

ADA Accommodations

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Agenda – First Half

The Pre-Hire Process and other Issues

- Employment application process
- Job descriptions/Essential job functions
- Interview process
- Determining a qualifying disability
- Post offer inquiries/physicals

Agenda – Second Half:

Post Hire ADA Issues

- Fitness for duty
- Interactive process
- Reasonable accommodations

Disability Law Basics

ADA

ORS 659A.112

- ADA passed by Congress in 1990.
- Applies to all employers with 15 or more employees.
- Enforced by EEOC and courts.
- Oregon law counterpart, closely follows ADA.
- Applies to employers with 6 or more employees.
- Enforced by BOLI and courts.

When does the ADA kick in?

- From the first communication.
- Protects applicants during the recruitment and interview stage.
- Applies to real or *perceived* disability.
- Do not have to actually discriminate *because of* the information you learn. Merely asking certain questions creates liability.

The Application Process



Advertising –Minimizing Exposure

What should a job advertisement include?

1. Clear and concise description of the job identifying essential job functions
2. Minimum job requirements
 - Avoid irrelevant job requirements
 - Avoid inaccurate physical requirements
3. Avoid unnecessary statements which could implicate ADA
 - Ex: “Looking for fit/healthy person for maintenance crew”
4. Consider putting EEO Statement in ad
5. Consider indicating whether drug screen required

Job Applications

- Should request only that information necessary to evaluate a candidate's qualifications, skill set and ability.
- Remove all:
 - Non-necessary information
 - Questions that elicit personal medical information
- Consider whether a generic application is sufficient or whether a more carefully tailored application is appropriate.
- Include EEO statement and attestation of honesty.

Reasonable Accommodations for the Application Process

- May need to adjust or modify application policies and procedures.
- Common examples:
 - A reader for a person who is blind
 - Making application available in alternative formats
 - Addressing building accessibility issues for those with mobility impairments
 - Assistance filling out application for individuals with learning disabilities or other

Job Description Essentials

- Carefully consider and identify the reason the job actually exists
- Identify the necessary portions of the job (keep in mind that not all parts of the job are essential)
- Consider importance of accuracy
 - Resources available to create job descriptions

Essential Job Functions



Essential Job Functions

- ADA requires reasonable accommodation be given to an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.
- Therefore, in order to properly assess an accommodation request, need to know essential and non-essential functions of job.

A function may be essential when:

- The number of employees available to perform the function is limited;
- The function requires specialized skills;
- The function occupies a large percentage of time; or
- Failure to perform the function may have serious consequences.

Can Regular Attendance be an Essential Job Function?

- Maybe. *Samper v. Providence St. Vincent*
- Consider the nature of the job at issue.

Drafting Strong Job Descriptions: Two Components

1. Essential job functions

- Should only include those core functions/activities that are truly required of the position – the performance of which is the reason the job exists in the first place. Generally includes five to seven key job functions – those functions for which the job was designed.
- Should not be an exhaustive list of every job duty the employee may or may not be asked to do.

2. Non-essential but preferred job functions

Examples

- Receptionist:
 - Essential job functions:
 - Answering phones in a professional and courteous manner
 - Greeting customers
 - Relaying messages
 - Non-Essential but preferred job functions:
 - Escorting clients to staff offices
 - Ordering office supplies when supply clerk on vacation
 - Other tasks that can be done by others

Additional Information for Inclusion in Job Description

- Training or credentials required
- Physical requirements of the job
 - Resources available for identifying
- Environmental factors
- Other information that clarifies job responsibilities

Why do well-written job descriptions matter?

- Scenario 1: ER terminates employee for performance issues. EE sues claiming terminated because disability. EE alleges she asked for disability accommodation which ER denied.
- Scenario 2: Employer sued for failure to accommodate. ER defends the job duty claimant wanted accommodation around was an essential job function and no reasonable accommodation could be provided. EE says was not an essential job function.

Why do well-written job descriptions matter?

