LEGAL UPDATE: NAVIGATING REASONABLE ACCOMMODATIONS AND WORKPLACE DISCRIMINATION IN THE TIME OF COVID-19

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- Title I – Employment
- Title II – Public Entities and Public Transportation
- Title III – Public Accommodations and Commercial Facilities
IS EMPLOYER A “COVERED EMPLOYER” SUBJECT TO THE ADA?

COVERED EMPLOYERS INCLUDE:

- Private employers with 15 or more employees;
- State and local governments;
- Employment agencies, staffing firms; and
- Labor unions.
The Arizona Civil Rights Act also applies to prohibit employers with 15 or more employees from discriminating against Arizonans with disabilities.

The Rehabilitation Act of 1973 applies to federal agencies, employers that receive federal financial assistance, and some employers owned by Indian tribes;

Many cities and counties have ordinances that prohibit private employers with fewer than 15 employees from discriminating against people with disabilities.

- Phoenix Human Relations Ordinance;
- Tucson Human Relations Ordinance; and
- Tempe Ordinance No. 02016.25.
Under the ADA, an individual with a disability is a person who either:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

“Major life activities” include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA also includes “major bodily functions” in this definition, which includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
The ADA requires employers to provide reasonable accommodations to employees or applicants with disabilities who need them, except when such accommodations would cause an undue hardship.

“Undue hardship” means a significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.

Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.
THREE CATEGORIES OF REASONABLE ACCOMMODATIONS

Under the ADA, reasonable accommodations fall into three categories:

- modifications to a job application process that enable a qualified applicant with a disability to be considered for the position he or she is applying for;

- modifications to the work environment, or to the way the position is customarily performed, that enable an employee/applicant with a disability to perform the essential functions of that position; and

- modifications that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.
The interactive process allows employees and employers to communicate in good faith to find a reasonable accommodation that both: (1) allows the employee to perform the essential functions of his or her job, and (2) does not cause the employer undue hardship.

Employer’s duty to initiate interactive process triggered when employee asks for reasonable accommodation.

In most situations, both the employee or applicant and the employer have vital information to share to identify an effective accommodation that will work for that workplace.

- Employees and applicants have information about their disability, abilities, and limitation(s) and how they have adapted and modified tasks to overcome limitations.
- Employers tend to have access to more information about the job and job duties and can analyze the essential functions of the job and possible range of alternative positions or accommodations.
EEOC’S FOUR STEPS CRITICAL TO THE INTERACTIVE PROCESS

Once a request for a reasonable accommodation has been made, the EEOC requires an employer to:

- Analyze the particular job involved and determine its purpose and essential functions;
- Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;
- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position and;
- Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.
COVID-19 AND THE ADA

- COVID-19 intersects with the ADA in a variety of ways, including:
  - COVID testing in the workplace.
  - Antibody testing
  - Symptom screening
  - Sharing COVID medical information:
    - With co-employers
    - With other employees
    - With public health agencies
  - Reasonable accommodations
  - Vaccine requirements
COVID-19 GUIDANCE FROM THE EEOC


- The EEOC’s guidance covers:
  - Disability-Related Inquiries and Medical Exams
  - Confidentiality of Medical Information
  - Hiring and Onboarding
  - Reasonable Accommodation
  - Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics
  - Return to Work
  - Updated Guidance on Vaccines
  - And more…
WHAT IS DISCRIMINATION UNDER THE ADA?

- An employee who works for a covered employer, or an applicant who applies to work for a covered employee, has a claim for employment discrimination under the ADA if he or she:
  - was disabled within the meaning of the ADA;
  - was qualified to perform the essential functions of his or her job with or without reasonable accommodation; and
  - was subjected to an “adverse employment action” as a result of his or her disability.

- An employee or applicant may also have a claim for discrimination based on association with a person with a disability.
ADVERSE EMPLOYMENT ACTIONS

“Adverse employment actions” include, but are not limited to, terminations, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of unlawful harassment by other employees, supervisors or third parties in the workplace (e.g. customer, vendor).
ATTORNEYS WANTING CLE CREDIT

Please email cgutierrez@azdisabilitylaw.org with your name, and the code word “HARASSMENT” and we’ll respond with your CLE certificate.
WHAT IS HARASSMENT UNDER THE ADA?

- Employees or applicants who experience harassment, though, may have a cognizable claim if they can show the following elements:
  - the employee/applicant was disabled within the meaning of the ADA;
  - she was subjected to unwelcome harassment;
  - the harassment complained of was based on her disability or request for accommodation;
  - that the harassment complained of affected a term, condition, or privilege of employment;
  - that the employer knew or should have known of the harassment and failed to take prompt, remedial action.
“Terms, conditions, or privileges of employment” include, but are not limited to: job application procedures, hiring, firing, promotions, and compensation.

In determining whether “unwelcome harassment” occurred, courts consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with an employee’s work performance.
Harassment claims are not limited to harassment by co-workers and can include harassment by a supervisor or third-parties at work, such as customers.

The employer’s knowledge of the harassment is an important element of establishing a claim for harassment against a co-worker or a third-party. If you are being harassed by your co-workers or by third-parties, you should inform your supervisor or your human resources department, in writing if possible.

If your supervisor is harassing you, then vicarious liability will attach and you may not need to establish that your employer should have intervened.
WHAT IS RETALIATION UNDER THE ADA?

- An employee is retaliated against under the ADA if she:
  - engaged in protected activity;
  - suffered an adverse employment action; and
  - the adverse employment action was the result of the employee’s having engaged in protected activity.
“Protected activity” includes two general types of activities: opposing a practice that is unlawful under the ADA or participating in the procedures for processing discrimination complaints through the U.S. Equal Employment Opportunity Commission (EEOC).

Examples of protected activity:

- filing charges alleging discrimination with the EEOC or other appropriate agencies;
- giving testimony as a witness to an EEOC investigator;
- complaining to an employer, either formally or informally, regarding disability discrimination;
- aiding or encouraging another employee to exercise rights under the ADA;
- reporting disability-related harassment of a co-worker by other employees;
- advocating on behalf of disabled students or on behalf of the employee’s own child;
- requesting a reasonable accommodation or reassignment;
- recalculating an employee’s long-term disability benefit amount; and
- filling vacancies for which an employee had applied with employees with a lower rank.
QUESTIONS?
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THANK YOU!

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