

WELCOME TO

Reasonable Accommodation Training

Instructed by:

Connie Minton, RA & Leave Management Administrator
Washington State Department of Social and Health Services
Operational Solutions
Human Resources Division

P. O. Box 45830
Olympia, WA 98504-5830
Phone: 360-725-5813
Fax: 360-586-0503

Workshop Objectives

- How does the CBA affect reasonable accommodation?
- What are the important differences between the ADA and Washington Law Against Discrimination (WLAD)?
- What triggers my obligation to address a reasonable accommodation?
- What do I need to know to complete the Essential Functions portion of the PDF?
- If leave is a reasonable accommodation, how is it managed?
- When does the Department initiate disability separation?

Americans with Disabilities Act

“This Act is powerful in its simplicity. It ensures that people with disabilities are given the basic guarantees for which they have worked so long and so hard: Independence, freedom of choice, control over their own lives and the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”

President George Bush at the signing of the Americans with Disabilities Act of 1990

The ADA is civil rights legislation that works to increase the inclusion of people with disabilities in all aspects of community life, including employment.

The ADA prohibits covered employers (15 or more Employees) from discriminating against qualified individuals with disabilities in:

- Recruitment
- Hiring
- Firing
- Job Assignments
- Job Training
- Promotions
- Compensation
- Other terms, conditions and privileges of employment

Intent: Washington Law Against Discrimination (WLAD)

- The “law against discrimination” ...is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds. . .that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.
- RCW 49.60.10

WLAD prohibits employment practices on basis of:

- Race, Creed, Color, National Origin,
- Families with children, Marital Status,
- Sexual Orientation, Age, Veterans,
- Active Military Status,
- Sensory, Mental or Physical Disability, and
- Use of Trained Dog Guide or Service Animal.

Similarities Between The ADA & WLAD

- Prohibit discrimination against disabled persons; persons having a history of being disabled; and persons perceived as being disabled.
- Require employers to reasonably accommodate the known limitations of a qualified individual with a disability.
- Restrict disability-related inquiries and medical examinations in the pre-offer, post-offer, and employment stages.

Definition of Disability

ADA

- i.) A physical or mental impairment that substantially limits one or more of the major life activities of an individual (walking, seeing, hearing, breathing, learning, caring for oneself, performing manual tasks, working, speaking, reading, thinking, communicating, etc.);
- ii.) A record of such impairment;
- iii.) Or being regarded as having such impairment.
- iv.) Persons who associate with disabled individuals.
 - Substantial limitation of major life activity (not limited to current job).
 - Temporary and minor conditions are generally NOT included. However, if the impairment is episodic or in remission, it is a disability if it is substantially limiting when active.
 - Mitigating measures, other than ordinary eyeglasses or contact lenses, not considered when assessing disability.

The ADA Amendments Act (ADAAA) of 2008 became effective on January 1, 2009

The ADAAA retains the basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

However, the ADAAA:

Broadens the definition of “disability” by modifying key terms of that definition by:

- expanding the definition of “major life activities”;
- redefining who is “regarded as” having a disability;
- modifying the regulatory definition of “substantially limits”;
- specifying that “disability” includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active; and
- prohibiting consideration of the ameliorative effects of “mitigating measures” when assessing whether an impairment substantially limits a person’s major life activities, with one exception.

The ADAAA also:

- adds a new provision restricting employers’ use of qualification standards, tests, or other selection criteria that are based on uncorrected vision standards;
- clarifies that an individual who satisfies only the “regarded as” prong of the definition of disability is not entitled to “reasonable accommodation”; and
- modifies the language of the ADA’s “General Rule” that prohibited discrimination against “a qualified individual with a disability because of the disability of such individual” to say that discrimination is prohibited against “a qualified individual on the basis of disability.”

Definition of Disability

WLAD

RCW 49.60.040

The presence of a sensory, mental, or physical impairment that

- i.) Is medically cognizable or diagnosable; or
 - ii.) Exists as a record or history; or
 - iii.) Is perceived to exist whether or not it exists in fact.
- A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job.

Characteristics or Physical Traits May Not Be Disabilities

Simple physical characteristics

- Hair color
- Height
- Weight — morbid obesity under the ADA, physiological disorder and substantially limits a major life activity, WLAD always a disability because it is a physiological disorder
- Left-Handed

Physical conditions

- Normal pregnancy is not considered to be a disability. Although pregnancy-related medical conditions could be a disability if it substantially limits her ability to perform her job duties. Example: High risk pregnancy, susceptibility to miscarriage, weight and mobility restrictions, gestational diabetes, hypertension, etc.
- Predisposition to disease

Personality traits

- Poor judgment
- Quick temper
- Irritability

However, characteristics and traits may be disabilities if they result from a physiological condition. For example, it may be necessary to provide reasonable accommodation that minimizes an employee's exposure to stress when an employee's Multiple Sclerosis is exacerbated by stress.