- Evidentiary Issues:
 - Accurate and well-written job description will more likely than not be given deference.
- Job description is *prima facie* evidence of the essential functions of the job.
 - ADA
 - Workers' Compensation

Consequences of Poorly Drafted Job Descriptions

- Listing non-essential job functions as essential may disqualify certain classes of workers – for example, the including of lifting requirements.
- Failure to define essential functions could result in court making the determination.

Other Considerations

- Do you want to broadly create job descriptions that apply to many employees or narrowly tailor the job description for each position?
- Periodic review and update of job descriptions

The Interview Process



"He's threatened to continue singing until we hire him."

Interview Process

- Be sure person conducting interviews is aware of procedures concerning the interview process.
- Create and use objective criteria standard to evaluate all applicants.
- Design questions that eliminate inquiry on non-essential items. Focus on skills, expertise and qualifications.
- Uniform process with same questions being posed to each applicant.

Dangers and Do-Nots

- Do not have to actually discriminate *because of* disability or perceived disability. Merely asking creates liability.
- Cannot ask question that is likely to elicit information about disability
 - Ex: candidate reveals he attended special school geared for students with learning disabilities. Can't ask why.

EEOC Examples of Questions Not to Ask

- Do you have a heart condition? Do you have asthma or any other difficulties breathing?
- Do you have a disability which would interfere with your ability to perform the job?
- How many days were you sick last year?
- Have you ever filed for workers' compensation? Have you ever been injured on the job?
- Have you ever been treated for mental health problems?
- What prescription drugs are you currently taking?

Drug and Alcohol Questions

- Addiction issues may fall under the ADA
- Avoid
 - Have you ever been treated for alcohol/drug addiction?
 - How many drinks do you have a day?
- Permissible
 - Do you currently use illegal drugs?

Alternative and Permissible Questions

- Do you anticipate any problem meeting our attendance policy?
- Will you be able to perform the essential functions of this job?
- Have you ever been disciplined for a safety violation?

Other Considerations

- Ask applicant to confirm non-medical qualifications such as education, work history etc.
- Ask employees about ability to perform specific job functions – lifting certain weights etc.
- Employer may ask the applicant to **DEMONSTRATE** how they would perform a task.
 - Must do it for all applicants, not just those that employer identifies as potentially having trouble performing task.



**Are accommodations necessary
during the interview?**

What if the Applicant has an Obvious Disability?

- Example: Claimant uses a cane and appears to have limited use of left leg. She is applying as a file clerk and will be responsible for filing legal files, which she must gather from throughout the office.
 - Is inquiry reasonable?
 - Is inquiry narrowly tailored?
- Permissible only to determine whether accommodation will be required and if so, to what extent. Must be very limited inquiry.

What if Applicant Discloses a Disability During Interview?

- Example: An individual with diabetes applying for a receptionist position voluntarily discloses that she will need periodic breaks to take medication.
- Limited discussion allowed, but only to determine if accommodation needed.
 - No questions about underlying physical condition

No Pre-offer Medical Examination

- As with questions likely to elicit medical information, they are strictly prohibited
 - Nothing administered by health care professional
 - Cannot have results interpreted by health care professional
 - Nothing invasive
 - Example of PCE being considered medical examination

Post Offer Inquiries

We've renamed our
"Personnel" office to "Personal" office.
Now, tell me about your disability.



Post-Offer Medical Inquiries

- Law *does* allow post-conditional job offer inquiries into medical history or prior injury claim history, but only if genuine conditional job offer has been extended.
- Prohibited investigations
 - Polygraph Testing
 - Genetic Testing
 - Brainwave Testing

Post-Offer Inquires

- Any medical inquiry should be the absolute LAST inquiry (after criminal history, etc).
- They must be done for all job applicants in that job classification
- Inquiry must be job related
- Answers must be kept confidential
- May trigger reason to do medical exam
- Remember that obligation for reasonable accommodation applies (discussed later)
- How much do you really want to know?

