



RETAIN Community of Practice

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RETAIN

Retaining Employment and Talent
After Injury/Illness Network

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ODEP
Office of Disability
Employment Policy

How the ADA and Reasonable Accommodations Can Make or Break a RETAIN Case

Leslie Dawson, MA, CRC, NCC

April 23, 2020

Webinar Quick Tips

- **If you are having any trouble with Adobe Connect, e-mail RETAINTA@air.org or use the chat box.**
- **Submit questions at any time during the webinar in the chat box—or use the “Raise Your Hand” function in the top menu.**



Welcome and Introductions

Please state

- Your Name:
- Your State:
- Role:
- Share a key area of interest regarding ADA and reasonable accommodations.

Norms for Interaction

- Be Present
- Share the Air
- Assume Goodwill
- Respect What Is Shared
- Embrace Productive Disequilibrium
- Learning Culture



“Coming together is a beginning. Keeping together is progress. Working together is success.”

- Edward Everett Hale

Today's Agenda

1. ADA Amendments Act
2. Qualified individual
3. Reasonable accommodation
4. State sharing: Implementation questions
5. Key takeaways and next steps

Today's Presenter



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Americans With Disabilities Act Amendment Act (ADAAA)

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Disclaimer

“These materials were prepared for the U.S. Department of Labor (DOL), Office of Disability Employment Policy, and Retaining Employment and Talent After Injury/Illness Network (RETAIN) state grantees, by the American Institutes for Research and its contracted subject matter expert. The views expressed are those of the authors and should not be attributed to DOL, nor does mention of trade names, commercial products, or organizations imply endorsement of same by the U.S. Government.”

Poll: How would you rate your working knowledge of ADA?

1. I've heard of ADA and have not applied into practice.
2. I have an understanding of ADA but have not put it into practice.
3. I have an understanding of ADA and have put it into practice.
4. I am knowledgeable about ADA and have put into practice; this is just a refresher.

The ADA Amendments Act and Business

Section 1*: Who's Covered?

Section 2: Key Concepts:

- **Qualified Individual**
- **Essential Job Functions**

Section 3: Reasonable Accommodation

- **Undue Hardship**
- **Direct Threat**

*Source of information for Section 1 slides: U.S. Equal Employment Opportunity Commission (EEOC) <https://www.eeoc.gov/laws/types/disability.cfm>

Who Is Covered as an Employer?

- Have 15 or more employees in each of 20 or more calendar weeks of the year
- Includes private sector and government entities
- Excludes tax exempt, private membership clubs as well as Indian tribes and religious entities (can give preference to members)

Who Is Covered as a Person With a Disability?

- Physical or mental impairment that substantially limits one or more major life activities
- Record of such an impairment
- Regarded as having such an impairment
- And then there's "associative discrimination"

Physical or Mental Impairment

- Physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine
- Mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities [Section 1630.2(h)]

Substantially Limiting

- Should be construed broadly
- Does not require extensive analysis
- Duration of impairment does not impact “substantially limits” (6 months or less can be substantially limiting, except for the “regarded as” element)

Substantially Limiting Impairments

- Covers impairments that are episodic or in remission:
 - Epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia, and cancer
- Specific impairments that are identified as substantially limiting:
 - Deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia

One or More Major Life Functions.....

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working...
- Operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions
- Not covered: A person who is currently using illegal drugs— or using drugs illegally

Record of Impairment

- Have a history of a disability
- Misclassified as having a substantially limiting impairment
- Whether or not they are currently substantially limited in a major life activity...
- Focus is on how a person is treated because of a perceived disability.
- Failure to hire; termination; demotion
- Do not have to provide a reasonable accommodation, unless actual disability or record of disability
- Does not include impairments with a duration of 6 months or less.

Associative Discrimination

- Extends to other associations (e.g., employee or applicant with a disabled child, spouse)
- Cannot discriminate on the basis of relationship to a disabled person
- Do not have to provide reasonable accommodations

What Are Mitigating Measures?

