

PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

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THE AMERICANS WITH DISABILITIES ACT

An attorney in Washington, DC applied for a position doing research for a legal firm. The attorney was blind. After warily discussing and tiptoeing around the issue, the law firm decided that there was no way to accommodate a researcher who could not see the research, and rejected his application.

The attorney sued the firm under the Americans with Disabilities Act (ADA). The attorney won the case and the law firm was required to hire him and to provide a reader to do the reading part of the research. The reader's pay could not be deducted from the attorney's salary.

More recently an employee claimed a "sensitivity to fragrance" as a disability. In seeking a reasonable accommodation, the company was advised to require all other employees to cease wearing fragrances such as cologne, aftershave, scented soaps, or hair care products. Bathroom air fresheners and scented cleaning agents should be eliminated; and, a private office should be assigned to the affected employee.

Is this what the ADA was created for? These cases are actual examples of ADA use and are quite different than its intended purpose. Although they are somewhat ridiculous in their extremism, they at least resulted in a disabled individual gaining employment. The greater and sadder reality is apparent when you examine the purpose and history of the ADA. The ADA was created with a stated purpose--it was to create job opportunities for our 50 million disabled Americans. At the time it was created, only 3 in 10 of all handicapped citizens were employed. Today, more than a decade and thousands of lawsuits later, the percentage of disabled Americans who are employed is still 3 in 10!

Who is winning all these lawsuits? People who are being terminated or were passed over for promotion or had difficulty getting around in a

restaurant or theatre, etc. That is not to say that their cases had no legitimacy or merit. That is to say that like so many employment regulations, it benefits the wrong people for the wrong reasons! People with headaches and hemorrhoids are keeping their positions but relatively few truly handicapped people are gaining employment.

What Is The Americans With Disabilities Act?

The ADA was created in May of 1990. Its primary purpose was to create job opportunities for people who were already qualified to perform a specific job, but were unable to do so because of a handicap. Companies with 15 or more employees are forbidden to discriminate against a handicapped individual, and further, they must provide a "reasonable accommodation" that would enable the individual to perform the job.

Employers are forbidden to discriminate in recruiting, hiring, promotion, benefits, leave, any employer-sponsored social activity, or other employment decision.

The ADA Defines A Disability As:

1. An actual physical or mental *impairment* serious enough as to "significantly limit" some form of major life activity, such as walking, talking, breathing, or working. (The State of California recently eliminated the word "significantly" so that any limitation of a major life activity is now covered in that state.)

The Supreme Court has since eased the federal requirement so that any disability that can be sufficiently corrected with medicine, eyeglasses or other measure is not considered a handicap for purposes of the ADA.

2. A *record* of having had such a disability. An example would be that Sarah had cancer but is no longer afflicted. But, the employer knows she used to have it, so they assume she still does or could have it again, so they pass her over for promotion. She is being discriminated against because of a *record* of an impairment.

3. A case of being *regarded* as having such an impairment. An example would be a person with a burn scar or a large birthmark on his/her face that might be *regarded* as an impairment.

What Is Not A Disability

Physical characteristics (blue eyes, tall, short), common personality traits, cultural, environmental, or economic disadvantages, homosexuality, bisexuality, pregnancy, normal deviations in height, weight or strength are not impairments, nor are "grief" or "stress." In addition, the earlier reference to conditions that are corrected through medication, eyeglasses, etc. However, a condition that poses a direct health or safety threat to others is recognized as a disability for the purposes of ADA.

What Is Reasonable Accommodation?

In classic terms, it might be a machinist with a total loss of hearing who cannot do the job because he/she cannot hear the alarm buzzer signifying an emergency shutdown. A reasonable accommodation might be a flashing red light in tandem with the buzzer.

It could also be raising or lowering a work device to allow a wheelchair-bound individual to access the work. Widening aisles, wheelchair ramps, extra machine levers or extensions are all examples of reasonable accommodations and are relatively inexpensive.

It might be redesigning a job so that some element of the operation could be reasonably assigned to another employees. An example of this might be when a warehouse worker must climb a 15 foot ladder to retrieve a 30 lb. box. It may be that with five warehouse workers who only have to do the ladder function three or four times each week, those three or four times are not essential to all positions. Assigning that box retrieval to another employee(s) is reasonable accommodation. Also:

- Job restructuring
- Part Time or Full Time modified work schedules
- Changing exams, training positions or policies
- Providing readers or translators
- Reconstructing the work area
- Reasonable leave time (unpaid)
- Temporary light duty

Reasonable accommodation leaves a lot to judgment. Just what is "reasonable?" If the accommodation would create an *undue hardship* on the employer, then that is not considered reasonable. As an example, a company with 75 employees, with one disabled worker who could be aided with a \$500 expenditure for accommodation would be reasonable. A \$10,000 investment would probably be unreasonable or an "undue hardship."

A company with 2,000 employees and eight individuals who could be accommodated and potentially other new applicants later, might have a \$20,000 expenditure and that might be considered reasonable. The size of the company, the number of people aided, the potential advantage of this expenditure to future applicants are all factors that are considered to determine reasonableness.

Another guideline is this: If the individual is not qualified to do the job and happens to have a handicap, then no amount of accommodation is required. You are not required to hire or offer ADA accommodations. The ADA is for "qualified" candidates who are unable to perform the job because of a disability and are asking you to offset the affects of that disability with some reasonable accommodation.

Is It ADA, FMLA, or Workers' Compensation?

With politicians looking for more regulations with which to hit employers while gaining popularity votes, the complex of leave laws are going to overlap. Well, this triangle of overlapping leave laws is a doozie. Can an employee put these three regulations in tandem and take off for six months straight? Absolutely! You must be careful regarding (and documenting) which leave you are granting for every single day. All of the above regulations [ADA, the

WHICH LEAVE ARE YOU GRANTING?