Confidentiality Concerns

- *Tamburino v. Old Dominion Freight Lines* (2012 US District Court Oregon)
- Employee failed to reveal prior disability in a post-offer medical questionnaire
- After prior disability was revealed during WC claim employer terminated employee
- Court found there was a viable claim for violation of ADA

Fitness for Duty in Post-Offer Stage

- Again, must be last inquiry prior to hire.
- Must be job-related.
 - Look at job description. Is a fitness for duty exam reasonable?
- Fewer legal implications for post-offer exams than for post-hire exams.
- Goal is only to determine if employee can perform (essential) physical job requirements.
 - Send doctor Job Analysis and minimal inquiry.

- If employee is screened out then must establish
 - “job-related and consistent with business necessity”
 - applicant could not be accommodated
- Ex: Fitness for hire establishes worker cannot lift 50lbs as required by job description. Offer withdrawn. Potential issues?

What is a qualifying disability?



What is a Disability?

- A physical or mental impairment that substantially limits one or more major life activities of an individual.

Three Separate Protected Persons

- Under both state and federal law, employers are prohibited from discriminating against:
 1. An individual with a disability
 2. An individual with a record of impairment
 3. An individual who is regarded as having an impairment.

The fact a person is regarded as disabled does not entitle them to accommodation unless they actually have a qualifying disability.

ADAAA Amendments

- Stated intent was to “Restore the intent and protections of the Americans with Disabilities Act of 1990.”
- Congress believed too many workers were not being accommodated. Believed definition of disabled too narrow.
- Congress believed employers argued too much over whether someone is or isn't disabled *instead* of asking, “is there any reasonable accommodation we can provide to the worker so they can keep working?”

“Major Life Activity” After ADAAA Amendments

- Definition remains the same. However, Congress has now instructed that definition must be interpreted more broadly.
- Now: ADAAA defines “major life activities” as including, but not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

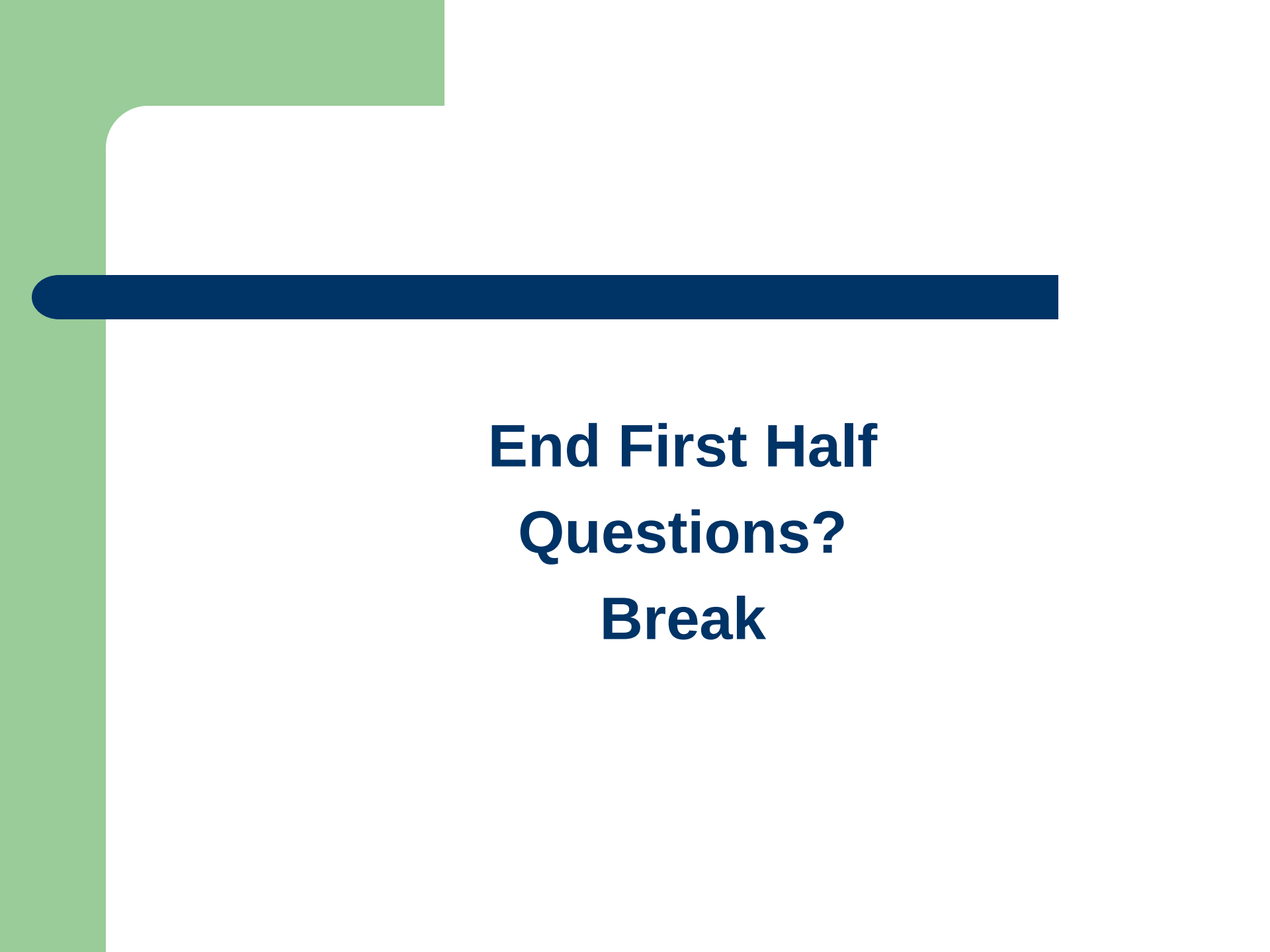
- The ADAAA also provides that “major life activities” includes “the operation of a major bodily function.”
 - This includes: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Lists are non-exhaustive.