Reasonable Accommodation

Reasonable Accommodations are adjustments or changes to a job, work environment, policy, practice, or procedure that allows a qualified individual with a disability an equal employment opportunity.

Reasonable Accommodations are required to:

- Provide access to the recruitment and application process.
- Allow an employee to perform the essential functions of the job.
- Ensure that employees have an equal opportunity to participate in and benefit from the benefits and privileges of employment.

Requesting Reasonable Accommodations

Generally, management is on notice that there may be a need to provide a reasonable accommodation when:

- ADA ~ The employee states they have a medical condition and there is a need for an adjustment or change at work.
- WLAD ~ Management is aware an employee has a condition that may require a change at work.

Requests DO NOT have to:

- Be made by the individual employee.
- Include medical or legal terms.
- Be in writing.

Interactive Reasonable Accommodation Process (IRAP)

Following the request for a reasonable accommodation, the employer engages the individual in an informal interactive process to:

- Obtain documentation (if needed) to verify the individual has the disability claimed and/or there is a nexus between the disability and the need for reasonable accommodation.
- Identify workplace barriers and assess the individual's abilities to perform the duties of the job.
- Identify possible accommodations and evaluate each for effectiveness.
- If more than one equally effective accommodation exists:

Taking into consideration the preference of the individual, management will select the accommodation that best serves the business needs and the needs of the individual.

- If unable to accommodate in current position, the department will attempt to identify an alternative position at or below the current salary range.

Reasonable Accommodation CBA

Collective Bargaining Agreement (CBA)

- Comply with state & federal law
- Comply with Governor's Executive Orders
- Decisions can be grieved
- The employer will acknowledge receipt of the request for reasonable accommodation or disability separation (WFSE)
- Begin processing RA request within 30 calendar days (WFSE)
- The Union is the exclusive representative

Reasonable Accommodation Disability Separation

Disability Separation (Department Initiated)

- Unable to reasonably accommodate in current position or alternative position
- Medical verification that employee is unable to work in any capacity
- Approval required by Reasonable Accommodation & Leave Management Administrator

Disability Separation (Voluntary)

- Employee submits request in writing
- Medical verification stating employee is unable to do present job
- The employer will acknowledge receipt of the request for reasonable accommodation or disability separation (WFSE)
- Approved by appointing authority
- Reasonable Accommodation NOT required
- Effective date determined by employee & appointing authority
- Cannot be grieved

Disability Related Questions, Medical Inquiries and Examinations

The General Rule:

- **An employer may ask disability-related questions and request medical examinations only if they are job-related and consistent with business necessity.**

Medical Inquiries and Examinations Pre-Offer (Recruitment/Application)

- General Prohibition
- Never ask questions that solicit information about the existence, nature, severity, or duration of a disability, even if those questions are job related.
- Exceptions
 - Requests for reasonable accommodation
 - Individual self-discloses disability
 - Obvious disability
- All hiring decisions should be based on an applicant's qualifications for the position.

Medical Inquiries and Examinations

Post-Offer Stage

- **Unrestricted Limitations**
 - Same medical inquiries made to all selected candidates for the job class.
 - Limits on how information is used.

- **Conditional Job Offer:** Only extended after candidate has met all prerequisites for the desired position.

- **Medical Inquiries/Examinations:** No restrictions as long as required of all selected candidates in the job class.

- **Rescinding the Job Offer:** It is the Department's burden to demonstrate that the reason for rescinding the offer was job related and consistent with business necessity, and the candidate could not be reasonably accommodated.

Medical Inquiries and Examinations ~ Employment

- Generally prohibited
- DO NOT request medical information if:
 - Disability is obvious and need for accommodation is apparent, or
 - Department already has sufficient documentation.
- Exceptions
 - Requests for reasonable accommodation.
 - Objective information exists to support a reasonable belief that an employee may have a disability that needs a reasonable accommodation.
 - Objective information exists to support a reasonable belief that due to a disability an employee poses a direct threat to the health or safety of self or others.
- Purpose is to verify that the:
 - Employee has the disability claimed, disability necessitates a reasonable accommodation.

Direct Threat Analysis

EEOC defines a direct threat as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

Four factors to consider:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

Any reasonable accommodations that would eliminate the risk of harm or reduce it to an acceptable level must also be considered.

