Americans with Disabilities Act
A Practical Guide

STEVEN P. POSTALAKIS
BLAUGRUND, HERBERT, KESSLER, MILLER, MYERS & POSTALAKIS, INCORPORATED
300 WEST WILSON BRIDGE ROAD, SUITE 100
WORTHINGTON, OHIO 43085
(614) 923-3112
SPP@BHMLAW.COM

OHIO ASSOCIATION OF COUNTY BOARDS
SERVING PEOPLE WITH
DEVELOPMENTAL DISABILITIES
2012 ANNUAL CONVENTION
HILTON AT EASTON
A disability is a “physical or mental impairment that substantially limits one or more of the major life activities of an individual.” 42 U.S.C. 12102(2)(A).

- The definition of disability also includes having a “record of” such impairment, or being “regarded as” having such an impairment. 42 U.S.C 12102(2)(B), (C).

- In recent years, the definition of disability has been expanded so that nearly any condition could be, and is likely to be, considered a disability.
Americans with Disabilities Act ("ADA")
Overview

- Everything with the ADA is step by step:
  1. Is there a disability?
  2. Is the individual “qualified” for the position?
     - What are the essential functions of the job?
       - Is it really a job function?
       - Is the particular job function an essential job function?
     - Can the employee perform those essential job functions with or without an accommodation?
     - Is there any outside evidence bearing on whether the individual is “qualified”?
     - Has the employee asked for help?
Determining whether an individual is “qualified”

- Once it is determined that the individual has a disability, the question turns to whether the individual is “qualified” under the Act.
- The ADA only protects an individual who has a disability and who is “qualified” within the meaning of the Act.
- To be “qualified” under the ADA, an individual must:
  - (1) have the requisite skills, experience, education, licenses, etc., AND
  - (2) be able to perform the essential functions of the job, either with or without reasonable accommodation. 42 U.S.C. 1211(8)
Practical Example #1

- SSA experiencing job performance problems – forgetfulness
- Known to HR that the employee has a brain condition. Doctors are monitoring.
- Employee volunteered the medical information regarding brain condition.
- How do you address this with the employee?
Practical Example #1

- **Address the performance issue with the employee**
  - Sit-down meeting, letter – detailing the performance issue.
  - Since medical condition is already known (volunteered by employee) you can acknowledge that this may be a factor.
  - Determine whether the medical condition is affecting the employee’s ability to perform the essential functions of his/her job.

- **Ask the employee what you can do to help**
  - If there is an accommodation that can allow the employee to perform the essential functions of the job, give the accommodation.
  - Realize there may not be an accommodation for the condition.
  - You are not required to displace an employee, create a new position, or change the employee’s essential job functions.
  - May require a fitness for duty examination.
Practical Example #1

After the meeting, things to document:

- What the employee said or did (that triggered the interactive process): “I need help” “I have this condition,”
- That the supervisor/HR person said, “how can we help you?”,
- What the employee asked for,
- What accommodation was provided, if any,
- What efforts were made to see if an accommodation was available,
- Whether you asked for any additional medical information,
- If accommodation provided, that you followed up at regular intervals to see how the help was working.
Practical Example #2

- Bus driver
- Aging and has diabetes (not insulin dependent so can still pass CDL physical)
- Has sleep apnea
- Forgetting to follow bus route as written and is delivering students late for school on occasion
Practical Example #2

- Address the performance issue with the employee
  - Sit-down meeting, letter – detailing performance issues.
  - Why is the employee not following bus route?
    - May or may not be related to medical conditions
  - Determine whether employee is currently able to perform the essential job functions of the position.

- Ask the employee what you can do to help
  - If an accommodation can allow the employee to perform the essential functions of the job, give the accommodation.
  - Realize there may not be an accommodation for the condition.
  - You are not required to displace an employee, create a new position, or change the employee’s essential job functions.
  - May require a fitness for duty examination.
Practical Example #2

- Should you ask for medical information?
  - Typically no, to preserve the lack of knowledge defense.
    - Document the fact that you didn’t ask for any medical information.
  - However, if medical conditions are already known (disclosed by employee), and employee brings this up in response to you addressing the performance issues, then okay to discuss.
  - Remember: A medical condition is not automatically a disability.
  - Therefore: Best to ask: How can we help. If a reasonable accommodation is available, then give help.
  - If a simple, easy solution is not available to accommodate the employee, you need to do more due diligence to figure out if there are other positions available, etc.
Practical Example #2

- Remember to document:
  - What the employee said that triggered the interactive process,
  - That HR/supervisor asked “how can we help you?”,
  - What the employee asked for,
  - That the employer gave help (if it was quick, simple, cheap, easy),
  - OR
  - That the employer performed searches for other positions and tried to come up with an accommodation, but was not able to find an accommodation,
  - That the employer didn’t ask for medical information (if it didn’t),
  - If simple, cheap, quick, easy accommodation is given, that the employer followed up to see if the help was working.
Determining whether an individual is “qualified”