Episodic Impairments/Remission

- The ADAAA provides that an episodic impairment or impairment that is in remission may constitute a disability “if it would substantially limit a major life activity when active.”
 - Post ADA: *Hoffman v. Carefirst*
 - Epilepsy, asthma, depression, bipolar, PTSD.

Post ADAAA Cases

- Review recent cases



**End First Half
Questions?
Break**

Agenda – Second Half

Post Hire ADA Issues

- Post-hire fitness for duty
- Interactive process
- What is a reasonable accommodation?

Fitness for Duty Exam



FITNESS FOR DUTY EXAMINATION

- For current employee, the employer must have a “reasonable belief, based on objective evidence” that:
 - (1) employee’s ability to perform essential job functions will be impaired by a medical condition; or
 - (2) an employee will pose a direct threat due to a medical condition.

What Triggers the Process?

- Employer receives knowledge of disability and possible need for accommodation.
 - Employee tells employer.
 - Obvious disabilities.
 - Permanent restrictions following work injury.
 - Leave for serious or chronic condition.
 - Indications that certain shifts or duties cannot be performed.

EEOC Case Study

- Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses. Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.
- Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under these circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious

EEOC Case Study

- For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate documentation for claimed deductions. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.
- Employer has reasonable belief that her ability to perform essential functions will be impaired because of a medical condition

Case Study

- As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined. Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition. Two days after his release, the employee returns to work with a note from his doctor indicating only that he is "cleared to return to work."
- The employer has a reasonable belief the employee will pose a direct threat due to a medical condition, it may ask now make disability related inquiries.

Direct Threat

- Defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.
 - More than likely; highly probable.
 - Threat of substantial and serious harm –not minor harm.
- *Chevron v. Echazabal* expanded this to include a threat to the person with the disability.

Cases Finding a Direct Threat

- *Hutton v. Elf Atochem North America* (chemical worker with seizures).
- *Waddell v. Valley Forge Dental* (HIV positive dental asst).
- *Robertson v. Neuromedical* (neurologist with short-term memory deficit).

Cases Finding No Direct Threat

- *Rizzo v. Children's World* (hearing impaired school van driver)
- *EEOC v. Kinney Shoes* (epileptic shoe salesman)
- *Nunes v. Wal-Mart* (EE prone to fainting)
- *Die v. D.C.* (HIV positive firefighter)
- *Chalk v. US District Ct.* (teacher with AIDS)

Words of Caution

- Direct threat standard is a very high one. Burden may be on ER to show direct threat.
- Employer cannot assume direct threat. Needs to be objectively supported.
- ER must provide accommodations which would reduce or remove the threat.
- EEOC notes that fear of HIV transmission will “rarely” be a direct threat.
- Must be individualized assessment of both EE and job. Blanket policies probably not okay.

