



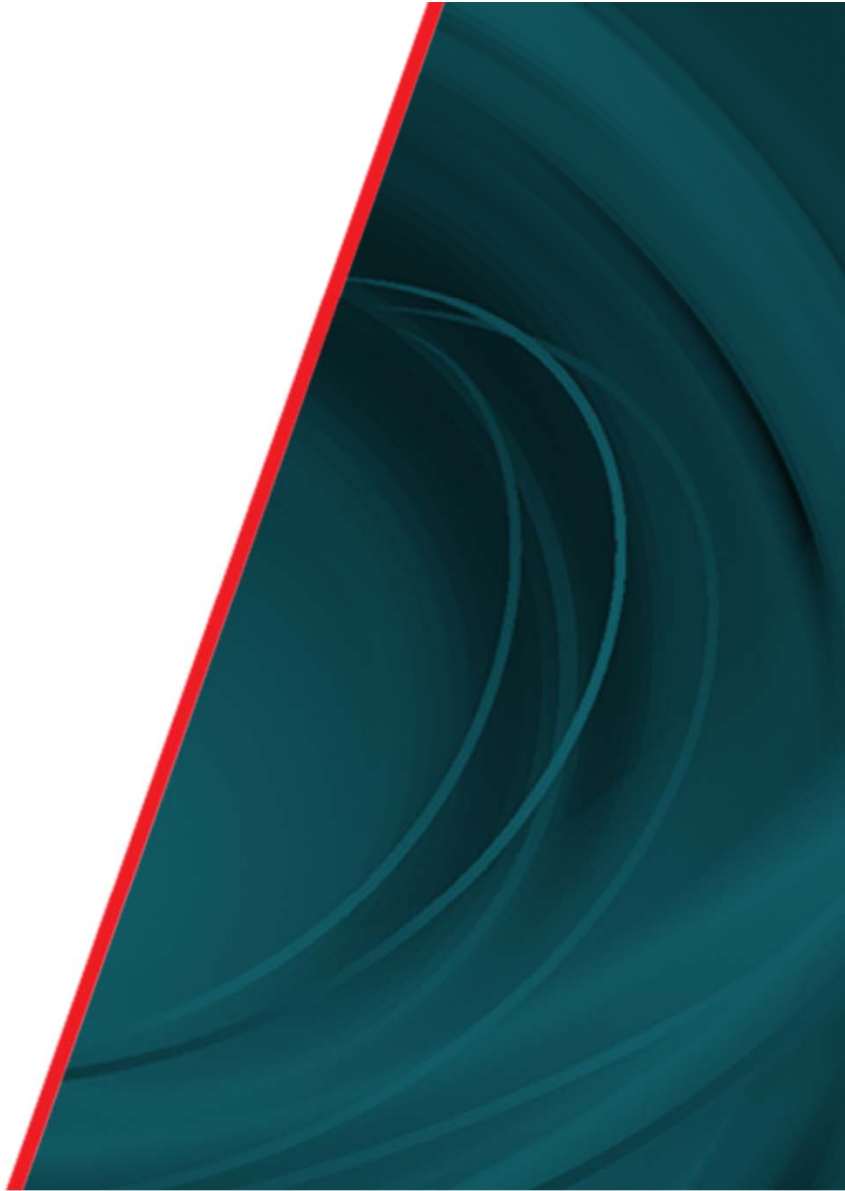
The Americans with Disabilities Act:

Challenges in the Reasonable Accommodation Process



Presented by Rosemary Gill Kenyon and Patrick D. Lawler

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Smith Anderson Overview



Smith Anderson has grown to become the largest business and litigation law firm headquartered in North Carolina's world-renowned Research Triangle region. We provide a full range of legal services to a diverse group of regional, national and international companies ranging in size from large public companies to emerging growth businesses. Over 100 years of practicing law has grounded our firm's culture and provided us the insight necessary to help our clients succeed.

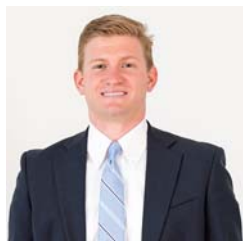
Challenges in the Reasonable Accommodation Process

- HR Certification pending approval for today's webinar. Your certificate will be emailed to you if you attended the entire duration.
- Today's PowerPoint presentation and recording will be available on 6/28/18 at <http://bit.ly/SAADAwebinar2018>
- For upcoming Employment Law webinars, please visit <http://www.smithlaw.com/events>

Challenges in the Reasonable Accommodation Process



Rose is a partner in Smith Anderson's Employment, Labor and Human Resources practice group. Rose has been consistently recognized as a leading labor and employment lawyer, including as a Fellow in the College of Labor and Employment Lawyers, and recognized by *Chambers USA*, *The Best Lawyers in America* and *North Carolina Super Lawyers*. Rose received her J.D. from the University of Notre Dame and her B.A. from Saint Mary's College (Notre Dame, IN).



