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Hot Topics of the ADA:
Navigating Psychological Disabilities, Remote Work and the Search for "Reasonable" Accommodations

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August 3-6 | Nashville, TN

Disability & Related Laws

- **Americans with Disabilities Act** (ADA) of 1990
  42 U.S.C.§ 12101 *et seq.*
- **Americans with Disabilities Amendments Act** (ADAAA) of 2008
  42 U.S.C.§ 12101 *et seq.*

And these coordinate with…

- **Workers' Compensation Labor Codes**
- **Leave Laws:** FMLA, Federal Pregnancy protections, State and Local Family and leave laws
- **Other:** Collective Bargaining Unit Agreements, State Education Codes, etc.

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ADA Obligations

Two Mandates of the Employer:

1. Employers must engage in a timely, good faith, interactive process with applicants or employees ***when triggered***, and
2. Employers must provide ***Reasonable Accommodations*** for persons with covered disabilities

Each is a stand-alone statutory obligation

ADA - 42 U.S.C. § 12112 et seq. (1990)



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ADA Obligation #1

The ADA is hard to do well because it requires:

1. Timely
2. Good Faith
3. Interactive

… and that is just ½ of the obligation



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ADA Obligations #1

What Do These Words Even Mean?

Employers must engage in a

Timely:

When triggered, you know it and you start the process

Don't intentionally or unintentionally delay – take the time that is needed to do good work and find the right answer

Good Faith:

Do the work to find a YES, your goal is to find reasonable accommodations regardless of the person

Interactive Process:

Engage in the steps needed to support you and the employee to understand each other's opinions and gather needed data to support decision making. The "Hallway!"



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Triggers to Begin

There are 3 Triggers that inform an employer that they are to begin an ADA disability interactive process:

1. **Request** for Accommodation
   - Applicant or employee verbalizes concern, regardless of the specific words that they may use
2. **Perception/Observation** of disability / impacting work
   - Performance changes
   - Attendance problems / changes
   - Rumors, with an impact on work performance or availability
3. **Knowledge of** work restrictions / functional limitations impacting work
   - Health Care Provider Note listing work restrictions



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When Triggered

Supervisors/employers MAY NOT ASK QUESTIONS to determine if a person is disabled, such as:

- What disability/condition they have or claim to have
- What treatment (medication, therapies, etc.) they are receiving
- If they have had a workers' compensation injury in the past
- If they are taking their medications/what medications are being taken



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When Triggered

Through the interactive process, human resources/risk management personnel MAY ASK for a healthcare provider's note indicating:

- **Covered disability:** Do they have a serious medical condition that impacts their ability to perform one or more of the essential functions of their job?
- **Work restrictions/leave needs:** What are their work restrictions/functional limitations and/or leave needs?
- **Duration:** What is the duration of work restrictions/functional limitations or leave needs?



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Manager / Supervisor Role

1. Know when they are triggered under ADA.
2. Report (1) requests, (2) perceptions, and (3) knowledge triggers to the Employee Accommodations Division (EAD) within the same shift, if possible, and not later than 24 hours after you become aware. This best protects you, your employees, and your organization.
3. Be consistent in what triggers a referral to HR.

Supervisors will need training on their role and communication expectations.



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You are triggered to start the process…

Let's get into the *hallway!*



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Two Types of Hallways

Short-Term Disability Compliance Programming: LOWER PROCESS

- For temporary/short-term restrictions, process can reflect the risk
- You **are not** considering medical separation but how to support during recovery
- Process goals: Timely, manageable, and producing realistic documentation

Long-Term Disability Compliance Programming: HIGH PROCESS

- For long-term/permanent restrictions, process must be robust
- If reasonable accommodations don't exist, you may be considering **medical separation**
- Process goals: Sufficient process to ensure proper data-gathering to support a full ADA/FEHA process, and higher levels of documentation



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What Defines Long-term

- Permanent work restrictions
- Chronic medical conditions
- Long-Term work restrictions exceeding _____ months
- Long-Term leave extending past _____ months
- Intermittent leave exceeding _____ days per year for _____ years in a row or _____ years out of _____ years
  - *Example: Using 65 days per year for 3 years in a row for reasons outside of accepted WC or pregnancy*
- Whenever employers are unsure if an accommodation is reasonable and medical separation or retirement is being considered.



