



ADA Live!

EPISODE 40: TOP 5 ADA TOPICS: NOTES FROM AN ADA SPECIALIST

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VOICE-OVER ANNOUNCER: Blog Talk Radio. (Music) Welcome to WADA ADA Live! Talk radio. Brought to you by the Southeast ADA Center, your leader for information, training and guidance on the Americans with Disabilities Act. And here's your host.

REBECCA WILLIAMS: Good afternoon and welcome to WADA ADA Live! On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University and the ADA National Network, welcome to the 21st episode of ADA Live.

My name is Rebecca Williams, and I am the Technical Assistance Specialist for the Southeast ADA Center. Our guest today is my colleague, Nancy Horton, the Technical Assistance Specialist for the Mid-Atlantic ADA Center. Today's topic is "The Top Five ADA Employment Accommodation Requests - Notes from an ADA Specialist." ADA listening audience, you can submit your ADA employment questions at any time on ADALive.org. Nancy, welcome to our show.

NANCY HORTON: Thank you, it's great to be here.

REBECCA WILLIAMS: Now, some listeners may be learning about the ADA. How about if we start with a definition of a qualified employee with a disability and then discuss the reasonable accommodation process?

NANCY HORTON: Well, a qualified individual with a disability is, is one who, this is a quote, satisfies the requisite, skill, experience, education and other job related requirements, unquote, of the job he has or is applying for. And who, with or without reasonable accommodations, can perform the essential functions of that job.

So, individuals with disabilities must first of all meet the basic legitimate job requirements just like individuals without disabilities. If a job requires a certain license, for example, or certain experience, generally a person with a disability is going to have to have that, just like anyone else.

But...employers that are covered by the ADA must provide reasonable accommodations to enable workers with disabilities to do three basic sorts of things. Apply for a job, and engage in that application process. Perform the essential functions of a job, once hired, and enjoy the same benefits and privileges of employment that a similar employee without a disability is entitled to.

So, reasonable accommodations can encompass a wide variety of things and what, what a reasonable accommodation is, is going to vary, depending on a number of factors. The nature of a person's disability, their needs, the job, the workplace, the operational needs of the employer, the resources available to the employer and a number of other factors. Accommodations could include things like providing equipment, assistive technology, making physical or structural modifications to facilities. Using accessible communication methods or techniques for people with disabilities like blindness or deafness, for example. Making adjustments in schedules, or granting leave, granting time off for workers who may need time off because of their disabilities.

REBECCA WILLIAMS: Wow, that's a great basis with which to begin this show. Now, previously, Nancy, you indicated to us one of the top five inquiries you get is about leave as an accommodation. I'd like to ask you some questions about leave. First of all, can an employer require an employee first use Family Medical Leave Act [FMLA] for leave time, before granting time off as an accommodation under the ADA?

NANCY HORTON: Generally, yes. I think there are a few things that are really important to, to know or to remember about the FMLA. When we start talking about leave, it often comes up, the FMLA is a very different law from the ADA. For one thing, not all employers that are covered by the ADA are covered by the FMLA. In the private sector, employers are covered by the ADA if they have 15, that's 15, employees or more. But only employers with 50, that's 50, employees are covered by the FMLA in the private sector. So you know, there are a lot of employers out there that are covered by the ADA, but they're not covered by the FMLA. Additionally, an employee must have worked a minimum amount of time for the employer before they become eligible to even possibly use FMLA. There are a great many workers across the country who are just not entitled to leave under the FMLA at all, but they may be [eligible] under the ADA. Where the FMLA is in play, it's pretty common for employers to require employees to, to use it up, it's an entitlement. It's a relatively

straightforward, how much leave you get, if you're eligible, what eligibility looks like, what reasons people can, you know, use to take leave, and, and all of that.

And very often, that leave will be considered to run concurrently with other types of leave that a worker might use. But...bottom line is, if employers are covered by both the ADA and the FMLA, they must comply with both.

REBECCA WILLIAMS: Thanks for that thorough answer, Nancy. Sounds like it could get a little tricky between ADA leave and FMLA leave. So probably the best thing, it sounds like, is for an employee to talk with their HR and find out which one of these laws applies to them, and then go from there.

Thanks a lot. Now I want to ask you, can an employer establish specific attendance and leave policies?

NANCY HORTON: Generally, yes. They can. Assuming that the policies themselves are not discriminatory or they're not applied in some kind of a discriminatory way, employers can have attendance and leave policies, but they still must consider requests for adjustments to those policies on an individual basis for workers with disabilities.

REBECCA WILLIAMS: Great, okay. Now the next question regarding leave is, is there a time limit as to how much time an employer must grant to an employee with a disability as an accommodation?

