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Don't Set it and Forget It: The Ongoing Interactive Process

Christine Hinnerichs, PHR

Jessica Kuehne-Tilton, CRC, MS



Presenters



Christine Hinnerichs

Total Absence Management,
Client Services Manager

The Partners Group



Jessica Kuehne-Tilton

Disability and Productivity
Consultant

The Standard





Legal Disclaimer

The information presented is not legal advice and should not be relied upon or construed as legal advice. The information presented is based on rules, regulations, and guidance issued as of **February 16, 2024**.

The information in this presentation is for general informational purposes only and does not purport to be complete or to cover every situation. You should consult with your own legal advisors to determine how these laws will affect you.



Agenda

- Overview:
 - Why The Ongoing Interactive Process Matters
 - ADA Recap

- Guiding Principles
 - Avoid a “One-Size-Fits-All” Approach
 - Remember to Use Your Job Descriptions
 - Empower Your Managers
 - Don’t Set It and Forget It

- Best Practices
 - General Tips
 - Empowering Managers

- Q&A

Overview



Formal Leave and Accommodations Programs Boost the Workplace Experience

Between 2018 - 2022, employers who provided programs reported an increase in employee satisfaction factors:



53%
Greater
Retention



48%
Stronger
Morale



45%
Lower
Absenteeism

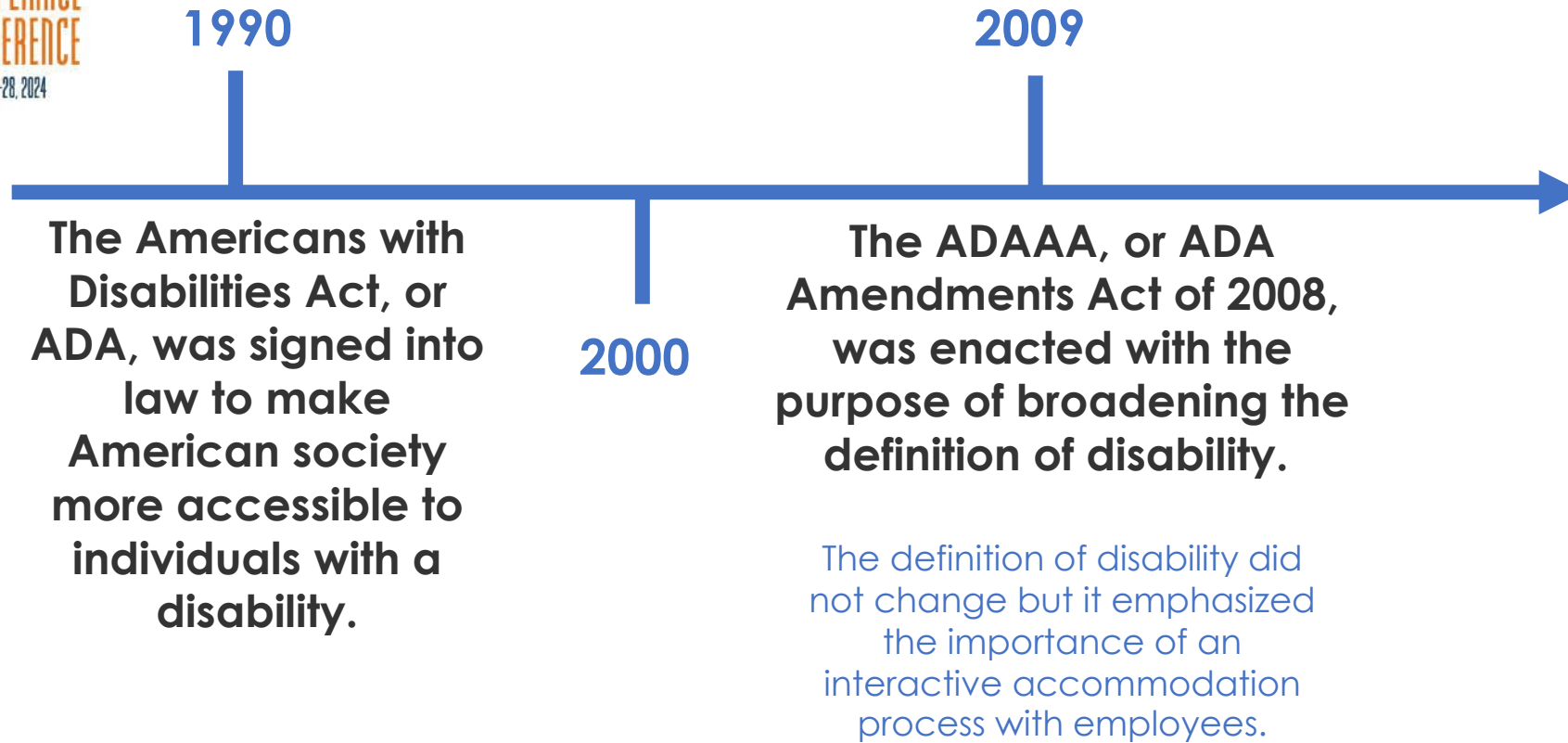


42%
Higher
Productivity





ADA Overview



Title I of the ADA requires employers to provide reasonable accommodations for applications and employees with disabilities and prohibits discrimination based on disability in all aspects of employment.



