



Examining the Nuts & Bolts: Workplace Accommodations, FMLA and ADA

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General Background of ADA

General Employer Obligations Under the Americans with Disabilities Act

- Private employers with 15 or more employees, state and local governments, employment agencies and labor organizations are all subject to the ADA.
- The ADA prohibits employers from discriminating against “qualified individuals with a disability” and requires employers to engage in the “interactive process” with disabled employees.

The ADA and the Hiring Process

- The ADA precludes prospective employers from inquiring about a candidate’s medical conditions or disabilities in either the job application or interview prior to extending a job offer.
- Once an offer has been made, the employer may inquire about medical conditions, provided it does so for all employees, not just those with obvious disabilities.
- If an applicant has an obvious disability that could reasonably inhibit them from performing a job duty, the employer may ask whether the applicant would need an accommodation to perform the task.

What Qualifies as a Disability Under the ADA?

- A qualified disability is a physical or mental impairment that “substantially limits” one or more “major life activities.”
- Some personality disorders including kleptomania, exhibitionism and compulsive lying disorders are not considered disabilities.
- *Note: gender identity disorders are not disabilities under the ADA, but may be covered under your state specific statute (ex: FEHA in California).*

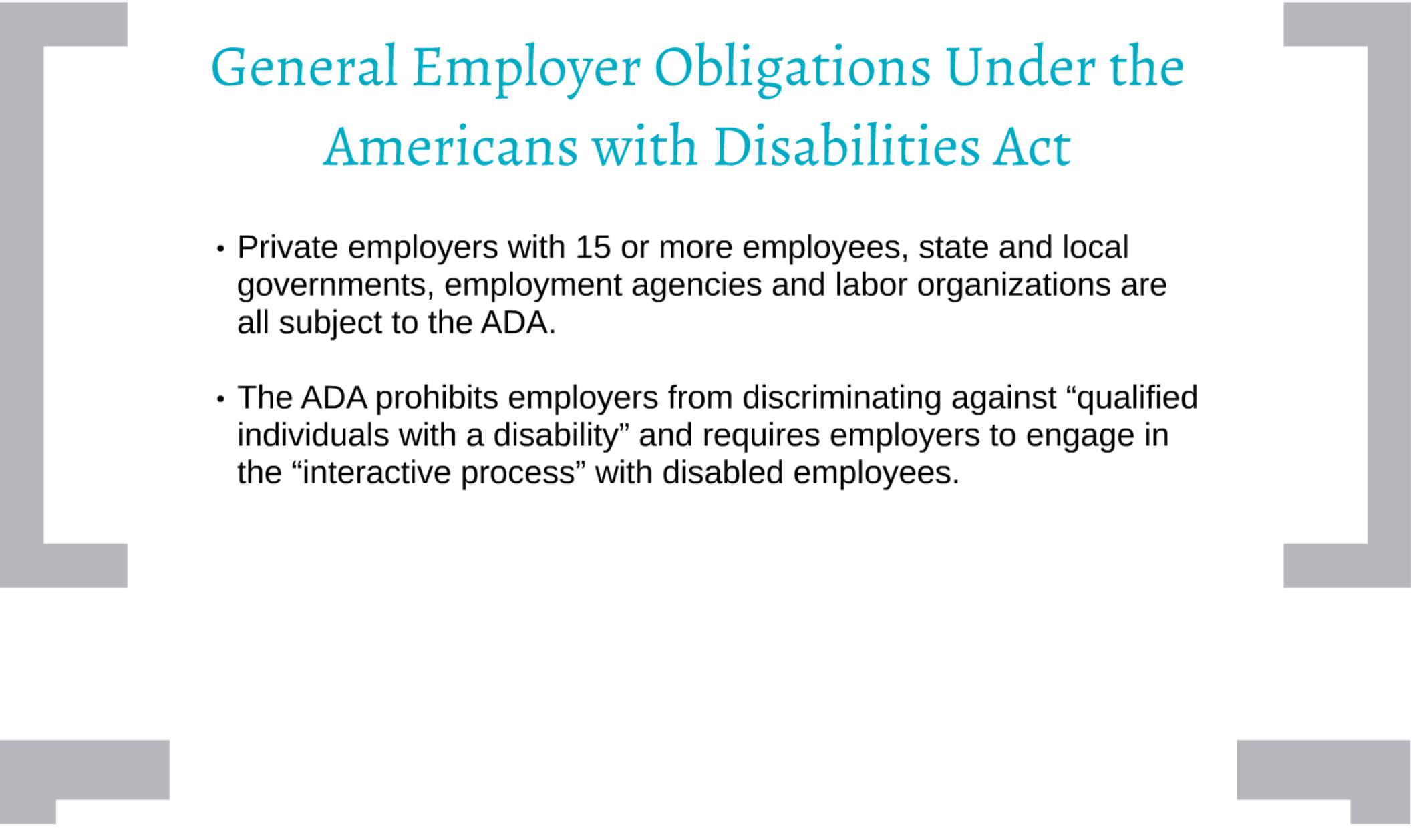


Common Disabilities Encountered by Employers

- Depression and Stress: May be considered impairments if they result from an actual physiological or mental disorder and substantially limit the employee’s ability to perform a major life activity.
- Carpal Tunnel Syndrome: Symptoms vary widely from person to person, an individualized assessment is necessary to determine whether it “substantially limits a major life activity.”
- Alcoholism: May be a “disability” if it substantially limits an individual’s major life activities. An employer **may not** make adverse employment decisions merely because it knows an individual is an alcoholic.



