THE RIGHTS OF DISABLED PERSONS IN THE WORKPLACE UNDER THE AMERICANS WITH DISAIBLITES ACT AND WHERE TO GO FOR ASSISTANCE

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I. Titles I and V of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101 *et seq.* ("ADA") set forth the fundamental anti-discrimination provisions and entitlements of disabled persons in the workplace

Statutory language § 12112

> ***No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment***

- The Rehabilitation Act of 1973, 29 U.S.C. § 791 covers employers in the public sector and federal contractors on essentially the same basis as the ADA
- The United States, Indian tribes and private membership clubs organized under IRS section 501(c) are excluded from coverage
- Religious entities may give hiring preference to individuals of a particular religion but may not otherwise discriminate

Important statutory definitions

- A "*covered entity*" is a private employer that has 15 or more employees who worked for the entity for at least 20 calendar weeks in the current or preceding year
- A "*qualified individual*" is someone who can perform the essential functions of the job with or without reasonable accommodations (reasonable accommodations are discussed below)
- A person with a "*disability*" is:
  - Someone who is "actually disabled," i.e. substantially limited in:
    - a major life activity such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working

OR

- A major bodily function, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

  - An impairment need not prevent, or significantly restrict, the individual from performing a major life activity to qualify. All that is required is that it restrict the conditions, manner or duration under which the function is performed as compared to most people

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

  - The question of whether a person qualifies as actually disabled requires an individualized assessment. There are no per se disabilities, but some conditions are nearly always considered disabling e.g. cancer, multiple sclerosis, epilepsy etc.

  - The question of whether a person is disabled is answered without consideration of "mitigating measures" e.g. wheelchair and other supportive devices and medicines. But the side effects of mitigating measures are considered and may, themselves, be disabling

- Someone the employer *regards* as disabled

  - It is not necessary for the entity to regard the employee as substantially limited due to the impairment or that the employee be in fact substantially limited due to the impairment

  - But if the employer regards the employee as having a condition that is transitory (having an actual or expected duration of 6 months or less) and minor, and the condition is, in fact, transitory and minor, this provision does not apply

    - If the condition is not, in fact, transitory and minor, the employer will be deemed to have regarded the employee as disabled

    - Similarly, if the employer regards something that, in fact, is transitory and minor as something that is not so

limited, the employer will also be held to have regarded the employee as disabled

- Someone with a record of a disability

  - Additionally, under the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff ("GINA") people with a genetic history of a disability are also protected from discrimination

II. The ADA Contains Both Prohibitions Against Disability Discrimination and an Affirmative Obligation to Reasonably Accommodation Applicants and Employees. For These Obligations to Apply, the Person in Question Must be a "Qualified" Individual with a Disability, which has Two Requirements and a Third Consideration

First, the person must be able to meet prerequisites for the position:

- This includes the appropriate educational background, employment experience, skills, licenses etc.

Second, the person must be able to perform the essential functions of the job held or desired with or without reasonable accommodations (discussed more fully below)

- This determination is made based on information available at the time of the employment decision at issue, not speculation about how the disabled individual's condition may evolve in the future

- The fact that the individual may cause increased health insurance or workers compensation premiums for the employer may not be considered

Third, the person must not pose a "direct threat" to his/her/their own safety or the safety of others

- An employer may require that the disabled employee not pose a direct threat in the workplace as a qualification standard. Alternatively, the employer may assert that the employee is a direct threat as a defense to liability for failing to hire/promote etc or failing to provide accommodations

- A "direct threat" is a "significant risk of substantial harm" to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation

  - The risk cannot be speculative or remote, and it must be based on the disabled employee's condition at the time (not speculation about how the disabling condition may progress or how stress might impact it)

    - The employer must specifically articulate what the risk is i.e. what aspect of the disability causes an unsafe condition when specific tasks are performed

    - Once the risk is identified, the employer must evaluate the risk based on objective evidence (not subjective perceptions, stereotypes or fears) with consideration of the following factors:

        - The duration of the risk
        - The nature and severity of the potential harm
        - The likelihood that the potential harm will occur; and
        - The imminence of the potential harm

    - Evidence relevant to this inquiry includes:

        - Input from the individual with a disability
        - The experience of the individual with a disability in previous similar positions
        - Opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise with the disability involved and/or direct knowledge of the individual involved

    - Before an employer disqualifies a disabled employee based on its conclusion that the employee poses a direct threat to safety, the employer must consider whether the risk can be mitigated or eliminated though reasonable accommodations

III. An Employer May Not Discriminate Against and Employee or Applicant, on the Basis of Disability in Any Term Condition or Privilege of Employment

The employer's obligations under the ADA begin in the application process

- An employer must ensure that its recruitment, advertising and job applications do not discriminate against individuals with disabilities

- Employers are required to provide reasonable accommodations necessary for disabled individuals to participate in the application process

    - This means that an employer may ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer before the administration of the test. And the employer may ask that documentation of the need for the accommodation accompany the request.

