


**Engaging in the Interactive Process**

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**How is Disability defined by the ADA?**

- The American with Disabilities Act defines an individual with a disability as any person who:
- Has a physical or mental impairment which substantially limits one or more major life activities (including walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself, or performing manual tasks).
- Has a record of such an impairment, or is regarded as having such an impairment.




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**“Disability” is Construed Broadly Under the ADAAA**

- Section 3(4)(A) of the ADAAA provides that the definition of disability “shall be construed in favor of broad coverage of individuals under this Act to the maximum extent permitted” by the terms of the ADA as amended.
- If in doubt, it is safest to assume that a medical condition is or may be a disability under the ADAAA.
- EEOC Training Institute




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## Mitigating Measures

The Amendments Act of 2008 expanded the definition of disability by specifying that an employer could not consider "mitigating measures" in determining whether an individual is "substantially limited" in a major life activity:

- Mobility Devices
- Prosthetics
- Medications
- Medical Supplies or Equipment



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## Why is this Important?

- Increasing Prevalence of Disability in the U.S. Workforce
- In 2010 18.7 % of the overall population identified themselves as having a disability.
- The 45 to 54 and 55 to 64 year old U.S. population is projected to grow by nearly 44.2 million (17%) and 35 Million (39%) in the next ten years\*
- This group will account for nearly half (44%) of the working age population (20-64) by the year 2010\*
- The prevalence of disability grows with age

\*From U. S. Census Bureau population projects <http://www.census.gov/ipc/www/usinterimproj/>.



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## Disclosure

- Employees with disabilities may be the largest "diversity" segment of the workforce.
- An estimated 20 percent of US workers will develop a disability that lasts a year or more during their careers.
- Yet few will identify themselves as such in the workplace, often because they fear being stigmatized or discriminated against.
- The Conference Board Inc.
- US Census Bureau



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## Disclosure

Compared to veterans and the LGBT community, employees with disabilities are less likely to be "out and proud." Because disability is such a broad category, they may not identify with each other. Despite the government's new clarification of what constitutes a qualifying disability, it's the individual who ultimately decides whether he or she has a disability and, if so, whether to self-identify at work.

- The Conference Board Inc.



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## National Study

These factors emerged as meaningful reasons for disclosure:

- Confidence in the job
- Capacity to regulate one's condition on the job, having learned how to manage one's illness.
- Knowledge of ADA
- Feeling socially connected
- Patterns and Correlates of Workplace Disclosure



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## Interactive Process

- The process for determining if an employee has a disability and whether there are reasonable accommodations that can be implemented is called the interactive process.
- It is a dialogue between an employee and their supervisor, human resource representative or ADA Coordinator.



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## The Accommodation Request

- An accommodation request is triggered by a request from an individual with a disability, who can suggest an appropriate accommodation.
- Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of the job will vary in each case.
- Equal Employment Opportunity Commission



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## The Accommodation Request

- If the individual does not request an accommodation, the employer is not obligated to provide one.
- If the individual requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.
- Equal Employment Opportunity Commission



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## Duty to Engage

- Analyze job functions to establish the essential and non essential job tasks.
- Identify the barriers to job performance by consulting with the employee to learn the employee's precise limitations
- Explore the types of accommodations that would be most effective



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### Employer Responsibility

- Understand employee's ideas for specific accommodations
- Request additional information that justifies an employee's specific request
- Facilitate a negotiation resulting in mutual agreement




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### Employer Responsibility

- Explain what accommodation the employer is able and willing to provide
- Inform the employee about the employer's inability to provide a reasonable accommodation due to undue hardship
- Occurs in a timely manner
- Ongoing obligation




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### Demonstrating Good Faith

- Employers should build in process to demonstrate that they approach the interactive process in good faith. Examples of this could be:
- Providing forms for the employee and/or his or her physician to complete to request accommodations;
- Training supervisors about the accommodation process;
- Responding promptly to accommodation requests;
- Including a discussion about the interactive process in its policy manual.

<http://www.schwabe.com/Articles/navigatingada.pdf>




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### Employer Do's and Don'ts

- When an employee has disclosed, what can you determine?
  - The functional limitations in the job
  - Accommodation options
- Do not:
  - Make an inquiry about the diagnosis, prognosis, symptoms or manifestation of the medical condition
  - Make allusions to the situation
  - Make judgment about the consequent changed capabilities



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### Employee Responsibility

- To make a request-no "magic words" required.
- To provide documentation when requested.
- To engage in the interactive process to determine relevant accommodations.



