserved for only employees on worker’s comp.

Reasonable Accommodation?

- Stan, comes back from leave for back surgery and brings his supervisor, Morris, a note from his doctor releasing him to work at a satellite office closer to his home.
- Is Stan requesting an accommodation?
Leave as a Reasonable Accommodation

- ADA/ADAAA requires Employers to consider providing and/or extending leave as a possible accommodation
- Inflexible period of leave will not satisfy ADA/ADAAA requirements
- Time away from work (continuous or intermittent) in order to return to work may be granted as a reasonable accommodation (regardless of FMLA status)
- Cannot require employee to be 100% healed or able to work without restrictions to come back to work

12 Weeks 4 Weeks
FMLA

Leave as a Reasonable Accommodation

- Time off as a reasonable accommodation is an approved leave and will not be counted towards discipline
- Job-protected
  - Duration of job protection is determined on case-by-case basis
  - May be coordinated with FMLA (if available)
Leave as a Reasonable Accommodation

- “Indefinite” leave does not have to be approved

- No “automatic” terminations after a set period of time

- Decision to terminate, extend leave, or require return to work should be made by a team—HR, the Supervisor or Section Head and Legal

Medical Leave

**Q:** The employee’s doctor has said an employee’s return date is unknown, should I ask for a specific date?

**A:** Whether to ask for further clarification or not is very fact specific. It largely depends on language used by the physician. For instance, if a physician states, “unable to work any position for any time in the foreseeable future,” or “leave needed for an indefinite period, I cannot provide any date or prediction when the employee can return,” then it is very clear the employee is requesting indefinite leave, and no further clarification is needed. However, if the physician puts a time limit on the expected duration of the impairment (i.e., four months) or suggests the leave is for a limited duration but does not specifically state what that duration is, we need further clarification.
No Fault Attendance Policy

The Firm has a policy stating that an employee will be automatically terminated if he or she has been on leave and away from work for any reason for a period longer than 180 days in a rolling calendar year.

Is this policy legal?

Yes and No.

• Neither the EEOC nor any Court has held a “no fault” policy is per se illegal.
• An employer must modify its “no fault” policy to provide for additional leave as a reasonable accommodation

See EEOC Enforcement Guidance No. 915.0002 at Q. 17.
What Next?

Fran states she has cancer and will need 14 weeks of leave for radiation and chemotherapy. Fran is eligible under FMLA for 12 weeks of leave (the maximum available), so this period is both FMLA leave and a reasonable accommodation. After 12 weeks she can’t return to work.

But What About This?

We know beloved employee Henry has been diagnosed with stage 4 colon cancer. Nevertheless, Henry comes to work every day. We have offered Henry time off of work as an accommodation, but he refuses to take it. His presence in the office is uncomfortable and we really feel he needs time off.
Choosing Accommodations

Senior Partner Steve has a severe, degenerative vision disability. He requests the Firm to provide someone to read printed materials (case law, emails, etc.) he needs to review daily. Steve explains a reader enables him to review substantial amounts of written material in an efficient manner. Believing the requested accommodation would be too costly, the Firm instead provides attorney with a magnifying device so he can read the materials himself. Steve can read using the magnifying device, but it significantly slows down his ability to review written materials.

Is this a reasonable accommodation?

The Good Lawyer?

Alicia has been on leave for 12 weeks (FMLA) due to stress and anxiety—she has had difficulty managing her career, husband, politics, lovers, children and family issues. Her doctor says she can return to work at the end of 12 weeks, but not in a litigation capacity— the courtroom is too stressful. What do you do now?
Return to Work

Q: We have job openings for an employee cleared to return to work for which she is qualified, but these jobs pay considerably less than her current position. Is she required to take one of those lower paying positions?

A: The regulations state that the first option should be to try to restructure her current position to reasonably accommodate her disability; if we can’t do that without creating an undue hardship, then the next step would be to engage in a good faith effort to identify open, available, vacant position(s) equivalent to the employees’ position in terms of pay, status, location, benefits, etc. If there are no such vacant equivalent positions, then we can identify lower-level vacancies or demotions she would be qualified to perform. If there are lower level positions, we would offer her the position(s) as an accommodation, showing our good faith efforts to comply with the ADA. However, the employee would not need to accept the accommodation—we can’t force her to do so. Instead, she can opt for the accommodation of unpaid leave for a reasonable period of time, as long as it is for a fixed duration and her physician states she can return to work sometime in the foreseeable future, which we consider on a case by case basis.