  - Such accommodations can include, for example, a sign language interpreter, more time to complete a written test, or alternative drug testing for people who can't pass urine

- An employer may make pre-offer inquiries into the ability of an applicant to perform job-related functions, and the employer may ask the applicant how, with or without reasonable accommodation he/she/they will be able to perform such functions

- An employer cannot conduct a medical examination or make general inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability

  - This also means that an employer cannot use an application form that lists a number of potentially disabling impairments and asks that the applicant to check any of the impairments he/she/they may have

  - And while an employer may explain its attendance policy during the application process and ask applicants to state whether they can meet it, the employer cannot ask whether or how often the employee may require leave for treatment or incapacitation due to a disability

- Physical agility tests are not considered medical examinations. Therefore, they may be given at any time, so long as:

  - They are given to all similarly situated applicants regardless of disability

  - If such tests screen out or tend to screen out individuals with disabilities, the employer can show that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation

- An employer may extend an applicant a job offer, conditioned upon the applicant passing a medical exam, as long as all entering employees in the same job category are subjected to such an examination regardless of disability

- Any medical exam (or other job requirement) that is used to screen out applicants or employees must be job related and consistent with business necessity. Non-job-related medical information may be gathered from all employees as long as it is not used to screen out employees.

- A test to determine the illegal use of drugs is not considered a medical exam

Once a person becomes an employe, the employer must ensure that the disabled person is not subject to differential treatment or benefits

- The employer must not limit disabled employees' opportunities or compensation. This includes opportunities for:
    - Promotion, award of tenure, demotion, transfer, layoff, right of return from layoff and rehiring
    - Rates of pay
    - Job assignments, job classifications, lines of progression and seniority
    - Leaves of absence, sick leave or any other leave
    - Fringe benefits, whether or not administered by the covered entity
    - Selection and financial support for training, such as apprenticeships, professional meetings, conferences and selection for leaves of absence to pursue training
    - Activities sponsored by the employer, including social and recreational programs
    - It also prohibits segregated facilities and job tracks

- The employer may not permit harassment of disabled employees that is either severe or pervasive, whether done by supervisors, co-workers, contractors or customers. Such harassment is unlawful because it alters the terms and conditions of disabled persons' employment

- It is unlawful for an employer to exclude or deny equal job benefits to, or otherwise discriminate against a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association

    - This protection is not limited to those who have a familial relationship with a person with a disability

    - Among other things, this provision precludes an employer that provides health insurance benefits to its employees for their dependents from reducing the level of those benefits to an employee simply because that employee has a dependent with a disability and provision of such benefits would result in increased health insurance costs for the employer.

    - NOTE: an employer's duty to provide reasonable accommodations does not extend to accommodating persons who have an association with a person with a disability.

- An employer may not do though a contractual or other relationship what it is prohibited from doing directly

    - For example, it would be unlawful for an employer to hire a company to provide training if the training will be held at an inaccessible facility and would, thus, preclude its disabled employees from attending, unless conducting the training in an accessible manner would be an undue hardship

- An employer may not retaliate against any individual because that individual has opposed unlawful disability discrimination or made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing to enforce the ADA

- An employer many not coerce, intimidate, threaten, harass or interfere with an individual's exercise or enjoyment of a right protected by the ADA or because that individual aided another individual in exercising such rights

IV. Employers Must Accommodate the Known Disabilities of Employees and Applicants Unless to Do So Would Impose an Undue Hardship

<u>The obligation to begin a discussion about accommodations arises when the employee asks for an accommodation or when the employer becomes aware that the employee is struggling at work due to his/her/their disability</u>

- The employee is not required to use any magic language to request an accommodation. But the request for assistance must clearly be tied to the employee's disabling condition

<u>The discussion between the employer and the employee about what accommodations are needed and feasible is called the "interactive process"</u>

- Both parties must participate in the process in "good faith" by staying engaged, responding promptly etc.