- That which eliminates or reduces the symptoms or impact of an impairment
 - Medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy
- Does NOT include ordinary eyeglasses or contact lenses (if vision is fully corrected)

Mitigating Measures

- Is individual substantially limited in performing major life activity without the mitigating measure? If yes, then covered.
- Focus on extent of limitation prior to use of mitigating measures
- Must accommodate negative effects of mitigating measures
- No reasonable accommodation needed for positive effects of mitigating measures

Poll: Does ADA protect a person's job?

- Yes
- No

The ADA and Business

Section 1: Who's Covered?

Section 2*: Key Concepts

- Qualified Individual
- Essential Job Functions

Section 3: Reasonable Accommodation

- Undue Burden
- Direct Threat

*Source of information for Section 2 slides: U.S. Equal Employment Opportunity Commission (EEOC) <https://www.eeoc.gov/laws/types/disability.cfm>

Qualified Individual

An individual **with a disability** who:

- satisfies the **pre-requisite skill or required skill**, experience, education, and other job-related requirements of the employment position,
- can perform the **essential functions** of such a position according to job standards....
- with or without **reasonable accommodation**.

Essential Functions of a Job

A function can be essential if...

- The **position exists to perform the function** (i.e., whether removing the function would fundamentally change the job).
- There are a **limited number of other employees available to perform the function**, or among whom the function can be distributed.
- A function is **highly specialized**, and the person in the position is hired for special expertise or ability to perform it.

Evidence for Essential Functions

- Employer judgement
- Job description before advertising
- Time spent on function
- Consequence of not performing function
- Experience of past incumbents
- Experience of incumbents in similar jobs

The ADA and Reasonable Accommodation

Section 1: Who's Covered?

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Section 3*: Reasonable Accommodation

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...With or Without Reasonable Accommodation

Many individuals with disabilities can perform the essential functions of jobs without accommodation. However, if the otherwise qualified individual with a disability cannot perform an essential job function because of the disability, the **employer must consider** whether there are modifications or adjustments that could enable the person to perform the function.

A REASONABLE ACCOMMODATION

(more to come on this later in presentation)

What Is a Reasonable Accommodation?

- A modification or adjustment to a job, the work environment, or “the way things are usually done” that enables a qualified individual with a disability to enjoy an equal employment opportunity.
- Instead of focusing on WHAT is done, accommodations focus on HOW.

When Is a Reasonable Accommodation Required?

- To ensure equal opportunity in the **application process**
- To enable a qualified individual with a disability **to perform the essential functions** of the job
- To enable an employee with a disability to enjoy **benefits and privileges** of employment

What Are the Areas to Consider for Reasonable Accommodations?

- Testing and Interviewing
- Job Site and Job Tasks
- Policy Compliance
- Training
- Work Settings and Activities
- Other Privileges of Employment

Reasonable Accommodations— Legal Obligations

- Must be provided unless it can be shown to cause undue hardship
- Applies to all aspects of employment
- Cannot deny employment because of the need of an accommodation
- Is not required if the individual is otherwise not qualified
- Generally, it is the obligation of the individual to request accommodation.

When Can an Employee Request an Accommodation?

- At any time during the application process or at any time during employment
- When the employee knows that there is a workplace barrier due to a disability
- Employee is encouraged to request an accommodation before his or her performance suffers.
- ADA does not preclude an employee accommodation request after hire.

“Bringing Up” Reasonable Accommodation

- If an employee has not asked for accommodation, the employer generally not obligated to ask.
- Employer should discuss Reasonable Accommodation if:
 - Employer cannot disclose whether an employee is receiving accommodations but can advise coworkers of policies for employees experiencing difficulties in workplace.
 - Employee with a disability may voluntarily disclose.

How to Request an Accommodation

- The employee lets the employer know that an adjustment or change is needed for reasons related to a medical condition.
- The employee need not mention ADAAA.
- The employee need not use the phrase “reasonable accommodation.”
- The employee can use plain English.
- Someone else may request an accommodation on behalf of the individual.
- The request does not have to be in writing.
- An employer can ask for a written request or use a form or other type of documentation.

