

Alameda County Transition Fair  
Reasonable Accommodation  
in Employment

March 13, 2021

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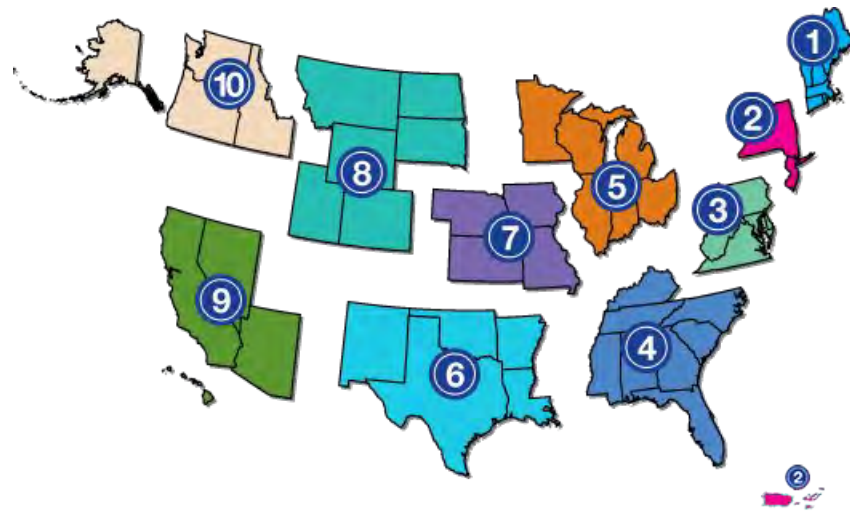
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# ADA National Network

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# Americans with Disabilities Act (ADA) Overview & Definition of Disability

# ADA Overview

- Signed by President George H. W. Bush
- July 26, 1990
- Civil rights law that protects people with disabilities from discrimination and provides equal opportunity





# Definition of Disability Under ADA

- 1) An individual with a physical or mental impairment that substantially limits one or more major life activities
  - Duration of impairment is *usually*  $\geq 6$  months
  - Do not consider presence of mitigating measures
- 2) An individual who has a record of such an impairment
- 3) An individual who is regarded as having such an impairment
  - Should not require extensive analysis

# Major Life Activities

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## Examples in ADA

Caring for oneself	Walking	Learning
Performing manual tasks	Standing	Reading
Seeing	Lifting	Concentrating
Hearing	Bending	Thinking
Eating	Speaking	Communicating
Sleeping	Breathing	Working

# Major Bodily Functions = Major Life Activities

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## Examples in ADA

Immune System	Neurological
Normal cell growth	Brain
Digestive	Respiratory, Circulatory
Bowel	Endocrine
Bladder	Reproductive

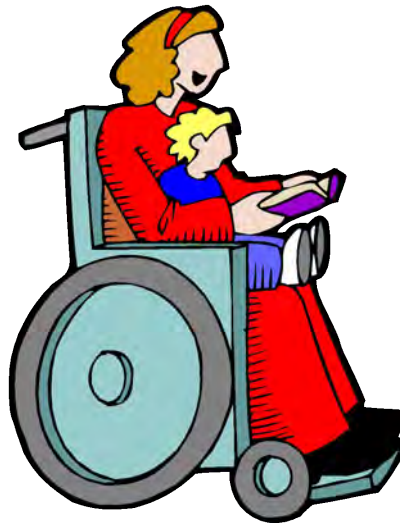
# Substantial Limitation

How do you know when a major life activity is substantially limited?

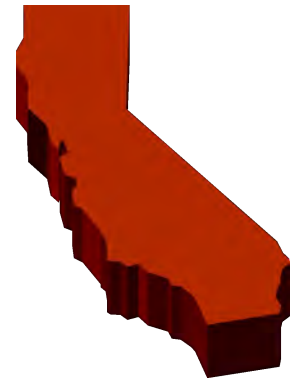
- Compare the major life activity with **most people** in the general population.
- Should not require extensive analysis.
- Congress wants broad coverage.

# Definition of Disability Under ADA: Associational Discrimination

- An individual who is “associated” with a person with a disability (e.g., family member, spouse, domestic partner, etc.) is also protected from discrimination.



# California Definition of Disability



Overall, same as the ADA EXCEPT:

- Says mental or physical disorder **LIMITS** major life activities
  - ADA says **SUBSTANTIALLY** limits major life activities
- Adds medical condition that includes cancer
- Says “major life activities” shall be broadly construed and include social activities and working
  - ADA does not include social activities
  - ADA includes working, but **only** if it is in a broad class of jobs, not just one job

(Cal. Gov’t. Code sec. 12926)

# Questions





# ADA Title I Requirements Employment



# Employment



The employment provisions of the ADA prohibit 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.