- Things to look for when determining whether someone is “qualified.”
  - The employer is allowed to change the “functions of the job” or job description of a certain job if necessary, even if that renders an employee “not qualified” under the ADA.
    - i.e. increasing production standards.
  - An individual who does not have the background required for a job or the necessary certifications is not qualified.
    - If the disability prevents the individual from obtaining the necessary licenses and certifications, then the individual is not qualified.
      - Safety-based qualification standards are given preference
      - Employer must demonstrate consistent enforcement of the standard
      - Employer may have to show that the qualification is a business necessity
Determining Essential Functions of a Job

- Is the duty a function or just a way of performing a function?
  - A way of performing a function can sometimes be modified to allow a disabled person to perform the function.
- If something is a function, is it an essential function of the job or just a marginal function?
  - Factors weighing in favor of the function being essential, not marginal:
    - The position exists to perform the function
    - There are a limited number of employees available who could perform the function, or
    - The function is highly specialized
Determining Essential Functions of a Job

- Additional considerations when determining whether a job function is essential:
  - The employer’s judgment
  - A written job description
    - NOTE: an inaccurate job description can hurt the employer in arguing that something is an essential function.
    - SO: when a job description changes, send an email to ALL employees affected that the job description is going to be updated.
    - ALSO: okay to add a disclaimer saying that essential functions of a job may vary depending on the location where the employee works.
  - The Amount of Time Spent Performing the Function
Determining Essential Functions of a Job

Additional considerations when determining whether a job function is essential (continued):

- Employer may argue that there are severe or dire consequences of not requiring someone in the job to perform the function—i.e. fire investigator fighting fire, bus driver completing route/starting route on time.
  - ASK: would there be critical consequences if the employee didn’t perform this particular function of his/her job?
- Terms of a collective bargaining agreement
- ***The actual experience of Incumbents and Prior Employees
  - KEY QUESTION TO ASK: What functions do we actually require of the employee, regardless of what’s in the job description. What does the employee actually do?
Determining whether employee is Qualified
What must employee show?

- Employee must be able to perform the essential job functions of the position in order to be qualified.
  - Employee must first demonstrate ability to perform essential job functions without accommodation, then, failing that, that he/she can perform the functions with a reasonable accommodation.
Whether Particular Functions are Essential

- “Ability to Get along with others”
  - In most cases, YES, this is essential
- “Ability to follow a supervisor’s instructions”
  - Yes, essential
- Mental Stability
  - Yes
- Interacting appropriately with Customers
  - No, BUT “not offending customers” is an essential function
- Ability to Work Independently
  - Yes, for certain jobs
Whether Particular Functions are Essential

- **Attendance?**
  - No, according to EEOC.
  - **BUT:** “regular, predictable performance” of a job is essential
    - HR Tip: Use the phrase “regular, predictable performance” instead of “attendance” in job descriptions or discipline.
  - Most courts say attendance is an essential job function.

- **Punctuality?**
  - No, according to EEOC, only job duties/tasks can be essential functions.
  - However, some courts say it is essential (school teacher, retail store coordinator)
  - **WATCH OUT FOR:** flex-time schedules – hard to say punctuality is essential.
Whether Particular Functions are Essential

- **Attendance – Bottomline**
  - Where regular attendance is considered an essential function, courts say that someone is not qualified if their attendance is unreliable or unpredictable.
    - NOTE: “uninterrupted” attendance is not essential – i.e. FMLA or other leaves.

- **Ability to Stay Awake – Essential Function?**
  - According to EEOC, No. “consciousness” is not an essential function, because, in their opinion, it is not an actual job function.
  - Most courts say the ability to stay awake is an essential job function.
Whether Particular Functions are Essential

- **Ability to work full-time or overtime?**
  - Full-time – usually no, not an essential job function, because part-time work might be appropriate as a reasonable accommodation.
  - However, in some cases, full-time work is an essential job function where duties can only be performed by working full-time.
    - Employer not required to create a part-time position to accommodate.
    - For some jobs the number of hours worked is an essential function, thus no requirement to exempt disabled employees from that requirement.
    - Overtime can be an essential function for certain jobs.
Whether Particular Functions are Essential

- **Ability to Work a Specific Shift?**
  - Yes, the time during which an essential function is performed may be critical to the job itself.
    - Includes working a “shift-rotation”

- **Ability to Work Rotating Assignments?**
  - Yes, the essential functions of these types of jobs are the essential function of ALL the various assignments.
  - Make sure employees really do rotate and know how to do all the jobs.

