ADA Dos and Don'ts for Savvy Employers

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Presented by
Mark Baugh, Esq.
Nashville

Jodi Taylor, Esq.
Atlanta
ADA Compliance – New Challenges

• 26 years
• ACA
• Aging population
• Expanding definitions and treatments of “disability”
• Expanding landscape of what should be accommodated
• Increased drug use, increased drug testing, increased exposure
Dos and Don’ts for Savvy Employers

- Drug Testing Policies
- Website Accommodation
- Court Decisions Regarding Accommodations
- Wellness Programs
Americans with Disabilities Act

- Covers all employers, including State and local, with 15 or more employees.

- Prohibits 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.

- An “individual with a disability” is a person who:
  - Has a physical or mental impairment that substantially limits one or more major life activities
  - Has a record of such impairment; or
  - Is regarded as having such an impairment.

- Definition of “disability” should be construed in favor of broad coverage to the maximum extent permitted.
ADA cont.

• Reasonable accommodation may include, but is not limited to:
  – Existing facilities used by employees should be readily accessible to and usable by persons with disabilities;
  – Job restructuring, modifying work schedules and/or reassignment to a vacant position;
  – Acquiring or modifying equipment or devices; and
  – Adjusting or modifying examinations, training materials or policies and providing qualified readers or interpreters.

• Must reasonably accommodate if it would not impose an undue hardship on the operation of the employer’s business – does not mean lower standards.
ADA and Substance (Drug/Alcohol) Testing

- ADA does not protect employees currently using illegal drugs
  - Employees who use drugs/alcohol required to meet same standards/conduct set for other employees
  - Does not restrict employers from testing applicants or employees for illegal drug use or making employment decisions based on verifiable results
  - Testing for illegal drug use is not considered medical examination under ADA
    - not required to show administration of test is job related or consistent with business necessity
  - Does not protect casual drug users
  - Employers may discipline, discharge or deny employment to an alcoholic where use of alcohol impairs job performance
So, No ADA Implications on Substance Testing -

WRONG!!

- ADA prohibits discrimination against rehabilitated drug addicts or those currently in treatment
- ADA requires reasonable accommodations extended to rehabilitated drug addicts or those undergoing treatment
- Alcoholism may qualify as “disability” under the ADA
- Medical Marijuana
- Prescription Medications
- Cannot use drug testing to identify/screen disabled employees
Dos and Don’ts Checklist re Drug Testing

DO
• Consistently apply drug test requirements to all applicants/employees
• Uniform treatment of all employees who test positive
• Provide reasonable accommodations to employees seeking substance abuse treatment

DON’T
• Discriminate against employees currently in substance abuse treatment or rehabilitated addicts
• Test for prescription drugs unless there is a business necessity for doing so
• Make employment decisions based on health information obtained through drug test (i.e. insulin detected – terminate diabetic employee)
Website Accommodation

• Current split on whether Title III of the ADA (public accommodation) extended to include non-physical locations

  – Courts in the 9th, 3rd, and 6th Circuits found Title III only applies to discrimination occurring at a physical place or somewhere with a sufficient nexus to a physical place. In other words, any alleged accessibility problems with a website would have to impede an individual’s access to a “specific, physical, concrete space” to violate Title III. Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

  – Other courts have held that Title III applies to websites, even in the absence of some connection to a physical place. The 1st, 2nd, and 7th Circuits have all held that Title III can apply to the sale of goods or services via websites. See, e.g., Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n, 37 F.3d 12 (1st Cir. 1994).
Does This Apply to Employers?

- Electronic Employee Handbook
- Web-based payroll, benefits, etc.
- Access to electronic screening tools, pre-employment tests, training, etc.

Are these accessible to disabled employees?
Dos and Don’ts Checklist re Website Accommodation

DO

• Ensure all handbooks, notices, payroll, training, etc. are available electronically and in another form
• Provide necessary accommodations to electronics allowing disabled individuals access to employment information
How are Courts Treating the ADA?

1. Opening the Door for Unpled Accommodation Claims.

   - *David Donaldson v. Texas Department of Aging and Disability Services*, No. 01-14-00736-CV, 2016 WL 2731675 (Texas App., May 5, 2016)
     - Plaintiff/employee claimed he was terminated after he began prostate cancer treatment in violation of the ADA
     - Court dismissed his disability claim, but allowed the case to proceed on the grounds that employer failed to provide reasonable accommodations
       - Although not specifically pled, the Court found that plaintiff’s accommodation claim overlapped the discrimination claim and allowed it to proceed

- Plaintiff/employee sought accommodations of his shifts to care for his son’s disability
- California Court of Appeals found that California's Fair Employment and Housing Act imposed accommodation requirement on employer
  - Protects disabled employee and their association with another who has a covered disability
  - This case requires accommodation of a disabled employee, *and* his or her disabled relatives
3. **Good Outcomes for Good Behavior!**


  - Driver/employee injured on job; exhausted medical leave; turned down other employment opportunities with the company, and ultimately terminated

  - Following a jury trial on his ADA claim, jury found the employer engaged in interactive process regarding reasonable accommodation and did not violate ADA

  - Employer’s efforts were well-documented and consistent with applicable policies
Dos and Don’ts Checklist re Recent Court Decisions

DO
• Prepare and maintain good records showing interactive process for reasonable accommodation
• Proactively discuss accommodations with employees who may have a disability, even if not specifically requested
• Consider accommodations for care of a disabled relative (likely limited to California only)

DON’T
• Discount accommodations – Courts may invite claim even if plaintiff fails to plead
Wellness programs: comprehensive health services offered by employer to employees (i.e. discounted gym memberships, health screenings, wellness newsletters)

- Promote healthy lifestyles
- Prevent worsening/onset of illness
- Increased productivity: keeps employees healthy and happy
- Reduced medical costs for employer
ADA Implications on Wellness Programs

- Inquiries into disability
- Medical examinations
- Increased premiums/reduced coverage
- Coercive
EEOC Guidance

• Covers employers with 15 or more employees
• Apply to all wellness programs
  – ADA limits do not apply if there is no disability inquiry or medical examination under the wellness program
• Limits financial inducement
• Participation cannot be required
• Cannot deny access to group health benefits if employee refuses to participate
• Prohibits discrimination/retaliation against employees who do not participate
• Provide notice detailing medical information obtained
• Smoking cessation programs
Dos and Don’ts Checklist re Wellness Programs

**DO**

- Confirm any financial inducement to participate in wellness program complies with EEOC regulation
- Provide notice detailing medical information (what is obtained, how it will be used, etc.)

**DON’T**

- Require participation
- Deny access to group health benefits
- Discriminate/retaliate
Final Dos and Don’ts

- Do review your policies to ensure prescription drug testing applied fairly and uniformly as to all applicants/employees
- Do provide accommodation for employees seeking substance abuse treatment
- Do be aware of state laws regarding medical marijuana use
- Do provide access to all employment policies, training, etc. through web-based and more accessible programs or provide necessary accommodation to electronics
- Do engage in an interactive process for accommodation and maintain detailed records of the process
- Do review your wellness programs to ensure compliance with the new EEOC regulations
Final Dos and Don’ts

• Don’t forget to ask any questions regarding this presentation – now or off-line

Mark Baugh: 615.726.5760, mbaugh@bakerdonelson.com

Jodi Taylor: 404.589.3413, jtaylor@bakerdonelson.com