# Which Employers Are Covered?

- Private employers, State and local governments, employment agencies and labor unions.
- Persons who are "agents" of the employer, such as managers, supervisors, foremen, or others who act for the employer, such as agencies used to conduct background checks on candidates.
  - Therefore, the employer is responsible for actions of such persons that may violate the law.

# Which Employers Are Covered?

The ADA's employment requirements apply to private employers with 15 or more employees.



# Which Employers Are Covered?

The ADA's employment requirements apply to all public or governmental entities, regardless of size.



# Which Employers Are Covered in California?

- California's Fair Housing and Employment Act (FEHA) applies to private employers with at least 5 employees



AND TO

- All government employers, regardless of size

# Qualified Individual with a Disability

- Satisfies the skill, experience, education and other job-related requirements.
- With or without reasonable accommodation, can perform the essential job functions of the position.

# What Are Essential Job Functions?

- Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. The functions are determined **by the employer** and must actually be “essential”.

Factors to consider in determining if a function is essential include:

- ✓ Whether the position exists specifically to perform that function;

# Essential Job Functions Factors

- ✓ The number of other employees available to perform the function or among whom the performance of the function can be distributed; and
- ✓ The degree of expertise or skill required to perform the function.



# Employers and Job Functions

## Employers:

- Do not have to eliminate or reassign essential functions of the job to accommodate a person with a disability.
- Do not have to change essential functions of the job.



# What Are Marginal Job Functions?

- Marginal job functions are those tasks which are incidental and can be reallocated to or accomplished by another employee.
- Though not required by the ADA, employers are ***strongly*** encouraged to write job descriptions that include both essential and marginal job functions that accurately reflect the actual tasks of the job.

# True or False

- An employer is allowed to ask a person with a disability to demonstrate or describe how he/she might perform a job function.

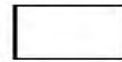


- An employer may ask questions about the ability to perform specific job functions and may ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

**True**



**False**



# Questions





# Reasonable Accommodations

# Reasonable Accommodation Statistics

- Estimates suggest over 70% of employees with disabilities never request an accommodation
- Cost effectiveness: 58% of employers reporting cost data paid nothing\*

\*Job Accommodation Network (Original 2005, Updated 2020). *Accommodation and Compliance: Low cost, high impact.*

# Reasonable Accommodation Statistics II

- Average one-time cost: \$500 (\$400 for employee without disability)\*
- 74% of employers report that accommodations are very or extremely effective\*

\*Job Accommodation Network (Original 2005, Updated 2020). *Accommodation and Compliance: Low cost, high impact.*



# Reasonable Accommodation Definition

Any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.



# Interviews , Applications and Reasonable Accommodations

- Responsibility for requesting an accommodation rests solely on the applicant.
- Applicant may have an advocate in the interview but should respond to questions as independently as possible.
- An employer may NOT ask about the need for an accommodation via questions on the application.

# Applicant Reasonable Accommodations

However, when an employer “reasonably believes” an applicant will need reasonable accommodations... they may ask the applicant if they need a reasonable accommodation, and if so, what type is needed for:

- An obvious disability
- Disclosure of a hidden disability
- A requested accommodation



# Accommodating **Known** Disabilities

- Employers are responsible for accommodating an employee's **known** disability. The employer does not have to guess.
- If an employer suspects an employee may have a disability, the employer may ask a general question regarding what might be necessary to assist the employee in improving his/her job performance.
- If an employee does not request an accommodation, then receives a poor performance review, the employee may not claim later that his/her poor performance was due to a disability – the evaluation stands as it is.

# Documentation of Disability

An employer may require that the documentation about the employee's non-obvious disability and the functional limitations come from an appropriate health care or rehabilitation professional.

- Current (usually within past 3 years)
- Information about the functional limitations (not necessarily the diagnosis) and what would be helpful



# Medical Examinations – Pre-Employment

- An employer may not ask or require a job applicant to take a medical examination ***before*** making a job offer. In fact, an employer cannot make any pre-employment inquiry specifically about a disability or the nature or severity of a disability.



# Medical Examinations – Post-Offer

- An employer may condition a job offer on the satisfactory result of a ***post-offer*** medical examination or medical inquiry ***if this is required of all entering employees in the same job category.***
- A post-offer examination or inquiry need not be job-related and consistent with business necessity. But if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity.

