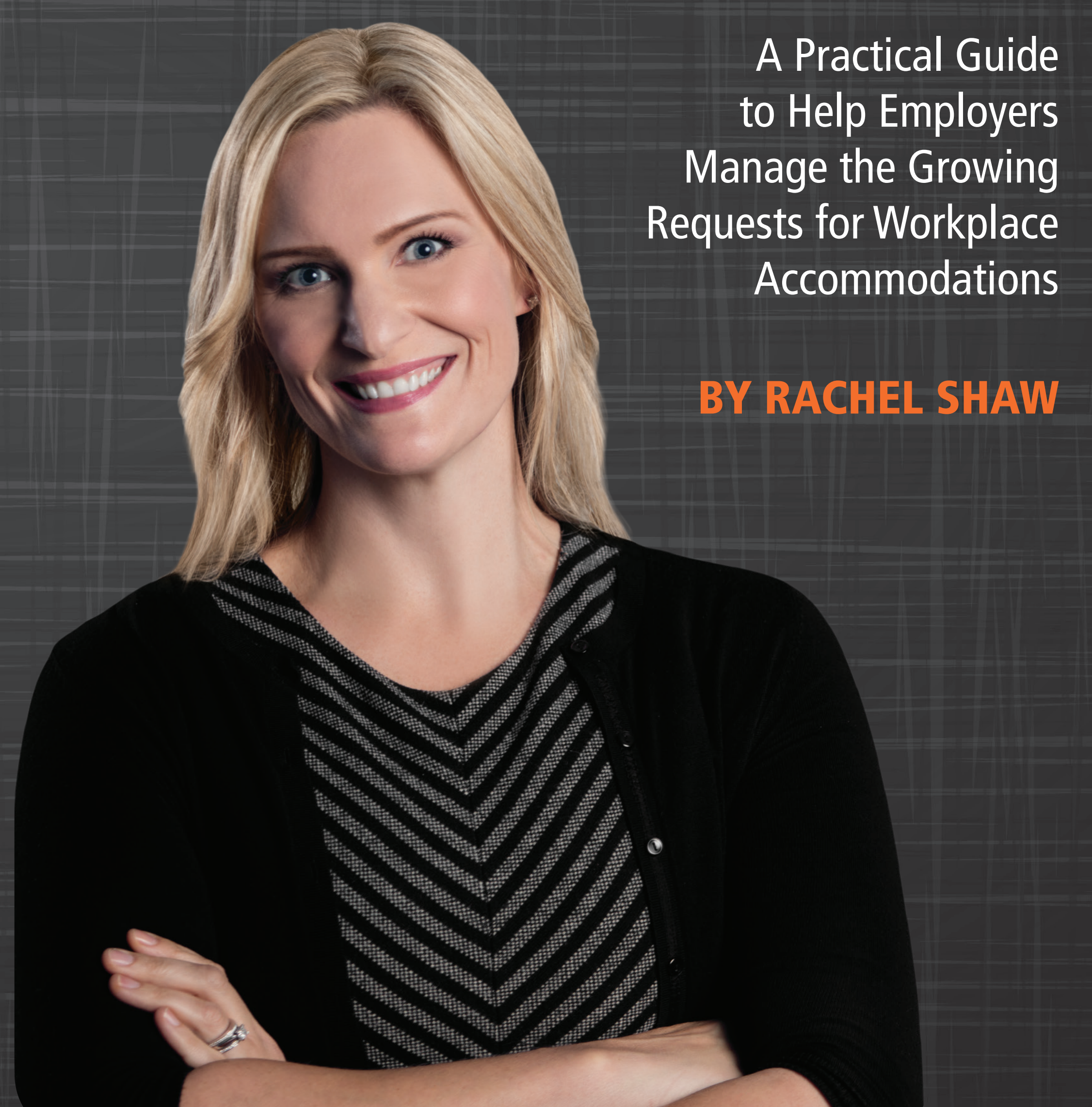
THE DISABLED WORKFORCE

WHAT THE ADA NEVER ANTICIPATED

A Practical Guide to Help Employers Manage the Growing Requests for Workplace Accommodations

BY RACHEL SHAW



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The Disabled Workforce:
What the ADA Never Anticipated
by Rachel Shaw

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Your work is to discover your work and then
with all your heart
to give yourself to it.

—Thomas Byrom

Acknowledgments

This book is dedicated to my nuclear family: Frank, Sarah, Caldwell, and Shadow (the cat). My work requires a lot of you because it requires so much from me. Thank you for loving me enough to let me do what I do.

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Introduction

The world is a better place when people with disabilities prominently and proudly work and participate in our businesses, schools, and communities. Since 1990, a landmark piece of civil rights legislation called the Americans with Disabilities Act (ADA) has promised equal access for Americans of all abilities. Instead of telling employers to lower standards or reduce expectations for people with disabilities, the act demands that organizations provide this demographic with the support and access needed to perform equally in the workplace and to experience the dignity and fulfillment of gainful contribution.

In my work with tens of thousands of disabled employees, many strong and honorable people have shown me why the ADA exists and what it's all about. Their stories remind me of why I started in the human resources field and why the work is so important. On my most frustrating of work days, their stories motivate me to continue implementing equal access for those with disabilities. Before we discuss the big issues of this book—mastering ADA law, handling a surge of accommodation requests, and more—allow me to share one such story that helps reinforce why we do the work we do.

Real-Life Example: Joley's Story

In January 2011, Joley,[1] a second-grade teacher, was admitted to the hospital for a routine medical procedure that resulted in septic shock. She awoke days after the procedure only to have doctors tell her that her arms and legs would

have to be amputated due to spreading infection. Thankfully, Joley survived the surgery. But when I met her 10 months later, I don't think anyone knew if she'd ever get her life back, let alone work again.

