

# **Legal Basics- Know Your Rights**

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# Presentation Outline

- Relevant Laws
- Who is Protected?
  - ❖ Definition of Disability Under ADA as amended (ADAAA)
  - ❖ Qualified
- What Does the Law Do?
  - ❖ Anti-Discrimination
  - ❖ Reasonable Accommodations
  - ❖ Disclosure, Medical Exams and Inquiries
  - ❖ Harassment, Retaliation, Confidentiality
- Practical Tips / Resources
- Questions

# Employment Discrimination: Disability Rights Laws

## **1973: The Rehabilitation Act (Federal Law)**

Prohibits employment discrimination for qualified individuals with disabilities who work for:

- Federal government
- Entities that receive federal funding

# Employment Discrimination: Disability Rights Laws



## **1990: Americans With Disabilities Act (Federal Law)**

Prohibits employment discrimination for qualified individuals with disabilities who work for:

- State government
- Local government
- Private businesses with 15+ employees

## **2008: ADA Amendments Act (Federal Law)**

Overtaken various Supreme Court decisions that narrowly interpreted the definition of disability under the ADA

# Definition of Disability: ADA & Rehab Act

An employee has a “disability” if he or she:

- Has a physical or mental **impairment** that causes a **substantial limitation** of one or more **major life activities**
- Has a record of such an impairment
- Is “regarded as” having an impairment

# ADA Amendments Act

## **2008: Congress passed the ADA Amendments Act**

The purpose of the ADA Amendments Act is to:

- Congressional intent: Focus in ADA cases is whether entities covered by the ADA have complied with their obligations.
- Definition of disability “shall be construed in favor of broad coverage ... to the maximum extent permitted by the terms of this Act.”

# Expanded Definition of Major Life Activities

caring for oneself

standing

bending

seeing

learning

eating

speaking

sleeping

performing manual tasks

interacting with others

walking

lifting

reaching

hearing

concentrating

communicating

thinking

breathing

working

sitting

## New Major Life Activities Category: Major Bodily Functions

immune system  
normal cell growth  
digestive  
bowel  
bladder  
reproductive functions

neurological  
brain  
respiratory  
circulatory  
endocrine

special sense organs & skin  
genitourinary  
cardiovascular  
hemic  
lymphatic  
musculoskeletal

**Includes the operation of an individual organ within a body system, e.g., kidneys, liver, or pancreas.**

**EEOC Regulations contain two lists:**

1. Impairments that should consistently be a disability.
2. Impairments that may be disabling for some but not others.

# ADAAA: Important Changes

**Conditions that are episodic or in remission:** An impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active

- Examples: Epilepsy, Bipolar disorder, PTSD

**Mitigating measures:** Ameliorative effectiveness of mitigating measures must be disregarded

- Examples: Medication, Coping Strategies, Behavioral Therapy, Hearing Aids

# You Be The Judge: *ADAAA*

Maria has MS. Her symptoms are mostly controlled by medication, but she still experiences some fatigue. She has not had an “MS flare” in a year. Is she a person with a disability under the ADA?

- Before the ADA Amendments Act?
- After the ADA Amendments Act?



# Qualified

An employee is "qualified" for a position if s/he:

- (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and
- (2) can perform the essential functions of the position, with or without reasonable accommodation.

42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m)  
29 C.F.R. pt. 1630 app. § 1630.2(o)

# Essential Job Functions

Factors to consider when determining whether a job function is essential:

- The employer's judgment
- Job descriptions
- The amount of time spent performing the function
- The consequences of not requiring the person to perform the function
- The terms of a collective bargaining agreement
- The work experience of others who have had, or currently hold, the same or similar positions

# Workplace Protections

**Discrimination is prohibited in any facet of employment, including:**

- Job application procedures
- Hiring / Firing
- Benefits and Compensation
- Advancement
- Training
- Any terms, conditions, or privileges of employment
- Refusing to provide reasonable accommodations
- Certain medical exams and inquiries