- During this process the employer may ask the employee to obtain medical documentation of his/her/their disability and the needed accommodations

- Examples of reasonable accommodations:

    - Elimination of non-essential job functions
    - Alternative schedules or work locations
    - Assistive devices such as screen readers
    - Safety devices such as harnesses for climbing safely
    - Sign language interpreters
    - Modified equipment
    - Additional training
    - Providing assignments in writing

- Moving an employee to a quiet workspace
- Physical modifications to the workplace such as ramps
- Additional breaks or leave
- Alterations in dress code or attendance policies
- Alternative format work materials (e.g. braille)

- If an employee cannot be reasonably accommodated in his/her/their current position and there is a vacant position (or one that the employer knows will soon be vacant) that is comparable in terms of pay and status to the employee's current position, and for which the employee is qualified (with or without reasonable accommodation), the employer must reassign the employee to the comparable position

    - The employee is not required to identify the transfer position or compete with others for it

    - The employee doesn't need to be the "best qualified" person for the position

    - If the employee is qualified for the position, the transfer must be made

    - If no equivalent position is available, a lower graded position may be offered, and there is no requirement that the higher salary be maintained

    - An employer is not required to promote an individual as a reasonable accommodation

    - Reassignment is not available to applicants

- An employee is not entitled to the accommodation of his/her/their choice if there is more than one that meets the employee's needs. And the employer is not required to provide the best accommodation.

- Things that assist a disabled individual throughout his/her/their daily activities on and off the job such as eyeglasses, hearing aids, wheelchairs and prosthetics are personal items, not reasonable accommodations

- Job Accommodations Network as well as state and local rehabilitation agencies are excellent resources for helping employers and employees

identify accommodations for a wide range of work situations and issues (See Resources section at the bottom of this document)

An accommodation that eliminates an "essential function" of the job is per se unreasonable

- An employer's designation of a job function as "essential" is not dispositive. It is one factor that is considered.

- Other relevant factors are:

    - Whether the position exists to perform that function
    - How much time in the job is spent performing the function
    - Whether removing the function would fundamentally alter the position
    - The number of people performing the job among whom the function can be distributed
    - The level of specialization/expertise required to perform the function
    - The current work experience of incumbents in the job
    - The work experience of past incumbents in the job
    - The terms of a collective bargaining agreement
    - The consequences of not requiring the disabled employee to perform that function

Accommodations that would impose an "undue hardship" on an employer are not reasonable

- Undue hardship does not mean simply difficult or inconvenient. It means that the accommodation is unduly costly, extensive, substantial or disruptive, or it would fundamentally alter the nature or operation of the employer's business

- The hardship cannot be speculative

- Factors considered when analyzing whether an accommodation imposes an undue hardship on an employer include:

    - The type of business the employer operates
    - The number of employees at the location where the disabled employee would work and whether there are other locations nearby
    - Whether, and to what extent the accommodation would burden other employees
    - Whether the accommodation would fundamentally alter the employer's business operation

- The cost of the accommodation as compared to the resources of the employer

- If an employer can show that the cost of the accommodation would be an undue hardship but funding for the accommodation, in whole or in part, is available from another source, e.g. a state vocational rehabilitation agency, or if state or federal tax credits are available to offset the cost, only the final net cost to the employer will be considered when analyzing whether the accommodation, in fact, would pose an undue hardship
- In the absence of other funding, the employee with the disability should be given the opportunity to provide the accommodation or pay for that part of it that constitutes an undue hardship

V. Common Missteps Made by Employers When Navigating these issues

<u>Employer assumes that a disabled employee cannot perform the essential functions of the job or cannot perform them safely</u>

- <u>The correct thing for the employer to do</u>: Ask the employee to obtain relevant medical records, consult Job Accommodations Network (JAN) then hire a qualified outside party to make that determination, if necessary.

<u>Employer identifies a safety concern presented by the employee performing the job and does not hire or terminates the employee</u>

- <u>The correct thing for the employer to do</u>: Follow the steps above. Then assess whether the risk can be mitigated or eliminated through reasonable accommodation by consultation with JAN and other relevant professionals. If it is found that the risk cannot be mitigated or avoided through reasonable accommodation, then assess whether the disabled person poses a direct threat (significant risk of substantial harm) in the workplace. Only refuse to hire/terminate the disabled individual if the answer is yes.

<u>Employer concludes that an accommodation is not reasonable after comparing its cost to the disabled employee's salary or the value to the company of the job in question</u>

- <u>The correct thing for the employer to do</u>: Evaluate whether the accommodation is reasonable with reference to the employer's overall business operations.

