

Accommodate, Don't Terminate: Best Employer Practices For ADAAA Compliance

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Introduction

In 2008, the Americans with Disabilities Act Amendments Act (ADAAA) changed the conversation about employees with disabilities. Instead of focusing on if an employee was disabled under the terms of the original Americans with Disabilities Act, the new legislation ensured employers were centered around reasonable accommodations to help support employees in the workplace.

As a result, human resources departments may need to review extended leaves of absence more thoroughly for ADAAA compliance. Mishandling or refusing such accommodations could result in an employee-filed complaint with the Equal Employment Opportunity Commission (EEOC) or even a lawsuit for failing to accommodate a disabled employee.

Employers should not resort to terminating an employee without first considering all reasonable ADAAA accommodations. The cost to recruit and train a new employee — and defend a potential lawsuit — could be far more expensive than implementing a reasonable accommodation that enables an employee to return to work.

To help navigate the legal complexities associated with providing accommodations or reviewing policies to ensure ADAAA compliance, employers can enlist the help of a trusted ally: a consultant from their disability insurance provider. Consultants — such as vocational, nurse or mental health — can be provided by an employer's comprehensive disability insurance plan to help find the best solutions for complying with ADAAA regulations. A consultant can help evaluate employee illnesses and injuries on a case-by-case basis, making it easier to identify and implement the appropriate accommodations.

To avoid headaches and potential lawsuits, employers need to understand how to comply with the ADAAA. Avoiding these common mistakes — and learning some best practices — can help ensure compliance.

Mistake No. 1:

Policies Must Be Strictly Enforced To Be Fair To All Employees

From a human resources standpoint, an employer's chief concern is ensuring workplace policies are fair and unbiased for all employees. This often leads to mandating certain work policies without considering reasonable alternatives.

For example, an employer's policies may require employees to be fully able to perform their jobs after returning from a Family Medical Leave Act (FMLA) period. Although many employers may think otherwise, employees returning from a disability leave can be less than 100 percent healthy, yet still be productive. Strict return-to-work policies might conflict with the ADA.

Employers can avoid this conflict by allowing employees to return to work even if they aren't at full capacity. This includes reassignment to a new or temporary role prior to returning to their permanent position, or allowing the employee to work part time and gradually increase to full time. A consultant can oversee the graduated increase to ensure the employee is recovering successfully and to take some of the burden from the supervisor.



Best Practice Case Study No. 1: Telecommunications Field Technician

A telecommunications provider required 100 percent capacity of all its employees who returned to work following a disability leave. When one of its employees, a field technician, suffered a knee injury that kept him from his repair and customer service duties, the employer reached out to its disability provider to enlist the help of a consultant. The consultant helped the employer reassign the technician to a temporary position that was less physically challenging instead of requiring him to remain on disability until he was fully recovered. The consultant monitored his progress until he was able to resume his full duties.

Refusing to entertain reasonable accommodations for this employee could have resulted in a complaint or lawsuit. The cost to reassign this employee was reasonable — only \$800 — which covered the cost for a consultant to identify a temporary assignment. That's far less than the millions the company could have risked in legal action involving a large number of employees affected by strictly enforced policies that do not accommodate those with disabling conditions.



On The Flip Side: Interstate Distributor Company

The EEOC does sue on behalf of employees. **Former employees brought a class action suit against a nationwide trucking firm because of the company's restrictive policies under which they were terminated:**

- **Maximum leave policy** — Employees were terminated if they couldn't return to work after the allowed time off
- **"No restrictions" policy** — Employees had to return at 100 percent capacity

No reasonable accommodations were discussed or considered for the terminated employees. This black-and-white approach cost the company nearly \$5 million. The EEOC said this settlement showed a need for employers to have policies permitting paid and unpaid leave as a reasonable accommodation.¹

¹ U.S. Equal Employment Opportunity Commission press release. Available at: <http://www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm>. Accessed November 15, 2013.

Mistake No. 2:

Believing That Accommodating Employees Is Too Expensive

You've heard the expression, "It takes money to make money." Providing accommodations, devices and/or training to an employee returning from a disabling illness or injury can save employers money in the long term. In most instances, it's certainly less expensive than defending a lawsuit.

Employers can rely on the assistance of a consultant, who may be provided by their disability carrier, to help determine the best course of action for an accommodation. Consultants can help by speaking with an employee's medical team, getting input from all decision-makers, and sourcing vendors and equipment on behalf of an employer and its employee.



Best Practice Case Study No. 2: Library Employee

A library employee had custodial, courier and delivery duties as part of his job description. A traumatic injury to his thigh and shoulder resulted in difficulty lifting and walking, especially on inclines or while climbing stairs.

