ADA: What Every Business Needs to Know

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Brendan Cassidy is an associate at Vanderpool, Frostick & Nishanian, P.C., where he has practiced for several years representing companies and individuals on employment and business related matters including: drafting and reviewing non-compete and restrictive covenant agreements; drafting contracts and forms; and representing companies on complex legal matters such as wage and hour issues under the Fair Labor Standards Act, discrimination and retaliation issues under Title VII, and accommodation requests under the Americans with Disabilities Act and the Family and Medical Leave Act.

Brendan's legal experience allows him to assist clients on matters including: drafting and updating employee handbooks and policy manuals; preparing management and employee training; drafting executive, independent contractor, and severance agreements; preparing Position Statements in response to EEOC Charges of Discrimination; conducting workplace investigations; and advising HR Professionals on employee issues ranging from discipline to termination.

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What is the ADA?

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History

- 1990: ADA enacted - prohibits discrimination against qualified individuals in hiring, advancement, other privileges of employment.
- Employer required to make reasonable accommodation to known disability of qualified applicant or employee.
- 2008: ADAA - broadens definition of disability, easier for individuals to establish disability under ADA.
- Prior to 2008, litigation often involved whether individual had disability. Following ADAA, litigation shifted to ability to perform essential job functions, with or without an accommodation.

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What the ADA Means to You as an Employer

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Are you Covered?

- 15 or more employees - covered by the Act.
- May be covered by state and local laws.

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Reasonable Accommodation

Change or adjustment that permits qualified applicant or employee to perform essential job functions.

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When May an Employer Inquire About ADA?

Reasonable belief, based on objective evidence:

(1) ability to perform essential job functions will be impaired by medical condition; or

(2) direct threat due to a medical condition.

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When May an Employer Inquire About ADA?

- Employer knows of medical condition.
- Third party can notify employer.
- Reasonable belief must be based on objective evidence prior to inquiry or exam.

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Interactive Process

Employers are to engage in an interactive process in regards to a reasonable accommodation.

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Requesting an Accommodation

Employee does not necessarily need to request accommodation.

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Interactive Process

The interactive process involves an informal dialogue between the employee and the employer in which the two parties discuss the issues afflicting the employee and potential reasonable accommodations that might address those issues. *Kohl's Dep't Stores, Inc.*, 714 F.3d at 132.

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Are There Limits on When You can Inquire About a Disability?

- (1) disability and need for accommodation are obvious, or
- (2) Already provided sufficient information.

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Get it in Writing

-Speak with an attorney about what you can and cannot ask physician; what you should ask.

-Can vary based on the situation.

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Have Enough Information to Communicate

Review your job descriptions

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Accommodation

- Don’t need to provide specific accommodation requested.
- Alternative suggestions.
- Can’t require employee to accept accommodation.
- Respond expeditiously

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Reasonable Accommodation Types

- Job Restructuring.
- Leave.
- Modified or Part-Time Schedule.
- Modified Workplace Policies.
- Reassignment.

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Leave

- Hold position open absent undue hardship.
- Must consider vacant equivalent position.

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How Much Leave is Too Much

- Circuit Courts - differing conclusions on how much leave is too much.
- The Supreme Court - not provided an answer.
- Is this an undue hardship?
  - Often not a clear cut answer

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Updates

- May require periodic updates.
- Cannot require with fixed return date.

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Return to Work

- Employer may make disability related inquiries if reasonable belief **present** ability impaired or direct threat.
- Must be limited in scope.

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Modified or Part-Time Schedule

- Changing start/leave time
- Periodic breaks
- Use of accrued leave
- Providing additional unpaid leave.

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What is An Undue Hardship?

- Individualized assessment of current circumstances – show significant difficulty or expense.

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Factors

- Nature and cost;
- Financial resources of the facility;
- Overall resources;
- Type of operation;
- Impact on facility.

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Reyazuddin v. Montgomery County Maryland (4th Cir. 2015)

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Pitfalls

Danger! Danger!

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Claims

- Failure to accommodate.
- Discrimination.
  - Disparate Treatment
  - Disparate Impact.
- Retaliation.

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Retaliation

- Significant number of EEOC charges.
- Failure to establish strong legal basis makes it difficult to defend.

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Company Policies

- One of the biggest pitfalls - company policies/handbook.

-Pulling policies offline or using same policies for 20 years– creates liability.

-Same for job descriptions.

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Recent EEOC Cases and Developments

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EEOC v. United Airlines (2009 Settlement Agreement)

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EEOC v. Sears Roebuck (2009 Consent Decree)

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Employer Defenses

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Failure to Engage in Interactive Process

Engaging in interactive helps protect against retaliation claims.

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Essential Function

- "Not all job requirements or functions are essential. A job function is essential when there aren't enough employees available to perform the function or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function." *Jacobs v. N.C. Administrative Office of the Courts* (4th Cir. 2015).

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Essential Function

- Includes:
  - Job description;
  - Employer’s judgment;
  - Amount of time spent job performing function;
  - Consequences of not requiring incumbent to perform;
  - Work experience of people with same/similar job title.

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Jacobs v. N.C. Administrative Office of the Courts (4th Circuit)

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Stephenson v. Pfizer, Inc.

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Stephenson v. Pfizer, Inc. (cont.)

Seven non-dispositive factors including:

1. "the employer's judgment as to which functions are essential";
2. "written job descriptions prepared before advertising or interviewing applicants for the job";
3. "the amount of time spent on the job performing the function";
4. "the consequences of not requiring the incumbent to perform the function";
5. "the terms of a collective bargaining agreement";
6. "the work experience of past incumbents in the job";
7. "the current work experience of incumbents in similar jobs."

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Stephenson v. Pfizer, Inc. (cont.)

REVIEW YOUR JOB DESCRIPTION! DON’T JUST COPY AND PASTE AND PUT OUT THERE.

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Engage in the Interactive Process

- Effort to accommodate.
- Rebut against claims of discrimination and retaliation.

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Properly Engage in Process

- Don’t go through the motions - case by case basis.
- If unsure, check with legal counsel.

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Complications

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Employer Concerns Regarding Mental Illness

- Mental health issues.
- What is an employer to do?

  EEOC – "There is no good answer."

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Most Mentally Ill Individuals Are Not Dangerous

- 95% of violent acts committed by the non-mentally ill.
- 90% of those with mental illness diagnosis are not violent.

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What of Threats

- Business considerations to take into account.
- Inquiry is whether employee is a direct threat.

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Direct Threat

Direct threat - significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

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Factors

Four Factors:

1. Duration of Risk.
2. Nature and Severity of Potential Harm.
3. Likelihood Potential Harm Will Occur.
4. Imminence of Potential Harm.

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Interaction with Other Laws

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ADA and FMLA

- FMLA - eligible employee entitled to 12 weeks of leave in 12 month period.
- Guarantees right to return to same/equivalent position (similar to ADA).
- Employee may be able to continue with ADA leave.

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Recent Developments

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- Telecommuting
- Technology

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Failure to Comply with ADA - Consequences

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Potential Remedies

-Reinstatement.

-Back Pay.

-Attorney’s Fees.

-Compensatory and Punitive Damages.

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Limits on Compensatory and Punitive Damages

- 15-100 employees: $50,000
- 101-200 employees: $100,000
- 201-500 employees: $200,000
- Over 500 employees: $300,000

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Questions?

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