

ACCOMMODATION DO'S AND DON'TS UNDER THE ADA

PRESENTED BY



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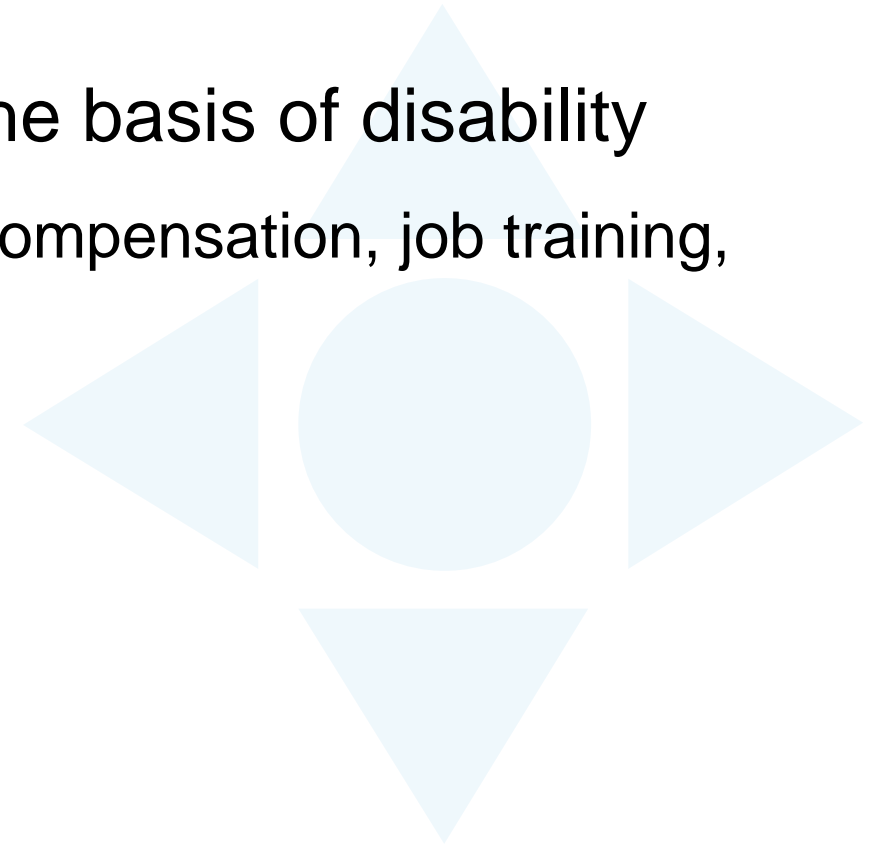
THE PRIMARY PURPOSE...



