

What's New With The ADA?

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Today's Topics

- Quick ADA Level-Set
- Work From Home Accommodations
- Repeated Requests for Leave Extensions
- Website Accessibility

ADA Refresher

ADA Basics

- An employer can't:
 - Discriminate against individuals protected under the ADA
 - Includes creating a hostile work environment due to a disability
 - Fail to make a reasonable accommodation
 - Retaliate against individuals who pursue their rights under the ADA (e.g., request a reasonable accommodation) or report a suspected violation of the ADA
 - E.g., coercion, intimidation, and threats
- An employer can make limited medical examinations and inquiries (job-related and consistent with business necessity)
 - Required confidentiality for medical information

Who Is Covered Under The ADA?

- Employees:
 - With a physical or mental disability (have it), or
 - With a history of having such a disability (had it), or
 - Who are regarded as having such a disability (you think have a disability)
- AND
- Are qualified to perform the essential functions of the position

What Is A Disability?

- A physical or mental condition that makes it more difficult for an individual to do something important or that impacts one of his or her major bodily functions in comparison to the general population
- No specific durational requirement
 - But if short duration, must be severe
- Can be episodic
 - Example: back impairment that results in a 20-pound lifting restriction that lasts for several months
- **Can be Long COVID**
- **Pregnancy/related to reproduction**

Reasonable Accommodation

- Employer must:
 - provide reasonable accommodations to qualified individuals
 - who have an actual disability or a disability record,
 - if such accommodations are necessary for them to perform the essential functions of the job
- Employee must be qualified
- Able to perform the essential functions of the job, with or without reasonable accommodation
- Accommodation must be provided up to the point of undue hardship

Reasonable Accommodation – Undue Hardship

- **Undue hardship** means an accommodation would be:
 - Unduly costly
 - Substantial
 - Disruptive
 - Would fundamentally alter the nature or operation of the business
- Employers are also not required to allow an employee to work if there is a direct threat to the employee or others
- These exceptions are very hard to show. Assume they are not present unless significant steps have been taken to show information or data that supports them

Reasonable Accommodation – Key Question

- **Can the disabled employee perform the essential functions of the job, with or without a reasonable accommodation?**
- Evidence that is relevant to whether a function is essential or marginal includes:
 - The employer's judgment
 - The written job description
 - The amount of time spent performing the function
 - The consequences of not requiring someone in the job to perform the function
 - The actual experiences of other employees (have other employees been required to perform those duties?)

Reasonable Accommodation - Examples

- Job restructuring
- Modified work schedules
- Acquiring or modifying equipment
- Reassignment to a vacant position
- Leaves of absence
- **Work from home**

Interactive Process

Document the process:

- Employee's requested/proposed accommodation(s) and why
- Other potential accommodations
- Pros and cons of all accommodations discussed
- Employee's reaction
- Which accommodation was chosen and why

Work From Home As An Accommodation

Work From Home Accommodations

- The EEOC and most courts take the position that where the work is performed is just another policy that may have to be modified as a reasonable accommodation
- It is important to look at the actual job and actual employee to determine whether the job can be performed at home

Work From Home Accommodations

- Relevant considerations:
 - The employee's need to work with certain equipment or tools that cannot be replicated at home
 - Whether there is a need for in-person face-to-face interaction with colleagues, clients, or customers
 - Whether the position in question requires the employee to have immediate access to information that is located only in the workplace
 - How the employee performed when working from home during COVID
 - Whether other employees work from home

EEOC Examples Where WFH Is A Reasonable Accommodation

- EEOC held that an employer must provide remote work for an employee who could not commute due to her disability whether the employer had admitted that the employee had adequately performed her functions remotely for a number of months
 - *Linda A. v. Wormuth (Army)*, 2023 EEOPUB LEXIS 716 (EEOC 2023)

EEOC Examples Where WFH Is A Reasonable Accommodation (Cont.)