NANCY HORTON: Well, yes, but it will vary depending on a number of factors. Although, leave, as an accommodation under the ADA never has to be granted for forever, or even for an indefinite period of time, there has to be some reasonable expectation that the worker is returning at some point that can at least be estimated. Workers, doctors, and so forth are not always going to know exactly the day or the hour that a worker is going to be ready to return to work. But there does have to be some expectation. That's the purpose, really, of leave as a reasonable accommodation, is to enable an individual to do things like obtain treatments or surgeries or to recuperate or to attend some disability-related training or do something that will get them back to work. It's not just to give time off, it's to enable them to return to work.

But reasonable accommodation of any kind, including leave, is limited by what's known as undue hardship. Which means significant difficulty or expense. And this concept, like many in the ADA, is intended to be applied in an individualized way, in a specific situation, and based on real life, real world factors. Not on bias, and stereotypes, and so forth.

So, what will impose an undue hardship on an employer in one situation may not in another. This can vary from employer to employer or even within the same workplace from one situation to another.

Some absences can be accommodated relatively easily, even for extended periods of time. While others can place a real strain on the workplace and involve things like difficulty and expense. Which leads to hardship on an employer in some cases.

Now the U.S. Equal Employment Opportunity Commission or EEOC, which regulates the employment provisions of the ADA, believes that an employer should not have an absolute no fault, what's often called a no fault leave policy.

For example, a maximum of six months of leave and that's all an employer will give anybody under any circumstances for any reason and the employee who needs six months and one day of leave is terminated.

The EEOC says that employer should look at all the relevant factors, can they really cover for that employee and hold his job for that one more day? And make these sorts of decisions on a case by case basis. I should note, though, that not all courts who have decided ADA cases have necessarily agreed with EEOC's positions.

REBECCA WILLIAMS: Great information for our listeners, Nancy, thanks. One last question in regards to leave as an accommodation, what happens if an employee can't return to work at the end of the agreed upon leave?

NANCY HORTON: Well...that's going to really depend on what's really going on at that point. Whether the employee simply needs more leave and if so, how much, and whether that is reasonable. Although, repeated requests for leave extensions can, at some point, basically become requests for indefinite leave, generally just not considered reasonable, because of this idea that an employer is, is entitled to some expectation of return.

I do like to kind of remind and encourage employers and employees to think about accommodations other than full time leave. That might enable the worker to return, at least on some basis. This is really always an option. Even when an employee starts out by just asking for a block of leave time, you know, I need six weeks, I need two months, I need two weeks of time off. An employer can certainly consider and possibly utilize other options or combinations of options where possible, to enable a worker to, to remain on the job or remain in the workplace or to continue to work at least to some extent. Options might include things like working part time, flexible scheduling or any other type of accommodation.

So, sometimes folks tend to get their mindset on kind of an all or nothing, you know, block of leave and, and forget to kind of think whether there may be other options that might balance, balance the leave time. But, if an employee does reach a point where additional leave is, is really what they need, and it's an undue hardship for the employer, it's reached a point where it really is an undue hardship for that employer to hold that job any longer. Or there's a point where it becomes clear that additional leave is not going to enable the employee to return to the job, even with any kind of accommodation, at any point. The employee has just reached a point where they are no longer qualified for the job, basically. Then what the employer needs to do is consider reassignment to a vacant position, if there is one that the employee is qualified for.

REBECCA WILLIAMS: ADA Live! Listening audience, if you have a question about the ADA and reasonable accommodation for employee, please submit it at any time at our online forum at ADALive.org. And now, a word from our sponsors.

VOICE-OVER ANNOUNCER: The Mid Atlantic ADA Center, administered by TransCen Incorporated, serves the states of Delaware, Maryland, Pennsylvania, Virginia and West Virginia, as well as the District of Columbia. Our staff and expansive network of affiliates provide information, materials and a variety of training programs ranging from webinars to workshops. Additionally, our information specialists are available to respond to specific questions from businesses, architects, employers and other individuals interested in the Americans with Disabilities Act. Call 1 800 949 4232 with your questions.

REBECCA WILLIAMS: Nancy, before our break, you mentioned that reassignment to a vacant position can be an accommodation. That's a great segue to my next question about reassignment. Who decides what position an employee will be reassigned to?

NANCY HORTON: Well, like all accommodations, the employer makes the initial decision about what accommodation to provide. Reassignment is no different. An employee always has the option of challenging an employer's decision if the employee believes that that decision has been discriminatory in some way, the employee can file a complaint and so forth. But, I like to make note that reassignment, like all accommodations, has to be effective. So...an employee should be reassigned to a vacant job that is, is most comparable to his current job.