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The Foyer

Discuss with employee:

- What was the trigger?
- What can they expect?
- What do they need to do?
- What will you do?

Have a conversation with the employee and the supervisor, and finish the Foyer by sending the Introductory Letter **(Sample 1)**. Then move down the Hallway.

(If not requesting accommodation, see **Sample 2**)



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The Disability Interactive Process Hallway

Door #1 **Gather clear data:** Obtain clear medical work restrictions. May determine that an Essential Functions Position Analysis® (EFPA) document needs to be created.

Door #2 **Research accommodations:** Call/email/discuss with employee and supervisor the restrictions and begin exploring accommodation ideas.

Door #3 **Schedule, prepare, and meet:** Schedule meeting and invite the right people to attend; confirm attendance in advance; prepare notes for meeting; meet and make decisions

Door #4 **Do what you said you would do:** After the meeting, implement decisions, and do what was decided.



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Disability Interactive Process Hallway: Door #1

GATHER DATA: Through the interactive process, human resources/risk management personnel will ask the employee's healthcare provider to provide in writing:

- **Covered disability:** Whether the employee has a serious medical condition that impacts their ability to perform one or more of the essential functions of their job.
- **Work restrictions/leave needs:** What are their work restrictions/functional limitations and/or leave needs?
- **Duration:** What is the duration of work restrictions/functional limitations or leave needs?



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Disability Interactive Process Hallway: Door #1

How does HR get clear work restrictions?

- Employee
- Doctor (medical supplemental reports)
- Fitness for Duty (FFD) examination



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Disability Interactive Process Hallway: Door #1

- No heavy lifting
- No prolonged standing
- Remote work/work from home
- Increased hybrid schedule and/or 9/80 or 4/10 schedule
- Specific location/office/building/classroom
- No working with supervisor
- Day shift/specific workhours
- No overtime/no call-back
- Intermittent leave
- Others…



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Disability Interactive Process Hallway: Door #1

Prepare and send a questionnaire for the healthcare provider to complete. Sample questionnaires for leave and restrictions:

- Generic/orthopedic **(Sample 3)**
- Sample questions **(Sample 4)**
- TTD **(Sample 5)**
- Long-term intermittent leave **(Sample 6)**
- Psychological condition/supervisor and co-worker restriction **(Sample 7)**
- Discipline or disability **(Sample 8)**
- Remote work/work from home **(Sample 9)**
- Unable to commute **(Sample 10)**
- Dog Accommodation **(Sample 11)**



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Disability Interactive Process Hallway: Door #1

Per the EEOC Enforcement Notice 915.002

May an employer ask an individual for documentation when the individual requests reasonable accommodation?

- Yes. The employer is entitled to know that the individual has a covered disability for which they need a reasonable accommodation.
- Reasonable documentation means the employer may require only the documentation that is needed to **establish that a person has an ADA disability**, and that the disability necessitates a reasonable accommodation.
- An employer may require that the documentation about the disability and the **functional limitations** come from an appropriate healthcare or rehabilitation professional.

Source: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada



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Disability Interactive Process Hallway: Door #1

When a specific accommodation is being asked for, employers can implement alternative accommodations to the employee's stated preference:

- The EEOC's interpretive guidance clarifies that **an employer is not required to provide the specific accommodation requested by the employee if another effective accommodation exists.** This principle is further supported by U.S. Supreme Court and appellate court rulings:
  - U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002): The court reaffirmed that while employers must provide a reasonable accommodation, they are not obligated to provide the employee's preferred choice if another effective option is available.
  - Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000): The court held that the employer retains discretion to choose among reasonable accommodations as long as the chosen accommodation is effective.

Source: ADA - 42 U.S.C. § 12112 et seq. (1990); 29 C.F.R. §1630 et seq.

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Disability Interactive Process Hallway: Door #1

- The most common questions we get about medical questionnaires:
  - Can you really do that?
  - What about HIPAA?
  - Do you ever get it back?