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### Document, Document, Document

- Ensure that there is a written record of meetings to illustrate all that has occurred. The record can be requested for identification and disclosure:
- Stick to the facts
- Write a summary of any in person meetings
- Be mindful that the documentation is needed to establish knowledge, notice, intent and good-faith effort.



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## Interview

- An employer may not ask whether an applicant has a disability before making a job offer.
- Employers can ask whether a job candidate can perform the essential job functions either with or without "reasonable accommodations."
- Ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations



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## Essential functions

- The minimum required duties and abilities necessary to perform the tasks of the job. Essential functions of a job can often be determined by writing accurate job descriptions to determine which tasks are a major part of the job and which are not. Factors to consider include the percentage of time spent performing those duties, the qualifications required to do these tasks, and whether the job exists in order to have these duties performed.



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## Reasonable Accommodations

- 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
- Equal employment opportunity: opportunity to attain same level of performance or to enjoy equal benefits and privileges of employment



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### Accommodation Basics

- Must be an effective and reasonable accommodation
- Need not be *best* accommodation, just *effective*
- Must only reduce employment-related barriers
- Personal devices not required
- Individuals covered solely under the "regarded as" prong NOT entitled to accommodations
- Employer not prevented from providing extra accommodations




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### Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000)

The Ninth Circuit Court of Appeals (whose decisions govern the Western states) noted that "the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and . . . this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for an accommodation."




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### Kauffman v. Peterson Health Care

Debra Kauffman pushed nursing home residents in wheelchairs from their rooms to the beauty shop as part of her job duties. After surgery, her doctor advised her to avoid pushing more than 20 pounds. Because residents weighed more than the doctor's suggested work restriction, Kauffman informed her supervisor of the work restrictions and asked if someone else could wheel the residents to the beauty shop for her.

- <http://www.govdocs.com/interactive-process-reasonable-accommodation/>




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**Kauffman v. Peterson Health Care**

Kauffman's employer, Peterson Health Care, claimed they would need to hire somebody to transport residents to and from the beauty shop for Kauffman and that would constitute an undue hardship for the business.

Her supervisor stated, "We just don't allow people to work with restrictions, and you have a restriction on here...[A]s long as you've got the restriction we can't employ you."

- <http://www.govdocs.com/interactive-process-reasonable-accommodation/>




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**Kauffman v. Peterson Health Care**

The Seventh Circuit Court of Appeals noted that staff members provided assistance to another hairdresser by wheeling residents to the beauty shop after Kauffman's resignation – with no evidence that wheelchair assistance created an undue hardship for the employer or reduced the quality of care to other residents.

The Court found that Petersen Health Care could not ignore Kauffman's initial request for accommodation, stating that the employer is required to engage in an interactive process to determine the type of accommodation that would be appropriate.

- <http://www.govdocs.com/interactive-process-reasonable-accommodation/>




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**EEOC v. St. Alexius Medical Center, Civil Action No. 12-cv-7646**

The hospital violated the ADA by failing to provide an employee, who worked as a greeter, with reasonable accommodations which would have allowed her to do her job and terminated her instead. The former employee has cognitive disabilities, and, she asked for simple accommodations such as written job instructions which would have allowed her to do her job.

In addition to monetary relief for the former employee, the judges decree required the hospital to provide training to its managers and other employees about the ADA.




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### Disclaimer

*This training is not engineered to provide legal advice for any particular situation. Legal advice can be provided only in the course of an attorney-client relationship with reference to all the facts of a specific situation. Accordingly, this information must not be relied on as a substitute for obtaining legal advice from a licensed attorney.*



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### Useful Resources

Building an Inclusive Workforce:  
<http://www.dol.gov/odep/pubs/20100727.pdf>  
Job Accommodation Network:  
<http://askjan.org/>  
Equal Employment Opportunity Commission  
<http://eeoc.gov/>  
Department of Labor's Office of Disability Employment Policy  
[www.dol.gov/odep/](http://www.dol.gov/odep/)  
Cornell University Employment & Disability Institute  
[www.hrtips.org](http://www.hrtips.org)



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### References

- United States Department of Labor:  
<http://www.dol.gov/odep/topics/Employers.htm>
- The Conference Board, Do Ask Do Tell:  
<http://askearn.org/docs/Do%20Ask%20Do%20Tell.pdf>
- Patterns and Correlates of Workplace Disclosure, Ellison, Russinova, MacDonald-Wilson. Journal of Vocational Rehabilitation Date: February 1, 2003



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