REBECCA WILLIAMS: Okay. Makes sense. Now, does the employee have to be moved to a position with the same pay rate?

NANCY HORTON: If possible. A reassignment should be to a position that is as equivalent as possible, in all ways. Pay, status, benefits, location, et cetera. However, an employer never has to create a job as a reasonable accommodation. A job has to

actually exist. And it has to be vacant at the time, or within some short foreseeable period of time.

For instance, maybe the employer knows that someone is retiring next week and that job would be the perfect job for this reassignment situation. But, if the only job that's vacant, and for which the individual is qualified, is a lower paying job, then the employer may reassign the individual to that job. That's the only job available. A person gets paid for the job they're in, not the job they used to be in.

REBECCA WILLIAMS: And that may come as a surprise to some people who have asked for reassignment. I'm glad you clarified that for folks. The last question I have regarding reassignment deals with seniority systems. Many employers have seniority systems. Does this affect reassignment?

NANCY HORTON: Yes, yes, it does. If there is a seniority system in place, and it is followed consistently, without exception, then it doesn't have to be set aside in order to provide a reassignment or an accommodation to a worker with a disability. The worker with a disability can't leap frog over another worker who has seniority. Seniority does trump where it is in place legitimately.

REBECCA WILLIAMS: Another good point to make our listeners aware of. Thanks a lot, Nancy. You've provided us quite a bit of valuable information, Nancy. Before we continue, here's a word from our sponsors.

VOICE-OVER ANNOUNCER: The Southeast ADA Center is your leader in providing information, training and guidance on the Americans with Disabilities Act and disability access tailored to the needs of business, government and individuals at local, state and regional levels. The Southeast ADA Center, located in Atlanta, Georgia, is a member of the ADA National Network and serves eight states in the Southeast region. For answers to your ADA questions, contact the ADA National Network at 1 800 949 4232.

REBECCA WILLIAMS: Welcome back, listening audience, we are speaking today with Nancy Horton, Technical Assistance Specialist with the Mid-Atlantic ADA Center, on "The Top Five ADA Employment Accommodation Requests.". Next on our list is accessible or reserved parking. Nancy, can an employee use the accessible parking that is meant for business customers as an accommodation?

NANCY HORTON: Well...let me start by saying that an employer's obligations to provide reasonable accommodations to workers with disabilities is a separate and different issue from any obligations that they may have to ensure access to any parking facilities they provide for general use or the use of customers.

So, I think maybe a simple example will help kind of illustrate this, this concept. Let's say an employer, which is a private business, that's also covered by Title III of the ADA, which governs the business-customer relationship, let's say this is a retail store. They build a brand new store with one, big, large parking lot that's intended to be used by both customers and employees.

That parking lot, because of Title III, will have a certain, specific number of accessible parking spaces, based on the total number of spaces in the entire lot, and those accessible spaces will have very specific dimensions and features. Now, based on statistics and research and building codes, and so forth, we can expect that those parking spaces will generally meet the needs of the population.

But sometimes the needs of an individual employee are not met. And the employer, under Title I of the ADA, owes an employee with a disability an individualized reasonable accommodation. So, sometimes an employer may have to take additional measures to provide reasonable accommodations.

Now, they still want to meet the needs of their customers, of course, so, to make sure that they accommodate their workers, they might do things like designate additional accessible spaces. They might allow an individual employee to park in a different location that's not available to the general public. Maybe around back or something. So that employee can get into the workplace. They might reserve a space for an individual employee that isn't really a true, what we would call an accessible space, but it's close to the entrance. And that's what meets the individual employee's needs.

There are lots of people with disabilities who use accessible parking, they have accessible parking permits, because they need to be as close as possible to entrances. They might be ambulatory people, they don't use mobility devices, like wheelchairs or walkers, but they might have something like a heart condition or a lung condition or some other disability that limits their stamina, for example. Maybe walking long distances is problematic.

But they might not necessarily need the extra width that an access aisle creates at an accessible parking space. They may be able to step up over a curb or park on a surface that has a slope that wouldn't be allowed in a true accessible parking space.

The point is that reasonable accommodation is an individualized thing. It's about meeting the needs of a specific worker. And so, the limit is undue hardship, not how many accessible spaces the ADA standards or the building code calls for in a parking lot. So...you know, the common situation is employees and customers are using the same spaces. It's first come first serve. But if the needs of employees are not being met, then the employer needs to look at that as a potential reasonable accommodation issue and move that to a new level.

REBECCA WILLIAMS: So that answer looked at when employees and customers may be using the same parking facility. Is the situation any different when an employer has one parking facility for employees and another for customers only?