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Disability Interactive Process Hallway: Door #1

How to get the questionnaire returned

It's all about process:

- Prepare the questionnaires using our templates.
- Email/fax healthcare provider, adjustor or employee .
- Call provider's office to confirm receipt.
  - Get the name of the person you talk with and document it.
- Follow up with the provider's office if not returned.
  - Ask for the same person, and they will help get it done (so you stop bothering them).



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Disability Interactive Process Hallway: Door #2

Engage, interact and explore together

- Ensure that applicant/employee is aware of process.
- Conversation with applicant/employee to discuss the clarification received at Door # 1.
- Seek applicant/employee opinions and interests
  - Research ideas of employee/applicant, department or organization before interactive process meeting
- Research accommodation ideas via the internet, the supervisor and/or professionals in the field
- No decisions, but research options and create awareness of "what may happen next"



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Disability Interactive Process Hallway: Door #2

Demonstrate good faith by researching the "yes":

- Google/AI research
- Explore leave needs vs. contractual leave allotments monthly (sick and vacation)
- Exploring ideas presented by the employee or supervisor
- Challenging organization to really explore what is possible for the workgroup
- Are there "work swaps" that don't impact "equal-work for equal-pay" concerns?
- Ensure that HR has enough information to confirm any "nos" being presented by the supervisor/department as likely



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Disability Interactive Process Hallway: Door #3

Scheduling the IPM

1. Have the right people involved in long-term decisions:

- Human Resources
- Workers' Compensation/Risk Management (optional)
- Employee's manager/supervisor
- Employee
- Employee representative of choice
- Facilitator and note-taker

2. Send the meeting notice **(Sample 12)**



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Disability Interactive Process Hallway: Door #3

Confirming attendance before the meeting to reduce reschedules and no-shows

- Call employee to verbally get confirmation of attendance
  - Leave detailed voicemail messages or send emails confirming trying to connect and with meeting details shared
- Allow for one reschedule, if requested
- If employee does not request a reschedule and is a no-show, meet without them
- If you have a union and they will attend, coordinate dates around their availability
- *Pro tip – ask them at Door #2 for their availability*



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Disability Interactive Process Hallway: Door #3

Preparing for the IPM

Prepare the IPM notes **(Sample 13)**. Notes should include:

- Purpose of meeting/reason for meeting
- Documents relied on (EFPA, medicals)
- A breakdown of work restrictions
- Summaries of discussions between all parties relating to:
  - Modified work
  - Extended leave of absence
  - Alternate work
- Next steps if accommodations are not able to be provided



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Disability Interactive Process Hallway: Door #4

Close the process correctly

Post-meeting activities:

- Place all documents in the employee's accommodations file
  - Process letters (summaries of events, meeting invites)
  - Meeting notes
- Complete post-meeting agreements
  - Inform others that need to know of a result
  - Complete post meeting forms, letters, etc.
- Implement the next steps of the interactive process
  - Implement reasonable accommodations
  - Submit retirement or disability paperwork
  - Evaluate alternative work placement
  - Proceed with medical separation, etc.



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ADA Obligations #2

2. Employers must provide ***Reasonable Accommodations*** for persons with covered disabilities



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ADA Obligation #2

What makes an accommodation REASONABLE:

1. Provides the employee/applicant with a **SAFE** work environment
2. Allows the employee/applicant to perform the **FULL** set of Essential Functions of their position

What the law specifically says:

Undue Hardship (29 CFR § 1630.15(d))
Direct Threat (42 U.S.C. § 12113(b); 29 CFR § 1630.2(r))

More on this later…



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Hot Topic #1:

Navigating Psychological Disabilities



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Let's talk about what your issues are…



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REPORTED TRENDS

Anecdotally:

- More requests for accommodation including to support remote work accommodations
- Greater leave usage
- Increased interpersonal relationship conflicts in the workplace
- Increased perception of persons being impacted by mental illness and fear of persons exhibiting what is perceived to be mental illness
- Increased perception that persons are using a psychological disability claim as a "weapon" against their employer



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THE REALITIES OF MENTAL ILLNESS