# Workplace Protections

**Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?**

# Workplace Protections: Limitations

## Answer

**ADA:** No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability.

<http://www.eeoc.gov/facts/adaqa1.html>

## **Workplace Protections: Limitations**

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**Q. Does having a disability protect an individual from being fired or laid off?**

# Workplace Protections: Limitations

## Answer

**ADA:** No. The ADA protects you from being discriminated against because of your disability. It is not a violation for your employer to fire, demote, not promote, reduce hours, or change any other condition of your employment for some other reason unrelated to your disability.

# Reasonable Accommodation

## **Discrimination under the ADA may include:**

- Not providing a reasonable accommodation for known limitations caused by a disability

## **What is a Reasonable Accommodation?**

- Modifications or adjustments to the work environment, or ...
- to the manner or circumstances under which the position is customarily performed ...
- that enable a qualified individual with a disability to perform the essential functions of that position ... or ...
- enjoy equal benefits and privileges of employment.

29 C.F.R. § 1630.2(o)(1)

# Three Categories of Accommodations



- Application Process
- Performance of the essential functions of the position
- Enjoyment of equal benefits and privileges of employment

# Examples of Accommodations for Job Applications / Interviews

- Conducting the interview in a physically accessible location
- Sign language interpreter for interview
- Modifying tests, training materials, testing time, and/or policy manuals
- Replacing a written test with a more extensive interview
- Allowing a support person during the interview

# Examples of Employment Accommodations

- Providing tasks orally instead of in writing
- Providing tasks in writing instead of orally
- Making the workplace accessible to and usable by an employee with a disability
- Restructuring a job (eliminating “marginal tasks”)
- Allowing break periods
- Modifying work schedule
- Scent-free or restrictive scent policies
- Unpaid Leave
- Modifying equipment

# Examples of Employment Accommodations

- Providing qualified readers to accommodate individuals who are blind or may have a vision impairment such as optic neuritis.
- Reassignment to a vacant position
- Providing periods of leave for treatment or recovery
- Allowing a job coach
- Allowing service animal
- Telework

**Other Ideas?**

## **Examples of Accommodations for Benefits/Privileges of Employment**

- Holding office parties at an accessible location
- Accessible cafeterias or employee lounges
- Accessible parking

# Not Required to Provide An Accommodation That...

- Causes an **undue hardship** to the employer
- Results in a **direct threat** to the health or safety of the employee or others
- Is **unreasonable**
  - ❖ Requires reallocation of essential job functions
  - ❖ Will not enable to the employee to be qualified
  - ❖ Lowers production standards applied to all employees
  - ❖ Provides personal use items
  - ❖ Changes an employee's supervisor
  - ❖ Excuses violation of uniformly applied conduct rules

# Undue Hardship (ADA)

- Definition: Action requiring significant difficulty or expense.
- (Some) factors to consider when determining whether an accommodation would pose an undue hardship:
  - ❖ nature and cost of the accommodation needed
  - ❖ overall financial resources of the facility making the reasonable accommodation (number employees; impact on facility)
  - ❖ 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)
  - ❖ impact on operations on the facility

# Accommodation Basics

- Must be an *effective* accommodation (not best)
- Personal devices are not required
- Individuals covered solely under the “regarded as” prong are not entitled to accommodations
- Individuals covered by association are not entitled to accommodations
- Employers are not prevented from providing extra accommodations
- Employee request triggers “interactive process”

# You Be The Judge

- Bill does not have a disability but has a spouse with MS.
- He asks for a reasonable accommodation – modified work schedule so he can take his spouse to physical therapy appointments.
- His employer says no.