TO MAKE IT EASIER FOR PEOPLE WITH DISABILITIES
TO OBTAIN PROTECTION UNDER THE ADA

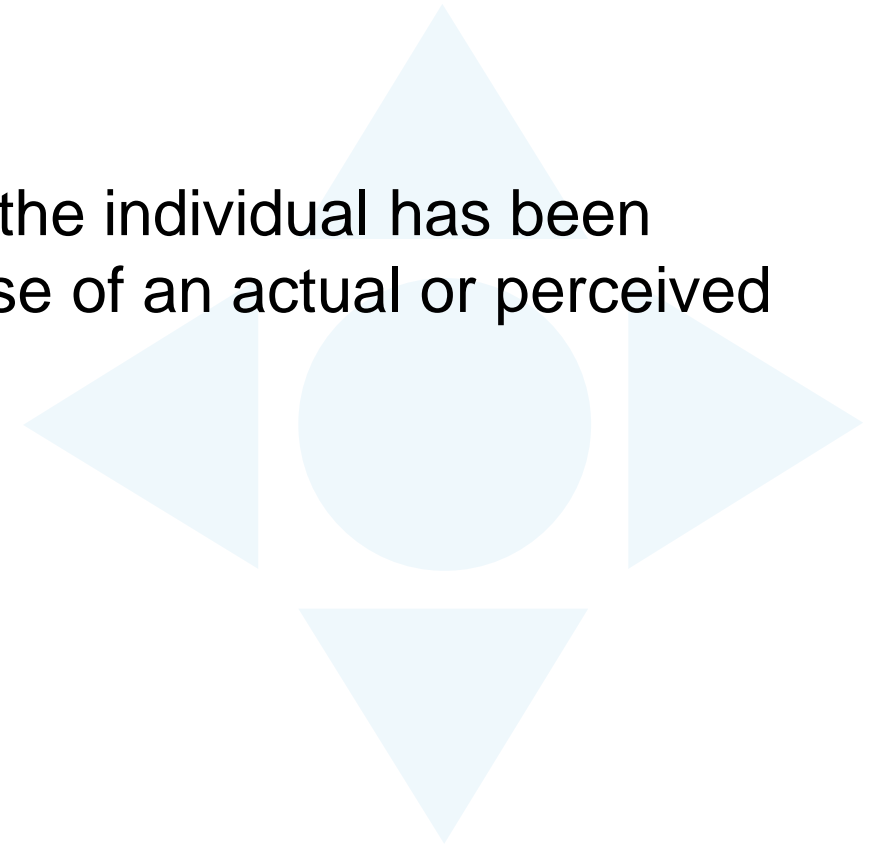
ADA BASICS

- ❖ Requires employers to provide “reasonable accommodation” to “qualified individuals with a disability”
- ❖ Prohibits discrimination against qualified individual on the basis of disability
 - Job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions and privileges of employment
- ❖ Prohibits retaliation for exercising rights under ADA



DEFINITION OF “DISABILITY”

- ❖ Physical or mental impairment that substantially limits one or more of the major life activities of such individual
- ❖ A record of such an impairment
- ❖ Being regarded as having such an impairment – this means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both transitory and minor

