

# **ADA UPDATES: TITLE I AND TITLE II**

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# ADA TITLE I

- Employment-related rights and obligations arise under Title I
- Other laws may apply specifically to individuals with disabilities (e.g. FMLA, GINA, Texas Commission on Human Rights Act, Pregnancy Discrimination Act)

# ADA TITLE I

☐ Requires employers to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to non-disabled persons . It prohibits discrimination in:

- job application procedures
- hiring
- advancement
- employee compensation
- Job assignment/classification
- job training
- other terms, conditions, or privileges of employment

# **OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS**

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

# EXAMPLE ACCOMMODATIONS

- Modifying the job application process
- Making facilities accessible
- Leave
- Acquiring or modifying of equipment/devices
- Modifying policies
- Providing readers/interpreters/notetakers/CART
- Other similar accommodations

# INTERACTIVE PROCESS

- Employers and employees have an obligation to engage in the “interactive process.”
- Timely, good faith discussion re: accommodations or job barriers
- Individualized to both the job and the person

# BEST PRACTICES: 6 STEPS

- Determine essential functions
  - (actual work experience, time spent on function, consequences of not doing function)
- Identify limitations and restrictions
- Identify possible accommodations (pay attention to what employee is requesting)
- Assess feasibility of accommodation
- Implement accommodation
- Monitor and check-in for effectiveness

## WHEN TO ENGAGE?

- Timely
- When accommodation is requested
- Triggers:
  - Leave has expired
  - Obvious and through observations



# INTERACTIVE PROCESS LESSONS

- In accommodation cases, the party that fails to engage in the interactive process often loses
- The best defense is often the employer's evidence of good-faith efforts to accommodate
- Employer may violate interactive process by failing to indicate that it needs more information or more definiteness. *Blanchet v. Charter Commc'ns, LLC*, 27 F.4th 1221 (6th Cir. 2022)
- Although failing to engage isn't a separate claim, it may justify denying a motion for summary judgment in an accommodation case. *Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184 (10th Cir. 2022)

# ACCOMMODATIONS- REASSIGNMENT

- Reassignment is listed in the ADA, and courts can err by failing to consider it. *Weber v. BNSF Ry. Co.*, 989 F.3d 320, 325 (5th Cir. 2021)
- In litigation, the plaintiff normally has the burden of showing that an appropriate reassignment existed. *Weber* (5th Cir.);
- Reassignment should be to position that best preserves pay and status; plaintiff has burden to show that reassignment offered was inconsistent with that general rule.
- It's the accommodation of last resort; preference is for accommodation in the original position. *Wirtes v. City of Newport News*, 996 F.3d 234 (4th Cir. 2021) Cf. *Thompson v. Microsoft Corp.*, 2 F.4th 460, 468 (5th Cir. 2021)

# ACCOMMODATIONS - LEAVE

- Both state and federal courts in Texas recognize that a period of leave may be a reasonable accommodation. *Texas Dep't of Transportation v. Lara*, 625 S.W.3d 46 (Tex. 2021)
- Forced leave an ADA violation if another accommodation keeps P working? *Busken v. City of Greenville, Texas*, No. 3:19-CV-02808-X, 2021 WL 5140827 (N.D. Tex. Nov. 3, 2021)
- It is a cliché that attendance is an essential function, but that statement may be overbroad, misleading, unsupported, or misapplied
- Indefinite leave is generally unreasonable

## OTHER CLAIMS

- **Hiring**—*EEOC v. Wal-Mart* (can ask job applicant without arm if she can do functions; not OK to screen her out after she says yes) Equal Emp. Opportunity Comm'n v. Wal-Mart Stores Texas, LLC, 438 F. Supp. 3d 758 (S.D. Tex. 2019)
- **Association**
  - Courts say that 5th Cir. has not “explicitly recognized” this claim, but it’s in the plain language of the ADA.
  - ADA’s association provision does not require accommodations. *Balachandran* (SDTX) (not get leave to care for relative with disability). But disparate treatment actionable. *Newman v. Kerr Cnty.*, No. SA-20-CV-0022-JKP, 2021 WL 4060571, at \*1 (W.D. Tex. Sept. 7, 2021)

- Harassment—ADA prohibits disability-based harassment; elements and standards generally track those for sex-harassment claims under Title VII.
- Retaliation—under the ADA, requesting an accommodation is protected activity, *Flores* (SDTX), but under Texas law, a request can be protected activity if it indicates the plaintiff’s belief that the employer is engaging in unlawful discrimination. *Lara* (Tex.)

