

Expansion of ADA Disabilities and Accommodation Obligations

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This presentation is intended solely for informational purposes, and is not offered as legal advice.

Expansion of ADA Disabilities and Accommodation Obligations

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Expansion of "Disability" Under ADA

- ADA protects only qualified individuals who have a "disability."
- The meaning of "disability" under the ADA is specific to that statute.
 - Different than disability for workers' comp
 - Different than disability for social security
 - Different than disability for disability insurance

Expansion of ADA Disabilities and Accommodation Obligations

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Expansion of "Disability" Under ADA

- Under ADA, a person has an ADA "disability" if he
 - (A) has a physical or mental impairment that substantially limits a major life activity; or
 - (B) has a record of such an impairment; or
 - (C) is regarded as having such an impairment

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Expansion of "Disability" Under ADA

- In *Sutton v. United Air Lines* (1999), the U.S. Supreme Court held:
 - To be "substantially limited" in a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing daily activities that are of central importance to most people's daily lives; manual tasks necessary for performance of a specific are not the test.
 - Impairment is determined by reference to the person's condition with available mitigating measures (here, eyeglasses).

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- In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002), the U.S. Supreme Court held:
 - A medical condition must be permanent or long term to be an ADA disability (here, carpal tunnel syndrome).
 - The terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled" under ADA.

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Expansion of "Disability" Under ADA

- After *Sutton* and *Toyota*, courts interpreted "disability" under the ADA narrowly.
- In response, Congress passed the Americans with Disabilities Act Amendment Act of 2008 ("ADAAA").
- In ADDAA, Congress directed the EEOC to revise its regulations to provide broader protections.
- EEOC adopted new final ADA regulations which became effective May 24, 2011.

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Expansion of "Disability" Under ADA

- ADAAA did not change the **basic 3-part definition** of "disability"
 - Actual impairment
 - Record of impairment
 - Regarded as having impairment

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Expansion of "Disability" Under ADA

- ADAAA expanded the definition of "**major life activities**" and included bodily functions:
 - (A) *IN GENERAL.* - Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, *eating*, sleeping, walking, *standing*, lifting, *bending*, speaking, breathing, learning, *reading*, *concentrating*, *thinking*, *communicating*, and working.
 - (B) *MAJOR BODILY FUNCTIONS.* - A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

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- Before ADAAA, EEOC regulations defined "**substantially limits**" as "*unable* to perform a major life activity that the average person in the general population can perform" or "*significantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity" as compared to the average person in the general population.

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- Before ADAAA, EEOC regulations stated the following factors should be considered in deciding whether an impairment substantially limits a person in a major life activity:
 - (1) The nature and severity of the impairment
 - (2) The duration or expected duration of the impairment
 - (3) The permanent or long term impact or expected impact of or resulting from the impairment.

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- The new EEOC regulations do not seek to define "substantially limits." Instead, they establish 9 "rules of construction."

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- **Substantially Limits - Rule of Construction #1**

"The term substantially limits shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. Substantially limits is not meant to be a demanding standard."

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- **Substantially Limits - Rule of Construction #2**

“An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.”

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- **Substantially Limits - Rule of Construction #3**

“The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.”

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- **Substantially Limits - Rule of Construction #4**

“The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term substantially limits shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADAAA.”

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- **Substantially Limits - Rule of Construction #5**

"The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate."

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- **Substantially Limits - Rule of Construction #6**

"The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of *mitigating measures*.

However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

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- **Substantially Limits - Rule of Construction #6**

"*Mitigating measures* include but are not limited to:

- (i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;
- (ii) Use of assistive technology;
- (iii) Reasonable accommodations or "auxiliary aids or services;"
- (iv) Learned behavioral or adaptive neurological modifications;
- (v) Psychotherapy, behavioral therapy, or physical therapy.

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- **Substantially Limits - Rule of Construction #7**

"An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

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- **Substantially Limits - Rule of Construction #8**

"An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."

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- **Substantially Limits - Rule of Construction #9**

"The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in § 1630.15(f) does not apply to the definition of 'disability' under paragraphs (g)(1)(i) (the 'actual disability' prong) or (g)(1)(ii) (the 'record of' prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

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Expansion of "Disability" Under ADA

- **Substantially Limits - Examples from the New Regs**
 - Deafness substantially limits hearing
 - Blindness substantially limits seeing
 - An intellectual disability (formerly termed mental retardation) substantially limits brain function
 - Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function
 - Autism substantially limits brain function

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- **Substantially Limits - Examples from the New Regs**
 - Cancer substantially limits normal cell growth
 - Cerebral palsy substantially limits brain function
 - Diabetes substantially limits endocrine function
 - Epilepsy substantially limits neurological function
 - Human Immunodeficiency Virus (HIV) infection substantially limits immune function
 - Multiple sclerosis substantially limits neurological function
 - Muscular dystrophy substantially limits neurological function

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- **Substantially Limits - Examples from the New Regs**
 - Major depressive disorder substantially limits brain function
 - Bipolar disorder substantially limits brain function
 - Post-traumatic stress disorder substantially limits brain function
 - Obsessive compulsive disorder substantially limits brain function
 - Schizophrenia substantially limits brain function

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- **Substantially Limits - Under the New Regs**
 - For conditions which are not clearly disabilities, the new regulations "it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity."