- Depression is the leading cause of ill health and disability worldwide
- Approximately 280 million people in the world have depression
- 23% of adults have experienced a mental illness

Sources:

1. Depression, Let's Talk, World Health Organization (WHO), https://www.who.int/news/item/30-03-2017--depression-let-s-talk-says-who-as-depression-tops-list-of-causes-of-ill-health, March 30, 2017
2. World Health Organization, https://www.who.int/news-room/fact-sheets/detail/depression, accessed on October 7, 2024
3. 2024 State of Mental Health in America report; https://mhanational.org/issues/state-mental-health-america

THE REALITIES OF MENTAL ILLNESS

- Three out of five employees believe they are not receiving adequate mental health support for stress from their supervisors
- 83 percent of U.S. workers suffer from work-related stress, and 54 percent of workers report that work stress affects their home life
- Workplace stress has been reported to cause 120,000 deaths in the U.S. each year

Sources:

1. Mind the Workplace, 2021 https://mhanational.org/sites/default/files/Mind%20the%20Workplace%20-%20MHA%20Workplace%20Health%20Survey%202021%202.12.21.pdf
2. U.S. Department of Labor Occupational Safety and Health Admission, https://www.osha.gov/workplace-stress#ref3, Accessed on October 8, 2024

THE REALITIES OF MENTAL ILLNESS

- 12 billion working days are lost every year globally to depression and anxiety, costing companies worldwide $1 trillion per year in lost productivity.
- In a survey of employee benefits leaders, 29 percent say employees are taking more sick days due to mental health challenges, and 32 percent say poor mental health is causing workers to make more mistakes

Sources:

1. Mental Health at Work, World Health Organization, https://www.who.int/news-room/fact-sheets/detail/mental-health-at-work, September 2, 2024
2. 2024 Workforce Mental Health, Lyra, https://www.lyrahealth.com/2024-state-of-workforce-mental-health-report/

NEURODIVERGENCE

- We are seeing an increase of requests in this area
- Defined as a range of developmental, learning, and mental health conditions, including dyslexia, attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder (ASD)

Source:

1. CEO Strategies For Neurodiversity: Expert Report Insights, Forbes, March 8, 2023, https://www.forbes.com/sites/onemind/2023/03/08/ceo-strategies-for-neurodiversity-expert-report-insights/?sh=2d07ca382dd1

WHAT CAN BE DONE

- **Resource your workforce/use your EAP:** Demand more **AND** use more of your employee assistance programs (EAPs) and other proactive supportive programs
- **Use the ADA Interactive Process to manage requests:** Organizations need to know when they've been triggered to begin the ADA Disability Interactive Process



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RESOURCE YOUR WORKFORCE

In the U.S., nearly all midsized to large companies (98 percent) offer EAPs, but only about 4 percent of employees use them each year.

- Due to:
  - Fears about confidentiality
  - Not knowing about it
  - Not realizing it is about more than therapy
  - Childcare/after-work demands on time

Source: Mental Health America, https://mhanational.org/how-can-we-promote-our-eap-increase-its-usage#:~:text=In%20the%20U.S.%2C%20nearly%20all,employees%20use%20them%20each%20year, accessed October 8, 2024



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RESOURCE YOUR WORKFORCE

Benefits reported when a company EAP is used:

- Fewer missed days from work (30–60 percent reduction in leave)
- Less turnover
- Higher employee satisfaction
- Improved productivity and engagement
- Decreased workers' compensation claims
- Decreased health plan therapy and Rx claims
- Reduced accidents and grievances
- Address safety and security issues



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RESOURCE YOUR WORKFORCE

Employers need to USE their EAP!

- Proactive mental health support in the workplace
  - Orientation on use of EAP during onboarding
- Lunch and Learns
  - Regularly monthly virtual and/or in-person sessions with incentives for attendance
  - Mandatory participation or "skill building" for career growth/promotion
- Childcare services
  - Referrals when issues are raised as reasons for attendance or punctuality
  - New parents given materials



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To manage requests, perceptions and needs for workplace accommodations…

Use the Interactive Process



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Preparing to Get Into the Hallway

- Who initiated the request?
- Discuss with supervisor
- Collect data
- What is the right tool to use? Are you in the right place?