# ACCOMMODATIONS AREN'T...

- Lowering of productivity
- A new supervisor
- Eliminating an essential function
- Providing personal medical device

BUT...

# **JOB ACCOMMODATION NETWORK (ASKJAN.ORG)**

- JAN is a free service that provides free, expert advice about accommodations and disability employment issues
- Searchable Online Database by disability/accommodation

# CONFIDENTIALITY

- Health information should be kept in a separate file, apart from the employee's personnel file
- Do not tell others about disability/accommodation process



## ADA TITLE II

- Applies to the “public” (e.g. students, parents, people attending school functions or school board meetings, etc.)
- Key features, one being reasonable modifications

# FRY V. NAPOLEON COMMUNITY SCHOOLS

- Does the Individuals with Disabilities Education Act's requirement that plaintiffs exhaust administrative remedies before suing under the Americans with Disabilities Act and the Rehabilitation Act apply?
- The first prong: could the plaintiff have brought essentially the same claim if the conduct had occurred at a public facility other than a school, such as a public theatre or a public library?
- The second prong: could an adult, not a child, conceivably have brought the essentially identical lawsuit?
- The third prong: does the history of the proceedings indicate that the gravamen is related to the denial of a FAPE?

# SERVICE ANIMALS

- Applicable regs amended in 2010
- Means trained to do work or task for person with disability
- Limited to dogs (but some protection for miniature horses)
- Breed restrictions not allowed
- Limits on what can ask person:
  - Is dog a service animal required because of a disability
  - What work or task has the dog been trained to perform.
- Generally cannot ask for ID card, documentation, or nature of disability

# EFFECTIVE COMMUNICATION

- Communications must be effective
- Usually requires provision of auxiliary aids & services
- Those vary but for many deaf people, may require sign-language interpreter, depending on facts (e.g. setting, kind of info conveyed, abilities and preferences of person)

## **EFFECTIVE COMMUNICATION**

- Can't require individuals to bring their own interpreter, or pay for one
- Can't rely on family unless that is individual's preferred choice
- Can't use minors except in serious and unexpected emergency

# PRIMARY CONSIDERATION

- Title II specifically states that primary consideration should be given to the individual with the disability asking for the accommodation.  
28 C.F.R. § 35.160(b)(2)
- "It is true that Defendant is not necessarily required to provide Plaintiff with her preferred auxiliary aid, but in giving her request primary consideration, Defendant may refuse her request only in limited circumstances, i.e. if there are other equally effective means of communication, or Defendant has an affirmative defense." *Hayden v. Redwoods Cmty. Coll. Dist.*, No. C-05-01785NJV, 2007 WL 61886, at \*1 (N.D. Cal. Jan. 8, 2007)

# ARCHITECTURAL BARRIERS

- New construction—2010 Standards
- Alterations—2010 Standards
- Updates to ADAAG and UFAS
- Applicable Dates:

Construction Dates	Standards
Jan. 26, 1992–Sept. 15, 2010	ADAAG or UFAS
Sept. 15, 2010–Mar. 15, 2012	ADAAG or UFAS or 2010 Standards
On or after March 15, 2012	2010 Standards

# COVERAGE

- 2010 Standards cover many elements, e.g., accessible routes, parking spaces, bus stops, stairways, drinking fountains, kitchens, sinks, toilet and bathing facilities, fire alarms, signs, telephones, ATMs/fare machines, seating, dining and work surfaces



## PRE-ADA REQUIREMENTS

- What about pre-ADA construction (i.e., pre-1/26/92):
  - § 504 required UFAS compliance for many facilities built after 1977
  - In any event, “Program Access”

# PROGRAM ACCESS

- “Program Access”
  - Means that each program, service, or activity is operated such that, when viewed in its entirety, it is readily accessible and usable by person with disability
  - But does not always require that each element be accessible



**THANK  
YOU**

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