**ADA Violation?**

# Interactive Process

## Step 1: Employee Request

- Requests do not need to be in writing
  - ❖ Best practice: Put it in writing
- There is no specific language that must be used
  - ❖ Best practice: Use ADA and reasonable accommodation
  - ❖ Best practice: Use employer-created forms
    - State employees: Most state agencies have their own forms (ask supervisor, agency EEO/AA Officer, ADA coordinator)

## Step 2: Interactive Process

- Considerations during discussions with employer:
  - ❖ Is the requested accommodation reasonable and effective?
  - ❖ Do other possible accommodations need to be examined?
  - ❖ Employers must provide an **effective accommodation**, not necessarily the requested one.
  - ❖ Employee's preference gets "primary consideration."
- Consult with:
  - ❖ Supervisor and possibly HR
  - ❖ Doctors
  - ❖ VR agency
  - ❖ Computer experts
  - ❖ Resources – Job Accommodation Network

# Reasonable Accommodation

## Step 2: Interactive Process

- Employers may request limited medical info regarding:
  - ❖ The nature, severity, and duration of the impairment.
  - ❖ The activity or activities that the impairment limits.
  - ❖ The extent of the limitations of the impairment.
  - ❖ How the impairment(s) relate to the accommodation.
- Employers are not entitled to release of entire record.
- **TIP:** If an employer requests access to **all** medical records, have your doctor provide a letter that addresses how your disability impacts work instead.

29 C.F.R. § 1630.2(o)(3); *EEOC Enforcement Guidance on Reasonable Accommodation, and Undue Hardship.*

# Reasonable Accommodation

## Step 3: Implement Accommodation

- If an effective reasonable accommodation is agreed upon, it should be implemented and there should be follow-up to ensure its effectiveness.
- The duty to accommodate is ongoing. The interactive process and the duty to accommodate can continue beyond the initial accommodation. The employer may need to modify the current accommodation or provide a new accommodation.

# Reassignment as an Accommodation

- **ADA:** Reassignment to a vacant position for which the employee is qualified may be an appropriate accommodation
- Reassignment is generally not reasonable where it is sought to obtain a new supervisor or to escape certain co-workers
- Need not be a promotion
- Does not require bumping if there is a bona fide union or other seniority system

# **Disclosing a Disability**

**Question:**  
**Am I required to disclose my disability?**

## **Disclosing a Disability**

**Answer:**

**No – you are not required to disclose your disability unless you decide to request a reasonable accommodation.**

# Disclosing a Disability

**Question:**

**Should you disclose your disability?**



# Disclosing a Disability

## A. It depends on personal situation – Reasons you may want to disclose:

- You are applying for a position with a government that has an affirmative action program for people with disabilities
- You are applying for or working for a known disability-friendly employer
- Your disability makes you more qualified for your job
- You are requesting a reasonable accommodation

**Note about** voluntary disclosure requests for affirmative action purposes (state government employees; Rehab Act)

# **Three Stages of Employment: Three Different Rules**

- 1. Pre-Employment: Application and Interview**
- 2. After a Conditional Job Offer Has Been Extended**
- 3. Current Employees**

# Stage 1: Pre-Employment – Application and Interview

- **Employers cannot:**
  - ❖ Request any disability-related information
  - ❖ Give any medical examinations
  - ❖ Ask questions that may elicit disability-related information is prohibited (ex: “Have you had to take a lot of sick time at a former job?”)
- **Employers can:**
  - ❖ Ask about ability to perform specific job functions
  - ❖ Ask applicant to describe/demonstrate how he or she would perform specific functions

## Stage 2: After Receiving Conditional Job Offer

- **Employers can:**
  - ❖ Ask disability-related questions and require a medical exam IF this is done uniformly for all applicants
- **Employers cannot:**
  - ❖ Withdraw a job offer unless the disability prevents performing the essential job functions and a reasonable accommodation cannot be provided

## Stage 3: Current Employees

- **Employers can:**
  - ❖ Seek disability-related information when it is job-related and consistent with business necessity
  - ❖ In other words, when there is a **reasonable basis** to believe that the employee:
    - Is **unqualified** to do the job
    - Needs a **reasonable accommodation**
    - Poses a **direct threat** to the health or safety of the employee or others

