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## Americans with Disabilities Act

### Who, What, Why . . .

*Who does it apply to:* The law applies to all employers with 15 or more employees.

*What is the issue:* It is against the law to discriminate against an employee or a prospective employee based on a disability the person has, or that you view them as having (even if they don't). The prohibition extends not just to hiring and firing, but to any discrimination in any significant term and condition of employment.

What is more, employers are required to reasonably accommodate any employee or prospective employee to assist that person in completing his/her job duties so long as the accommodation does not create an undue hardship on the business. Reasonable accommodations range from special keyboards for employees with carpal tunnel, to specialized monitors for employees with vision issues, and everything in between. What may be a reasonable accommodation is limited only by the imagination of the parties, what technology and devices are available, and the cost or hardship to the employer of implementing the accommodation.

*What is a "disability" . . . under the law:* Everyone has a personal view of what "disabled" means, but personal views do not count in the eyes of the government. The law defines disability as a physical or mental impairment that substantially limits one or more major life activities which may be permanent or temporary. Employers must be careful, however. Treating or "regarding" someone as though they have a disability is just as though the person actually has whatever malady the employer treats them as having. And, after changes in the law in 2009, almost anything can be a disability so employers should err on the side of viewing any malady as a temporary or permanent disability.

*How does reasonable accommodation work:* The process of accommodating an employee should be an interactive process. The employer and the employee are each required to work together to come up with solutions to accommodate the disability without undue hardship to the business. The goal is to help the employee to be able to perform the "essential functions" of the employee's job so that the profitable relationship between

employee and employer may continue. The process may involve consulting with a disability specialist and physicians to determine what can be done at what cost. And, be careful, too quickly deciding the accommodation creates an undue hardship on your business. The government's view of an undue hardship is likely to be far higher than your own.

*What are these "essential functions":* In any job there are critical or essential functions the employee was hired to perform and less critical functions the employee performs, which the employer could assign to another employee, if necessary. An employer can terminate a disabled employee or refuse to hire a disabled applicant if that person cannot perform the essential functions of the job even with accommodation. An employer cannot adversely affect a disabled person who cannot perform a non-essential function that can be assigned to another employee. For example, a person with a bad back who occasionally lifts a box of paper for the copier cannot be fired if the company can get another employee to do it.

*What if I need a prospective employee to take a physical:* A prospective employee's capacity to handle the work sometimes is not obvious from looking at them. A person may look okay on the outside to be a lifeguard, but you need to know how well they swim, and whether they can carry an injured person back to shore. To protect against disability discrimination, employers are required to consider all other hiring factors before administering the physical and make an offer of employment conditioned only on the result of the physical examination.

*What constitutes discrimination:* By now a familiar refrain in EH editions, there are two basic types of violation – direct mistreatment and disparate impact. Direct mistreatment is straightforward. If an employer affirmatively mistreats an employee because of a disability, it can be actionable.

Disparate impact remains more subtle. If an employer creates a policy that is neutral or non-discriminatory on its face, that policy might have a consequence of negatively impacting disabled workers more significantly than others. This is less likely in a disability situation, but it can happen.

*What if my employee violates without consent:* Also, a familiar refrain in EH editions on discrimination. Employers may be liable for the actions of their employees who commit discriminatory acts without the employer's knowledge.

*What if no accommodation works:* If the employer and the employee engage in an interactive effort to find a reasonable accommodation and come up empty or discover the solutions are just too hard on the business to make them workable, the employer may terminate the relationship. Because of the risk of a claim, however, it is strongly recommended that the employer consult a qualified employment attorney to be sure they have done everything possible before terminating the relationship.

### **Common Situations:**

*You're outta here:* Bob, who is blind, is called into his manager's office and let go from the company. Bob's manager is a non-confrontational person. Instead of explaining to Bob that he is being fired for totally screwing up a major project, she tells him that the company is experiencing financial difficulty and cannot afford him anymore. She thinks this will be a softer blow and certainly will make for an easier termination meeting. Bob carries a chip on his shoulder about his disability and is convinced he was let go because of his blindness, so he files a disability discrimination claim. Bob's employer is off the hook because disability wasn't a factor, right? Hopefully, but the employer has made it much more difficult. When the lawyer explains the real reason Bob was let go, it will look like the employer is lying and a jury could infer discrimination.

*But, that's impossible:* Derek runs Oil Express, an oil and gas drilling company. Henry, an employee of the company, is injured severely in an accident at a site. He is no longer able to use his

right arm. Derek feels for Henry, but does not think Henry can return to work after he returns from worker's comp leave. He spends some time on the internet looking for solutions, and asks Henry for his thoughts. Henry does not know where to start. Feeling he met his obligations, Derek lets Henry go. Henry files a claim. Did Derek do anything wrong? Maybe. Spending a little time on the internet is likely not enough to meet the requirement of working interactively. There are organizations that help answer these questions for employers at little or no cost. The Texas Department of Assistive and Rehabilitative Services, for example, can provide guidance to inexperienced employers.

### **What should I do:**

*Good:* Establish a written policy notifying employees to bring disabilities requiring accommodation to the company. Be careful not to assume an employee's health issue is a disability until the employee complains about it. Work with any disabled employee to find a reasonable accommodation – and be careful – a reasonable accommodation may be a period of unpaid time away from work for treatments.

*Better:* The above and train one employee to be knowledgeable about the ADA and address all complaints to that person to get a better result. Be wary of harassment or segregation. A disabled employee may still make a claim even with accommodation if the employer harasses or ostracizes him or her.

*Best:* All of the above and create job descriptions outlining the "essential functions of the job" and any physical requirements of the job. This will set the standard in case a claim for disability is made. Carefully sanitize job postings to avoid unnecessarily leaving out disabled persons.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**