Independent Medical Examination (IME)

The Department may pay for an independent medical examination when:

- There is a need for a second medical opinion (insufficient documentation from employee's treating physician).
- Objective evidence exists that there may be a need to provide a reasonable accommodation.
- Assess if employee poses a direct threat to the health and safety of self or others.

Genetic Information Nondiscrimination Act (GINA) of 2008

- Title II prohibits **genetic information** discrimination in employment, took effect on November 21, 2009.
- Prohibits the use of genetic information in employment, prohibits the requesting or requiring genetic information about applicants and employees or their family members.
- Genetic information, as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Confidential Information

Disability related information includes:

- Documentation from a health care professional.
- Information volunteered by the employee/applicant.
- Information about the reasonable accommodation process.

Department's responsibilities include:

- Appointing Authority or designee responsible for contacting, corresponding with, and receiving information from health care professionals.
- Maintaining medical information in a secure manner apart from personnel and supervisory files.
- Disseminating confidential information only on a need-to-know basis.

Confidential Medical Records

Who needs to know what?

<u>Who</u>	<u>What</u>
Supervisor	Restrictions on work and duties, and provisions of reasonable accommodation.
First Aid/Safety Person	Possible emergency treatment related to disability. Assistance evacuating building.
Government Investigators	Documents or dates regarding compliance with state and federal laws.

Qualified Individual With A Disability

- Can perform the essential functions of the job with or without a reasonable accommodation.
- Satisfies the requisite skill(s), experience, education, and other job-related requirements of the employment position.
- An individual may be required to have basic licenses or certifications required for a job, BUT it must truly be necessary to perform the job.
- You are not required to hire or maintain employment of a person who is not qualified (cannot perform the essential functions of the job with or without a Reasonable Accommodation).

Essential Functions

Essential Functions – What:

- Fundamental job duties of the position
- The reason the job was created
- Actually performed by employee
- The term does NOT include marginal functions of the position

Essential Functions – When:

- If a reasonable accommodation is being considered, essential functions **MUST** be identified on the PDF.
- As a best practice, essential functions on the PDF should be identified:
 - when a position is established
 - while a position is vacant
 - prior to interviewing
 - prior to any conditional offer medical examinations

Determining Essential Functions

- Generally essential functions are **WHAT** the complete task is, not **HOW** the task is completed. An essential function must really be a function, not merely a way of performing a function.
- **Criteria to consider:**
 - The position exists to perform that function
 - The function is highly specialized
 - Amount of time spent performing the function
 - Consequences of not performing the function
 - There are a limited number of employees available who could perform that function

Obligation to Provide Reasonable Accommodation

- The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. A limitation is not substantial if it has only a trivial effect
- Must have a substantially limiting affect upon the individual's ability to perform their job; the individual's ability to apply or be considered for a job; or the individual's access to equal benefits, privileges or terms or conditions of employment.
- Affects all candidates for employment and current employees (including probationary and non-perm).
- Is ongoing and may arise any time a qualified individual's disability changes or the duties of the job change.
- Applies to all aspects of the job including: recruitment, application, hiring, training, office sponsored events/parties, etc.

Reasonable Accommodation

General

Examples of what might not be reasonable accommodations:

- Eyeglasses
- Hearing aids
- Wheelchairs
- Personal assistants

Types of reasonable accommodations

- Job restructuring
- Leave
- Modified or part-time schedule
- Modified workplace policies
- Reassignment to a vacant position
- Provide or modify equipment or devices

Reasonable Accommodation

Job Restructuring

Job restructuring includes modifications such as:

- Reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability, and
- Altering when and/or how a function, essential or marginal, is performed.

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if they wish.

An employer may switch the marginal functions of two (or more) employees in order to restructure a job as reasonable accommodation.

Reasonable Accommodation Leave

Permitting the use of paid leave, or unpaid leave, is a form of reasonable accommodation.

Examples of reasons an employee with a disability may need leave:

- Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis), rehabilitation services; or physical or occupational therapy,
- Recuperating from an illness or an episodic manifestation of the disability,
- Obtaining repairs on a wheelchair, accessible van, or prosthetic device,
- Avoiding temporary adverse conditions in the work environment (for example, an air conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis),
- Training a service animal (e.g., a guide dog), or
- Receiving training in the use of Braille or to learn sign language.

Reasonable Accommodation Leave

FMLA and ADA

DSHS practice is to designate any leave needed due to a medical condition as FMLA (if the employee qualifies) prior to considering the leave under Reasonable Accommodation.