Patrick is an associate in Smith Anderson's Employment, Labor and Human Resources practice group. Patrick advises clients in a variety of industries on a broad range of employment issues, including developing effective policies and procedures and providing risk management advice. Patrick received his J.D. with honors and B.A. from the University of North Carolina.

Reasonable Accommodations under the ADA

- How and when to respond:
 - When an employee has a physical condition that may impact performance
 - When an employee requests an accommodation

Reasonable Accommodations

- Employers must provide accommodations:
 - For the known disabilities of applicants and employees
 - UNLESS doing so would constitute an undue hardship or the individual would pose a direct threat to the health or safety of the individual or others

The Interactive Process

- What is it?
 - An *interactive*
 - *Process*
 - *Individualized* to the employee
 - To determine *specific obligations* under the ADA

The Interactive Process

- What triggers this obligation?
 - Employee request?
 - Employee performance?
 - Indication of medical condition?
 - Indirect information?

Triggering Events Can Include:

- Performance affected by health
 - Attendance/tardiness issues
 - Requests for leave
 - Requests for accommodations
 - Health-related episode on the job
 - Outbursts/threats or aberrant behavior
- *Supervisors must be trained to recognize these triggers*

Initiating the Interactive Process

- Recognize when to begin and assign responsibility
 - Manager/supervisor should limit discussions with the employee
 - HR should be responsible for interactions with the employee and leading the process
- Adhere to the confidentiality requirements under the ADA, FMLA, and GINA

Collect Facts

HR should collect information:

- How did the issue arise?
- Has management and the employee already headed down a particular path (e.g., informal accommodation, friction, etc.)?
- Are there performance issues?
- Employee communications with others in the company or 3rd party administrators in connection with absences or leaves (e.g., sick leave, FMLA, STD, etc.)?

Request Medical Information

- Do not make assumptions . . .
- HR should send a letter to the employee's treating healthcare provider, tailored to the specific situation:
 - What is the nature of the condition?
 - Likely duration?
 - Restrictions that apply to work duties?
 - Explain problems at work, if any
 - Copy to employee

Evaluate Medical Information

Common problems:

- Treating healthcare provider uses legal conclusions (e.g., concludes “disabled” under the ADA)
- Recommends specific accommodations without diagnosis or description of limitations
- Generalist when specialist is needed
- Not credible or adequate

Evaluate Medical Information

- An employer may obtain a second opinion (employer must pay)

Is there a Covered Disability?

- Evaluate information from the healthcare provider and determine whether the employee has a covered disability under the ADA

Is the Employee Able to Perform the Essential Functions?

- Does the condition actually impact the performance of usual duties?
- Can the employee perform the *essential functions* of the job?
 - If not, the employee is *not qualified for the position*

Identify the Essential Functions

Factors:

- Management's business judgment
- Written job descriptions
- Amount of time spent performing a function
- Work experience of incumbent or others in the job
- Other accommodations or exceptions
- Industry standards

Is a Reasonable Accommodation Necessary?

Is a reasonable accommodation necessary to allow the employee to *perform the essential functions* of the job?

- If an accommodation is possible, it is required unless it causes “undue hardship” to the employer
- The employer decides which accommodation will be adopted, and the employee is not entitled to his preferred accommodation
- It is never a reasonable accommodation to eliminate an *essential function*

Essential Functions - Practice Pointers

- Develop job descriptions that address essential functions
- Define parameters of exceptions to policies or eligibility for flexible practices (e.g., telecommuting subject to supervisory approval and job requirements, must have strong performance record to be eligible)
- Document reasons for specific exceptions or accommodations (avoid “no good deed goes unpunished”)

Communicating with the Employee

HR should inform employee:

- Employee's status
- Whether accommodations are being provided and if not, why not
- If accommodations are being provided, describe conditions and circumstances, including duration and required medical updates
- Provide employee an opportunity to respond

Confidentiality Concerns

- Explaining accommodations to the workgroup
- Limiting discussions about medical conditions with supervisor
- When the employee posts on Facebook. . .

Monitor and Document

HR should:

- Continue to assess whether working
- Monitor performance just like any other employee
- Coach supervisors
- Document



Thank You!



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