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The Disability Interactive Process Hallway

Door #1 **Gather clear data:** Obtain clear medical work restrictions. May determine that an Essential Functions Position Analysis® (EFPA) document needs to be created.

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Door #3 **Schedule, prepare, and meet:** Schedule meeting and invite the right people to attend; confirm attendance in advance; prepare notes for meeting; meet and make decisions

Door #4 **Do what you said you would do:** After the meeting, implement decisions, and do what was decided.

The Hallway: The Foyer

Discuss with employee:

- What was the trigger?
- What can they expect?
- What do they need to do?
- What will you do?

THEN Document your conversation



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THE HALLWAY: DOOR #1

Don't cut corners.

Prepare and send a questionnaire to the primary treating physician/healthcare provider to complete:

- Sample questionnaires:
  - Psychological condition
  - Dog accommodation/therapy dog



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REASONABLE ACCOMMODATION DECISIONS

Mental health is treatable, and most conditions are manageable in the workplace. What reasonable accommodations **may** look like:

- Trial accommodations to support breaks during the day
  - Allows for tracking to see if the reality of the breaks is impactful
- Sometimes providing someone with "permission" to take a break, leave a meeting that is triggering, or adjust their workday will result in the accommodation not being needed
  - A trial can be a great tool to see what the real impact is
- Leave to support starting or adjusting treatment/FMLA
- Communication modifications
- Distraction reductions and physical environment changes



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REASONABLE ACCOMMODATION DECISIONS

These are **NOT** reasonable accommodations:

- Changing supervisors or co-workers
  - Unless there is harassment or discrimination found
- Removing interactions with others in the workplace
- Removal of essential functions (i.e., customer service/front counter, etc.)
- Reduction of workload
- Acceptance of unacceptable behaviors in the workplace



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Scenario #1: Susie

- Susie is a train operator
- She has been employed at ABC Trains since 2000
- She has had been written up for four time for: missed lights, wrong route, missing her arrivals
- When her supervisor met with her to go over these issues, she just stared blanky at him. He offered her EAP paperwork because it was "unlike her"
- Due to the discipline, the supervisor requested a ride along. The trainer noted "she just stared blanky at the tracks as she drove the train"
- The supervisor perceived a disability and called HR



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Are we ready for the Hallway?



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Susie – Foyer

- What should we do to prepare for the call?
- What is her work status?
- What key pieces of data / information is important to bring up?
- Do we generally know our plan of next steps?



Susie – Foyer

- When we spoke with Susie she shared:
  - She has gone through some significant loss lately and has been feeling really out of it.
  - She is not treating with anyone right now but feels like she should be.
  - She thinks it is best that she is not operating a Train
  - She is willing to establish care and get a provider again.

So, what is next?



Susie – Door #1

- Susie called and said she has her first appointment with a new provider in 2 weeks as that is the earliest she could get
- What data gathering do we need?
  - Is she fit to be working?
  - Did her disability cause the issues / incidents?
    - Will they occur again?
  - If she is provided with work restrictions / functional limitations what is the duration?



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We received the completed questionnaire, what next?



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Susie – Door #1

- Reviewing the completed questionnaire, the provider indicated:
  - Is she fit to be working?
    - No she is not fit to work as an operator or any position. She is required to establish care with a psychiatrist and begin treating and once this begins she will be re-evaluated
  - Did her disability cause the issues / incidents?
    - Yes they caused these issues / incidents
    - Will they occur again?
      - Unknown, until treatment occurs.
  - If she is provided with work restrictions / functional limitations what is the duration?
    - No work restrictions/ functional limitations as she is completely off work for 6 months



Susie – Door #2

- Let's talk about door #2 – what do you do here?
- Reminder Door #2 is:
  - **Research accommodations:** Call/email/discuss with employee and supervisor the restrictions and begin exploring accommodation ideas.



Susie – Door #3

- Hold an interactive process meeting to review the completed questionnaire and discuss the "to-do's" for the employee
  - Questions I often get during this scenario:
    - Can you really make her get care?
    - What if she does not follow through?