# Direct Threat

- **Direct threat:** 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.
- Requires an “individualized assessment...”
- Must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.
- **Examples of direct threat?**

# Confidentiality

- All information about disability and accommodations must be kept confidential
- Information can be available to supervisory staff but only on a “Need to Know Basis”
- Keep separate medical and personnel files
- Beware of office gossip
- What should employers tell co-workers?
- Exception for “voluntary” medical information

## Tips for Employees with Disabilities and Their Advocates

- Be ready to explain gaps in employment.
- If asked improper questions during an interview, simply say: “I’d like to focus on why I am qualified for the job.”
- Consider whether to disclose your disability – remember you are not required to disclose unless you are requesting a reasonable accommodation.
- Balance confidentiality concerns with the need for an accommodation.
- Duty to interact applies to both employers & employees.
- Ensure that any medical release is limited to need for accommodation.

## Tips for Employees with Disabilities and Their Advocates

- When requesting a reasonable accommodation, identify your impairment, limitations, requested accommodations.
- Submit accommodation requests in writing. Document all interactions regarding accommodation request.
- Be far-reaching in exploring reasonable accommodation. For example, if you think unpaid leave would cause an undue hardship for your employer, examine part-time work or working from home.
- If you feel that discrimination has occurred, seek a copy of your personnel file and contact an appropriate agency.

# Filing Charges of Discrimination

Unlike other lawsuits, you cannot go directly to court to challenge employment discrimination

- Must “exhaust” administrative remedies
  - ❖ Equal Employment Opportunity Commission
    - Must file within 300 days of discriminatory action
  - ❖ PA Human Relations Commission
    - Must file within 180 days of discriminatory action
- Do not need a lawyer
- Sometimes offered mediation
- Investigation → Finding → Notice of Right to Sue

# Selected Resources

- National MS Society – [www.nmss.org](http://www.nmss.org)
- Disability Rights Network of Pennsylvania – [www.drnpa.org](http://www.drnpa.org)
- Pennsylvania Office of Vocational Rehabilitation
- Pennsylvania Client Assistance Program – [www.equalemployment.org](http://www.equalemployment.org)
- Job Accommodation Network - <http://askjan.org/>
- Equal Employment Opportunity Commission - [www.eeoc.gov](http://www.eeoc.gov)

# Job Accommodation Network (JAN)



- Fact sheets / accommodation ideas for almost every impairment and disability:  
<http://askjan.org/media/atoz.htm>
- Technical assistance:  
<http://askjan.org/JANonDemand.htm>
- JAN's Employers' Practical Guide to Reasonable Accommodations: <http://askjan.org/Erguide/>
- JAN's Sample Reasonable Accommodation Form  
<http://askjan.org/media/accommrequestltr.html>

# Resources about Disclosure

- JAN fact sheet:
  - ❖ [askjan.org/media/disclosurefact.doc](http://askjan.org/media/disclosurefact.doc)

# Additional Resources on Medical Exams

- ***Disability-Related Inquiries and Medical Examinations of Employees Under the ADA***
  - ❖ <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>
- ***Reasonable Accommodation and Undue Hardship Under the ADA***
  - ❖ <http://www.eeoc.gov/policy/docs/accommodation.html>
- ***Enforcement Guidance: Preemployment Disability- Related Questions and Medical Examinations***
  - ❖ <http://www.eeoc.gov/policy/docs/preemp.html>
- ***Job Applicants and the ADA***
  - ❖ <http://www.eeoc.gov/facts/jobapplicant.html>

## QUESTIONS -

- Contact Information –
- Jamie Ray-Leonetti, Staff Attorney
- Disability Rights Network of Pennsylvania
- (215)238-8070 x 219
- [jray-leonetti@drnpa.org](mailto:jray-leonetti@drnpa.org)



## **A Practical Approach to Your Rights under the ADA**

Linda Carter Batiste, JD, Principal Consultant



**JAN is a service of the U.S. Department of Labor's  
Office of Disability Employment Policy.**

## A Practical Approach

A job applicant for a nursing position has MS and experiences cognitive issues and extremity weakness when fatigued. During the job interview, the interviewer states that nursing staff works on a 12-hour shift schedule. The job applicant thinks she can do the job if the employer modifies this schedule for her.