- EEOC held that an employee, whose job consisted of performing tumor measurements which could be done on a computer, was entitled to work at home where her asthma was triggered by exposure to the carpeted areas at her work site
 - *Complainant v. Azar (HHS)*, 2020 EEOPUB LEXIS 483 (EEOC 2020)

EEOC Examples Where WFH Is Not A Reasonable Accommodation

- EEOC held that an employer did not violate the ADA by denying an employee with a shoulder injury full-time telework where the evidence showed that the employee needed to be on site at least part-time to review sensitive/classified information that could not be removed from the office
 - *Hollis B. v. Mayorkas (DHS)*, 2023 EEOPUB LEXIS 1084 (EEOC 2023)

EEOC Examples Where WFH Is Not A Reasonable Accommodation (Cont.)

- EEOC held that a medical support assistant could not be given telework as an accommodation because she had several essential duties that had to be completed on site, including customer service and scanning of documents that includes patient information.
- “To allow [this employee] to telework would have meant very private, personal medical information would have been physically leaving the office such that security and privacy of that information could not be maintained.”
 - *Yolanda P. v. McDonough* (VA), 2022 EEOPUB LEXIS (EEOC 2022)

EEOC Examples Where WFH Is Not A Reasonable Accommodation (Cont.)

- EEOC held that telework was not a reasonable accommodation for a transportation security inspector who was responsible for conducting inspections and investigations because telework would limit him to performing only clerical and administrative duties.
 - *Keri v. Wolf*, 2020 EEOPUB LEXIS 477 (EEOC 2020)

Inadequate Job Performance

- The EEOC has held that an employee's inadequate job performance is not a reason to deny a WFH accommodation request because an employee is still required to meet all performance requirements regardless of where they are working
- The relevant question is whether the employee could be accommodated "without incurring an undue hardship, not whether [the employee's] performance merited special privileges."
 - *Alonso v. Dhillon*, 2020 EEOPUB LEXIS 161 (EEOC 2020)

WFH During COVID-19 Pandemic

- During the pandemic, many employees worked from home even if they were not performing all of the essential functions of the job at home.
- The EEOC stated in a webinar that an employer does not have to continue telework as an accommodation if it was choosing to excuse an employee from performing on or more essential functions
 - However, at the same time, the EEOC stated that the temporary COVID-19 telework experience could be relevant when analyzing whether the employee was able to satisfactorily perform all essential functions while working remotely

Repeated Requests for Leave Extensions

FMLA vs. ADA

FMLA

- 12 weeks for an employee's serious health condition or to care for a family member with a serious health conditions

ADA

- No set duration
 - Subject to:
 - Reasonableness
 - Undue hardship

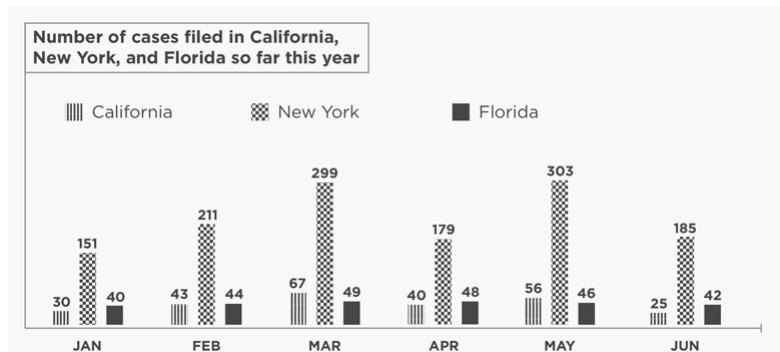
Extended Leave Under the ADA

- Although a leave of absence may be a reasonable accommodation, an extended duration of the leave can constitute an unreasonable accommodation.
- When “an employer has already provided a **substantial** leave, an additional leave period of a **significant duration**, **with no clear prospects for recovery**, is an objectively unreasonable accommodation.” *Walsh v. United Parcel Service*, 201 F.3d 718, 727 (6th Cir. 2000).
- An employer is not required to wait **indefinitely** for an employee’s medical condition to improve for a return to work. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998).