Susie – Door #4

The "Do what you said you were going to do" Step…

- Do NOT forget to check in
- Is this pre-scheduling a call with the employee or a more formal meeting?
- What do you do once the employee does what the need to do

BACK to Door #1

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Hot Topic #2:

Remote Work

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Who has remote policies in place?

What type of medicals are you getting?

Medicals with words like "suggest" or "would be best"?



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REMOTE WORK: THE BASICS

Allowing an individual with a disability to work from home may be a form of reasonable accommodation under the Americans with Disabilities Act (ADA)

Federal: EEOC, Work at Home/Telework as a Reasonable Accommodation, https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation#:~:text=Yes.,allow%20other%20employees%20to%20telework



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REMOTE WORK: THE BASICS

Federal guidance: Preferred accommodations

Q: May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?

A: **Yes.** *Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.* ***However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective.*** *(See question 6)*

Source: EEOC, Work at Home/Telework as a Reasonable Accommodation, https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation#:~:text=Yes.,allow%20other%20employees%20to%20telework



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ALTERNATIVE ACCOMMODATIONS

The ADA does not require an employer to provide a specific accommodation if it causes undue hardship—i.e., significant difficulty or expense—or if it eliminates an essential job function.

Meaning:

- Employers can implement **alternative accommodations**, if they exist, that are preferable to the employer
- Employers **can deny remote work as an accommodation** if the employee cannot do their full job remotely, as long as you have not removed this essential function from others



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ALTERNATIVE ACCOMMODATIONS

Federal guidance: Preferred accommodations

Q: May an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?

A: **Yes, *the employer may select any effective accommodation, even if it is not the one preferred by the employee.*** *Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.*

Source: EEOC, Work at Home/Telework as a Reasonable Accommodation



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REMOTE WORK EVALUATION

Does an employer need to consider reasonable accommodations related to limitations related to the employee's ability to commute to and from work?

Consider? **Yes**

Provide? **Maybe**



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REMOTE WORK EVALUATION

Employers cannot treat disabled persons worse than non-disabled persons:

- If you have non-disabled persons who have been "allowed" to work fully remote, you may be required to do the same for disabled persons
- Disabled persons will have preference over non-disabled persons with the same benefit of employment (a.k.a. remote work flexibility)



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The Key Questions to be asking

1. What are the functional limitations?
2. Can the Essential Functions be done remotely?
3. Are there alternatives to remote work?



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Interactive Process

- If remote request is for a **TEMPORARY** period, (total time needed is less than XX months) most employers will follow your current short-term/temporary accommodation process
- If remote request is long-term, permanent or exceed XX months, we recommend you follow a robust **LONG-TERM** Interactive Process.

Remote Work Evaluation: Essential Functions

Is Working In-Person an Essential Job Function?

- Employers **cannot** treat disabled persons worse than non-disabled persons
- If you have non-disabled persons who have been "allowed" to work fully remote, you will likely be required to do the same for disabled persons
- Disabled persons **will have preference** over non-disabled persons with the same benefit of employment (a.k.a. remote work flexibility)



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Remote Work Evaluation: Essential Functions

Is Working In-Person an Essential Job Function?

- If you Answer:
  - **YES**, then you will be seeking alternatives to work remotely, because if you cannot discover alternatives, you will be looking at leave, alternative work exploration and possibly medical separation
  - **NO**, then you will want to have a very **robust medical clarification process** to ensure that ONLY people who have no alternative accommodation options are being accommodated to work fully remote (see sample 2)
    - When accommodations are **desirable**, more process is recommended to ensure that only those that truly need the accommodate, receive it.



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Remote Work Evaluation

Is Working In-Person an Essential Job Function?

- Regardless if your answer is YES or NO, you will need a compliant and consistent ADA disability interactive process to confirm there is a medical need for accommodation and to seek alternative accommodations
  - IP must be consistently applied
  - IP must be documented



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Disability Interactive Process Hallway

The foyer is EXTREMELY critical for these requests:

- Transparency on the organizations views on remote work
- Alternative options can be explored
- Asking if they have alternative ideas
- Asking what interferes with them working on site?
- How will telework overcome these?

https://askjan.org/articles/Finding-Alternatives-to-Telework-as-an-Accommodation-Interactive-Process-Tips.cfm



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Disability Interactive Process Hallway

Door #1 – Obtaining Medical Clarification

- Do not forget you can ask for MORE before making a long-term decision



Remote Work Evaluation: Medical Need

Is Working In-Person Medically Required?