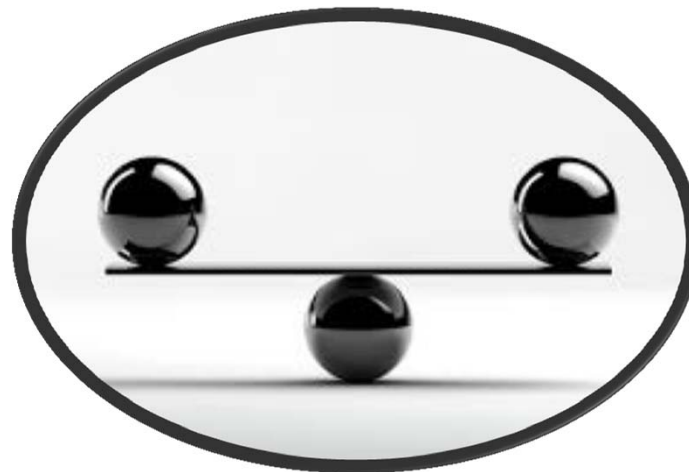
**Should she disclose during the interview?**



# A Practical Approach

## Disclosure: Generally a personal choice

- Con: You might not be prepared to disclose
- Con: May affect whether you get the job



- Pro: You will know whether the employer will accommodate
- Pro: Might start off better with the employer

# A Practical Approach

A newly hired dental office manager has MS and a post-offer medical examination revealed she was taking prescription medication. The employer asks follow up questions about the medication.

**Should the new hire disclose?**



# A Practical Approach

## Disclosure: May have to disclose under some circumstances

- Legal medical questions
- General rule: Do not falsify information



# A Practical Approach

A high school teacher with MS just returned to the workforce after several years. She thought she could work without accommodations, but after working for a month she realized she could not. She disclosed her MS and said that due to fatigue issues, she would need to modify her schedule to build in some breaks and also asked to be excused from overseeing extracurricular activities. Her employer denies the request, stating: “We all get tired, you’ll get used to it.”

**Now what?**



# A Practical Approach

## Might be helpful to:

- Make a written request for accommodation
- Explain your fatigue, but don't over emphasize it
- Provide supporting medical documentation



# A Practical Approach

A long-time social worker with MS started having blurred vision and difficulty driving. She talked with her direct supervisor about the problem and asked for accommodations related to driving to do home visits. Her supervisor said driving is an essential function of her job and she would not be qualified if she could not drive.

**Is the supervisor right?**

**If not, what should the social worker do?**



# A Practical Approach

## Might be helpful to:

- Make a written request for accommodation
- Go up the chain of command
- Offer accommodation ideas



# A Practical Approach

A federal employee with MS had been having trouble performing her job. Her long-time supervisor/friend had been helping her out by performing some of the more difficult job tasks for her. That supervisor retired and her new supervisor says she must perform all of her job.

**Can the new supervisor do this?  
If so, what should the employee do?**



# A Practical Approach

## Might be helpful to:

- Put something in writing about the situation
- Ask that accommodations be considered and time allowed to get them in place
- Consider asking for reassignment if needed



# A Practical Approach



## Contact

- (800)526-7234 (V) & (877)781-9403 (TTY)
- AskJAN.org & jan@askjan.org
- (304)216-8189 via Text
- janconsultants via Skype



## Q&A

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Text your questions in the chat box at the bottom left  
hand side of your screen

OR

the operator will assist you with asking your questions