What to Do After the Request for a Reasonable Accommodation

- Employer should begin the process of discussing disability and identifying reasonable accommodations immediately.
- It is acceptable to discuss the nature of the disability and functional limitations in order to identify an effective accommodation. Stay focused on essential functions.
- Employer is entitled to know that the employee has an ADAAA-covered disability.

Tips for the Dialogue

- Know the job tasks and policies.
- Talk with the individual about
 - specific job-related impairments,
 - job tasks or policies affected, and
 - his or her ideas for accommodations.
- Identify other accommodation options.
- Assess options and make choice.
- Inform employee and document.

Poll: Does a reasonable accommodation negate disciplinary action, as a result of job performance issues, due to limitations from a disability?

- Yes
- No

Selection of Reasonable Accommodation

- Employer chooses.
- Selection must be effective.
- Employer does not have to show undue hardship to provide the less expensive accommodation.
- Give primary consideration to preference of individual.
- Cannot require qualified individual with a disability to accept the accommodation; however, if the employee refuses the accommodation offered, and performance suffers, he or she may no longer be qualified.

Unreasonable Modifications or Accommodations

- Do not have to eliminate the essential functions
- Do not have to lower production standards
- Do not have to accommodate for personal use items

Undue Hardship

An employer is not required to make reasonable accommodation if it would impose an undue hardship on the operation of the business.

Undue Hardship

- An action causing ***significant difficulty or expense***
- Factors considered:
 - Nature and cost of accommodation
 - Financial resources
 - Number of employees
 - Effect of accommodation on company
 - Number, type, location of facilities
 - Geographic separateness

Undue Hardship (more)

- If undue hardship is due to financial constraints:
 - ADA requires maximum effort.
 - Decisions are made on a case-by-case basis.
 - Employer bears the burden of proof.
 - It is an ongoing process.
 - Document, document, document.

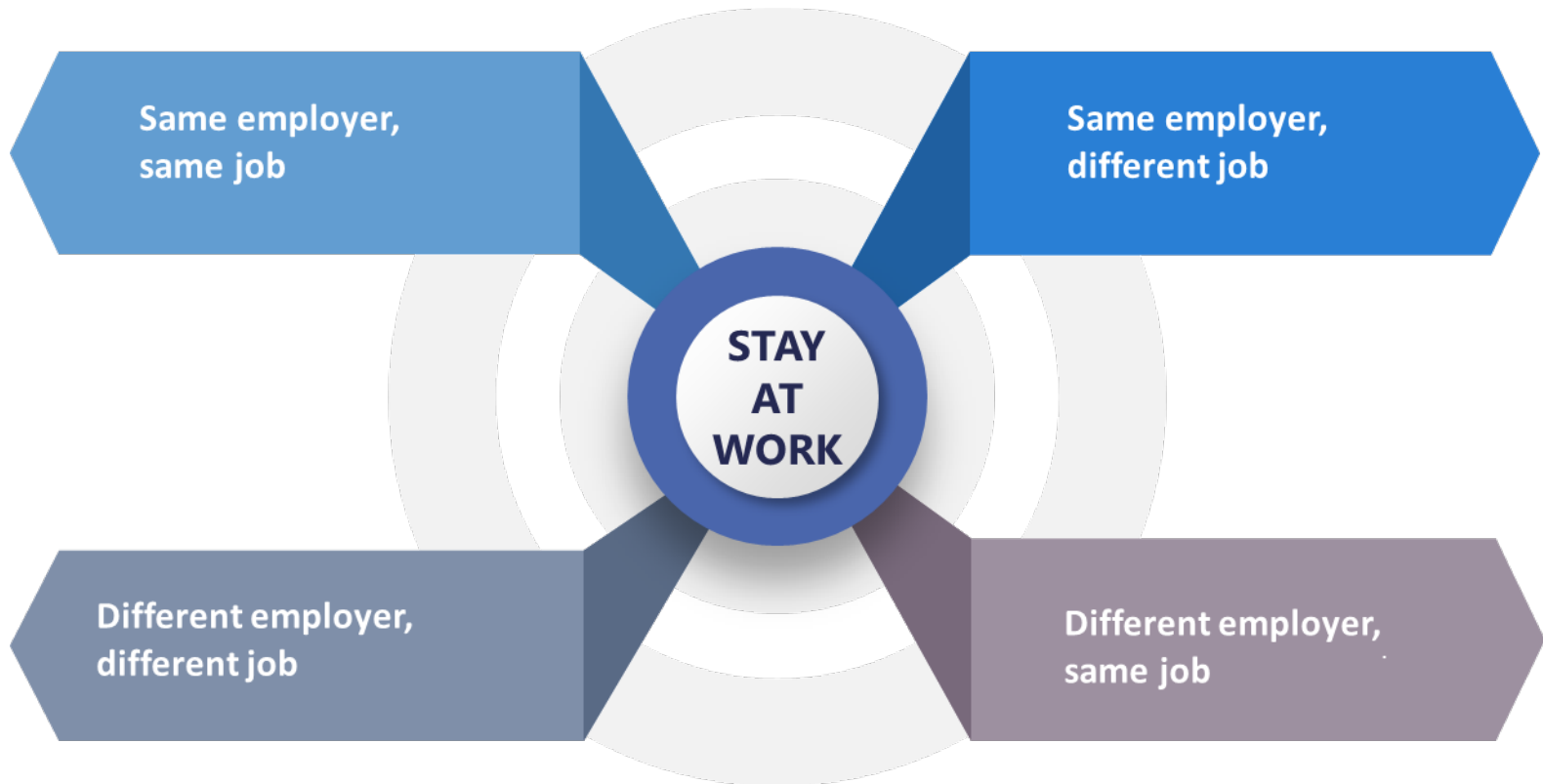
And Finally, “Direct Threat...”