- **Ability to Travel?**
  - Yes, an essential function of certain jobs.
Whether Particular Functions are Essential

- **Standing/Walking?**
  - Standing - No., usually there is an accommodation.
  - Walking – Yes, an essential function of some jobs – i.e. nurse at extended care facility

- **Lifting?**
  - Yes, essential job function
Evidence Bearing on Whether Individual is Qualified

- An Employer’s acknowledgment of an Employee’s Satisfactory Performance as evidence that he/she is qualified
  - The fact than an employee has been performing a job satisfactorily – after the onset of a disability – is very helpful to an individual in proving that he/she is qualified for the job.
    - HR Tip: If an employee is not meeting expectations, make note of it in performance evaluations. Use language: “employee meets some expectations.” Supervisors must be willing to give these kinds of ratings in performance evaluations.
    - If employee’s performance is deteriorating, prior satisfactory performance is less persuasive on whether he/she is qualified.
Evidence Bearing on Whether Individual is Qualified

In the alternative, if individual’s performance has been unsatisfactory, that will be evidence that the individual is not qualified (assuming performance could not be corrected by a reasonable accommodation).

Evidence that Employee is Not Qualified Because of Information in a doctor’s note.

- Doctor states that employee is unable to work, or doctor suggests that employee will need job modification to work, or doctor states that employee cannot do something that is an essential function.
Evidence Bearing on Whether Individual is Qualified

- Evidence that Employee is Not Qualified Because he/she poses a safety risk
  - Document it with objective analysis. Employer has burden of proving.

- Apparently Inconsistent Statements in Other Forums on Whether the Individual is Qualified
  - Employee claims he/she is qualified under the ADA while simultaneously claiming that he/she is totally disabled in a different forum.
    - These kinds of inconsistent statements used to be barred by the courts.
    - Now courts say employees can make both claims but employee must show how claims are not inconsistent.
Evidence Bearing on Whether Individual is Qualified

- Inconsistent Statements (continued)
  - An individual can be “totally disabled” or “unable to work” for purposes of disability benefits (social security disability) but still able to make an ADA claim because reasonable accommodations are not part of SSDI claim.
    - An individual can still be considered “qualified” under the ADA.
    - The individual has to provide a “sufficient explanation” for the inconsistency, if there is one.
  - Typical Explanations for inconsistent statements:
    - “My condition has improved”
    - “My Boss told me I couldn’t work” – supervisor told me I wasn’t qualified to work
    - “The time periods were different”
    - “I wasn’t telling the whole truth”
Evidence Bearing on Whether Individual is Qualified

- Typical Explanations for Inconsistent Statements (continued)
  - Difference between Factual and Legal Inconsistency
    - Factual inconsistency not tolerated – can’t say permanently and totally disabled (including with accommodation) in SSDI and then later claim qualified under ADA.
    - Legal inconsistency sometimes permitted – can still argue qualified and prevail.
Practical Pointers – how to approach the subject with an employee

- Step One: We’ve noticed [job performance problem]. (letter, sit-down conversation).
  - If employee discloses/volunteers medical condition, then ask employee to bring/get documentation.
    - Maybe ask for Dr.’s recommendation/evaluation regarding work.
- Step Two: Ask – How can we help?
  - Engage in an interactive process to determine if there is a reasonable accommodation that is not an undue burden to you as the employer.
Practical Pointers – how to approach the subject with an employee

- **Step Three (if accommodation provided):** Document that you gave help
  - i.e. “I helped the employee by doing __________ (no need to use the word accommodation). I didn’t ask about anything else. The employee did not ask for anything else. The employee did not tell me anything else.”
  - In other words, the employee said what he/she needed, I gave help.
- **Step Four:**
  - Follow-up with the employee to make sure the help you gave is working.
Do’s and Don’ts of the ADA

- **DO:** Address the performance issue, and the performance issue alone.
- **DO:** Treat the employee like everyone else. Do not treat the employee as if he/she is disabled.
  - Just because an individual has a medical condition does not mean they are disabled. Even if you know they have a medical condition, that does not mean they are covered under the ADA.
- **DO:** If the employee explains a medical situation, ask them to get medical evaluation or medical clarification from doctor concerning the condition, how it affects their job duties and performance.
Do’s and Don’ts of the ADA

- DON’T: Refer to the medical condition as a disability.
- DON’T: Use the word “accommodate” or “how can we reasonably accommodate your disability?”
- DO: Engage in an interactive process (asking the employee, “how can we help”) to determine whether you can accommodate their situation.
  - Realize there may or may not be an accommodation that allows the employee to perform the essential functions of his/her job.
    - You are not required to create a new position or displace someone from their current position.
- DO: Document that you gave help, what the help was.
- DO: Follow-up at regular intervals to see if the help is working. Is performance up to par with what is required of all employees?
QUESTIONS?

THANKS FOR ATTENDING!