DOL “Certification of Health Care Provider”

- Is there serious health condition?
- Is intermitted or reduced schedule necessary?
- Likely duration of disability.

Medical Examination

- Must be tailored to actual medical condition and the ability to perform the essential functions of the job
- For those of you who do WC – the questions and the reports do not look like an independent medical examination

Medical Certification

- As a general rule, rely on the medical opinion from worker's treating provider.
- However, the ADA does not prevent an employer from requiring an employee to go to a health care professional of the employer's choice if the employee provides **insufficient documentation** from his/her treating physician to substantiate that s/he has an ADA disability and needs a reasonable accommodation.
 - EEOC recommends first giving the employee an opportunity to correct the deficiency.

GINA warning (EEOC recommendation)

- The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Interactive Process

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The Template

1. A disability
2. A discussion
3. An accommodation
4. Repeat steps two and three as necessary

What Discussion Must be Held?

- Ideally, an open and cooperative discussion about needs and accommodations.
 - Take the initiative and invite the conversation.
 - Have employee suggest accommodations.
 - Ask employee to seek doctor's input about accommodations.
 - Pose several alternatives and weigh how those would work, or if they are reasonable.
 - More than one conversation.

Tips for Productive Interactive Process

- Do not focus on assumptions.
- Make sure there is agreement on the job description.
- Make sure there is agreement on the medical restrictions.
- Now the discussion turns on whether there are reasonable accommodations.

Employer's Obligations

- Provide reasonable accommodations, but the obligation starts with the interactive process.
- Interactive process is simply a conversation with the employee about the need for accommodations and what accommodations may be reasonable.

Employee's Obligations

- Make need for accommodation known.
- Certify a disability.
- Participate in the process.
- Accept accommodation if it works.

What if the Employee Refuses?

- If an employee refuses to meet with the employer, or does not respond to an invitation, the employer does not have to force a discussion.
- The employer should remain open to later discussions.

Documentation of Interactive Process

- Document the interactive process and the attempts at reasonable accommodations.
 - Invite in writing.
 - Request in writing.
 - Summarize in writing.
 - Document missed meetings or refusals.
 - Include **date**, time, persons. As always, avoid value judgments.

Documentation (contd.)

- Usually there are several management people involved.
- Consider NOT engaging in lengthy email discussions regarding process.
- Consider instead scheduling periodic meetings to discuss progress to be documented by one person.

Reasonable Accommodation



What is an Accommodation?

- An accommodation is any modification or adjustment to the job or worksite that allows the employee with a disability to perform the job and enjoy the same benefits and privileges of employment as all other employees.

Examples of Accommodations

- Equipment or assistive technology.
- Changes to worksite or work station.
- Shift changes.
- Extra training.
- Changes to policies.
- Alternative formats of instructions.
- Accommodations for interview/application.
- Removal of non-essential functions.
- Telecommuting.
- Reassignment to open positions.

What Makes an Accommodation Reasonable?

- Effective (removes the barrier).
- Employer choice if more than one effective alternatives.
- If the employee refuses a reasonable accommodation, the employee will be responsible for the breakdown in the process.

What is Not Reasonable?

- Eliminating primary job duty.
- Lowering production or performance standards.
- Providing personal use items (prosthetics, hearing aids, etc.).
- Excusing violation of work rule.
- Creating an undue hardship.

Ongoing Obligation

- If an accommodation is tried and found to be ineffective, the employer has the obligation to consider other accommodations. Return to square one!