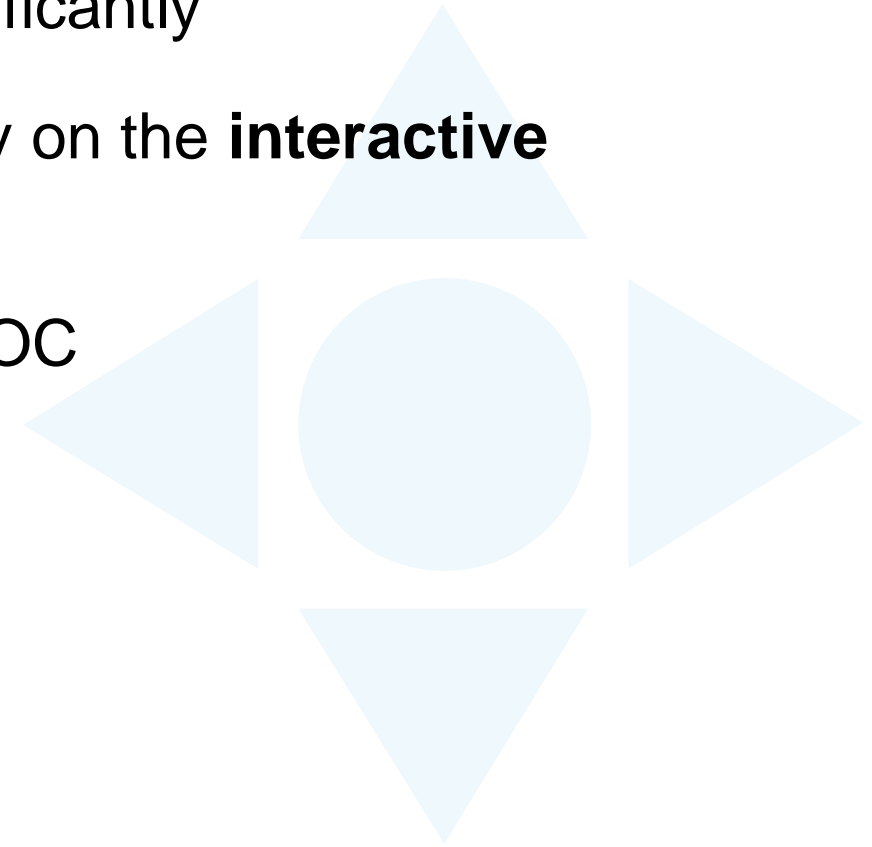


DON'T PLAY DOCTOR

- ❖ 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 the individual meets the definition of disability
- ❖ The question of whether an individual meets the definition of disability should not demand extensive analysis
- ❖ What does this mean?
 - ***The focus for employers and courts will be on engaging in the interactive process and providing reasonable accommodations***

WHAT IMPACT IS THE ADA HAVING ON THE WORKPLACE?

- ❖ **Dramatic increase in** number of individuals in the workplace who are protected
- ❖ Range of coverage and protections afforded has **expanded** significantly
- ❖ Remove the focus from a “disability” inquiry, and place it squarely on the **interactive process**
- ❖ Disability related charges are **No. 1 in charges** filed with the EEOC

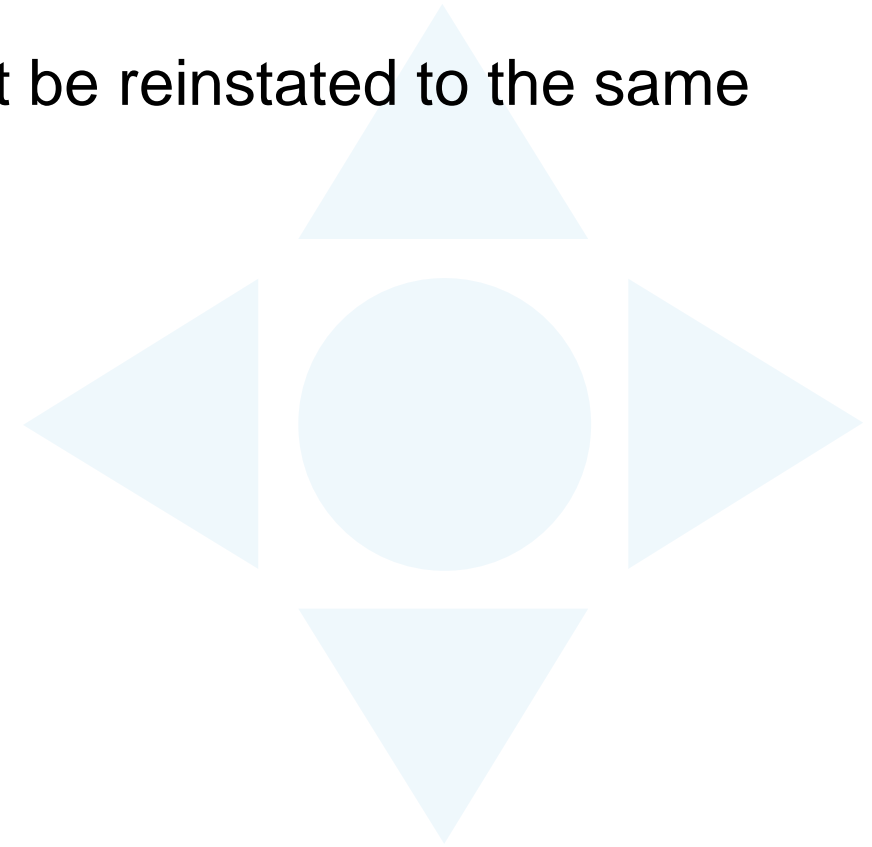


DON'T MISUNDERSTAND THE INTERPLAY BETWEEN THE ADA AND FMLA

- ❖ The FMLA is a “leave” statute – i.e., we will provide you with time off from work so you can heal/recover/seek treatment
- ❖ The ADA is an “accommodation” statute – i.e., how can we help you perform your job?
- ❖ Serious Health Condition vs. Disability
 - Some FMLA “serious health conditions” may be ADA disabilities; for example, some cancers and serious strokes
 - Other “serious health conditions” may not be ADA disabilities; for example, pregnancy or a routine broken leg or hernia