ADA Coverage

Employers

- Employers with 15 or more employees

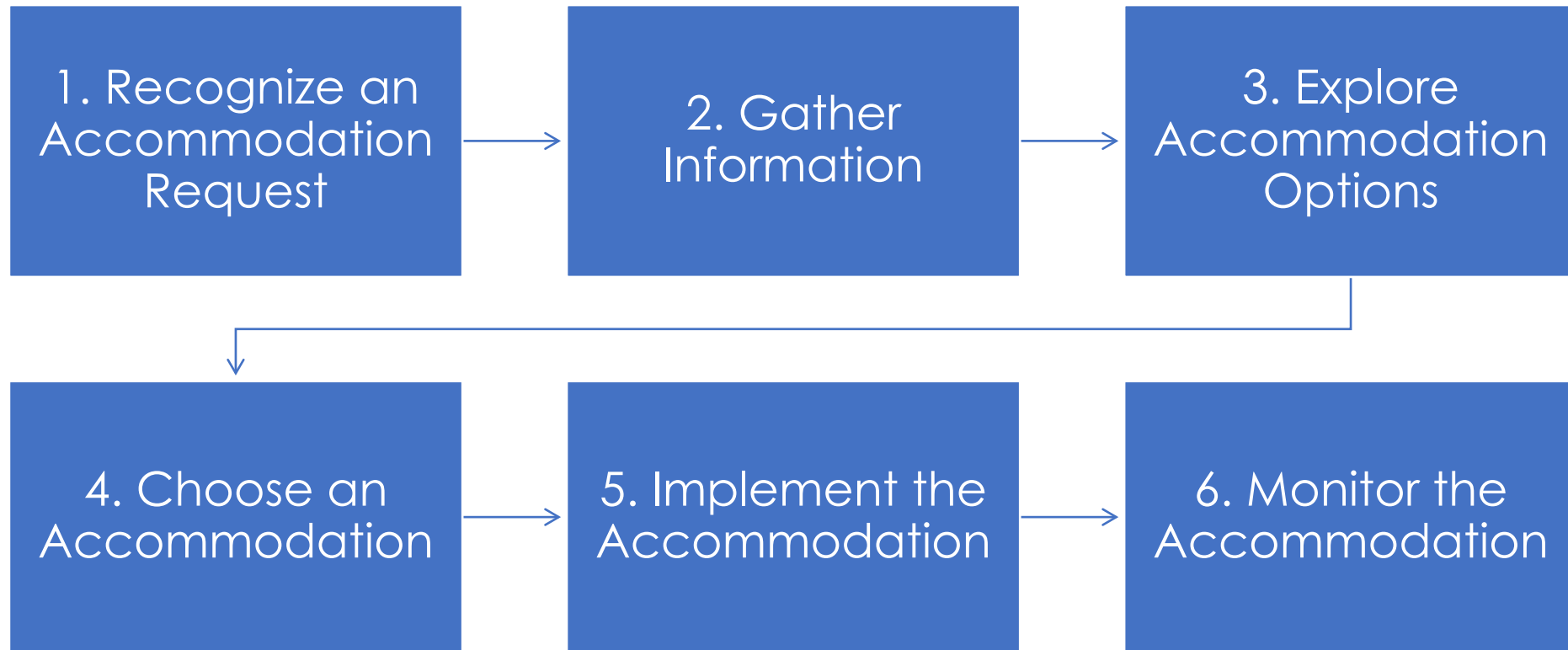
Employees

- Qualified* employees or applicants of any covered employer
- Day one of employment
- Physical or mental impairment that “substantially limits” one or more major life activities as determined without regard to mitigating measures (working is considered a major life activity)
- Those having a record of such impairment
- Those being regarded as having such impairment

*Qualified = Individual with a disability who meets the job's general requirements and can perform the essential functions of the job desired or held, with or without reasonable accommodation.



The Interactive Process





Employers Are Not Required To:

- Make changes to help an employee with daily activities not specific to work (e.g., prosthetic limbs, wheelchairs, hearing aids)
- Lower quality or production standards
- Create a new job for a disabled individual
- Accommodate violation of conduct or safety rules
- Excuse employee from essential functions
- Accept indefinite absences or unreliable unpredictable attendance
- Revoke performance management that occurred prior to a request*
- Change supervisors
- Employee preference for a specific accommodation should be considered but an employer can provide an alternative effective accommodation

*Usually.