Monitoring Accommodations

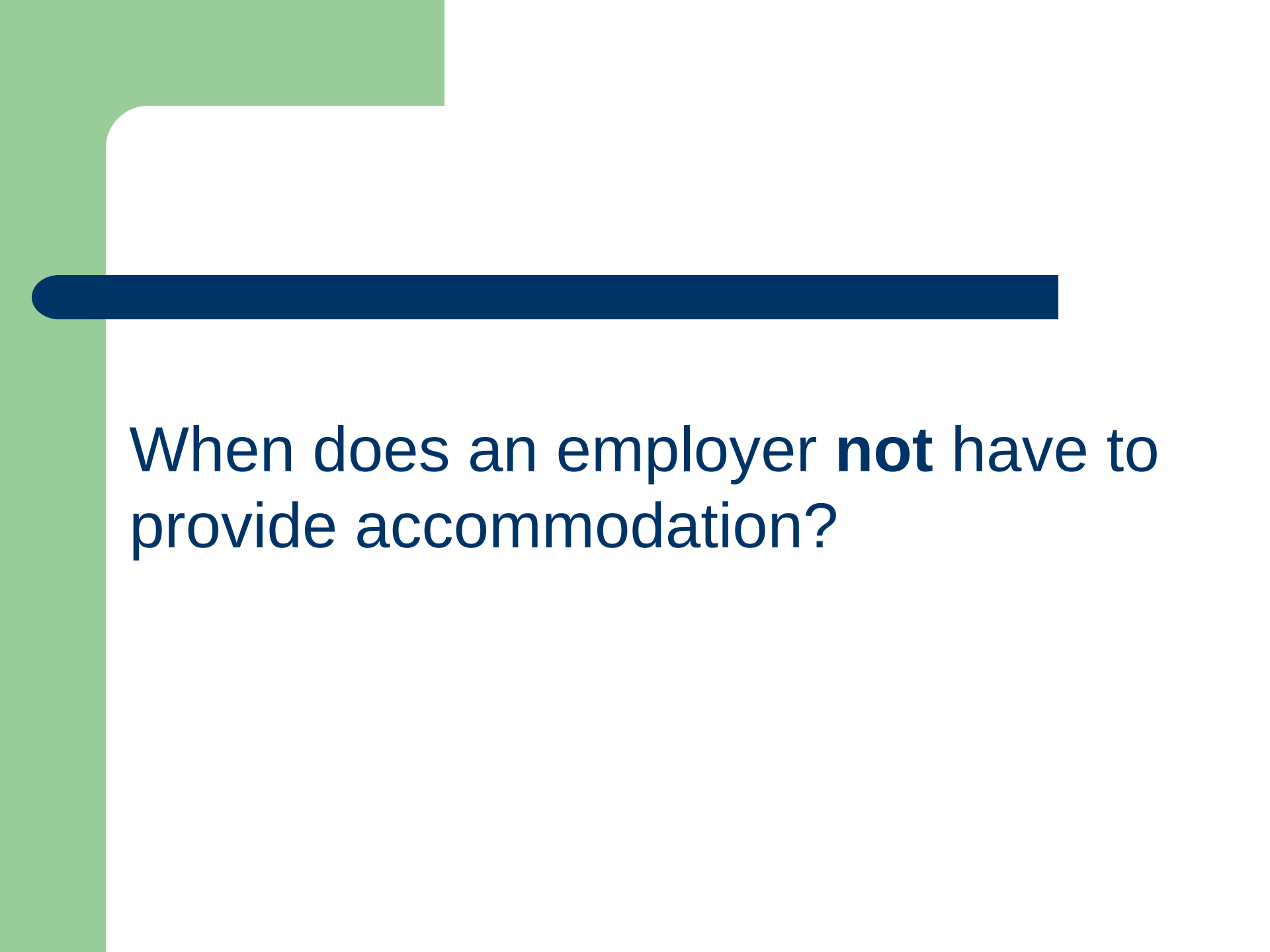
- Be sure to assign a supervisor or management employee to monitor accommodations.
- Remind employee that company will not tolerate accommodations and to report any issues.
- Remember that employer attitude to the accommodation will impact how other employees respond.

Ergonomic Assessments

- If your company has a policy of doing ergonomic evaluations be sure this is done in a non-discriminatory manner.
- If an employee is given a new device then be sure you are willing to give it to all employees who want such a device – unless the decision is made based on whether the employee has a disability and needs accommodation.

Confidentiality

- An employer cannot tell other employees that an employee with a disability is receiving certain accommodation because s/he has a disability.
- Separate file, labelled “confidential.”