REINSTATEMENT RIGHTS UNDER THE ADA AND FMLA

- ❖ Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship
- ❖ Under the FMLA, (with very minor exceptions) an employee must be reinstated to the same position or to an equivalent position



DON'T OVERSIMPLY UNDUE HARDSHIP

- ❖ An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer
- ❖ Generalized conclusions will not suffice
- ❖ Must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation **would cause significant difficulty or expense**
 - the nature and cost of the accommodation needed;
 - the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
 - the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
 - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
 - the impact of the accommodation on the operation of the facility

UNDERSTANDING THE ADA'S INTERACTIVE REASONABLE ACCOMMODATION PROCESS

DO ENGAGE IN THE CONVERSATION

- ❖ The law does not require an employee to use any particular words to request an accommodation
- ❖ “Although employees must initiate this discussion process, the ADA does not require employees ‘to use the magic words ‘accommodation’ or even ‘disability.’”
 - **“How can I help you?”**
- ❖ Simply asking for continued employment can be a sufficient request for an accommodation. Calling HR and asking to return to work on light duty sufficient to be request for accommodation.
- ❖ Reasonable accommodation must be provided UNLESS accommodation would cause employer an undue hardship (i.e., significant difficulty or expense)

DO ENGAGE IN THE INTERACTIVE PROCESS

- ❖ Employers must initiate an interactive process with the employee
- ❖ This requires “communication and good-faith exploration of possible accommodations”
- ❖ The process is mandatory and both parties have a duty to participate in good faith
- ❖ An employer who acts in bad faith in the interactive process will be liable if a jury can reasonably conclude that the employee would have been able to perform the job with accommodations

DO DEMONSTRATE GOOD FAITH

- ❖ Meet with the employee
- ❖ Request information about the employee's condition and the employee's limitations
- ❖ Analyze and identify essential/non-essential functions of the job
- ❖ Identify what the employee can and cannot do (either in total or partially)
- ❖ Ask the employee what he or she specifically wants
 - The expressed choice of the employee is to be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity – an appropriate reasonable accommodation must be effective in enabling the employee to perform the duties of the position
 - The employer is not obligated to provide the accommodation requested or preferred by the employee, just a “reasonable” accommodation

DO DOCUMENT

◆ That's it – that's the slide.