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- **Substantially Limits - Under the New Regs**
 - Consideration of facts such as condition, manner, or duration may include, among other things:
 - consideration of the difficulty, effort, or time required to perform a major life activity;
 - pain experienced when performing a major life activity;
 - the length of time a major life activity can be performed;
 - the way an impairment affects the operation of a major bodily function.

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- **Substantially Limits - Under the New Regs**
 - "Non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity."

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Expansion of "Disability" Under ADA

- **Substantially Limits - Under the New Regs**
 - In determining whether an individual has an "actual disability" or a "record of" a disability, "the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve."
 - Example: "Someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population."

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- **Record of Impairment as an ADA Disability**
 - "An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."
 - "Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis."

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Expansion of "Disability" Under ADA

- **"Regarded As"**
 - "An individual is regarded as having such an impairment if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."

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Expansion of "Disability" Under ADA

- **"Regarded As"**
 - "An individual is regarded as having such an impairment any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment"

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Expansion of "Disability" Under ADA

- **Transitory and Minor Impairments**
 - A person is not regarded as having an impairment supporting an ADA claim if the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor:"
 - "Transitory" means lasting or expected to last six months or less.
 - The impairment must be both transitory and minor.

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Expansion of "Disability" Under ADA

- Transitory and Minor Impairments
 - Whether the impairment at issue is or would be "transitory and minor" must be determined objectively.
 - An employer may not defeat "regarded as" coverage by demonstrating that it subjectively believed the impairment was transitory and minor.

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ADA Accommodations

- Basic Obligation: The ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

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ADA Accommodations

- An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

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ADA Accommodations

- EEOC - There are three categories of reasonable accommodations:

(1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires

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ADA Accommodations

- EEOC - There are three categories of reasonable accommodations:

(2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position;

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ADA Accommodations

- EEOC - There are three categories of reasonable accommodations:

(3) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

- Benefits and privileges of employment include but are not limited to employer-sponsored training, services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation, and parties or other social functions).

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- EEOC: Reasonable accommodations must be provided to qualified employees regardless of whether they work full-time, part-time, or are probationary.

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ADA Accommodations

- EEOC: Generally, the individual with a disability must inform the employer that an accommodation is needed.

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ADA Accommodations

- EEOC has identified a number of possible reasonable accommodations that an employer may have to provide:
 - making existing facilities accessible
 - job restructuring
 - part-time or modified work schedules
 - acquiring or modifying equipment
 - changing tests, training materials, or policies
 - providing qualified readers or interpreters
 - reassignment to a vacant position

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ADA Accommodations

- EEOC reasonable accommodation example:

“An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is reasonable because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.”

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- EEOC reasonable accommodation example:

“A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This reasonable accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.”

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- EEOC reasonable accommodation example:

“A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.”

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ADA Accommodations

- An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative(14) -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

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ADA Accommodations

- **Essential Job Functions**
 - An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position.
 - A person with a disability who is unable to perform the essential functions of a job, with or without reasonable accommodation, is not a qualified individual with a disability within the meaning of the ADA.

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ADA Accommodations

- **Production Standards**
 - An employer is not required to lower qualitative or quantitative production standards that are applied uniformly to employees with and without disabilities.
 - However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard.

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ADA Accommodations

- Personal Use Items
 - An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job.
 - Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job.

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ADA Accommodations

- Personal Use Amenities
 - An employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities.
 - However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.

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ADA Accommodations

- Requesting Accommodations
 - To request accommodation, the individual or his representative must let the employer know that he needs an adjustment or change at work for a reason related to a medical condition.
 - To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."

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ADA Accommodations

- Requesting Accommodations - Form
 - Requests for reasonable accommodation do not need to be in writing.
 - Individuals may request accommodations in conversation or may use any other mode of communication.

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ADA Accommodations

- Requesting Accommodations - Timing
 - An individual with a disability may request an accommodation at any time during the application process or during the period of employment.
 - ADA does not preclude an employee with a disability from requesting an accommodation because he did not ask for one when applying for a job or after receiving a job offer.
 - An individual should request an accommodation when he knows that there is a workplace barrier that is preventing him, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."