The Differences In The Three Federally-Mandated Leaves

What Constitutes FMLA Leave?

FMLA requires employers with 50 or more employees to grant all eligible employees up to 12 weeks of unpaid leave in any 12 month period to care for family members or because of their own illness. FMLA is granted for the following reasons:

1. The birth, and the care of the employee's child,
2. The placement of a child with the employee for adoption or foster care,
3. The care of a spouse, child, or parent (of the employee) who has a serious health condition, or
4. The employee's own serious health condition that renders them unable to perform their job.

Only Item No. 4, above, will overlap the leave conditions of the ADA or Workers' Compensation as no other items involve a disability or a work place injury.

FMLA is meant to provide time off to employees for health and adoption purposes. The intent is not to get the job performed, but to accommodate the "time off" needs. The employee may take intermittent leave in small chunks of time. The employee is guaranteed to regain their former job and benefits.

What Constitutes ADA Leave?

Employers with 15 or more employees must provide a "reasonable accommodation" to a disabled employee if that accommodation thereby enables them to perform the job. This means that if you can make changes in work assignments, physical environment, work schedules, etc., that will thereby enable this person to adequately perform the essentials of the job, you must make those changes if they require no more than a "reasonable accommodation." That "reasonable accommodation" may include allowing this employee to work less hours, take extended leave or take off time in incremental amounts, even if that results in them taking off more than the 12 weeks covered by the FMLA. However, you can count that time off against the employee's FMLA allowance even though you may not (under ADA leave) limit them just to the 12 weeks allowed by FMLA. The employee may take intermittent leave in small chunks of time if that accommodation enables them to perform the job essentials. The employee under ADA leave is not guaranteed to regain their former job or benefits.

ADA is meant to provide "reasonable accommodation" to a disabled employee to enable them to do the job. The intent is not to acquire time off, but to get the job accomplished in spite of the employee's disablement. That often means allowing time off, short term, long term, incremental periods, flextime, etc., without time restrictions as long as the end result is that the job is being performed and the overall effect on the company is "reasonable."

What Constitutes Workers' Compensation Leave?

Workers' Compensation generally requires all employers to cover employees with Workers' Compensation protection. If an employee is injured "out of and in the course of" their employment, then they are allowed to receive necessary compensation for medical treatment and work time lost as a result of the injury.

Workers' Compensation is meant to recompense employees for job accidents. The intent is neither to acquire time off nor to get the job done, but to replace compensation lost and medical expenses incurred as a result of a job-related injury. The employee on Workers' Compensation leave may not take intermittent leave in small chunks of time as in FMLA or ADA leave; nor can the employee sue the company for injuries covered under Workers' Compensation.

In the course of dealing with Workers' Compensation, most employers will try to limit the time off an injured employee needs by creating a "light duty" work assignment, thereby reducing the work time lost and the ultimate cost of the injury.

The employee on Workers' Compensation leave is not guaranteed to regain their former job or benefits. Nor may an employee on Workers' Compensation leave use paid sick days or compensation from the employer while they are

Family and Medical Leave Act (FMLA), and Workers' Compensation (WC)] all involve time off (both paid and unpaid), injuries, illnesses or disabilities, and job protections. They can overlap and run simultaneously, be connected to run end to end or be used intermittently throughout the year. You must know the difference between each leave you are granting and very specifically document every day (or hour and minute if less than a day or hour is being claimed) and to which category you are charging it. Failure to do so can not only lead to legal complications, but to expensive leave allowances or repetitions later.

See the chart on page 3 to determine which leave you are granting and counting.

What's All This Contention About "Job Essentials?"

Under a later development in the ADA, it was determined that unless you, the employer, define those absolute key essential job functions that could not be discarded, re-assigned or otherwise removed from the job without making the job unnecessary, then the government would make those decisions for you! In other words, you should write a job description of the job in question. Include all the elements or functions you want in this job. Then identify those few elements or functions that are so basically essential to this job that without them, this job is no longer essential. A simple example might be that a delivery driver with an inability to lift might be accommodated by having someone load the truck for him in the morning and arrange for the customer to unload, or to use a lifting/carrying device at the customer's location. But his "job essentials" might be the ability to safely drive and to remain licensed and insured.

Writing position descriptions (PDs) is highly recommended. They will help you in so many ways--compensation programs, job assignments, performance evaluations, job interviews, etc. In ADA cases, PDs can not only show who is or is not qualified, but as required in the ADA enforcement, those key functions (or job essentials) without which the job is just not really worth existing.

In a late development in the ADA, the issue of harassment is now in the picture. Ridicule,

harassment, employment exclusion, have now been added to the list of offenses in the ADA for which the employer may be charged.

The ADA is a good law that is being misused. Beyond the issue of so little progress towards its intended use is another serious but seldom mentioned issue: approximately 90% of all disabilities have nothing to do with mobility or wheelchairs, but approximately 90% of all the expenditures and activities in ADA are for mobility and wheelchair accommodations. Like so many federal regulations, particularly in employment, the laws are created, the money is spent, the votes are counted, but no one is measuring the actual results.

With this law, a truly noble and realistic viewpoint was presented on the American scene. The realization that few Americans fit the model of being perfectly healthy, always capable, and never in need, yet we must accommodate us all. The ADA is at its heart, an outstanding beacon that is targeted to produce a universally positive end result. We can't prevent the actions of those who take advantage of its weaknesses, but we can exercise every opportunity to make it work and serve those for whom it was intended. Hire the handicapped.

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