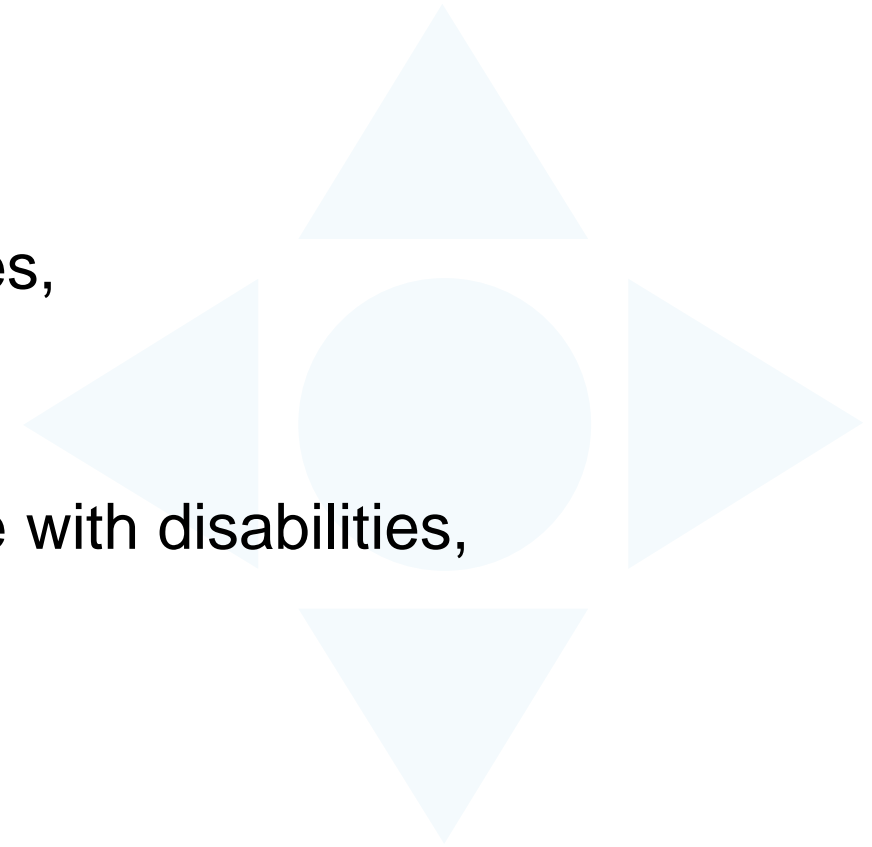


WHAT IS A REASONABLE ACCOMMODATION?

- ❖ An employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform
- ❖ Must try to accommodate in employee's job first
- ❖ Reassignment is a last resort
- ❖ The employer is not required to create a new position as an accommodation, and employer may reassign the employee to an existing lower grade and paid position
 - Reassignment must be considered before termination

EXAMPLES OF REASONABLE ACCOMMODATIONS

- ❖ Providing or modifying equipment or devices,
- ❖ Job restructuring,
- ❖ Part-time or modified work schedules,
- ❖ Adjusting or modifying examinations, training materials, or policies,
- ❖ Providing readers and interpreters,
- ❖ Making the workplace readily accessible to and usable by people with disabilities,
- ❖ Providing leave of absence, and
- ❖ Reassignment to a vacant position.



WHAT IS NOT REASONABLE?

- ❖ Removing essential functions
- ❖ Lowering quality standards
- ❖ Lowering productivity standards
- ❖ Authorizing a completely flexible schedule or indefinite leave of absence
- ❖ Tolerating poor performance when the employee does not request an accommodation until after a performance problem occurs
- ❖ Excusing poor workplace behavior

WHAT INFORMATION CAN YOU OBTAIN?

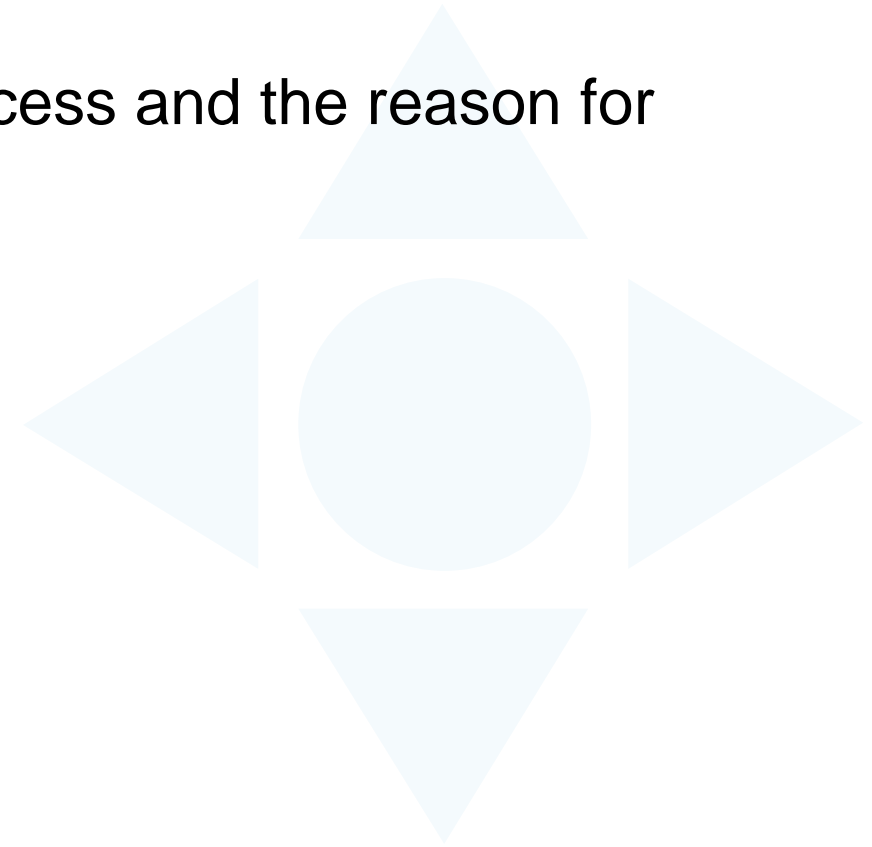
TAKE ADVANTAGE OF YOUR RIGHT TO RECEIVE CLEAR AND SUFFICIENT MEDICAL INFORMATION TO SUPPORT AN ACCOMMODATION REQUEST

