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Your Disability Compliance Program:

Building a Transparent Process that Fosters Trustworthiness



By Rachel Shaw

Disability compliance work is hard. To do it well you must be knowledgeable, skilled, disciplined and remain open and compassionate. Building a transparent disability compliance program within your organization is not only key to creating solid relationships between employees and employers, but is also important when legal issues arise. With the latter, all too often, not enough has been said between the parties in an open forum or formal process — and, too much goes undocumented.

A successful disability compliance program is strategically developed and staffed, consistently applied and appropriately documented for maximum transparency for all parties involved. Simply put transparency = communication. A

transparent interactive process means no one should be surprised by the outcome reached. It means all parties understand what the next step is – and the step after that.

Employees enter the Americans with Disability Act (ADA) disability interactive process for different reasons – from known impairments and work related injuries to psychological disabilities and excessive leave use. Regardless of why an employee enters the disability interactive process, an organization's job remains singular: to employ a process that will support you to find and implement reasonable accommodations. Having a standardized disability interactive process ensures your methods are fair and defensible. A uniform process also builds trust with your employees as they will have

a better understanding of what to expect and know they are being treated the same as others.

A way to ensure you are in compliance with the ADA is to follow a method I call the Disability Interactive Process Hallway™. This hallway is a figurative hallway with four doors. You make your way down the Hallway and through the doors, or key process steps. At each step you are gathering the data you need to support sound decision-making, while also building understanding between employees, their representatives and supervisors. At each step, or door, you are also developing and sharing information needed to memorialize your good work. These four steps produce four key documentation opportunities.

The Hallway always starts with Door #1: gathering data. Don't be afraid to spend the time needed at this door to gather objective information on specific work restrictions leave needs and the duration of such. Ensure you have a documented and sharable clear understanding of the essential functions of the particular job or classification. This step allows you to take an emotional issue – their disability's impact on their job – and make it factual and focused on information. Ultimately the decision isn't based on what you "want to do" or "are willing to do," but on what accommodations are reasonable to be implemented. It becomes a data-driven decision, not an emotional one.

To gather this data, create a questionnaire for the employee to have their health care provider complete. This will not only speed up the process, but guarantee better information sharing. For example, restrictions such as "no heavy lifting," can be ambiguous and can result in opinions that knowingly, or unknowingly, rely on prejudices or positions. Decision-making is easier when information is clear. If you are able to establish from a medical provider a work restriction of "no lifting over 10 pounds when lifting with the right hand or left hand individually, and when lifting with both hands, can lift 20 pounds," lifting is no longer an estimation or guess, it is a fact. If you know the job traditionally requires the employee to lift with right and left hands and with both hands, you can now compare the restriction to the traditional requirement to see if accommodations are needed. If there is a conflict between what is traditionally done in the job and the limitations imposed, you move down the Hallway to explore if accommodations would be reasonable to implement.

Employers are recommended to create Essential Function Job Analyses to document the traditional physical, mental and emotional demands required to perform the essential functions of a position. Having this created in a document will deescalate the emotions of a situation by allowing the parties to compare restrictions with job requirements. It allows

employees to also see they are being evaluated equally with other employees in their job title.

Sometimes you will get stuck at Door # 1. For example, if an employee's health care provider will not provide the level of clarity to take ambiguous restrictions such as "heavy lifting, repetitive bending, no undue stress" and make them clear – you may need to consider a Fitness for Duty Examination to gather this data as it is critical to moving down the Hallway.

Door #1 Key Documentation Opportunities:

- Letter of Introduction – as you enter Door #1, you share verbally (telephonically or in-person) why they are in the Hallway, what the governing laws and regulations are, what they can expect from you and how you will need their support in the process. Then you send a letter documenting this verbal exchange.
- Medical Supplemental Questionnaire and Cover Letter - Develop a letter and questionnaire for the employee's health care provider. This will explain to the provider why they are getting this letter and questionnaire, what the ADA allows of you as the employer, and directions on returning the questionnaire.

Door #2: Research and Exploration of Accommodation Ideas, is where accommodation options are sought, researched and evaluated. This is not where decisions are made. It is when ideas are researched, and options are looked at with the goal of arming decision makers with the best information to use when making reasonable accommodation decisions. Information is shared with the employee, supervisor and others such as the organization's attorney, a workers' compensation carrier, the Job Accommodation Network, or disability consultants to identify additional accommodation options. It is here you create a report of feasibility including costs, and availability of accommodation ideas gathered.