The library enlisted the help of a vocational consultant. **The consultant collaborated with the employer, employee and the employee's medical providers to implement accommodations that enabled him to return to the workplace, including using:**

- **Running boards to help him easily get into the delivery van**
- **A rolling cart to transport library materials**
- **A ramp to load the cart onto the van**

The total cost of these accommodations was less than \$3,500. The disability insurer paid \$2,255 for the consultant services. The employer paid \$1,059 for the equipment. These accommodations helped the employee regain full-time status in just four months.

In this case, the consultant's experience and knowledge helped find creative solutions the employer may have assumed were too expensive.



On The Flip Side: What If The Library Went Another Way?

What if the small library had taken the opposite approach and terminated the employee?

The ADAAA stipulates that employers don't have to provide accommodations that impose an undue hardship.² But proving undue hardship in court could be a challenge, which is all on the employer and is fact-specific. There's also very little case law on point to provide guidance since the ADAAA was enacted. It's imperative that employers consider all available funding sources, including tax credits,³ before coming to the conclusion that an accommodation is too pricey.

² 42 U.S.C. § 12112(b)(5)(A)

³ 29 C.F.R. § 1630.2(p)(2)

Mistake No. 3:

Staying Inside The Box

If a company is successful at making a product or providing a service, it's hard to deviate from that business-building formula. However, when a unique employee disability scenario endangers those time-honored procedures, an employer is challenged to apply creative thinking to accommodate the employee.

Best Practice Case Study No. 3: Food Production Company Employee

An employee at a national food production company underwent gastric bypass surgery to address her obesity. Her new, doctor-recommended eating schedule conflicted with her employer's policies, work schedule and production demands.

The company worked with a vocational consultant who conferred with the employee's physician and supervisor to develop an eating schedule that matched her break schedule. She returned to work after her short-term disability leave and was able to fulfill all her job requirements.

The cost of this simple accommodation was \$430, which covered the consultant's services. The low cost and positive outcome made it a win-win for everyone.

On The Flip Side: EEOC V. Resources For Human Development, Inc.

Sometimes a preconceived notion about an employee's health and abilities can be considered "staying inside the box." Consider the case of a 400-pound woman who was hired to oversee the daycare program of a treatment facility for chemically dependent women and their children. She gained weight over the course of her employment, weighing more than 500 pounds when her employer terminated her. The reason for her termination? Not her job performance, but her weight.

The case went to court, as the employee was able to perform her job duties even though the employer terminated her because it believed she was no longer mobile enough to do her job. The court decided that obesity was a qualifying disability under the ADA, and that the employer should not have terminated her based on its preconceived notions about the employee's inability to perform her job.

Obesity as a disability has been a topic of debate for years. Don't assume obesity and its related conditions are outside the ADA's reach. The EEOC's position is that obesity is an impairment, and it has taken employers to court for failure to accommodate obese employees. Courts differ on this issue, so check with your attorney regarding your local courts' decisions.

The Cost Of Obesity

Employers are becoming increasingly concerned about the health of their workers. Many companies are establishing "employee wellness committees" to encourage employee health and fitness. Roughly one-third of Americans are considered obese, and another one-third is considered overweight.⁴ Along with concern for their employees' well-being, companies have a financial stake in ensuring employee health: Studies estimate compensating for obesity costs employers nearly \$70 billion each year,⁵ which includes everything from health care costs to equipment to accommodate obese employees.

Employers need to start thinking creatively about certain disabilities and what accommodations can be made to comply with ADA. The EEOC has issued guidance about modifying workplace policies, including policies related to employees eating or drinking at their desks.

Health concerns including obesity and Type 2 diabetes are increasing, so this is something employers should consider. Restrictive policies such as the one imposed on the employee who had gastric bypass surgery should be evaluated and modified to accommodate disabled employees. One size does not fit all.

⁴ Centers for Disease Control and Prevention. Overweight and Obesity. Centers for Disease Control website. Available at: <http://www.cdc.gov/obesity/data/adult.html>. Accessed November 7, 2013.

⁵ Binole G. Employers bear the weight of obese workers. BenefitsPro website. Available at: <http://bit.ly/1duDchQ>. Accessed November 7, 2013.

Mistake No. 4:

Devaluing An Aging Workforce

Retirement at age 65 is no longer automatic. People are working longer, which could increase the total number of people with health conditions in the workforce. Some of these health issues could require ongoing treatment.

