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ATTORNEYS AND COUNSELORS AT LAW

**Take a Guided Tour through the ADA Interactive Process without Getting Lost**

Presented by: Tanya S. Bryant

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Lex Mundi World Ready

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- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Tanya Bryant, or another licensed attorney.

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**BEFORE YOU PLAN YOUR TRIP, KNOW YOUR TERRAIN**

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## What Does it Mean to be Disabled?

**Qualified individual** is someone who, with or without reasonable accommodation, can perform essential functions of the job she holds or desires

**Disability** includes:

- Physical or mental impairment that substantially limits one or more major life activities
- Major life activity includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, or the operation of a major bodily function
- Impairment can be disability even if episodic or in remission, so long as it substantially limits a major life activity when active

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## What Does it Mean to be Disabled?

- A record of such impairment (e.g., prior treatment for drug or alcohol abuse); or,
- Being regarded as having such impairment
  - Being regarded as having a “transitory” impairment (lasting six months or less) does not qualify

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## Accommodating the Disabled

Key Question:

Can individual perform **essential functions** of job with or without reasonable accommodations?

Company required to provide **reasonable accommodation** to individuals with disabilities

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## The Winding Roads of Reasonable Accommodations

- Begins during hiring process
- Applicant may request reasonable accommodation to allow for participation in the hiring or interview process
- Employer must provide an accommodation unless doing so would pose an undue hardship



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## The Winding Roads of Reasonable Accommodations

- **Some** reasonable accommodations during the hiring process:
  - Providing written materials in accessible formats, such as large print, braille or audiotape
  - Providing readers or sign language interpreters
  - Ensuring that recruitment, interviews, tests and other components of the application process are held in accessible locations
  - Providing or modifying equipment or devices



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## A Road Map for the Interactive Process

- Starting the adventure:
  - When is employer's duty to engage triggered?
  - No special words
  - Verbal or written



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## A Road Map for the Interactive Process

### Request for Reasonable Accommodation

- Employee can request reasonable accommodation from supervisor, another manager in the immediate chain of command or Human Resources

Employee's representative, medical provider, or family member may request a reasonable accommodation on behalf of the employee

Ultimate decision of whether particular accommodations request is reasonable is left to sound discretion of direct supervisor

- HR provides expertise and support in the accommodations process

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Timing
  - Immediacy?
  - Promptly!

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Document, document, document
- Important for several reasons

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Once a request is presented, the manager/supervisor should initiate an interactive dialogue with requestor, during which they can discuss:
  - Whether the employee has a physical or mental impairment
  - The limitations associated with the medical impairment at issue
  - Frequency and duration of any limitations associated with medical impairment at issue
  - What accommodation(s) is(are) being requested
  - How accommodation(s) requested will assist in performing essential functions of job
  - All of alternatives that exist to assist the employee in performing the essential functions of the job

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Employer may require that employee provide documentation from the healthcare provider most familiar with employee's disability
  - Confirm specific limitations
  - Confirm need for reasonable accommodation

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Except in the case of obvious impairments (coupled with obvious accommodations requests), the requesting employee should provide medical documentation
- Medical documentation should support nature of claimed impairment and provide the physician's opinion regarding appropriate reasonable accommodations

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Essential functions
  - Review essential functions of the job
  - Assess employee's ability to perform the functions

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Essential functions of the job means the fundamental job duties of the employment position the individual with a disability holds or desires
  - The employer's judgment as to which functions are essential
  - Written job descriptions prepared before advertising or interviewing applicants for the job
  - The amount of time spent on the job performing the function
  - The consequences of not requiring the employee to perform the function
  - The terms of a collective bargaining agreement
  - The work experience of past employees in the job; and/or
  - The current work experience of employees in similar jobs
- Determining whether a particular function is essential is a factual inquiry

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## Trail Guide for the Interactive Process

Employers must provide effective auxiliary aids and services to disabled employees in order to assist them in performing the essential functions of their jobs

Examples of potential reasonable accommodations include:

- Leave in addition to that granted by policy
- Adaptive computer equipment
- TDD/TTY phones
- Modified workstation
- Flexible work schedule

Creating a new job or allowing employee to perform "odd jobs" around department are not reasonable accommodations

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Reasonable accommodation
  - Which, if any, will allow the employee to perform the job

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- When is it allowable for an employer to make a subsequent request for updated records?
  - Must be reasonable and not create a burden on the employee
  - Weekly?
  - Monthly?
  - If the medical provider's assessment may change, employer may request documentation at a time that coincides with employee's next scheduled appointment

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Medical information is confidential
- Disability
- Need for accommodation
- Accommodation
- Keep all medical documents in a file separate from employee's personnel file

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Stay the course!
- Follow-up with employee
- Follow-up with supervisor

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Whoa! A bump in the road
- Outcome is not feasible
- What next?

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Reassignment?
- Temporary leave of absence?