Conversations at Door #2 are especially powerful. As you enter this door, you will make sure the data gathered at Door # 1 has been shared with the employee. Specifically, the questionnaire and Essential Functions Job Analysis or Job Description. Talk with the employee about the results, make sure they understand how you are interpreting the results. If the restrictions seem significant, make sure the employee is aware of this impression. While decisions are not made at this door, you will need to ensure the employee understands the weight of the opinion so they are prepared for the possible outcome of the Hallway. A clear and direct conversation about how the restrictions are seen by the employer also ensure that if the employee does not agree with the restrictions as clarified, it is addressed here, and not after a meeting where an accommodation was not able to be offered.

Door #2 Key Documentation Opportunities:

- Share the Essential Functions Job Analysis (EFJA) and completed questionnaire(s) with the employee via email or mail.
- Hold a brief and informal meeting or call to share the EFJA and medical information to ensure the employee has a clear understating of how the work restrictions are understood by the organization and if conflicts exist with demands of the position, let them know now. Though it might be frustrating when employees "miraculously heal" when they understand limitations are problematic, it is far better to know this information earlier in the Hallway and before you have wasted the time going up and down the Hallway multiple times. If you have concerns that the medical opinion(s) received at Door # 1 is not accurate or are unsure which opinion is accurate when employees submit revised questionnaires, you can also confirm what is true by conducting, and paying for, a Fitness for Duty Examination.

Door #3 is where you schedule and prepare for the upcoming reasonable accommodations meeting. The upfront work to schedule a

meeting is critical. You need to make sure the right people are in the meeting, including the decision makers. Some organizations hold meetings telephonically as personnel are spread across the country, other employers have face-to-face meetings. The latter is always better as more “yesses” come when parties are looking each other in the eye and listening to each other share accommodation ideas.

Door # 3 includes holding the reasonable accommodations meeting and documenting the discussion and decisions made in a notes document. During the meeting the employer needs to take notes on the discussion items. Before the parties leave the meeting, the drafted notes document should be passed out to all participants; edits are then gathered from all parties and inputted into the drafted document. Once all requested edits and additions are made they are finalized and one copy is sent around the table for initial and signature.

Taking notes and requesting signatures at the end of the meeting is a critical. It will best protect you by providing a real-time document of what was discussed, what agreements or disagreements occurred, and why accommodations were deemed reasonable or not by the employer. Though it will take more preparation and effort to finish the meeting with signed notes, you will never regret the additional work.

Door #3 Key Documentation Opportunities:

- Meeting Notice: This document needs to include more than just the date, time and place of the meeting. It should outline what data will be relied on such as the Essential Functions Job Analysis, and work restrictions that were clarified at Door # 1. It should also include any research done at Door #2 and list the possible outcomes of the meeting – including modified work, alternative work placement, an extended leave of absence, retirement, or medical separation.
- Meeting Notes: This document captures both the reason for the meeting including

circumstances, the events that triggered the process as well as all pertinent documents such as the Essential Functions Job Analysis, and work restrictions that were clarified at Door # 1. This is your “catch” documentation tool. If there was additional work done in the Hallway, but there was not a letter to memorialize these activities, add the good work you did in the notes document and to summarize what came before the meeting.

In the end you arrive at Door #4 where you implement decisions and close the process properly. This is the step in which the organization ensures the actionable items and next steps outlined in the meeting notes are performed as promised. This is where you complete necessary follow up, and support the implementation of accommodations, medical separation or retirement activation. It is at this Door you make sure you have collected all of your call logs, copies of emails and medical notes, professional recommendations, summaries of events and any other documentation. If litigation or other post-meeting evaluation work ensues, you’ll have a great documentation trail.

Door #4 Key Documentation Opportunities:

- Final Closing Letter: If important work happens after the meeting, document this with a brief interactive process closing

letter. Don’t let any of your good work go undocumented. Unfortunately, the adage of “if you didn’t document it, you didn’t do it” never rings more true than in the ADA Disability Interactive Process.

Maintaining a transparent disability interactive process means the process is laid out for the employee at the beginning, and at every door, there is regular communication to underscore what was accomplished, and where the parties are proceeding to next. It leads the parties, confidently, down the Hallway together. This supports employers to find “yesses” when accommodations are reasonable to implement and when accommodations are not reasonable – it helps employees understand and potentially accept a difficult outcome. **HR**



Rachel Shaw is the principal consultant of Shaw HR Consulting, a Human Resources firm specializing in providing employers with a full range of Disability Compliance Management consulting and training services to support their compliance with federal and state disability and leave laws. Rachel is also the author of “The Disabled Workforce: What the ADA Never Anticipated.”