- Remote work is an accommodation. Employers must demand health care providers list the underlining **work restrictions / functional limitations** that the health care provider and/or employee, believe are best accommodated with a remote work assignment.
- You obtain this listing through Door # 1 of the ADA/FEHA Disability Interactive Process (sample 2)



Remote Work Evaluation: Medical Need

Is Working In-Person Medically Required?

- Establish Your Consistent Process:
  - Will you utilize a **Fitness for Duty Examination** (sample 3 and 4)?
    - For all employees requesting to work fully remote for more than 1-year?
    - Only when you have objective and spoken concerns that the request is not legitimate and/or if the questionnaire is not returned?
  - Establish your steps at the front end of the interactive process and communicate this
    - You may have fewer requests due to this
    - You will not have any surprises when/if this step is used later in the Hallway



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We will later discuss reasonable accommodations that we believe may be alternatives to work from home



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FINAL THOUGHTS ON REMOTE WORK

1. **Open the closets:** Know if you even *can* say no, by researching the realities of who is working/has been working fully remote and why. If others have been allowed to work fully remote, you likely cannot have a blanket no utilized to evaluate requests.
2. **Develop a process:** Identify from the start what your process will entail. Will you require ingredients? Will you allow remote work or light duty for non-pregnant persons? Will you utilize the Fitness for Duty tool to confirm need and/or clarify if there are alternatives?
3. **Consistently apply it:** Once you commit to a process, you need to be consistent in applying it. Use the Hallway.
4. **Document it:** Always document everything.

The above will ensure that you make good decisions organizationally and—if the you does not prefer remote work assignments—find as many alternative accommodations as possible.



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Scenario #2: Sean

- Sean is a Payroll Technician
- He has been employed at ABC Associates for 1.5 years
- He has shared that he has ADHD and is very vocal about it to his co-workers
- He has requested:
  - Work from home 3 days a week
- There is a rumor that he just hates the commute



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Sean – Foyer

- Do I need to collect any data BEFORE I make this call?
  - Talk to the supervisor!
  - We found out that the employee is asking for this after a 3 month FMLA leave but prior to that they were not performing well.
- Do I have a medical report? Is it enough?
- My game plan is to discuss:
  - The organizations views on remote work
  - Alternative options can be explored
  - Asking if he has alternative ideas
  - Asking what interferes with him working on site?
  - How will telework overcome these?



Sean – Foyer

- Sean shared:
  - The office is just so noisy it is hard to focus and wants to work from home more than the organizations 1 day a week
  - He is giving too many tasks at one time and so it is hard to complete them in the office
  - He wants all instruction in writing that requires a deadline
  - Step by step instructions on payroll tasks
  - Additional training



Sean – Door #1

- Do you think we need more medical information?
- Is this ENOUGH?



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Sean – Door #2

- Exploring options of what can be implemented
  - Touring workplace (photos if you are not there)
  - Discuss with the supervisor / manager what can be done?



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Sean – Door #3

- Hold an interactive process meeting to implement alternatives
  - How do you think these typically go?
  - Let's talk about the "what ifs" if the employee says no



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Sean – Door #4

- Do what you said you are going to do:
  - Purchase noise cancelling headphone
  - Providing the step-by-step instructions



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Hot Topic #3:

Search for "Reasonable" Accommodation

August 3-6 | Nashville, TN

Reasonable Accommodations

Reasonable accommodations include:

- Any appropriate measure that would allow the applicant or employee with a disability to perform the **essential functions** of the job, such as:
  - Facility modifications
  - Schedule changes
  - Equipment purchases
  - Modifying examinations
  - Changing policies

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Reasonable Accommodations

An accommodation can be ANYTHING
You are not required to provide accommodations. You are required to provide REASONABLE accommodations.

What makes an accommodation REASONABLE?