DO ASK FOR MEDICAL DOCUMENTATION

- ❖ Disability related inquiries and medical examinations must be job-related and consistent with business necessity
- ❖ Employer “has a reasonable belief,” based on objective evidence that:
 1. an employee’s ability to perform essential job functions will be impaired by a medical condition; or
 2. an employee will pose a direct threat due to a medical condition
- ❖ Disability-related inquiries and medical examinations that follow a request for reasonable accommodation when the disability is not known or obvious also may be job-related and consistent with business necessity

DON'T FORGET ABOUT HIPAA

- ❖ Communicate in writing – with the physician
 - Don't communicate with a medical provider without a HIPAA authorization.
- ❖ Hold face-to-face meetings with the employee to discuss the process and the reason for needing information from the healthcare provider
- ❖ Be clear and be specific



DO REQUIRE SUFFICIENT DOCUMENTATION

- ❖ Documentation that is sufficient to substantiate that she/he has an ADA disability and needs the reasonable accommodation
- ❖ Cannot ask for unrelated documentation – cannot ask for complete medical records!
- ❖ Documentation is sufficient if:
 1. it describes the nature, severity and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and
 2. substantiates why the requested reasonable accommodation is needed

GATE-KEEPING ISSUES UNDER THE ADA...

- ❖ May an employer require an employee to go to a healthcare professional of the employer's choice?
- ❖ Yes, if:
 - employee provides insufficient documentation from his/her treating physician to substantiate the disability and need for a reasonable accommodation
 - employer reasonably believes the employee will pose a direct threat

Remember – examinations under the foregoing situations must be limited in their scope – cannot go beyond narrow purpose of the examination

OTHER GATE-KEEPING ISSUES UNDER THE ADAAA...

- ❖ Explain why documentation is insufficient and allow employee to provide missing information in a timely manner
- ❖ Documentation is insufficient if:
 - does not specify existence of ADA disability
 - does not explain need for reasonable accommodation
 - healthcare professional does not have expertise to give an opinion about employee's medical condition and limitations
 - information does not specify functional limitations due to the disability
 - other factors that indicate the information provided is not credible or is fraudulent

