

EMPLOYMENT LAW AND REASONABLE ACCOMMODATION

**Job Applicants,
Disclosure, and
Employment
Discrimination**



At-Will employment

- MOST employees are considered “at-will”
- This means that an employee can be terminated without warning, with or without cause.
 - Employee can leave at any time for any reason
- Exceptions: employment contract; union member; public policy; discrimination
- Discrimination laws protect employees from decisions made on the basis of **protected status**

Workplace Protections - Disability

Discrimination prohibited in *ANY* facet of employment, including:

- Job application procedures and recruitment
- Hiring / Firing
- Benefits and Compensation
- Advancement
- Training
- Any terms, conditions, or privileges of employment

Workplace Protections

State and federal disability laws also include a requirement that employers provide:

REASONABLE ACCOMMODATION

Any change or adjustment to a job or work environment that allows a person to:

- Participate in the job application process
- Perform “Essential Functions” of the job

Laws that apply – federal and state

- Private employers with **15 or more** employees
- All State and local government employers with at least one employee
- Massachusetts Law, Ch. 151B, covers all employers with **six or more** employees
- Protections are similar
- Section 504 – Federal employees

Protected Individuals



An employee is protected under the ADA if:

- They have a physical or mental **impairment** that causes a **substantial limitation** of one or more **major life activities**.
- **Also covered are people who:**
 - ❖ Have a record of such an impairment, (e.g. a cancer survivor);
 - ❖ Are “regarded as” having such an impairment and are subjected to discrimination because of the perceived impairment. But, no Reas. Acc.

ADA Amendments Act

- Underlying definition unchanged
- Major life activities includes operation of major bodily functions
- Do not consider mitigating measures
- Impairments that are episodic or in remission covered IF substantially limiting when active
- More of a common sense approach; emphasis should be on reasonable accommodation, not on whether individual is covered

A Few Important Points

The employee must also be:

- **Qualified** to do the **essential job functions of the job** with or without a **reasonable accommodation**
- No requirement to lower production standards
 - **Whether quantitative or qualitative**
- **AND**, disability-related workplace issues must be decided on a **case by case** basis. This requires an **individualized assessment**. *Every individual and each situation are unique.*

A Few Important Points

After ADA Amendments Act, employers now focus on terms “qualified” and “reasonable”

- Minimum job requirements
- Essential functions of the job
- Job Performance
- Timing of RA request
- Participation in interactive process

DISCLOSURE

- An applicant or employee is **not obligated** to mention that they have a disability unless or until they request a reasonable accommodation.
- The following question is permissible on a job application or at an interview:

*** Are you able to do the essential functions of the job with or without a reasonable accommodation?**

- The timing of your disclosure should depend on the type of accommodation you may need.

Why Disclose at All?

- Societal stigma and discrimination against people with disabilities is widespread.
- An applicant or employee is under no obligation to disclose unless s/he needs a reasonable accommodation
- BUT, not disclosing a disability is also risky as the ADA only applies to **known disabilities**.
- So, you must determine:
 - NEED for disclosure -> is RA necessary?
 - WHEN to disclose -> pre- or post- hire?
 - HOW to disclose -> formal/informal? to whom?

Job Application Process

- Employers must provide reasonable accommodations to enable an applicant to be considered for a job opening.
 - Written materials in accessible format
 - ASL interpreter
 - Accessible location
 - Modifications to equipment or devices
 - Adjustments to application policies/procedures/tests

Job Application Process

- Examples of reasonable accommodations during a job application process
 - Sarah is blind and applies for a job which requires use of a computer. With assistive technology, Sarah can perform such job functions. If the employer requires applicants to demonstrate their computer skills, it must provide Sarah with the technology.
 - A large employer requires applicants to line up outside its building to apply. Jim has MS and cannot be outside in the heat for long periods of time. The company should allow Jim to wait indoors where it is cooler.

Interview Questions – OK or Not?

- Do you have certification as a child care provider?
- Can you safely climb a ladder?
- Do you have a drivers license?
- Have you ever missed more than 5 consecutive days of work due to an illness?
- Were you ever fired from a job because of attendance problems?

Job Applicants and Documentation

- Employers may ask an applicant for documentation of his/her disability if a request for reasonable accommodation is made during the hiring process...
- As long as disability is not obvious ...
- And, request is not overly burdensome
- *A note from a doctor or other health care professional should suffice.*

Observable Disabilities

- Employers cannot ask medical questions of applicants who have readily-apparent or already-disclosed disabilities.
- However, where it is clear that an individual's disability may pose difficulties with performing a specific job task, the person may be asked to describe how they might perform the task.
- This conversation may include a discussion of reasonable accommodation.