When does an employer **not** have to provide accommodation?

Undue Hardship

No duty to provide accommodation if it creates an undue hardship.

What is an undue hardship?

Is it an Undue Hardship?

Is a 'net cost calculation'

- (i) The nature and cost of the accommodation;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources; or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) The overall financial resources of the covered entity; and
- (iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity.

Difficulty in Establishing an Undue Hardship

- *Garcia-Ayala v. Lederle Parenterals* (17 months leave).
- *Kauppila v. Dept of Health and Human Services* (pushing back start date 2 weeks).
- *Preston v. USPS* (ER needs to prove undue hardship not just say its so).

Undue Hardship

- Never a duty to take away essential job functions (*Phelps v. Optima Health*; *Williams v. United Ins.*).
- Never a duty to *create* a job (*Matthews v. Denver Post*).
- EEOC says concerns about workplace morale never a justifiable reason for denying accommodation.
- No claims for reverse discrimination: Non disabled, non accommodated employees cannot claim discrimination.

SUMMARY

- Increased focus on accommodating disabilities.
- Evaluate if EE is otherwise qualified to perform essential functions.
- Engage in interactive process and accommodate.
- Limited by direct threat, undue hardship, and EE's noncooperation.



When Worker Does not Disclose Need for Accommodation until being Disciplined

Employer does not have to:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including termination) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance

Employer may nevertheless need to:

- Engage in the interactive process

Disciplinary Issues

- An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.
- An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.
- However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.
- Employer does not have to tolerate violation of work conduct rules because of disability.

EEOC Example

- Last year Nicole received an “above average” review at her annual performance evaluation. During the current year, Nicole had to deal with a number of medical issues concerning her disability. As a result, she was unable to devote the same level of time and effort to her job as she did during the prior year. She did not request reasonable accommodation (i.e., inform the employer that she requires an adjustment or change as a result of a medical condition). The quantity and quality of Nicole’s work were not as high and she received an “average” rating.
- The supervisor does not have to raise Nicole’s rating even though the decline in performance was related to her disability.

EEOC Example

- Robert is a sales associate for a pharmaceutical company. His territory covers a three-state region and he must travel to each state three times a year. Due to staff cutbacks, the company is increasing the number of states for each salesperson from three to five. Robert explains to his manager that due to his disability he cannot handle the extra two states and the increased traveling, and he asks that he be allowed to have responsibility only for his original three states.
- The company may refuse this request for accommodation because it conflicts with the new production standard. However, the company should explore with Robert whether there is any reasonable accommodation that could enable him to service five states, and if not, whether reassignment is possible.

Employee with Mental Illness

- Special considerations
 - *Bultemeyer v Fort Wayne Community Schools*
 - *Ozlek v Potter*
 - *Gaul v Lucent Technologies, Inc.*

Lessons

- Transfer to different department or change in supervisor or coworker is not a reasonable accommodation.
- Hold employee to performance of essential job functions.
- Is there a direct threat or undue hardship?

Extended Leave Beyond FMLA

- Cases

- *EEOC v Tri-City Comprehensive Community Mental Health Center*
- *Peyton v Fred's Stores of Arkansas*

Lessons

- Leave beyond protected FMLA/OFLA leave may be a reasonable accommodation.
- But no “indefinite” leave. Undue hardship vs. unable to perform essential functions.

Intellectual Impairment

- Cases
 - *Murphy-Sweet v Q4, LLC.*

Lessons

- Interview accommodations (extended interview instead of written test) or accommodations for discipline meetings (another person present).
- Job coach or extended training.
- Trade off of non-essential functions.
- Labeling or coding of work items.

Prescription Drugs

- Cases

- *Dovenmuehler v St Cloud Hosp.*
- *Wysong v Dow Chem. Co*
- *Gonzalez v Illinois State Toll Highway Authority*

Lessons

- Drug tests and restrictions on prescription medications must be tailored to the specific essential job duties – tied to safety.
- Direct threat created?
- Performance standards met?

Note: Avoid “regarding as disabled” trap.

Questions?

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