LEAVE AS A REASONABLE ACCOMMODATION

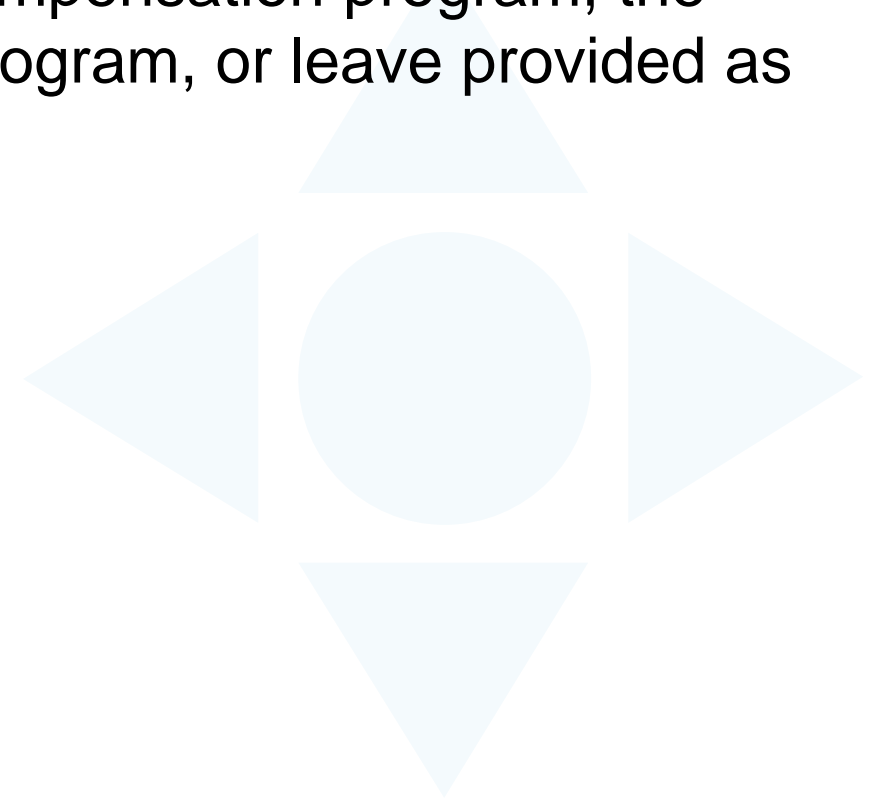
HOW MUCH LEAVE IS REASONABLE?

DO CONSIDER LEAVE AS A REASONABLE ACCOMMODATION

- Get verification from the employee's physician that the requested leave will enable the employee to perform the essential functions of the job and will give the employee clear prospects for returning to work.
 1. The leave must be finite – the employee must provide an estimated date when he/she can resume her essential duties; and
 2. The leave request cannot be too lengthy – the end date must be in the near future. For example, the Sixth Circuit has stated that employers are not required to allow an employee lengthy leave (over one year), but “definite, relatively short leave periods” may constitute reasonable accommodations. The Sixth Circuit has approved leave request of 6 months where the condition did not persist indefinitely.
- ***Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation***

LEAVE UNDUE HARDSHIP CONSIDERATIONS (CON'T.)

- ❖ In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may take into account leave already taken – whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation



RETURNING TO WORK



RETURN TO WORK AND REASONABLE ACCOMMODATION

- ❖ Employees on leave for a disability may request reasonable accommodation in order to return to work
 - **Made by Employee or Medical Provider**
 - **An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is, be "100%" healed or recovered**
- ❖ Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk, but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "significant risk of substantial harm" to self or to others. If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

WHAT ABOUT REASSIGNMENT?

CAN I MOVE THE EMPLOYEE TO ANOTHER OPEN POSITION?



REASSIGNMENT CONSIDERATIONS

- ❖ 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
 - 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**
- ❖ If an employee is reassigned to a lower level position, must an employer maintain his/her salary from the higher level position?
 - No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries
- ❖ "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
- ❖ This is a Last Resort
 - However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee

REASSIGNMENT CONSIDERATIONS

Does reassignment mean that the employee is permitted to compete for a vacant position?

- ❖ EEOC - No. Reassignment means that the employee gets the vacant position if she/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.
- ❖ Compare with the 2nd, 4th, 5th, 6th, 8th and 11th Circuit Courts of Appeals - employees with disabilities are not entitled to noncompetitive transfers as a reasonable accommodation.

QUESTIONS?



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