Equal Treatment

- Employers may establish job related qualification standards, including education, skills, work experience and physical and mental standards necessary for job performance, health and safety; HOWEVER
- An employer cannot impose different hiring standards or criteria for a person with a disability than it requires of others.
 - i.e. higher level of education or training.

Employers can ask all applicants to demonstrate how they would perform the job, subject to obligation to provide reasonable accommodation.

On-Line Job Applications



- It is not a violation of the law to use web-based recruitment and hiring methods.

Basic Principles:

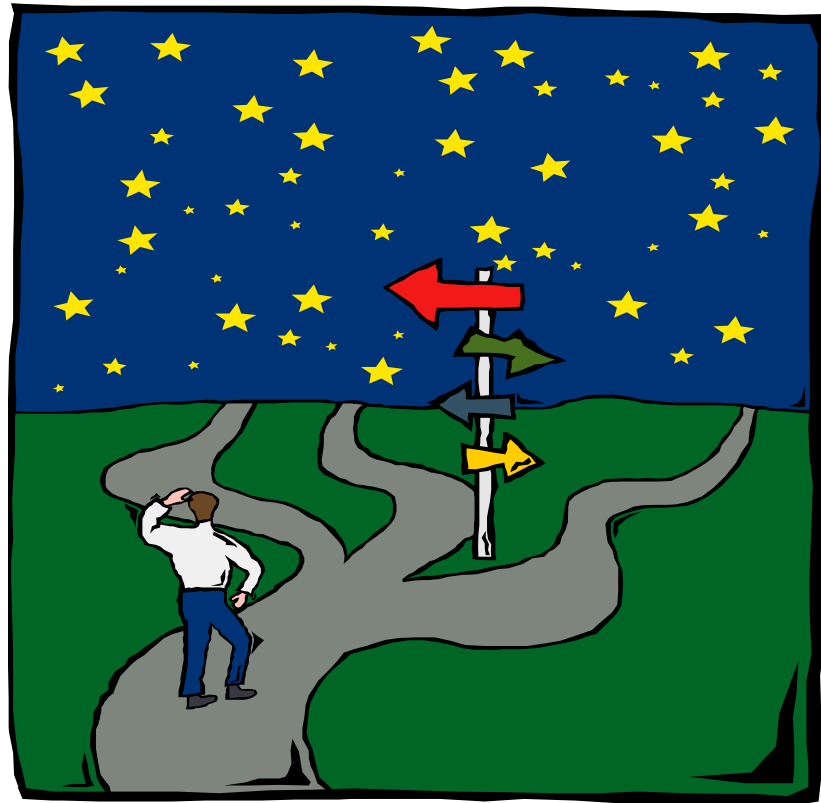
- Application process must be accessible to all.
- Individuals with disabilities must have equal opportunity to apply for jobs.
- Reasonable accommodation must be provided to ensure equal access.

Conditional job offer

Employers may ask disability-related questions and require medical exams after extending a conditional job offer.

- May require medical exam or ask questions only if same process is applied to all others
- Exam should be designed to measure ability to perform essential functions of job
- Accommodations must be made
- Cannot withdraw job offer solely because exam revealed existence of a disability

**Let's see what we've
learned so far!**



Protected Individuals



- John has been hospitalized twice in the past year for a heart condition. He has no symptoms at the present time.
- Carol has been feeling sad because she recently broke up with her boyfriend. For the past week she hasn't been sleeping well.
- Dan has epilepsy which is controllable with medication. For the past week he has been out sick with the flu. His employer fires him.

Job Applicants



- An employer posts a job opening which requires “ability to drive” of applicants.
- During an interview, Anna is asked whether she can safely perform a physical agility test.
- Richard, who has diabetes, indicates during his interview that he will need periodic breaks to take medication. The employer asks how many breaks he would need and for how long.

Testing



- An applicant for a job involving a great deal of lifting is required to lift a 25 pound box and carry it 30 feet.
 - What if his blood pressure is taken afterwards?
- An employer has given five applicants conditional job offers, subject to medical exams.
 - What if only one person is required to take the exam?
 - What if all five take the exam and one is screened out?

Third Stage of Employment

Post-Hire: After employment begins

- Must provide **REASONABLE ACCOMMODATION**
- Change or adjustment to a job or a workspace that allows a person with a disability to perform the essential functions of his or her job.