NANCY HORTON: Well...it could be, but it might not, parking facilities can be restricted, and it's not uncommon for them to have restrictions of various kinds, you know, customers only, employees only, time limits, cost factors. And that's fine. Employers and businesses can place restrictions on facilities and have different parking lots for different populations, as long as they provide accessibility for those different groups. If they've got an employee only lot, it should have this minimum number of spaces available. It should have an accessible route to get to the building, the entrance, wherever people are going. This is just this basic concept of equal opportunity, based on whatever group you belong to. Nevertheless, this obligation to provide individualized reasonable accommodation for employees is kind of a layer on top of these basic provisions.

So, there could be a case where parking even in an accessible space, in an employee lot doesn't meet an individual employee's needs and the employer may have to consider, should they designate an additional space in the customer lot? Should they look at some of these other options to try to make sure that the individual worker is accommodated?

REBECCA WILLIAMS: What would happen if an employer doesn't provide parking for employees? Are they still required to provide parking for an employee with a disability as a reasonable accommodation?

NANCY HORTON: That's a very good question. It's an excellent question, one that continues to be debated by employees, and employers, and courts even. Many would argue, and the EEOC would point this out as well. The ADA really only requires an employer to provide equal opportunities in relation to the terms, the benefits, the facilities, that it provides, that it generally provides. So that is parking for anyone? They wouldn't have an obligation to provide it for a worker with a disability.

But at least one court, a court in New York, actually, did rule that an employer had an obligation to provide paid parking, in a, you know, garage in town, for an employee with a disability even though it didn't do anything like that for employees in general and the court reasoned that was the only way the employee was going to be able to get to work. So, the employer had to do that. So, that is out there. This is not a question that has a real clear cut answer.

REBECCA WILLIAMS: Okay, thanks for that clarification. Now what if an employer provides employee parking in a facility owned by somebody else? Let's say they rent

space in a parking garage. Who, in this instance, would be responsible for providing accessible or reserved parking for an employee as an accommodation?

NANCY HORTON: Well...an employer is always the entity that's responsible for reasonable accommodation for workers. The owner or operator of the parking garage may have obligations of their own under Title II or Title III of the ADA, for example, in terms of ensuring that the parking garage is accessible. It has accessible parking spaces, and so forth. But it has no additional obligation to provide a reasonable accommodation to someone else's employee. So, depending on what the individual worker needs, the employer may be able to make some sort of arrangement with the garage, pay some additional fee or make arrangements to make some type of modification within the garage, restriping, signage, what have you, to allow the employer to meet its obligation to accommodate the worker.

REBECCA WILLIAMS: I don't know about you, Nancy, but I received good questions about parking as an accommodation. Your information should help employees and employers understand this requirement as it pertains to parking facilities. Now I have just one last question about parking as an accommodation. If an employee requests accessible parking or reserved parking and they already have a state issued accessible parking permit, can an employer require additional medical documentation to support this request?

NANCY HORTON: Well...I guess that would depend on why the employer thinks that it needs some different or additional information. Usually, when a person already has a state issued accessible parking permit and can prove it was issued to them, not their dead grandmother or something and it's current, most employers will accept that as evidence of disability and the need for accessible parking because, after all, the person has established, to the satisfaction of the state, by providing medical documentation from a qualified professional, that they need accessible parking. But...I suppose there could be a scenario where an employer has some valid reason to either question why the individual's needs aren't being met under current conditions, you know, knowing what they know about their facilities and so forth, or maybe to suspect that the individual doesn't actually need what they're asking for. When it comes to request for reasonable accommodations, an employer generally does have the right to get documentation to show that an individual has a disability as defined by the ADA and that they need what they're asking for because of that disability.

If either or both of those things are not obvious, an employer can get documentation. No more than that though, just that basic information.

So again, most employers would generally accept the permit, the placard, if parking is really the issue on the table. So, I can't imagine why they wouldn't, but...maybe there's a, maybe there's a scenario out there.

REBECCA WILLIAMS: Who would have thought accessible parking as an accommodation could get so complicated. That's a great deal of excellent information for our listening audience.

Our time for this show is up. I would like to thank Nancy Horton from the Mid Atlantic ADA center for joining us today and sharing such a wealth of information. Thank you also to our ADALive! listening audience. The Southeast ADA Center is grateful for your support and participation in this series of WADA, ADALive! broadcasts. You may submit questions about any of our ADALive! topics by going to [www.adalive.com](#) if you have questions about the Americans with Disabilities Act, please contact your Regional ADA Center at 1 800 949 4232. Once again, that's 1 800 949 4232. All calls are free and confidential.

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We hope you'll join us next month on ADALive! as we continue our conversation with Nancy Horton of the Mid Atlantic ADA center on the top five ADA employee accommodation requests. See you then!

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