Guiding Principles



Principle 1: Avoid a “One-Size-Fits-All” Approach

Maintain a consistent process, but individualized approach

- Eliminate barriers
 - Meet employees where they are
 - Promote health equity
 - Consider Social Determinants of Health
 - Avoid “if we do this for one, we must do for all” mentality.



Eliminating Barriers: Health Equity Tips

Remove obstacles to health:

- Offer convenience
- Provide time and flexibility
- Consider financial restrictions
- Incorporate prevention, wellness and disease management
- Provide education
- Destigmatize Care (mental health)
- Allow for language interpretation as needed



Principle 2: Remember to Use Your Job Descriptions

The job description, including the essential job functions, serves as a tool for:

- focusing the conversation on the essential functions of the job vs. the employee's request
- providing clarification to medical providers of the job requirements
- identifying reasonable accommodations

Essential Job Functions



- Include the fundamental duties of a position – the tasks a person holding the job must absolutely be able to do.
 - Essential does not always mean the most frequently performed (ex. CPR)
- An employee who can't perform the essential job functions, even with a reasonable accommodation, isn't considered qualified for the job under the ADA.



Job Description Case Law Example

Well-written job descriptions provide a fair representation of the job functions and conditions in which the job will be performed and will assist in litigation.

- [Mark MLSNA vs. Union Pacific; \\$44M Award](#)
- The employee's job required that he pass a hearing test. However, the employee could only do so when wearing his hearing aids without additional hearing protection. The company claimed using this extra hearing protection was an essential function of the job. The employee disagreed, and the two sides were never able to arrive at a reasonable accommodation.
- Hearing acuity requirement was not listed in essential functions
- The Equal Employment Opportunity Commission, or EEOC, has stated a written job description can be considered as one form of evidence for determining the essential duties or functions of a job.





Principle 3: Empower Your Managers

Empower managers to support your ADA program by:

- recognizing an employee's need for accommodation
- participating in the interactive process
- supporting accommodation approvals



Empowering Managers

Recognizing an Employee's Need for Accommodation

- Train managers that a need may be casually mentioned
- How can I help you? How can I help you? How can I help you?
- If an employee states they are struggling to perform certain tasks because of a medical condition, managers should direct those requests to HR

The Interactive Process

- Rely on managers to provide objective information on job tasks. Managers have the most knowledge on jobs.

Accommodation Approvals

- Managers should check in with employees every 30 – 45 days to see if the accommodation is helpful and if anything additional is needed. If employee reports the accommodation is ineffective, managers should notify HR.



Empowering Managers: Off Limits Discussion

Managers **should never ask for medical information.**

Caution against statements such as “We treat everyone the same and make no exceptions” or implying an accommodation will be a lot of work, too expensive, or impact morale.

If co-workers inquire why an employee has exceptions, **managers should not reveal the employee has an accommodation.** Instead, they can say, “This was for legitimate business reasons” or “I can’t discuss another employee’s private information with you, just as I would not discuss your private information with others.”

If an employee volunteers health information, state, “**You are not required to share private health information but help me understand how I can help you.**”

Most disabilities are hidden; avoid statements like, “You look okay to me!”

Managers should be aware **accommodations cannot be denied because of poor performance** and must be evaluated on the merits of reasonableness.



Principle 4: Don't Set it and Forget It!

Talk with Employees

The interactive process requires “good faith” dialogue, this should include:

- open communication lines
- periodic check-ins and touchpoints



Monitoring Considerations

Monitoring will depend on your ADA program administration.

In-House ADA

- Employer will be responsible for designing and implementing process
- Consider leveraging existing technology to provide reminders (i.e. HRIS, Smartsheets, etc.)

Outsourced ADA

- Many outsourced providers will not provide follow-up or monitoring services
- Outsourced providers may not likely keep an accommodation case open indefinitely, even if needs are outlined as permanent
- Employers will need to design internal process to check in on effectiveness after accommodation approval

ADA Software

- Potential ability to build customized tasks into your workflows, providing automatic reminders for follow-up
- Configure communications to engage at certain times, post accommodation approval, to employee or manager



Sample Monitoring Questions

A. DOCUMENTING CURRENT ACCOMMODATIONS
What accommodations and when (month/day/year) were they implemented? Are the accommodations permanent or temporary (if temporary, identify end date)?
B. EVALUATING CURRENT ACCOMMODATIONS FOR EFFECTIVENESS
If equipment or software was provided, was the employee trained in the use of that equipment or software? <input type="checkbox"/> Yes <input type="checkbox"/> No Does the employee report that the training was sufficient to meet his/her needs? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain: Is the equipment being used effectively and properly? Explain any issues in using equipment. <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:

This sample template/example is adapted from JAN's [Sample Form for Monitoring Accommodations](#). It should not be acted on without legal advice. Organizations are encouraged to contact their legal counsel.