Examples of Reasonable Accommodations

- Part-time or modified work schedules
- Job restructuring; retraining
- Job reassignment
- Leave of absence
- Providing readers and interpreters
- Making the workplace accessible
- Providing or modifying equipment or devices
- Job Accommodation Network: <http://askjan.org>

Reasonable Accommodation Requirements and Limits

- Reasonable Accommodations must be provided unless there's an **undue hardship** or a **health and safety risk to the employee or to others**
- An **undue hardship** is defined as requiring significant difficulty or expense
- Employers must provide an **effective accommodation**, not necessarily the exact accommodation requested
- **Personal Devices or Services** are not required

Reasonable Accommodation: Responsibility of Employees

The Employee usually makes the request for a reasonable accommodation; or

Someone else may make the request for the person

- The request need not be in writing but **it is a good idea to have the request written, dated, and signed.**
- The request should include:
 - ❖ Nature of the disability
 - ❖ Reason for the request
 - ❖ Requested accommodation
 - ❖ If possible, include a doctor's note explaining the disability and accommodation

The Reasonable Accommodation Process

- The employer may ask for documentation describing the impairment and how it relates to the reasonable accommodation request if the impairment is not readily apparent.
- The employer is not entitled to request information regarding:
 - ❖ General medical information
 - ❖ Medical conditions or impairments unrelated to the reasonable accommodation request.

The Interactive Process

- The “**Interactive Process**” is key to the provision of reasonable accommodations.
- Does the employer agree that the accommodation is reasonable and effective? Do other possible accommodations need to be examined?
- Utilize available resources in determining an effective accommodation (e.g. www.jan.wvu.edu).
- Maintain a paper trail
- If an effective, reasonable accommodation is agreed upon, it should be implemented and there should be follow-up to ensure its effectiveness.

Employment Accommodations

- Job Restructuring
 - Bill takes medication which limits his ability to drive in the early morning. He applies for a job as a school bus driver, and during the interview is asked whether he's available to drive mornings between 7:00 and 9:00 and afternoons between 3:00 and 5:00.
 - Is this a permissible interview question?
 - Is Bill a qualified individual?
 - Can the employer reasonably accommodate him?

Employment Accommodations

- **Job Coach**

- ❖ An employer is probably not required to provide a job coach throughout employment process but would need to consider as part of learning the job
- ❖ Use of internal supports for employee (assign staff to work one-on-one when learning new tasks)

- **Acquisition/Modification of Equipment or Devices**

- ❖ Tape recorder to record/review instructions
- ❖ Large button telephone
- ❖ Computer software

Employment Accommodations

- Modified Work Schedule
 - Natalie is an administrative assistant, and sees a therapist for major depressive disorder. The therapist can only see her in the morning and she is occasionally late for work. In order to complete her work on some days, she has to stay late.
 - Does she have a disability?
 - What advice would you give her?
 - What if her employer fires her before she requests an accommodation?

Employment Accommodations

- Leave of absence
 - Steve has alcoholism and has decided to enter a residential treatment program. He has no FMLA rights because his company has only 30 employees.
 - Is there an accommodation his employer can provide?
 - Can his employer claim giving him a leave of absence would be too difficult or expensive?
 - What if Steve is caught drinking while he is at work?

Employment Accommodations

- Modification of Supervisory Process
 - ❖ Review tasks to be completed on daily basis and provide in writing versus orally
 - ❖ Supervisor providing a demonstration of what needs to be done versus describing orally what the employee is expected to do
 - ❖ More frequent feedback regarding performance
 - ❖ Allowing individual to bring someone to support them during review of performance or disciplinary meetings
 - ❖ Change supervisor?

Employment Accommodations

- Modification of Policies/Procedures
 - ❖ Workplace conduct rules
 - Modify those that are not job related and consistent with business necessity
 - Most are job related
 - ❖ Never required to tolerate violent or abusive behaviors that are inconsistent with uniformly applied conduct rules
 - ❖ Examples: Service animal; work at home; dress code; methods of communication

Practical Tips

- It is best for employees to obtain the medical information rather than having the employer speak to the doctor.
- If an employee speaks openly in the workplace about a disability, confidentiality may no longer be protected.
- Disclose/Request an accommodation prior to performance problems arising.

Enforcement and Legal Issues

- Filing a complaint of employment discrimination:

M.C.A.D.: (617) 994-6000

- <http://www.mass.gov/mcad/>
- File within 300 days!

E.E.O.C.: (800) 669-4000

Federal employee EEO process:

http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm