

# Complying with the complexities of the ADA/ADAAA: A top priority for HR leaders

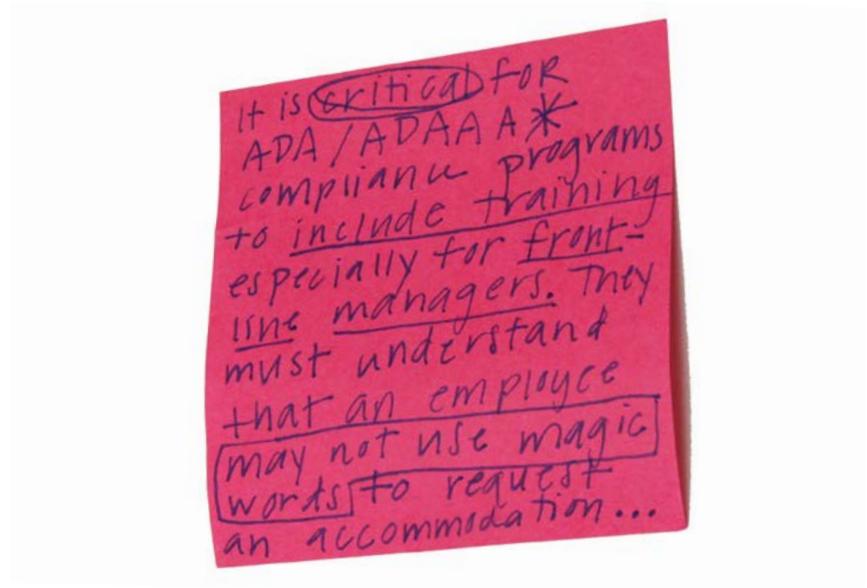
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The Americans with Disabilities Act (ADA) celebrated its 25th anniversary on July 26, 2015. One of the goals of this landmark legislation was to improve employment opportunities for individuals with disabilities. The ADA is civil rights legislation, regulated and enforced by the U.S. Equal Opportunity Commission (EEOC). Title I of the ADA prohibits discrimination against qualified individuals with disabilities.

Just over 18 years after the ADA was enacted, the law was amended with the Americans with Disabilities Amendments Act (ADAAA) that was effective on January 1, 2009. The ADAAA retained the ADA definition of disability, but it expanded the interpretation of its terms. The intent of the ADAAA was to encourage broad coverage of individuals with disabilities. Employers were expected to place less emphasis on determining whether a person is disabled and instead focus on the interactive process, so that the employee could perform the essential functions of the position with a reasonable accommodation.

The ADA and ADAAA have made it possible for Americans with disabilities to have meaningful careers; the significant impact of this legislation is remarkable and deserves celebrating. While substantial progress has been made, the laws have not always been easy for employers, acting in good faith, to interpret.



What is challenging for employers currently is the practical application, especially with limited case law and enforcement assistance. Since each situation must be reviewed on its own, no bright-line rules can be applied. Nevertheless, some framework has been developed that provides helpful guidance. Let's take a look at a few hot topics and recommended considerations.

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### Leave as a reasonable accommodation

One major determination is whether attendance is an essential function for a position. When evaluating a position to determine whether attendance is essential, several factors should be considered such as staffing, overtime costs, enforcement of attendance rules,

job description, training required and other leave policies. If it is determined that attendance is an essential function of a position, then the next question is whether the time requested off is reasonable or if it will be an undue hardship. Unlimited, indeterminate, extended leaves, without regard to attendance guidelines, are not typically considered reasonable, nor are irregular, unpredictable schedules such as an open-ended request to come and go as needed. In contrast, shorter durations of leave such as a couple of days per month – especially when the employee can complete the essential functions before and after the leave and/or with minimal assistance from co-workers – are likely reasonable. Keep in mind the facts of the specific situation will dictate the outcome.

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### Temporary impairments

Temporary conditions such as the flu, a stomach bug or bronchitis do not usually qualify as a disability under the ADA/ADAAA. However, a temporary condition or injury could develop into a disability if it is "sufficiently severe" and would substantially limit a major life activity – the Fourth Circuit Court of Appeals ruled on this issue last year in *Summers v. Altarum Institute Corp.*, No. 13-1645 (4th Cir. January 23, 2014). This case provides guidance on how to analyze – through an interactive process – whether or not a temporary impairment constitutes a disability and therefore invokes the need for a reasonable accommodation.

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### Intellectual disabilities:

#### Performance management and accommodations

Employers still struggle with how to handle performance management for employees who disclose having an intellectual disability. The EEOC's guidance, "The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities," is helpful with examples and practical tips on frequently experienced scenarios that involve performance management and discipline of employees with disabilities. It is important to note that once an individual has indicated that he/she has a disability, then the interactive process must begin. While an employer is not required to remove a progressive counseling and discipline document that was previously presented to the employee, the triggering of the interactive process may impact the timing of future discipline. Keep in mind, the ADA/ADAAA does not require that performance standards be modified. Additionally, qualified individuals with disabilities must be able to perform the essential functions of the position, but assistance may be needed such as additional training and coaching. The amount of time needed to

help an employee with a disability is a question that comes up often and no specific time can be set for all situations; the time to meet expectations with the accommodation(s) does need to be a reasonable amount so that the employee has a fair opportunity to improve.

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#### Alleged fraud/misuse

Circumstances come up from time to time in which it appears that an employee may not be using a leave accommodation for the purpose it was intended. This may be revealed through social media and cause frustrations among co-workers. It is important to keep emotions in check and handle with an interactive process – through discussions with the employee and the treating physician (if applicable).

#### ON THE HORIZON

Employers will continue to focus on pregnancy-related accommodations – for both normal pregnancies and those with complications. The Supreme Court remanded *Young v. United Parcel Service*, No. 12-1226 (U.S. S. Ct. March 25, 2015) to the Fourth Circuit, and the parties reached a confidential settlement agreement in early October 2015. In light of this case, the EEOC revised its enforcement guidance on pregnancy in June 2015. Additionally, many states have enacted laws that require employers to provide reasonable accommodations for pregnant employees. Pregnancy-related accommodations will continue to be a hot topic as employers follow these legal developments.

While substantial progress has been made, the laws have not always been easy for employers, acting in good faith, to interpret. What is challenging for employers currently is the practical application, especially with limited case law and enforcement assistance.

Furthermore, transgender situations may become relevant under the ADA/ADAAA. While assisting transgender employees with transitioning is not new for many employers, the heightened attention the issue has received in the media may lead to further developments. Most of the legal issues so far have been under Title VII, but it is likely for the ADA to come into play with reassignment surgeries.

## PRACTICAL POINTERS

It is critical for ADA compliance programs to include training especially for front-line managers. They must understand that an employee may not use magic words to request an accommodation – they need to recognize when an accommodation may be what an employee is requesting without using the word “accommodation.” However, these leaders do not need to handle the interactive process without help from internal (or external) resources; they should know when to seek further assistance.

Documentation throughout the interactive process is also very important. Each conversation or interaction must be captured. This information may be needed later when an accommodation needs modifying or is no longer applicable. It is also essential for defending allegations of disability discrimination. A best practice recommendation is to utilize a software program to record the interactive process activity.

Remember to engage your employment counsel – sooner rather than later – as you handle challenging accommodation situations.

*This material is for general informational purposes only and is not legal advice. It is not a substitute for advice from legal counsel. Please consult with your attorney before relying on any information contained within this article.*

## ADDITIONAL RESOURCES

**Summers v. Altarum Institute Corp., No. 13-1645 (4th Cir. January 23, 2014).**

<http://www.ca4.uscourts.gov/Opinions/Published/131645.P.pdf>

**The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities.**

<http://www.eeoc.gov/facts/performance-conduct.html>

**Young v. United Parcel Service, No. 12-1226 (U.S. S. Ct. March 25, 2015).**

[http://www.supremecourt.gov/opinions/14pdf/12-1226\\_k5fl.pdf](http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf)

**EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues**

[http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)