This is a request for a reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."

This is a request for a reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.

This is a request for reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.

Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off.

This discussion is a request for reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - EEOC Example:

An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to light duty work.

The letter constitutes a request for reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations
 - An employer is not required to ask whether a reasonable accommodation is needed when an employee has not asked for one. **An individual with a disability must inform the employer that an accommodation is needed.**

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ADA Accommodations

- Requesting Accommodations
 - An employer may ask an employee with a known disability whether he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation.
 - An employer also may ask an employee with a disability who is having performance or conduct problems if he needs reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - Interactive Process
 - A request for reasonable accommodation is the first step in an **informal interactive process** between the individual and the employer.
 - In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of disability.

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ADA Accommodations

- Responding to Accommodation Requests
 - An employer may write a letter confirming the worker's request.
 - An employer may ask the worker to fill out a form or submit the request in written form.
 - An employer may request reasonable documentation that the worker has an ADA disability and needs a reasonable accommodation.

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ADA Accommodations

- Requesting Accommodations - Interactive Process
 - The employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation.
 - An employer cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation.
 - If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

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- Requesting Accommodations - Interactive Process
 - EEOC: In most situations an employer cannot request a person's complete medical records, because they are likely to contain information unrelated to the disability at issue and the need for accommodation.
 - EEOC: An employer cannot ask for documentation when both the disability and the need for reasonable accommodation are obvious, or when the individual has already provided the employer with sufficient information to substantiate that he has an ADA disability and needs the reasonable accommodation requested.

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ADA Accommodations

- Requesting Accommodations - Interactive Process
 - The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.
 - While the worker does not have to be able to specify the precise accommodation, he needs to describe the problems posed by the workplace barrier.

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ADA Accommodations

- Providing Accommodations
 - The employer is required to provide the reasonable accommodation that the individual wants.
 - The employer may choose among reasonable accommodations as long as the accommodation the employer chooses is effective.

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ADA Accommodations

- Providing Accommodations
 - If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective.
 - The employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation.

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ADA Accommodations

- Providing Accommodations
 - An employer may not require a qualified individual with a disability to accept an accommodation.
 - If an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, he may not be qualified to remain in the job.

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ADA Accommodations

- Accommodations - Job Applicants
 - An employer may tell applicants what *the hiring process* involves (e.g., an interview, timed written test, or job demonstration) and may ask applicants whether they will need a reasonable accommodation for this process.

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ADA Accommodations

- Accommodations - Job Applicants
 - During the hiring process and *before a conditional offer is made*, an employer generally may not ask an applicant whether he needs a reasonable accommodation *for the job*, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that he needs a reasonable accommodation, the employer may inquire as to what type.

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ADA Accommodations

- Accommodations - Job Applicants
 - *After a conditional offer of employment is extended*, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job, as long as all entering employees in the same job category are asked this question.

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ADA Accommodations

- Accommodations - Job Applicants
 - *After a conditional offer of employment is extended, an employer may ask a specific applicant if he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation.*
 - If the applicant replies that he needs a reasonable accommodation, the employer may inquire as to what type

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ADA Accommodations

- Accommodations - Benefits and Privileges of Employment
 - EEOC: An employer must provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees, regardless of whether they need it to perform their jobs.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Benefits and Privileges of Employment
 - EEOC: Employers must provide reasonable accommodation (e.g., sign language interpreters, written materials produced in alternative formats, such as braille, large print, or on audiocassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored training, absent undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Job Restructuring
 - EEOC: Job restructuring includes modifications such as
 - reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability
 - altering when and/or how a function, essential or marginal, is performed
 - An employer never has to reallocate essential functions as a reasonable accommodation.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Job Restructuring
 - An employer may restructure an employee's job to eliminate some marginal functions, and require the employer require the employee to take on other marginal functions that he can perform

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation
 - An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.
 - EEOC: Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - EEOC examples of reasons for leave as an accommodation:
 - obtaining medical treatment, rehabilitation services, or physical or occupational therapy
 - recuperating from an episodic manifestation of the disability
 - obtaining repairs on a wheelchair, accessible van, or prosthetic device
 - avoiding temporary adverse conditions in the work environment (an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis)
 - training a service animal
 - receiving training in the use of braille or to learn sign language