Website Accessibility

Huge Growth in Cases

- Cases doubled in five years:
 - 2018: 2,314
 - 2023: 4,630
- Most cases are filed in New York



What Are The Lawsuit About?

- Inaccessible web content means that people with disabilities are denied equal access to information
- Cases focus on plaintiffs with visual impairments
- Visually impaired persons rely on “reader” software to navigate websites
- Some websites are not compatible with readers, and need to be updated

When Is Website Accessibility Required Under the ADA?

- The ADA applies to state and local governments (Title II) and businesses that are open to the public (Title III).
- Many state and local government services, programs, and activities are now being offered online. These include, for example, things like:
 - Applying for an absentee ballot
 - Paying tickets or fees
 - Filing a police report
 - Attending a virtual town meeting
 - Filing tax documents

When Is Website Accessibility Required Under the ADA?

- Examples of businesses open to the public include:
 - Retail stores and other sales or retail establishments (or businesses that have a retail element)
 - Banks
 - Hotels, inns, and motels
 - Hospitals and medical offices
 - Food and drink establishments
 - Theaters
 - Sports arenas
 - Any business that participates in e-commerce?
 - (Can customers purchase your products online?)

Examples Of Website Accessibility Barriers

- **Poor color contrast.** People with limited vision or color blindness cannot read text if there is not enough contrast between the text and background (for example, light gray text on a light-colored background).
- **Lack of text alternatives (“alt text”) on images.** Text alternatives convey the purpose of an image, including pictures, illustrations, charts, etc. People who are blind will not be able to understand the content and purpose of images, such as pictures, illustrations, and charts, when no text alternative is provided.

Examples Of Website Accessibility Barriers (Cont.)

- **No captions on videos.** People with hearing disabilities may not be able to understand information communicated in a video if the video does not have captions.
- **Mouse-only navigation (lack of keyboard navigation).** People with disabilities who cannot use a mouse or trackpad will not be able to access web content if they cannot navigate a website using a keyboard.

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April 2024 Updates

- New Regulations for Title II (state and local governments)
- New Regulations for Medicare recipients
 - Prohibit medical treatment decisions from being based on bias or stereotypes about persons with disabilities;
 - Prohibit discriminatory use of “value assessment methods,” which play a role in determining whether a particular medical treatment will be provided and under what circumstance; and
 - Provide rules to prevent disability discrimination in child welfare programs.
- The updated regulations for governments and health care entities set a specific technical standards must follow to meet their obligations for website and mobile app accessibility

This Is The Current Standard

The Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA

- Guidelines can be accessed here:
<https://www.w3.org/WAI/standards-guidelines/wcag/>

Case Study

Case Study

- Employee had a long successful work record as a support coordinator for individuals in the county
- She was diagnosed with ADHD and depression
- Around the same time, the requirements of the job changed from a standard office to a mobile office
- Employee's performance started declining, was on a series of PIPs, etc.
- Employee asked to WFH as an accommodation
 - Her supervisor (not HR) denied the request

Case Study (Cont.)

- Employee's performance continues to be below standards
- Employee submits FMLA paperwork to HR requesting an accommodation to work from home
- HR set up a meeting to discuss the request, Employee did not appear for the meeting
- Employee indicated she could not work. She then exhausted her FMLA leave.
- Employee did not respond to several requests for medical documentation to extend her leave
- Eventually she submitted documentation saying she could not work

Case Study (Cont.)

- She asked to extend her leave again
- She did not submit medical documentation supporting the need for the extension
- Employer terminates the employment relationship
- Employee then submits the documentation, employer does not revoke the termination
- Employee sues, claiming violation of the ADA



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