<u>The employer fails to consider transferring a disabled employee to a position that is vacant (or the employer knows will soon be vacant) if the employee cannot reasonably be accommodated in his/her/their current position</u>.

- The correct thing for the employer to do: If a disabled employee cannot reasonably be accommodated in his/her/their current position, before terminating that employee, the employer must determine whether there is a comparable (pay/status) vacant position at the company, (or one it knows will soon be vacant, for which the disabled employee is qualified and the essential functions of which the employee can perform with or without reasonable accommodation. If such position exists, the employer must transfer the employee to that position without requiring the employee to compete for it or demonstrate that he/she/they are the "best" qualified person for the job. If no such position exists, the employer may offer lower-level positions. If there is no match with alternative positions, then the employer may terminate the employee.

The employer fails to consider additional unpaid leave as a reasonable accommodation when an employee exhausts Family Medical Leave Act ("FMLA") leave

- The correct thing for the employer to do: After FMLA leave runs out, the employer must consider whether granting an additional period of unpaid leave would be reasonable. Leave of an indefinite or exceptionally long period will not be considered reasonable.

VI. Common Missteps Made by Employees When Navigating these issues.

The employee assumes that because he/she/they have notified the employer of their disability that they cannot be fired or held to the same performance or conduct standards as other employees

- Employees must be aware that employers are not required to reduce performance standards for disabled employees. Courts consider that unreasonable. Further, improper workplace conduct, e.g. fighting, cursing, being intoxicated etc is never excused, even when attributable to a disability.

The employee assumes that the employer is required to accommodate his/her/their disability and provide the accommodation they want

- Employees should be aware that accommodations must be reasonable from a business perspective (cost, disruption etc), to be required by law, and they are not entitled to the accommodation of their choice or even the best accommodation. They are only entitled to one that works, and is reasonable.

The employee waits to disclose his/her/their disability or request an accommodation until significant performance problems arise

- The correct thing for the employee to do: The employee should notify management in writing (save a copy) of his/her/their disability and the need for accommodation at the first sign the disability is causing the employee to fall short of performance standards. Waiting until there is impending

discipline or termination leaves the employee open to the argument that he/she/they have concocted the disability to avoid discipline or termination.

The employee does not communicate/respond promptly to the employer during the interactive process to find a reasonable accommodation

- The correct thing to do: The employee should be responsive and err on the side of over-communicating (in writing) with the employer during the process of discussing possible accommodations. Both the employer and the employee have an obligation to engage in the interactive process in "good faith," which requires responsiveness. Prompt and frequent communication goes a long way towards eliminating the risk that a court will find that the employee failed to engage in this process in good faith.

- NOTE: There is no separate cause of action for an employer's failure to engage in the interactive process in good faith. What this means is that if an employer does not participate in good faith but there was no reasonable accommodation possible, then the employer is not liable.

The employee creates a major obstacle to his/her/their continued employment though their reasonable accommodation request

- How does this happen? The employee requests an accommodation that is deemed unreasonable and for which there is no reasonable alternative (disqualifying the employee from his/her/their current job), AND there is no current or soon-to-be-vacant position or for which the employee is qualified with or without reasonable accommodation.

- The correct thing for the employee to do: The employee should think the process all the way through before seeking an accommodation. I highly recommend that anyone in this situation talk to an attorney who specializes in representing employees in disability discrimination cases. Attorneys who work in this area are well versed in helping employees in this process and avoid the traps

VII. Resources Available to Both Employers and Employees

U.S. Equal Employment Opportunity Commission (EEOC) www.eeoc.gov

The EEOC is the federal agency that enforces the anti-discrimination provisions of the ADA and GINA in employment. For comprehensive information about the types of discrimination prohibited by these statutes, including examples and an explanation of how to file a complaint of discrimination, click the table for "Employees and Job Applicants."

Job Accommodations Network (JAN) www.askjan.org

JAN is a free service of the U.S. Department of Labor Office of Disability in Employment Policy that provides on-on-one practical guidance and technical assistance on job accommodation solutions.

The Disability Rights Center of Kansas (DRC) www.drckansas.org

The DRC is a not-for-profit that provides free legal advocacy services to disabled Kansans. The range of advocacy it provides runs from brief consultations to full legal representation based upon organization priorities and resources. The agency also has a limited amount of money to help house crime victims with a disability, and it has helpful informational resources on its website addressing numerous issues affecting the disabled community.

National Employment Lawyers Association (NELA)
www.exhange.nela/org/membershipdirectory/findalawyer

This is a national professional organization of attorneys who represent employees in employment disputes.