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - EEOC: An employer is not permitted to apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period.
 - EEOC: If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his position, or (2) granting additional leave would cause an undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - EEOC: An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his same position unless the employer demonstrates that holding open the position would impose an undue hardship.
 - EEOC: If the employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - EEOC: An employer cannot penalize an employee for work missed during leave taken as a reasonable accommodation.
 - To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.
 - Such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave
 - EEOC: In lieu of providing leave, an employer may provide a reasonable accommodation that requires the employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his medical needs. The employer is obligated to restore the employee's full duties or to return the employee to his original position once he no longer needs the reasonable accommodation.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Modified Schedule
 - EEOC: An employer may allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship.
 - A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave.
 - If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Modified Policies
 - EEOC: It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship.
 - Reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Modified Policies
 - EEOC Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Modified Policies
 - EEOC Example: It would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship.
 - EEOC Example: An employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Modified Policies
 - EEOC: In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Telecommuting
 - EEOC: The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Telecommuting
 - EEOC: The ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home.
 - For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Telecommuting
 - Factors that should be considered in determining the feasibility of working at home include:
 - The employer's ability to supervise the employee adequately
 - whether any duties require use of certain equipment or tools that cannot be replicated at home
 - whether there is a need for face-to-face interaction and coordination of work with other employees
 - whether in-person interaction with outside colleagues, clients, or customers is necessary
 - whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Telecommuting
 - An employer may make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home.
 - The employer may select any effective accommodation, even if it is not the one preferred by the employee.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - EEOC: Reassignment to a vacant position as a form of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - An employee must be qualified for the new position. An employee is qualified for a position if he (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.
 - The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.
 - The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position.
 - Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his current position, or (2) all other reasonable accommodations would impose an undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - "Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time.
 - A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.
 - A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - An employer does not have to bump an employee from a job in order to create a vacancy, nor does it have to create a new position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - If there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.
 - If it is unclear which position comes closest, the employer should consult with the employee about his preference before determining the position to which the employee will be reassigned.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - Reassignment does not include giving an employee a promotion. An employee must compete for any vacant position that would constitute a promotion.

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ADA Accommodations

- Accommodations - Reassignment
 - If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - Employers cannot deny a reassignment to an employee solely because he is designated as probationary, as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - An employer's obligation to offer reassignment to a vacant position is not limited to vacancies within an employee's office, branch, agency, department, facility, personnel system, or geographical area.
 - If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which he may be eligible as a reassignment.
 - An employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him that no appropriate vacancies are available, the employer will have fulfilled its obligation.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Reassignment
 - Generally, an employer is not required to reassign an employee with a disability if doing so would violate the rules of a seniority system.
 - This is true both for collectively bargained seniority systems and those unilaterally imposed by management.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Related to Effects of Treatment
 - An employer must provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- **Violations of Rules of Conduct**
 - An employer is not required to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is uniformly applied, job-related, and consistent with business necessity.
 - Example: An employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property.
 - An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- **Violations of Rules of Conduct**
 - EEOC: An employer must provide a reasonable accommodation for an employee with a disability who violates a conduct rule that is job-related for the position in question and consistent with business necessity, except where the punishment for the violation is termination.
 - Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- **Co-Workers**
 - EEOC: An employer may not tell other employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability.
 - This usually would amount to a disclosure that the individual has a disability, and the ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave / FMLA
 - An employer should determine an employee's rights under ADA and FMLA separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave / FMLA
 - EEOC Example: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under FMLA for 12 weeks of leave, so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under FMLA, the employer could deny the employee the thirteenth week of leave. But because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave / FMLA
 - EEOC Example: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position with or without reasonable accommodation, the employer must reinstate the employee to her original position.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA Accommodations

- Accommodations - Leave / FMLA
 - EEOC Example: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Expansion of ADA Disabilities and Accommodation Obligations
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ADA / FMLA Policies

- All covered employers should adopt written ADA policies and written FMLA policies

Expansion of ADA Disabilities and Accommodation Obligations
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ADA / FMLA Policies

- ADA policies should address issues including
 - Employer complies with ADA
 - Overview of ADA
 - Nondiscrimination on the basis of disability
 - Procedure for requesting for reasonable accommodations
 - Medical certifications
 - Procedure for ADA complaints
 - Non-retaliation
 - Coordination with FMLA

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ADA / FMLA Policies

- FMLA policies should address issues including
 - Employer complies with FMLA
 - Overview of FMLA
 - Procedure for requesting FMLA leave
 - Procedures during and after FMLA leave
 - Medical certifications
 - Procedure for FMLA complaints
 - Non-retaliation
 - Coordination with ADA

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**For assistance in compliance with
the Americans with Disabilities Act
and other Federal and State laws
please contact Hogge Law.**

**For other labor and employment law resources
for Virginia employers
please visit VirginiaLaborLaw.com**