The baby boomer workforce challenges employers to address disabilities that may come with older employees. Devaluing the contributions of these workers can make an employer a target for the EEOC.



Best Practice Case Study No. 4: Band And Computer Teacher

A 63-year-old teacher who taught band and computer classes was diagnosed with Parkinson's disease, affecting his voice and manual dexterity. He had difficulty projecting his voice over the noise of a large classroom and had problems typing curriculum, grading, scheduling and handling other duties.

A vocational case manager from The Standard researched potential accommodations and found two that made the teacher's job easier. One was a vocal amplification system that allowed him to project his voice over the classroom noise. The other was dictation software to help him enter data with minimal use of his hands or fingers. The cost for the accommodation was \$1,898.

In this case, just a few modifications enabled the school district to retain a valuable employee.



On The Flip Side: Silk-Screen Company Employee

This example has a very different outcome and was the subject of a news release headline from the EEOC on Oct. 19, 2012: "DuPriest and Sons to Pay \$24,000 to Silk-screener Fired Because of Disability."⁶ The company terminated an employee of 38 years after he needed to start dialysis for kidney failure. As part of the settlement news release, the EEOC observed: "That the ADA isn't just about hiring qualified persons who may have some limiting health conditions, it is also about retaining and accommodating employees who may develop impairments while working, and who can still perform their jobs."

⁶ U.S. Equal Employment Opportunity Commission press release. Available at: <http://www.eeoc.gov/eeoc/newsroom/release/10-19-12.cfm>. Accessed November 15, 2013.

Mistake No. 5:

Not Asking For Help

Human resources managers deal with far more than disability claims and absence management issues. Although disabling illnesses and injuries might not come up often, they can be labor-intensive. **Effectively managing a disability claim may include:**

- **Obtaining medical documentation**
- **Researching possible accommodations**
- **Investigating alternative job placement**
- **Documenting the process**
- **Observing progress of employees who are being accommodated**

A consultant, or other representative from a disability insurer, can relieve the stress of these tasks from already busy human resources departments.

Best Practice Case Study No. 5: Academic Counselor

A consultant can be especially helpful when employees struggle with mental health issues. A university academic counselor was on leave because of depression, anxiety, fatigue and other related ailments. She wasn't in counseling because she hadn't found a professional with whom she felt comfortable. In addition to coping with workplace stress, she was starting a new treatment plan and medication.

With the employee's permission, a consulting psychologist — provided through the disability carrier — gave support and guidance, obtained clarification from the health insurance provider and reviewed the employee's psychiatric records to understand her limitations. The consultant referred her to the company's employee assistance program and offered tips on choosing a counselor.

Her employer allowed her to be off for the seven weeks she needed, and she successfully returned to work full time. The direct cost to her employer was \$757, which covered the cost of the consulting psychologist.



On The Flip Side: Criado V. IBM Corp.⁷

If IBM had taken a page from the previous example's playbook, a lawsuit might have been prevented. One of the company's well-performing marketing employees experienced personal and professional stressors that exacerbated some long-standing mental disorders. She took a three-week leave at her doctor's request to treat the condition. IBM refused to consider additional leave requests and terminated the employee, despite her doctor's belief that further leave would improve her condition. The case was taken to court, and the jury awarded the employee approximately \$450,000 in compensatory and punitive damages, which was reduced to \$300,000 to comply with applicable law.⁸

The cost of the consulting psychologist for the academic counselor was \$757. What would have been the result for IBM if it had identified some creative solutions, and possibly used a consultant, to accommodate this valuable employee?

⁷ 145 F3d 437 (1st Cir, 1998)

⁸ 42 U.S.C. § 1981a(b)

ADAAA Accommodations Can Help Retain Valuable Employees

Accommodating employees returning from a disability or other leave should be viewed as a solution, not a hindrance. Enlisting the expertise of a consultant to research ways to keep your employees working — or getting them back to work more quickly — can help you avoid costly lawsuits for ADAAA noncompliance. And it can help you preserve your most valuable assets: your employees.





About Sandy Johnson and Alycia Bleeker

Sandy Johnson is a disability and productivity consultant with the Workplace PossibilitiesSM program at Standard Insurance Company (“The Standard”). By meeting with employers and understanding their culture and needs, she matches consultants with employers and oversees services that help injured and ill employees stay at work and return to work as soon as possible.

As an attorney at Standard Insurance Company, Alycia Bleeker advises on compliance with disability discrimination laws, including the Americans with Disabilities Act (ADA/ADAAA), various privacy laws including the Health Insurance Portability and Accountability Act (HIPAA), state insurance laws, advertising laws and age discrimination laws.

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