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Red Flag

A workplace injury may also be considered a disability under the ADA. When there is a question about whether a condition is covered, it is best to check with legal counsel for assistance.

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The Interactive Process

What is the Interactive Process?

- Under the ADA (and most state statutes), the employer has a duty to engage in a conversation with the employee about any necessary workplace accommodations.
- The employer and employee must have a *dialogue* to determine:
 - Can the employee continue to perform the **essential functions** of the position with or without an accommodation?
 - Does the employee need an accommodation?
 - Does the employee need time off work to recover?

When is the Interactive Process Triggered?

- Do not wait for the employee to come to you!
- The employer's duty to initiate the interactive process is triggered when it knows the employee is injured, suffering from a disability, or suffering from a serious health condition.

Document, Document, Document!

- Many disability discrimination lawsuits could have been avoided had the employer kept better records.
- It is the best practice to talk to the employee often regarding any accommodations they may request.
- Document all conversations in writing and keep all documentation in a separate file.



BEWARE!

Employees have privacy rights pertaining to their medical conditions or diagnoses. Avoid asking "what" is wrong and simply initiate a conversation about possible workplace accommodations.

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Reasonable Accommodations

What is a Reasonable Accommodation?

- A reasonable accommodation is any change or adjustment to a job or work environment that permits a disabled employee to perform the essential functions of a job.



Common Examples of Reasonable Accommodations

- Light duty
- Lifting restrictions
- Modified furniture or special equipment/devices
- Modified work schedule
- More frequent breaks
- Reassignment to a vacant position
- Granting leave



Types of Medical Leaves

- Family Medical Leave Act: Available to employees with serious health conditions, those who have to care for family members with serious health conditions or for new parents.
 - The FMLA provides up to 12 weeks leave per year for eligible employees.
- ADA Leave: There is no set leave period mandated by the ADA, but should be considered on a case-by-case basis.
- State-specific leave:
 - Worker's Compensation leave
 - Pregnancy leave



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Reassignment and leave are generally considered "last resort" options, unless the employee has specifically requested these accommodations.

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Practical Tip:

• A good resource for a listing or suggestions of reasonable accommodations is the Job Accommodation Network, which can be found at www.asqjan.org.

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Documenting Accommodations

Documenting

- If an employee needs leave, be sure to give proper notice regarding protected leave under the FMLA and/or any state-specific statutes.
- Doctor's Certifications: Employers may require doctor notes before approving medical leave or other accommodations.
 - Make sure to obtain an anticipated return to work date or time frame for the employee's accommodation.

Avoiding the Litigation Trap

- The best way to avoid disability discrimination lawsuits is to document everything!
 - Conduct regular performance evaluations
 - Implement and enforce good employment policies
 - Keep proper attendance and payroll records
 - Provide proper training for managers and supervisors

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Performance & Discipline

While Under Accommodations

Regular Performance Evaluations

A problem employee's potential lawsuit is drastically undercut if there is proper documentation of his or her performance problems.

- Have a set schedule for evaluations
- Train evaluators about what to say and what not to say
 - Think before you write!
 - Examples of what NOT to say.
- Have at least two managers in all evaluation meetings
 - Who should attend?
 - What if an employee refuses to sign an evaluation?
- Use performance coaching and counseling for non-performing employees.
 - Set benchmarks and goals

Attendance

- Most states have a statute or regulation specifying how long attendance and payroll records must be kept.
- If an otherwise reliable employee suddenly develops attendance issues, do not automatically begin disciplinary procedures.
- Instead, initiate the interactive process with the employee to determine if there is a problem and how the problem can be accommodated.

Manager/Supervisor Training

- Many employment discrimination lawsuits arise because managers or supervisors were not properly trained!
- Consult with counsel to provide discrimination and harassment training when new managers are hired.
- Continue manager education with monthly meetings and/or annual training sessions.
- Help your supervisors identify red flags.

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Best Practices for Reintegrating Employees into the Workplace

Reasonable Employment Policies

- Implement and enforce sensible employment policies to head off any litigation before it starts!
 - Avoid automatic termination if an employee cannot return at the end of a leave period.
 - Use sensible policies

Where Compassion and Sound Business Decisions Intersect

- Be prepared to be flexible in enforcing leave policies.
- Communicate through multiple mediums with employees on leave.

Monitor Your State Law for Variations with Federal Requirements

- State laws are often more flexible and expansive than federal law. For example, while the ADA's definition of a disability is a physical or mental impairment that may substantially limit a major life activity, California law is more liberal and drops the word "substantially" to define disability as a physical or mental impairment that [merely] limits a major life activity without regard to remedial measures (eyeglasses, insulin, pacemaker etc.)
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Takeaways

- Engage in a dialogue
- Determine if reasonable accommodations exist
- Follow up
- Document, document, document!