# Medical Examinations – On the Job

- After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity.
- Employers may conduct employee medical examinations under the following circumstances:
  - evidence of a job performance or safety problem;
  - examination is required by other federal laws (e.g., transportation providers);
  - determination of fitness to perform a particular job; and
  - voluntary examinations that are part of employee health programs.



# Reasonable Accommodation Scenario

- Example: An employee at a call center consistently says “what?” or “speak up” when answering calls. Based on this information, the employer could ask if an amplifier might help the employee perform his job better.
- The employer may NOT ask if the person has a disability.



# Employees and Reasonable Accommodations

An employee may refuse a reasonable accommodation. But if the employee can no longer perform the essential job functions, he or she is no longer ***qualified*** for the job.



# Principles of Reasonable Accommodation

- Reasonable accommodation process is an interactive one between employer and applicant/employee.
- Reasonable accommodation must be an effective accommodation.
- Reasonable accommodation applies only to accommodations that reduce barriers to employment as they relate to the person's disability.

# Principles of Reasonable Accommodation

- A reasonable accommodation need not be the preferred accommodation as long as it is effective and specific to the individual employee.
  - You need not provide a Cadillac when a Volkswagen will do!
- An employer is not required to provide an accommodation that is for personal use.
- ADA requirements do not prevent an employer from providing an accommodation beyond what is required by the ADA.

# ADA Employment & COVID-19

- Protecting at-risk applicants and employees
- Use of PPE
- Temporary accommodations
- Modifications when returning to the workplace
- Telework as an accommodation

# Reasonable Accommodation Examples

- Telework & other COVID-19 accommodations
- Job reassignment or restructuring
- Modifying or acquiring equipment
- Use of a job coach to learn the job
- Providing auxiliary aids and services
- Modifying policies or procedures
- Accessible work stations
- Modified work schedules or leaves of absence
- Use of a service **OR** emotional support animal

# Service Animals



- ADA Titles II and III regulations say definition is a dog, a dog, and only a dog.
- Must be individually trained to perform one or more **tasks** related to the person's disability.
  - Emotional support is **not** a task
- Must be under control at all times
  - On a leash or tether or under voice control
  - No running around, growling or barking
  - Must be housebroken

# Service Animal Questions



- Title II & III entities may ask: 1) is the animal necessary due to the handler's disability?; and 2) what tasks or work does the animal perform?
- May not ask about the disability itself or to see the task.
- No certification or licensing is required.
- Do not feed or pet a service animal.



# Other Animals?

- Covered entities may now be asked to modify their policies, practices and procedures to allow **miniature horses** as service animals.
- This modification will be necessary unless the entity can demonstrate a fundamental alteration, violation of legitimate safety requirements, or a direct threat.



# Assistance Animals in Employment

- There are no federal guidance documents on animals as a reasonable accommodation.
- Individuals with disabilities may request a reasonable accommodation to use an assistance animal on the job.
  - Assistance animals include service animals **and** emotional support animals
  - Assistance animals can be in addition to dogs that are service animals
- Must use the reasonable accommodation interactive process to determine if it is possibly an undue hardship to allow an animal on the job.

# Issues with Animals at Work

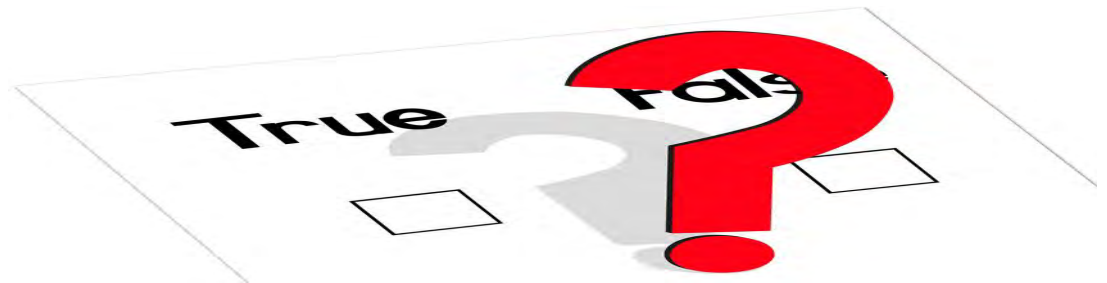
- Issues that may arise with the use of animals at work are:
  - Other employees can have allergies or may fear dogs
  - The animal may not be under control
  - The animal may distract employees from their work

