Employment, Disclosure, Reasonable Accommodations & The Americans with Disabilities Act
Alphabet Soup of Laws/Regulations

- ADA
- LTD
- FMLA
- STATE LAW
- HIPPA
- STD
- WORKER'S COMP
The ADA prohibits discrimination against individuals with disabilities through the following five Titles of the Act:

- Title I – Employment; covers all employers with at least 15 employees
- Title II – State & Local Government; covers all programs, services and public activities
- Title III – Public Accommodations; Restaurants, stores, and places of public business
- Title IV – Telecommunications; Every state must have a message relay service – 711
- Title V – Miscellaneous Provisions
Title I General Rule

No employer shall discriminate against any qualified individual with a disability in regard to any aspect of employment.

Aspects of employment include:
- Recruitment, Application process, Hiring
- Leaves, Layoffs
- Training, job assignments, Promotions
- Benefits, Employer-sponsored events
- Discharges
Definition of Disability: Is it a disability or not?

- Not all limitations experienced by workers are “disability” related as defined by State/Federal Law
  - Federal Law - One or more physical or psychological impairments that substantially limit an individual in one or more major life activities
  - MN Law – has a physical, sensory or mental impairment which materially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

- Long term vs. Short Term Limitations
  - Disability measured in terms of long term/chronic and persistent after the “normal” course of recovery
  - Short term limitations still have an impact upon the employee/workplace and employer may still consider “workplace” adjustments to retain a qualified worker
ADA Amendments Act

- September 25, 2008 the ADA Amendments Act was signed into law and became effective on January 1, 2009.

- The Act was supported by more than 220 national organizations, both business and disability related.

- The bill passed 402 to 17 in the House and passed unanimously in the Senate.
Why amend the ADA?

- Americans with Disabilities Act of 1990 used the Rehabilitation Act of 1973 definition of disability

- Supreme Court decisions narrowed this definition of disability in unexpected ways
  - Sutton v. United Airlines, 1999
  - Toyota v. Williams, 2002
Congressional Findings

- Congress intended the ADA to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage; and

- While Congress expects that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled; and

- Specific statements that the Supreme Court holdings in Sutton and Toyota eliminated protection for many individuals that Congress intended to protect.
Purposes of the ADA Amendments Act

- To reject the requirement, under Sutton, that mitigating measures be considered when determining whether a person meets the definition of disability; and

- To reject the Supreme Court’s reasoning, under Sutton, with regard to the "record of" prong of the definition of disability, and reinstate the Arline standard; and

- To reject the Toyota standard that the terms "substantially" and "major" need to be interpreted strictly because that creates a demanding standard for qualifying as person with a disability; and

- To express Congress' expectation that the EEOC will revise its definition of "substantially limits."
ADA Amendments Act
Disability Definition

- emphasizes that the definition of "disability" should be interpreted broadly.

- This makes it clear that Congress intended the ADA’s coverage to be broad, to cover anyone who faces unfair discrimination because of a disability.
Definition of “Disability”

An individual with a “disability” is someone who:

- Has a physical or mental impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment
expands the definition of "major life activities" by including two non-exhaustive lists:

- the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);

- the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
Hidden disabilities – largest group of disability

- Conditions which are not readily visible.
  - Examples:
    - Major health conditions such as Diabetes, High Blood Pressure, seizure disorders, Cancer, Carpal Tunnel Syndrome, Back Impairment, Fibromyalgia, etc.
    - Psychiatric conditions such as Major Clinical Depression, Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder, Anxiety Disorder, Seasonal Effectiveness Disorder, Post Traumatic Stress Syndrome (PTSD), Bi-Polar Disorder, etc.
    - Learning Disabilities such as Dyslexia, Dyspraxia, Auditory, Memory and Processing Disorder, etc.
Qualified Individual with a Disability

An individual with a disability is “qualified” if he or she:

- Satisfies the skill, education and training for a position and

- Can perform the essential function of the position with or without a reasonable accommodation

- Qualifications for a position are determined by the employer
  - Job Descriptions/Advertisements are a piece of evidence of what these are. A job description is not required under the ADA
Essential Functions

These are fundamental job duties. A function may be “essential” for several reasons:

- The job exists to perform the function
- There are a limited number of people to perform the function
- The job is highly specialized
Disability-Related Questions and Medical Examinations

General Principles

- Pre-offer: no questions or examinations of applicants

- Post-offer: all questions and examinations okay as long as required of all applicants in the same job category

- During employment: must be job-related and consistent with business necessity

- To process an accommodation request: if the disability and/or the need for accommodation is not obvious or already known.
Disability-Related Questions & Medical Examinations
The Job Interview

Prohibited Questions:

- Questions about an individual’s impairment
- Questions about an individual’s use of medication
- Questions about workers’ compensation history
- Questions about mental health treatment
Examples of Unlawful Questions

- Do you have a heart condition?
- 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
The Job Interview

Permissible Questions:

- Questions about whether the person can perform the essential functions of the job
- Questions about current illegal use of drugs
- Questions concerning a history of workplace violence
The Job Interview

Permissible Questions:

• Questions about why the person left a prior job

• Whether an applicant will need a reasonable accommodation for the application process

• Whether someone with an obvious disability will require a reasonable accommodation to perform the job.
During Employment

The employer must have a reasonable belief based on objective evidence that a particular employee:

- Will be unable to perform essential functions because of a medical condition; or,

- Will pose a direct threat because of a medical condition
Safety Concerns

Factors to consider in assessing direct threat:

- The nature and severity of the risk
- The severity of the potential harm
- The imminence of the harm
- The likelihood that harm will occur
- Whether risk can be eliminated or reduced
Disclosure

- Why would an employee disclose any disability, hidden or otherwise?
  - To ask for job accommodations
  - To receive benefits or privileges specifically for employees with disabilities
  - To explain an unusual circumstance or phenomenon
Disclosure

● What benefit can come from disclosing a disability to the employer?
  - The employee may receive an accommodation
  - The employee gains protection under the ADA
    ● Anti-discrimination
    ● Freedom from harassment
    ● Freedom from intimidation
Disclosure

- Why someone may not disclose a disability?
  - Employee does not need an accommodation
  - Employee is afraid to disclose, for many reasons:
    - Fear they will be stereotyped, or misunderstood, or not believed
    - Fear their confidentiality will be violated
    - Fear of retaliation
    - Fear of their disability “being used against them”
    - Fearful of adverse employment action such as:
      - Demotion
      - Cut in hours
      - Shift change
  - Employee desires privacy about their disability
What the EEOC says about disclosure:

- An individual with a disability may request a reasonable accommodation **at any time** during the application process or during the period of employment.

- The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer.

- An individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.

- As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.
Accommodating Employees with Disabilities in the Workplace

A reasonable accommodation is:

- Any change in the workplace or in the way things are usually done that provides equal opportunities for those with disabilities

- **General Rule:** An employer provides reasonable to a qualified individual with a disability if requested and not an undue hardship
Accommodating Employees with Disabilities in the Workplace

Undue Hardship:

- **Significant** difficulty or expense (financial hardship)

- Focuses on the resources and circumstances of particular employer

- Refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive

- Administrative Hardship – alters the nature of the job or activity
Principles of Reasonable Accommodation

- Effective reasonable accommodation process must be interactive (employer and applicant or employee).
- A reasonable accommodation must be an effective accommodation.
- The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment as they relate to an individual's disability.
- A reasonable accommodation need not be the best accommodation as long as it is effective.
Accommodating Employees with Disabilities in the Workplace

Interactive Process:

- Generally begins with a request from the individual with the disability
- No “magic words” such as “ADA” or “reasonable accommodation”
- Request does not have to be in writing
- Request may come from someone other than the employee - a family member or counselor
- ADA requirements do not prevent an employer from providing an accommodation beyond what is required by the ADA
Requirements of the Accommodation Request

- The request should describe:
  - The nature of the disability and resulting limitations
  - The need for an accommodation
  - A requested accommodation, if known by the employee

- If an employer has knowledge of a disability and there is a reasonable basis to believe an accommodation is needed, the employer may have a duty to accommodate even without a specific request.

_EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship._ See, e.g., _Bultemeyer v. Fort Wayne Community Schools_, 100 F.3d 1281 (7th Cir. 1996); _Taylor v. Phoenixville School District_, 184 F.3d 296, 312 (3rd Cir. 1999).
Reasonable Accommodation Process

- Request for accommodation is the responsibility of the applicant or employee. Employer is not required to second guess the need for an accommodation.
- Once request is made, employer has an obligation to engage in an interactive process with the applicant or employee.
- Identify “limitations” that affect the individual's ability to perform a job task or activity.
- Identify whether or not the “limitation” is based on a disability as defined under the ADA.
  - Documentation from “qualified” medical professional.
- Identify available options for addressing the issue.
  - Multiple options may be available.
  - Consultation with professional may be needed.
Is the Request Reasonable?

- Determine if accommodation is reasonable
  - What evidence do you have to substantiate “unreasonable”?
  - Case by case analysis – avoid generalizations
  - “If we do it for one, we will need to do it for everyone” is not a defense for “unreasonable”
  - Avoid saying “no” unless you can substantiate “why” and have reviewed the “reasonableness” of the potential accommodation
If the Request is Reasonable…

- If reasonable, implement the accommodation
- Evaluate effectiveness of the accommodation
  - Adjust if needed or try a different accommodation if what has been provided is not “effective”
- Monitor effectiveness of accommodation
  - Periodic review of whether or not the accommodation remains needed and/or continues to be effective
Accommodating Employees with Disabilities in the Workplace

Reasonable accommodations include:

- Physical modifications to the workplace
- Job restructuring, part-time work, or modified work schedules
- Leave – must be related to employee’s disability
- Reassignment to a vacant position
- Providing qualified readers or interpreters
  - Not required to hire two people to do the same job

- Reassignment to a vacant position
  - Last resort when unable to accommodate in current position
    - Individual must be “qualified” for the position
    - First obligation is to identify positions of similar rank/pay, if not available, then may be a position with lower rank/pay
    - Employer is not required to create a position or remove someone else from a position to create a vacancy
● Acquiring or modifying equipment
  – Modified keyboard, specialized software, etc.

● Changing tests, training materials
  – Additional time on tests and or for training as needed
  – Training materials in alternative formats

● Modification of policies/procedures
  – Allow service animal in the workplace
  – Modified dress code
Accommodating Employees with Disabilities in the Workplace

Actions that are not required:

- Removing an essential function or hiring someone else to perform the function
- Lowering production standards
- Reassign to a different supervisor
- Promotion to a higher position
- Provision of “light duty” items
- Excusing misconduct
- Providing “personal use items”, such as eyeglasses, wheelchairs, prosthetic limbs
National Resources

- **US Equal Employment Opportunity Commission (EEOC)**
  - [www.eeoc.gov](http://www.eeoc.gov)
  - toll free: 800-669-4000, local number: 612-335-4040

- **Job Accommodation Network (JAN)**
  - [www.jan.wvu.edu](http://www.jan.wvu.edu)

- **HR Tips**
  - [www.hrtips.org](http://www.hrtips.org)
Helpful Websites

- RERC on Workplace Accommodations
  - www.workplacererc.org
- RRTC on Workplace Supports
  - www.worksupport.com
- National Business Group on Health
  - www.wbgh.org
- Bazelon Center for Mental Health Law
  - www.bazelon.org
Minnesota Specific Resources

- Minnesota Department of Human Rights
  Voice: 651-296-5663
  TTY: 651-296-1283
  Toll Free: 800-651-3704
  www.humanrights.state.mn.us

- Department of Employment and Economic Development
  Rehabilitation Services Branch
  651.259.7366
  800.328.9095
  651.296.3900 TTY
  800.657.3973 TTY
  http://www.deed.state.mn.us/rehab/vr/main_vr.htm
State of MN Resources

MMB Extranet
http://extranet.mmb.state.mn.us/

ADA Toolbox
http://www.mmb.state.mn.us/ada-toolbox

ADA
http://www.eeoc.gov/policy/ada.html
Still Have Questions?

Contact us:

Minnesota State Council on Disability
Voice: 651-361-7800
TTY; 651-603-2001
Toll free; 800-945-8913
www.disability.state.mn.us

ADA Minnesota
Voice: 651-603-2015,
TTY; 651-603-2001
Toll free; 888-630-9793
www.adaminnesota.org