Interactive Process

Once Reasonable Accommodation is identified/implemented

- Stay in touch with the employee on ongoing basis
  - Check in regarding changing circumstances
  - Check in on effectiveness of accommodation
  - Maintain open door
- Document process and outcomes
- Maintain confidentiality
Avoid Discrimination

Laura is a paralegal in the Maritime section and has taken a medical leave of absence and is now ready to return to work. HR is aware the work in the Maritime Section has slowed, partly because they hired a new paralegal for the group in the past month, so the plan is to place Laura as a paralegal in another section – same rate of pay, same hours, same benefits, basically the same type of work and job functions.

Nosy Neighbors

Sally’s coworker have seen her get an update in equipment- she received a new computer, an ergonomic keyboard, two large size computer screens, and a new chair with a footrest! Naturally, Sally’s nosy neighbors want the same upgrades and inquire to HR why Sally deserves the better equipment. HR legally tell Sally’s nosy neighbor...
MEDICAL TESTING AND INQUIRIES

Permissible and Impermissible Testing

- Pre-offer: non-medical tests and drug/alcohol tests only
- Post-offer, Pre-Placement: medical tests and inquiries acceptable, but limited ability to screen out candidates
- During Employment: Wellness is okay, but only if VOLUNTARY; Fit for Duty if job related
Permissible?

The Firm does not want employees to work while impaired. Therefore, it implements a requirement that employees periodically report to manager all prescription and non-prescription medications they are taking that has a warning stating it. OK?

NO

This disability – related inquiry violates the ADA because it goes beyond asking for illegal drug use and asks for information that might reveal the existence of a disability.
Permissible?

An employee takes multiple “smoke breaks” during the day. After returning from each break, the employee appears dazed, lifeless, confused and zoned out. After a few instances, the Firm’s Administrator sends the employee for drug and alcohol testing. Does this violate the ADA?

No

Drug and alcohol testing is not “medical test” and any resulting discipline for violation of a uniformly-applied conduct rule, is permissible under the ADA.
Permissible?

Max has been off work as a result of a serious head injury. His doctor releases him to return to work with no restrictions and the Firm reinstates him to his attorney position. However, it becomes clear Max can't perform the job—he has difficulty concentrating on tasks and communicating with his supervisor, coworkers and clients. Should we have him undergo an IME?

Yes

The Firm may require fit-for-duty medical exam if job related and consistent with business necessity.
Can You Request Medical Documentation?

Tammy, says she has a severe learning disability and, in order to remember what is discussed at meetings she must attend, she needs an assistant present at the meeting to record notes for her.

Can You Request Medical Documentation?

Yes

Because neither disability nor need for accommodation are obvious, the Firm may ask Tammy for documentation about impairment: nature, duration, severity of impairment, activity impairment limits, extent to which impairment limits ability to perform activities.
Can You Request Medical Documentation?

You learned a year ago that Tim has bipolar disorder after he requested a reasonable accommodation. The documentation you received at the time from Tim’s psychiatrist indicated this is a permanent condition which will always involve periods in which the disability will remit and then intensify. Now a year later, Tim again requests a reasonable accommodation related to his bipolar disorder.

No and Yes

No, the Firm can’t ask for medical documentation that he has a disability because the doctor has already said the disorder is permanent and substantially limiting.

Yes, the Firm can seek documentation from treating physician regarding requested accommodation.
Finally . . . Maintain Records

- Can you maintain a single medical file on all employees?

- Who can access the medical file?

UNDUE HARDSHIP
“Unreasonable” Requests

While employers do not have to …

– Grant employee’s preference, when other option is available
– Grant request if “UNDUE HARDSHIP”
– Grant request if “DIRECT THREAT”
– Forgive essential functions
– Create new position
– Grant indefinite leave

… Employers must still engage in INTERACTIVE PROCESS with qualified person with disability

“Undue” Hardship

• Very high legal standard that is difficult to meet
• Factors:
  – Nature and cost of the accommodation needed;
  – Overall financial resources
  – Type of operation of the employer
  – Impact of the accommodation on operation of the facility
QUESTIONS?

Renee Culotta
(504) 599-8085
rculotta@frilot.com
Your opinion matters!

Please take a moment now to evaluate this session.

Thank You!