

Welcome!

Americans with Disabilities Act: Focusing on Reasonable Accommodations

Presented by Rosemary G. Kenyon and Megan P. Black



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Americans with Disabilities Act: Focusing on Reasonable Accommodations

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ADA: Reasonable Accommodations



Rosemary G. Kenyon

Rose Kenyon is a partner in Smith Anderson's Employment and Labor Law Practice Group. She has significant experience as a counselor and litigator, both in private practice and as in-house counsel, on all aspects of employment and labor law. Rose has been recognized as a Fellow in the *College of Labor and Employment Lawyers*, and in *Chambers USA: America's Leading Business Lawyers*, Labor & Employment, among others. She is a frequent speaker on emerging employment and labor law trends.



Megan P. Black

Megan Black is an associate in Smith Anderson's Employment and Labor Law Practice Group, and joined the firm in January 2011. Megan assists client in complying with state and federal employment laws. Her experience includes assisting clients in developing effective employment practices and policies and advising employers regarding wage and hours laws, leaves of absence, hiring and termination issues, OSHA matters, and other issues arising in the employment context.

ADA: Reasonable Accommodations

How and when to respond:

- When an employee has a physical condition that may impact performance
- When an employee requests an accommodation



The Interactive Process

What is it?

- An *interactive*
- *Process*
- *Individualized* to 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?

→ **Supervisors must be trained to recognize when the ADA is triggered (and FMLA)**



The Interactive Process – Initiation

Recognize when to begin and assign responsibility

- Manager/supervisor should limit discussions with employee
- HR should be responsible for interactions with employee and leading the process

→ **Adhere to confidentiality requirements under the ADA, FMLA and GINA**



The Interactive Process – Collect Facts

HR should collect information:

- How did the issue come to the attention of the company?
- Has management and the employee already headed down a particular path (e.g., informal accommodation, friction, etc.)?
- Are there performance issues?
- Has the employee been communicating with others in the company or third party benefit administrators about the condition in connection with absences or leaves (e.g., sick leave, FMLA, STD, etc.)?



The Interactive Process – Medical Information

Request medical documentation

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



The Interactive Process – Evaluate Medical Information

Is an additional medical assessment necessary?

Common problems:

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



The Interactive Process – Evaluate Medical Information

- **An employer may obtain a second opinion**
 - Employer must pay



The Interactive Process – Is There a Covered Disability?

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



The Interactive Process – Is 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*



The Interactive Process – Identify 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



The Interactive Process – 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”)



The Interactive Process – 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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