

ADA Dos and Don'ts for Savvy Employers

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ADA Compliance – New Challenges

- 26 years
- ACA
- Aging population
- Expanding definitions and treatments of “disability”
- Expanding landscape of what should be accommodated
- Increased drug use, increased drug testing, increased exposure



Dos and Don'ts for Savvy Employers

- Drug Testing Policies
- Website Accommodation
- Court Decisions Regarding Accommodations
- Wellness Programs



**Corporate
Wellness
Programs**





Americans with Disabilities Act

- Covers all employers, including State and local, with 15 or more employees.
- Prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training and other terms, conditions and privileges of employment.
- An “individual with a disability” is a person who:
 - Has a physical or mental impairment that substantially limits one or more major life activities
 - Has a record of such impairment; or
 - Is regarded as having such an impairment.
- Definition of “disability” should be construed in favor of broad coverage to the maximum extent permitted.

ADA cont.

- Reasonable accommodation may include, but is not limited to:
 - Existing facilities used by employees should be readily accessible to and usable by persons with disabilities;
 - Job restructuring, modifying work schedules and/or reassignment to a vacant position;
 - Acquiring or modifying equipment or devices; and
 - Adjusting or modifying examinations, training materials or policies and providing qualified readers or interpreters.
- Must reasonably accommodate if it would not impose an undue hardship on the operation of the employer's business – does not mean lower standards.

ADA and Substance (Drug/Alcohol) Testing

- ADA does not protect employees *currently* using illegal drugs
 - Employees who use drugs/alcohol required to meet same standards/conduct set for other employees
 - Does not restrict employers from testing applicants or employees for illegal drug use or making employment decisions based on verifiable results
 - Testing for illegal drug use is not considered medical examination under ADA
 - not required to show administration of test is job related or consistent with business necessity
 - Does not protect casual drug users
 - Employers may discipline, discharge or deny employment to an alcoholic where use of alcohol impairs job performance

So, No ADA Implications on Substance Testing -

WRONG!!

- ADA prohibits discrimination against rehabilitated drug addicts or those currently in treatment
- ADA requires reasonable accommodations extended to rehabilitated drug addicts or those undergoing treatment
- Alcoholism may qualify as “disability” under the ADA
- Medical Marijuana
- Prescription Medications
- Cannot use drug testing to identify/screen disabled employees

Dos and Don'ts Checklist re Drug Testing

DO

- Consistently apply drug test requirements to all applicants/employees
- Uniform treatment of all employees who test positive
- Provide reasonable accommodations to employees seeking substance abuse treatment

DON'T

- Discriminate against employees currently in substance abuse treatment or rehabilitated addicts
- Test for prescription drugs unless there is a business necessity for doing so
- Make employment decisions based on health information obtained through drug test (i.e. insulin detected – terminate diabetic employee)



Website Accommodation

- Current split on whether Title III of the of the ADA (public accommodation) extended to include non-physical locations
 - Courts in the 9th, 3rd, and 6th Circuits found Title III only applies to discrimination occurring at a physical place or somewhere with a sufficient nexus to a physical place. In other words, any alleged accessibility problems with a website would have to impede an individual's access to a "specific, physical, concrete space" to violate Title III. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).
 - Other courts have held that Title III applies to websites, even in the absence of some connection to a physical place. The 1st, 2nd, and 7th Circuits have all held that Title III can apply to the sale of goods or services via websites. See, e.g., *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3ed 12 (1st Cir. 1994).

Does This Apply to Employers?

- Electronic Employee Handbook
- Web-based payroll, benefits, etc.
- Access to electronic screening tools, pre-employment tests, training, etc.

Are these accessible to disabled employees?



Dos and Don'ts Checklist re Website Accommodation

DO

- Ensure all handbooks, notices, payroll, training, etc. are available electronically and in another form
- Provide necessary accommodations to electronics allowing disabled individuals access to employment information

How are Courts Treating the ADA?

1. *Opening the Door for Unpled Accommodation Claims.*
 - *David Donaldson v. Texas Department of Aging and Disability Services*, No. 01-14-00736-CV, 2016 WL 2731675 (Texas App., May 5, 2016)
 - Plaintiff/employee claimed he was terminated after he began prostate cancer treatment in violation of the ADA
 - Court dismissed his disability claim, but allowed the case to proceed on the grounds that employer failed to provide reasonable accommodations
 - Although not specifically pled, the Court found that plaintiff's accommodation claim overlapped the discrimination claim and allowed it to proceed



2. *Disability Accommodation Implicated in Unusual Places.*

- *Castro-Ramirez v. Dependable Highway Express, Inc.*, 200 Cal. Rptr. 3d 674 (Ca. Ct. App. 2016)
- Plaintiff/employee sought accommodations of his shifts to care for his son's disability
- California Court of Appeals found that California's Fair Employment and Housing Act imposed accommodation requirement on employer
 - Protects disabled employee and their association with another who has a covered disability
 - This case requires accommodation of a disabled employee, *and* his or her disabled relatives

3. *Good Outcomes for Good Behavior!*

- *Gardner v. Fed. Express Corp.*, No. 14-cv-01082, 2016 WL 1560080 (N.D. Cal. April 18, 2016)
- Driver/employee injured on job; exhausted medical leave; turned down other employment opportunities with the company, and ultimately terminated
- Following a jury trial on his ADA claim, jury found the employer engaged in interactive process regarding reasonable accommodation and did not violate ADA
- Employer's efforts were well-documented and consistent with applicable policies

Dos and Don'ts Checklist re Recent Court Decisions

DO

- Prepare and maintain good records showing interactive process for reasonable accommodation
- Proactively discuss accommodations with employees who may have a disability, even if not specifically requested
- Consider accommodations for care of a disabled relative (likely limited to California only)

DON'T

- Discount accommodations – Courts may invite claim even if plaintiff fails to plead

EEOC Wellness Regulation – released May 16, 2016

Wellness programs: comprehensive health services offered by employer to employees (i.e. discounted gym memberships, health screenings, wellness newsletters)

- Promote healthy lifestyles
- Prevent worsening/onset of illness
- Increased productivity: keeps employees healthy and happy
- Reduced medical costs for employer



ADA Implications on Wellness Programs

- Inquiries into disability
- Medical examinations
- Increased premiums/reduced coverage
- Coercive



EEOC Guidance

- Covers employers with 15 or more employees
- Apply to all wellness programs
 - ADA limits do not apply if there is no disability inquiry or medical examination under the wellness program
- Limits financial inducement
- Participation cannot be required
- Cannot deny access to group health benefits if employee refuses to participate
- Prohibits discrimination/retaliation against employees who do not participate
- Provide notice detailing medical information obtained
- Smoking cessation programs

Dos and Don'ts Checklist re Wellness Programs

DO

- Confirm any financial inducement to participate in wellness program complies with EEOC regulation
- Provide notice detailing medical information (what is obtained, how it will be used, etc.)

DON'T

- Require participation
- Deny access to group health benefits
- Discriminate/retaliate

Final Dos and Don'ts

- Do review your policies to ensure prescription drug testing applied fairly and uniformly as to all applicants/employees
- Do provide accommodation for employees seeking substance abuse treatment
- Do be aware of state laws regarding medical marijuana use
- Do provide access to all employment policies, training, etc. through web-based and more accessible programs or provide necessary accommodation to electronics
- Do engage in an interactive process for accommodation and maintain detailed records of the process
- Do review your wellness programs to ensure compliance with the new EEOC regulations



Final Dos and Don'ts

- Don't forget to ask any questions regarding this presentation – now or off-line

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