1. Provides the employee/applicant with a **SAFE** work environment
2. Allows the employee/applicant to perform the **FULL** set of Essential Functions of their position



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Reasonable Accommodations in the Long-Term

1. Offer of **Modified Work**: In current classification, performing all of the essential functions with the same efficiency and effectiveness

2. Offer of **Alternative Work**/Reassignment
   a) Available and approved to be filled
   b) Minimally qualified
   c) Not a promotion
   d) Only after a to c, physically appropriate with/without reasonable accommodation



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Interactive Process

Let's Agree on Vocabulary

Modified Duty

- Performing 100% of the essential functions of the position, same effectiveness and efficiency as all others in the position/class but with LONG-TERM reasonable accommodations that the organization believes will be able to be implemented ongoing
- Determination HAS been made that it appears the accommodations are reasonable for the long term as the employee appears to have **long-term or permanent work restrictions / functional limitations**
- However, NOTHING in life is permanent and this could change if the condition changes, the work changes or if it no longer appears that the accommodations are working sufficiently



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Interactive Process

Let's Agree on Vocabulary

Alternative Work / Reassignment

- If an employer determines they cannot accommodate an employee to return to work in their regular/usual and customary position and an extended leave of absence is not reasonable due to their **long-term or permanent work restrictions / functional limitations**, the employee may be reassigned into another position
- Position must be vacant and approved to be filled
- Position cannot be a promotion
- Employee must be minimally qualified / demonstrate minimum proficiency for the position
- Employee must be able to perform all of the essential functions of the position with the same effectiveness and efficiency as all others in the positions – with or without reasonable accommodations



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Reasonable Accommodations

An employer <u>is not</u> required to:

- Lower quality or production standards
- Provide personal use items (such as glasses or hearing aids)
- Create a new position / create permanent "light-duty"
- Displace (bump/layoff) other employees



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Reasonable Accommodations

When Accommodations are Reasonable:

- Document decisions in writing
- Accommodations are never permanent, goal is long-term
- Revisit, if needed or requested by any party



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Reasonable Accommodations

When no accommodations are reasonable, the employer must document the following evaluations and decisions:

1. What could the employee no longer do **FULLY or SAFELY** due to their permanent or long-term restrictions?
2. That an extended leave of absence was for an **unknown duration** or that it was **not medically expected to support a return to work** in the end
3. No appropriate vacant positions were available



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Reasonable Accommodations

- Since there is increased litigation surrounding the ADA, you better have ***really good*** data if you are going to say no
  - This is where door #1 is so important
  - If you are arguing/negotiating what a specific restriction means, you don't have clear enough data.



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Reasonable Accommodations

What You Need:

- "**No heavy lifting**" vs. "no lifting over 10 pounds with right hand/arm left hand/arm unrestricted, when using both hands/arms 30 pounds"
- "**No prolonged standing**" vs. "weightbearing up to 10 minutes at one time, 20 minutes per hour and 3 hours per 8-hour day"



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Reasonable Accommodations

- Since there is increased litigation surrounding the ADA, you must try harder to accommodate and say "is that really unreasonable"?



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Lifts for Ladders





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Scooters



- 265 Lbs Weight Capacity
- 25 Miles Rated Range per Charge
- All Terrain Ride with 2.76" Clearance
- Steering Deceleration & Slope Speed Control
- Flexible Speed Selection: Up to 6 MPH



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Electric Carts





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Mouse Alternatives





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Additions to Cubicles





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Trial Accommodations

Trial Accommodations: If you are unsure if an accommodation will support an employee to **FULLY** perform their job, don't be afraid to trial the accommodations

1. Clarify and document what a successful accommodation plan will look like and/or produce
2. Identify when the plan will be reviewed / checked-in on
3. Discuss and document what happens if the accommodations don't work so there are no surprises and clear direction

Note: Trials don't work when there are concerns for **SAFETY** of accommodation ideas

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In Conclusion…

- Be ready to look for the **YES**… if a yes exists
- If you say **NO** be sure you have **REALLY good** data
- Ask yourself if that essential function that they cannot do is really an **ESSENTIAL** function



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Questions?



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