- EEOC takes the position that compliance with FMLA does not necessarily meet an employer's obligation under the ADA. *“Is not sufficient to show undue hardship”*.
- Other than FMLA protected leave, an employer may consider whether other reasonable accommodations may be effective in allowing the employee to work rather than granting leave.
- Return to work notification forms/letters should indicate employee's rights under RA.

Indefinite Leave Analysis:

- Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.

Reasonable Accommodation Modified or Part-Time Schedule

An employer must provide a modified or part-time schedule when required as a reasonable accommodation—unless the accommodation would pose an undue hardship. A modified schedule may involve:

- Adjusting arrival or departure times
- Altering or providing periodic breaks
- Altering when certain functions are performed
- Allowing an employee to use accrued paid leave
- Providing additional unpaid leave.

Reasonable Accommodation Modified Workplace Policies

It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations. Examples include but are not limited to:

- Dress code
- Allowing a service animal in the workplace
- Driving motor pool cars
- Personal heating and cooling devices
- Modifying leave or attendance
- Food and drink at their workstations

Reasonable Accommodation Reassignment

Reassignment to a vacant, funded position within DSHS must be provided to an employee who:

- Can no longer perform the essential functions of their current position, with or without reasonable accommodation.
- Is “qualified” for the new position. The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.
- Can perform the essential functions of the new position with or without a reasonable accommodation.

Vacant means that the position is available when the individual asks for reasonable accommodation, or will become available within a reasonable amount of time.

Obligation is agency statewide, however, employees may choose to limit the geographical scope of their search efforts.

Can not violate the rules of a seniority system.

Probationary employees should adequately perform the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment.

Reassignment is the accommodation of last resort. However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

Defenses for not providing a Reasonable Accommodation

Defenses:

- Individual does not have a disability.
- Individual's disability does not necessitate an accommodation.
- Individual is not a qualified person with a disability.
- No effective accommodations identified.
- Only effective accommodation poses an undue hardship.
- Individual declines the reasonable accommodation.

Undue Hardship

Undue hardship is defined as something that is unduly costly or extensive or disruptive or fundamentally alters the nature or operation of the Department.

Reasonable Accommodation Issues

Discipline and RA

An employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.

Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

Stress (Generalized Stress is not RA)

The stress associated with a position is considered as an essential function of that job.

In Hill v. Walker, (8th Cir. 2013), the court held that the State was not required to allow the employee, a Family Services Worker, to recuse herself from a particularly stressful case, since handling stressful cases was an essential job function.

Reasonable Accommodation Issues

Clash with Supervisor

- The employer is not required to change supervisors as a form of RA.
- ADA may require that supervisory methods may be altered as a form of RA.

Service Animals vs Comfort/Emotional Support Animals

- The court found that discrimination based upon use of service animal is only actionable where there is some evidence that the service animal has received individual training that distinguishes it from the ordinary pet.
- Where an animal is not specifically trained to assist a disabled person, it cannot qualify as a service animal under the statutory meaning and the claim of discrimination.
- Under the WLAD, as well as the ADA, a business (and presumably an employer) has the right to make an inquiry about whether an animal functions as a service animal when the circumstances suggest otherwise.
- Therapy dogs may qualify as service animal when trained to provide specific service for an individual with a disability.
- Comfort animals do not qualify as service animals. However, the employer must engage the employee in the IRAP to determine alternative RA. If there is no effective RA and the comfort animal is medically necessitated, the employer must consider allowing the animal at the workplace.
- Assistive animal must be trained well enough so as not to be disruptive in the workplace.

Reasonable Accommodation Issues

Alcoholism and Drug Addiction

Although alcoholism and drug addiction both are disabilities under the ADA, they are, in some respects, treated differently. An alcoholic is viewed as having a disability and may be entitled to consideration of accommodation if the individual can perform the essential functions of the job. In contrast, someone who is addicted to drugs is protected only if they are not currently using illegal drugs.

According to the Equal Employment Opportunity Commission (EEOC), “A person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if they are qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that they are not ‘qualified.’ ”

Reasonable Accommodation Issues

Illegal drug use is never protected, but recovering addicts are protected under the ADA. According to the EEOC's manual, "Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction, or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction." However, a drug test that shows the employee is using an illicit substance qualifies as "illegal drug use" and bars them from ADA protections.

In both cases, employers are allowed to hold the individuals to the performance standards applicable to their jobs, and an employer may prohibit the use of drugs and alcohol in the workplace and require that employees not be under the influence of alcohol or drugs in the workplace.

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