# Reasonable Accommodations Do Not Include:

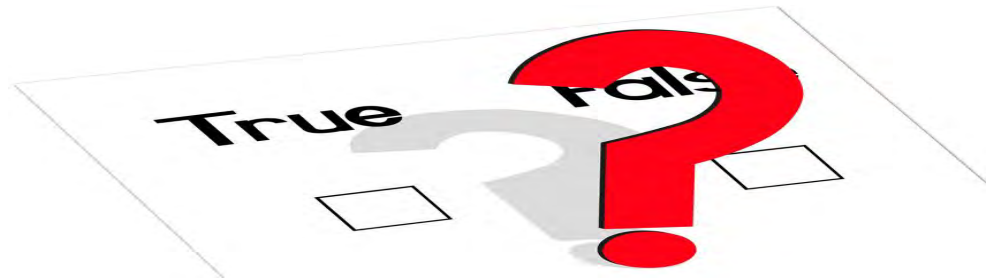
- Elimination of an essential function
- Lowering production standards
- Reassignment to a different supervisor
- Promotion to a higher position
- Provision of personal use items
- Creation of “light duty” position
- Creation of a new position

# True or False

- An employee with a developmental disability has asked for use of a job coach to learn the job as a reasonable accommodation.
- True/False: The employer must consider the above request as an accommodation for this employee.



- True. The request to use a job coach to learn the job likely will be a reasonable accommodation. However, the employer may not want the job coach beyond a few months. There is no actual time limit.





# Disclosure of Disability & Confidentiality of Disability Information

# The Do's and Don'ts of Disclosure

DO	DON'T
Disclose if an accommodation is needed	Wait until disability has negatively affected performance
Have documentation ready	Disclose to everyone
Get accommodation agreement in writing	Feel badly about needing an accommodation



# Disclosure of Disability



- Disclosure is only required when a specific accommodation is being requested.
- Only basic information regarding the condition, limitations and what accommodation(s) are being requested, is required.

# Disclosure of Disability



- The decision to disclose is a very personal one.
- Disclosure should be done in private only with people who have a need-to-know.
- Disclosure of a disability should be done if reasonable accommodations will prevent under-performance in productivity and/or office conduct problems with supervisors or co-workers.

# Confidentiality and Disability Information

- Medical records are confidential and must be filed in a locked area separate from an employee's personnel file.
- Impairment-related information can be confidential even if it contains no medical diagnosis or treatment course, and even if it is not generated by a health care professional.



# Reasonable Accommodations and Other Employees

- You are an employer. John notices that his co-worker, Bill leaves early on Tuesdays and Thursdays. What he does not know is that Bill has a modified schedule, as a result of a reasonable accommodation, to attend treatment.
- John comes to you and asks why Bill gets to leave early and states he'd like to leave early on Fridays to attend his son's soccer matches.
- How might you respond?

# Reasonable Accommodations and Other Employees

- Because of confidentiality, employers are not allowed to disclose information regarding the accommodations of other employees. A couple of tips might be:
- Training all employees on policies and procedures through employee handbooks, staff meetings, and periodic workshops.
- Saying the person has a legal accommodation without giving further details.



# Undue Hardship

# Undue Hardship

- Action that requires significant difficulty or expense - unduly costly, extensive, substantial, disruptive, fundamentally alters nature or operation of business
- In relation to size of the employer, resources available, nature of the operation

# Undue Hardship II

- Must be determined on a case-by-case basis
- Effect on morale of other employees is not an undue hardship
  
- **IMPORTANT:** Employer must consider alternate accommodations that do not create undue hardship before terminating an employee with a disability





# Resources

# Key ADA Title I Organizations

- Job Accommodation Network 800/526-7234 (V, TTY) [www.askjan.org](http://www.askjan.org)
- Equal Employment Opportunity Commission 800/669-4000 (V) [www.eeoc.gov](http://www.eeoc.gov)
- Department of Labor's Office of Disability Employment Policy [www.dol.gov/odep/](http://www.dol.gov/odep/)
- Cornell University Employment & Disability Institute [www.hrtips.org](http://www.hrtips.org)

# Employment & COVID-19 Resources

- EEOC's What You Should Know about COVID-19 and the ADA, the Rehab Act, and Other EEO Laws

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- EEOC's Pandemic Preparedness in the Workplace and the ADA
- EARN's COVID-19 and Job Applicants and Employees with Disabilities

# Resources for More Information

- Pacific ADA Center [www.adapacific.org](http://www.adapacific.org)
- ADA National Network [www.adata.org](http://www.adata.org)
- U.S. Department of Justice [www.ada.gov](http://www.ada.gov)

# Questions



Thank you!