- There are specific and stringent requirements in order to establish “direct threat.”
- Even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a “direct threat” by use of reasonable accommodation.

Reasonable Accommodations

- Job restructuring
- Leave
- Holding a job open
- Modified or part-time schedule
- Reassignment

Tiers of SAW/RTW



Job Restructuring

- Reallocate/redistribute marginal functions.
- Alter when/how a function (essential or marginal) is performed.
- Consider assigning other marginal functions to replace those removed.

Leave

- Reasons for Leave as a Reasonable Accommodation:
 - Not required to provide paid leave beyond that for similarly situated individual
 - Can require employee to exhaust accrued leave before using unpaid leave
 - AUTOMATIC termination not permitted

Holding a Job Open

- This must be considered as a reasonable accommodation option.
- Employee with a disability, who is on leave as a reasonable accommodation, is entitled to return to the same position unless holding the position is an undue hardship.
- If unable to hold the position, must consider a vacant, equivalent job, for which the employee is otherwise qualified.
- If an equivalent, vacant position is not available, then consider a vacancy at a lower level.
- Continued leave is not required if the above options do not exist.
- An employee cannot be penalized for work missed during this leave.

Modified or Part-Time Schedule

- Adjusting arrival/departure times
- Periodic breaks
- Altering when functions are performed
- Must consider, even if not provided to other employees

Reassignment

- First consider an accommodation that would allow employee to remain in current job.
- Consider for employee who cannot perform essential functions of current position.
- This option is a “last resort.”
- Employee must be qualified for new position.
- No obligation to assist the individual in becoming qualified for vacancy.
- “Vacant”= Available at the time of the reasonable accommodation request or becoming available within a reasonable amount of time.
- No bumping required.
- Reassignment accommodation does not include promotion.

Key Takeaways



Share a key takeaway from today's discussion.

What are the next steps you will take?

Any remaining questions or needs that you would like follow-up on?

Recommended Resources

- U.S. Equal Employment Opportunity Commission (EEOC): <https://www.eeoc.gov/laws/types/disability.cfm>
- ADA.gov website – Information and Technical Assistance on the Americans with Disabilities Act: <https://www.ada.gov/>
- ADA National Network: <https://adata.org/learn-about-ada>
- JAN Job Accommodation Network: <https://askjan.org/>
- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Thank you for your participation today!

- Please complete end-of-session survey!
https://www.surveymonkey.com/r/RETAIN_ADA_4_23_20
- Today's CoP slides and notes will be accessible on the RETAINTA Online Community (ROC) at <https://retainta.org>.

Disclaimer

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