Sample Monitoring Questions (cont.)

If a service (e.g., interpreter, reader, CART) was provided, does the employee report the service is meeting his/her needs?

Are the accommodations currently enabling the employee to perform essential job functions? What difficulties, if any, does the employee experience with the accommodations? Explain.

Is the employee currently requesting additional or alternative accommodations?

Yes

No

If yes:

- What job function(s) is s/he having difficulty performing, outline what new accommodations are being requested and how the employee believes the accommodations will better assist?





Sample Monitoring Questions (cont.)

C. RECOMMENDATIONS

Current accommodations have been found to:

- Be effective for the purpose
- Require adjustments
- Be ineffective for the purpose
- Require additional accommodations to be effective

Explain.

Outline next steps if additional accommodation is needed. For example, will EE need to provide additional documentation, who will arrange purchase/installation of alternative accommodation, who need to be notified, etc.





Recertifying Accommodations Requests

Remember that the ADA is not FMLA.

According to the EEOC, employers cannot:

- ask for additional medical documentation when an employee has already provided sufficient documentation to verify the disability and need for the accommodation, unless there is a valid reason to do.
- Further, there will rarely be a valid reason to request that the employee recertify the existence of that disability unless, for example, the initial documentation indicated the disability was temporary.



Recertifying Accommodations Requests (cont.)

It may be acceptable to ask for recertification if/when:

- The original documentation or request for accommodation indicates the medical condition and limitations, or need for accommodation, are likely to change
- No duration for the accommodation was included in the original medical documentation or request for accommodation or the noted duration is nearing expiration and it is apparent or known that the employee still requires accommodation
- There is a change in the employer's ability to accommodate, the employer may seek information about whether alternative reasonable accommodations may be effective
- When the employee indicates the accommodation is no longer effective due to a change in their medical condition or limitations, employers may need information about these changes, the impact on performing job duties, and the need for accommodation

Remember: Don't request new information about an employee's medical condition to continue an accommodation when sufficient information to substantiate the existence of an ADA disability is already available.

Monitoring Process in Action

Challenge

- Employee is neurodivergent with anxiety and major depressive disorders
- These conditions make it difficult for employee to complete tasks on time and interfere with organization
 - Essential functions of the job require time management and staying focused on a singular task



After the interactive process, the employer approved the following:

- Online coaching program offered through company's benefit program
- Noise cancelling earplugs or headphones
- Extended deadlines at times of higher stress
- Private space as necessary to complete job tasks
- Scheduled focus work time to allow employee to have blocked/uninterrupted time
- 'To Do' app built into computer system



Monitoring Process in Action (cont.)

- After 90 days, the Accommodation Specialist followed up with the employee to determine the effectiveness of the accommodation.
 - The employee expressed concerns about the effectiveness of some of the accommodations.
- ↓
- Updated accommodations in addition to previously offered accommodation:
 - Visual countdown timer app
 - Scheduled weekly meeting with supervisor to discuss work tasks and prioritization
 - Additional training on 'To Do' app

Monitoring Process in Action (cont.)

- After an additional 60 days the Accommodation Specialist followed up again. The employee reported that the following accommodations were working well:
 - Visual timer
 - Noise cancelling headphones
 - Weekly meetings with supervisor
 - Extended deadlines at times of higher stress
 - Scheduled focus work time to allow employee to have blocked/uninterrupted time

↓

- Employee did not find the following accommodations helpful:
 - Online coaching program offered through company's benefit program
 - Private space, as necessary, to complete job tasks
 - 'To Do' app built into computer system

Best Practices



General Tips and Reminders

Focus less on the definition of disability and medical information and focus more on the accommodation requested.

Create an environment where the need for accommodations is recognized and valued

- Different than STD or LTD claims

Temporary condition lasting fewer than six months can be an actual disability if “sufficiently severe”

There is no comprehensive list of accommodations that are “reasonable” under the ADA

Employers may provide trial or short-term solutions — can be an effective way to test an accommodation



General Tips and Reminders (cont.)

- Employees are not required to assert rights under the ADA, use terms like “reasonable accommodation” or submit an accommodation request at a particular time (e.g., upon hire) – best before performance suffers
- Request can be made through supervisor, manager, HR – someone who can act upon request
- Employer may initiate interactive process when there is good reason to believe that an accommodation is needed
- Do not disclose an employee is receiving an accommodation – all disability related information must be kept confidential.
 - Supervisors and managers may be informed about restrictions and accommodations but, restrict sharing medical information

Q&A



Thank You



Christine Hinnerichs

Total Absence Management,
Client Services Manager

The Partners Group



Jessica Kuehne-Tilton

Disability and Productivity
Consultant

The Standard



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