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
- Obligations of employer
- Employee's entitlement

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## The Winding Roads of Reasonable Accommodations

- Trail Guide for interactive process
  - An employee is entitled to a reasonable and effective accommodation—not necessarily the accommodation of the employee's choice

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## The Winding Roads of Reasonable Accommodations

- Undue hardship
  - An action requiring significant difficulty or expense
  - Requires thoughtful consideration
  - Risky to jump to conclusions

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## The Winding Roads of Reasonable Accommodations

- Undue hardship...or not?
- Factors to consider
  - Nature and cost of the accommodation needed
  - Overall financial resources of the facilities involved
  - Number of employees
  - Effect on expenses and resources, or the impact of accommodation upon the operation of the facility
  - Overall financial resources of the employer
  - Overall size of the employer considering the number of employees; the number, type, and location of its facilities
  - Type of operation of the employer, including the composition, structure, and functions of the workforce

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—which route will you take—approve or deny accommodation request?
  - Will the requested accommodation require significant difficulty or expense and therefore be an undue hardship on the operation of the business?
  - Employer cannot refuse to provide an accommodation solely because it entails some costs, either financial or administrative

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## The Winding Roads of Reasonable Accommodations

- Undue hardship – which route will you take – approve or deny request?
  - Example of denied request for accommodation
  - Lawsuit—plaintiff alleged that a 12-month leave of absence coupled with allowing her job to remain vacant during her absence was a reasonable accommodation for her disability
  - Outcome?

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—which route will you take—approve or deny request?
  - Court found employer showed special circumstances that demonstrated undue hardship in the particular facts of this case. During time period plaintiff's position remained vacant, employer was unable to maintain its market presence, unable to adequately market its new marketing program, and suffered morale and effectiveness issues in its marketing department. Additionally, employer's volumes, admissions, patient discharges, patient days and average daily census suffered while plaintiff's former position was vacant.

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—which route will you take—approve or deny accommodation request?
  - Example of denied request for accommodation
  - Lawsuit!
  - Requested accommodation for depression of employee at residence for severely disabled individuals that all of her medication-related duties be eliminated would cause undue hardship to employer and, therefore, was not required under ADA; such accommodation would have required employer to hire additional staff to ensure that the employee was never left alone with resident who needed medication and that employee did not have access to resident medications, and expense of hiring additional staff was too great for small nonprofit organization like employer to reasonably be expected to bear.

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## The Winding Roads of Reasonable Accommodations

- The EEOC weighs in
  - Yes, undue hardship if: it fundamentally alters the nature of the operation or business
  - No undue hardship if: it's based on employees' or customers' fears or prejudices toward the disabled employee
  - No undue hardship if: accommodation will cause a negative impact on the morale of other employees
  - However, employers might be able to establish an undue hardship defense if an accommodation would be unduly disruptive to other employees' ability to work

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—"Special Treatment Stigma"
- Non-disabled coworkers are resentful of an accommodation needed by an employee with a disability
- Is perceived to or does place burdens on other employees
- Is an accommodation that other employees covet

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—"Special Treatment Stigma"
- Inconsistent court rulings
  - Cashier at drug store diagnosed with osteoarthritis of both knees—hard to walk/stand
  - Cashier would occasionally sit down in a lawn chair behind the register when there were no customers
  - Employer/employees unhappy because the cashiers were supposed to work on the sales floor when not helping a customer at the register
- Lean staffing model where there were only one or two cashiers and a manager on duty, and the cashiers were expected to stock merchandise—having a cashier sit idly for half of her shift caused productivity and morale issues
- Plaintiff's argument—sitting accommodation was essentially cost-free and that the defendant could easily absorb the impact caused by the accommodation because it was a large corporation with more than 80,000 employees
- Court's response—true cost of the accommodation and its impact should be judged at the store where plaintiff worked. Allowing plaintiff to sit would mean that other employees would have to do her job duties
- Court held the accommodation met the definition of undue hardship under the ADA

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## The Winding Roads of Reasonable Accommodations

- Undue hardship—"Special Treatment Stigma"
- Inconsistent court rulings
  - Issue—whether an accommodation requiring other employees to work a less desirable shift would result in an undue hardship
  - Court emphasized that employee disapproval of a proposed accommodation, in and of itself, does not rise to the level of undue hardship
  - Neither does the fact that an accommodation would force other employees to work an altered schedule
  - Court found employees grumbling was not an undue hardship

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## Mistakes to Avoid

- Equating disability with inability. Key consideration is whether employee is able to perform essential duties—not whether employee has a disability.
- Assuming employee has a disability. Some disabilities are obvious, but many are not. In some cases employees label correctable condition or temporary impairment as disability when it's not. So, pay close attention, and ask for help.
- Tolerating unacceptable performance or conduct. Employees with disabilities must live up to the same standards of conduct and performance as other employees. There is no reason for you to accept less.

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## Mistakes to Avoid

- Tolerating unacceptable health or safety risks. Accommodation is neither reasonable nor responsible if it would result in allowing employee with disabilities or co-workers to be placed at health or safety risk.
- Telling other employees that employee is receiving accommodation. Federal law prohibits supervisors from disclosing an employee's "medical" information (with limited exceptions). Disclosing that someone is being provided reasonable accommodation is therefore disclosing that the person has a disability.
  - If asked, simply say that the same would be done for any employee in a similar situation.

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