Before her debilitating procedure, Joley worked for a wonderful school district in California that absolutely loved her. It rallied behind her and wanted so much to believe that she could come back to work. However, second-grade teachers have a physically demanding job—they're on their feet all day leading students through academic and artistic exercises, supervising recess, and much more.

Eventually, the school district hired me to help determine whether it could get Joley back to work. If accommodation was not possible, I was needed to help make that difficult decision. Joley's employer wanted to do the right thing, but it was a tough call: Was it best to return the district's beloved teacher to the classroom or to support her disability retirement instead? For Joley, as with many people with significant disabilities, returning to the classroom meant more than earning a paycheck—it meant overcoming hardship and reclaiming a deeply meaningful and fulfilling part of her life. It was about saying, "I won! I have a disability that tried to take everything from me, but I defeated it."

When the district brought me on to help, I believed it was possible that Joley would work again. I didn't know how it might happen, but I did know this: If I followed the steps created in my own Disability Interactive Process Hallway™ (or what I dub "The Hallway™")—and believed in the process—then we would find reasonable accommodation, if it existed. If such accommodation didn't exist, then The Hallway would guide us to best minimize the district's legal risks and Joley's emotional impact.

There's a happy ending to this story: The school district brought me into the ADA interactive process in November, and by the following January, Joley had returned to teaching. In that time, she received and learned to use three prosthetic limbs. Joley's return to work was made possible by her iron will and the organization's commitment to the interactive process.

At first, many people voiced concerns as to whether Joley could do the work—and whether the young students would be distracted by their teacher's very visible physical disabilities. Joley returned to the classroom on a trial, part-time basis, both to support her medical needs and to make sure that her students' education wouldn't take a hit if the accommodation plan failed. The result? She did an excellent job. Her students continued to learn

and grow, and I like to think that everyone involved got an amazing lesson in human perseverance. In light of what Joley had accomplished, slacking off seemed ridiculous to Joley's students and co-workers.

Of Course, Not Every Employee Is a Joley

I wish I could say that the majority of my work involves the Joleys of the world. It doesn't. Because their disabilities are so great, not everyone I encounter is able to come back to work. And, sadly, I have used my Disability Interactive Process Hallway with people who aren't as disabled as they would like to be, or who want to use the law to protect themselves from discipline or poor performance. I've even seen employees make inappropriate accommodation requests after not receiving promotions or when unable to get along with supervisors.

I began my career in this field to make sure there's space for people like Joley to work and contribute equally. No matter how much her employer loved her and wanted her back, I strongly suspect that, without the ADA's protection, Joley may not have had the opportunity to return to her job. Because the truth is it's not easy to fight for the acceptance, understanding, facilities, and processes that go against the norm, no matter how heroic one's efforts.

As I begin this book, I can't help but think about where American businesses are right now with the ADA and with equal employment opportunities for those with disabilities. By my measure, we're at a critical time regarding the issue of disability accommodation in the United States. At its heart, ADA compliance is based on the idea that disabled people have equal rights, just like people of any ethnicity, gender, or religious affiliation. A hard fight was waged in the 1970s and 1980s to have this concept accepted. When the movement began, it was simply about getting access and job opportunities for people with physical disabilities. Back then, people with significant disabilities often couldn't get into a building to work, let alone be provided with the reasonable accommodations they needed. With the ADA's passage in 1990, disabled Americans were granted a place at the table.

At that point, lawmakers largely thought they'd be helping people with what we refer to as "visible disabilities," such as those in wheelchairs with serious mobility difficulties or with limb amputations. (Mental illnesses, or what we now think of as "invisible disabilities" were not yet widely considered.) In the 1990s, the ADA's considerations largely boiled down to this: Disabled people should be able to access buildings, be considered for employment (presuming equal qualifications and capabilities), and generally have the same

opportunities as everyone else. Overnight, it became unacceptable (in fact, illegal) for an organization to deny a position to someone in a wheelchair or with another visible impairment because of a perceived impact on the person's job performance or attendance.

The Rising Tide of "Accommodation Fatigue"

Since then, however, an increasing number of Americans have been grouped into the "disabled" category—something that has changed the legal scene dramatically. And this has brought us to a point of crisis concerning ADA implementation. Today, employees are filing an onslaught of requests for accommodation in the workplace. What's more, students in K-12 special education and community college are seeking accommodations through disabled student programs as well. More and more, these requests are inappropriate and based on the hope of increased services and a preferential outcome. American businesses and schools are really struggling under that burden.[2]

Of course, there's a real need to accommodate disabled students. But it's important to note that those students will eventually become our employees. This may be a topic for another book, but I think it's important to note: Students who have always received accommodations may be conditioned to expect the same support in the workplace. And, in truth, there are significant differences between student accommodations and reasonable accommodations under the ADA. Does this mean we are helping to foster a generation of pretenders or, worse, liars? No. But in general this demographic would never have been considered for help under a healthy ADA.

But back to American employers: Many of my clients have seen this segment of the workforce (those who had previously become accustomed to accommodations while in schools) grow, along with its rights. Now employees benefit from a situation in which organizations legally have to manage their many requests. Meanwhile, organizations also receive requests from folks who greatly need access to an ADA disability compliance program, while simultaneously managing an increase in so-called employee intermittent and "forever" leave requests under the problematic Family and Medical Leave Act (FMLA). Compounding this influx of requests is a more evolved definition of what constitutes a disability in the workforce. It's no longer simply about understanding what someone cannot physically do and making a decision based on visual evidence. Now employers are increasingly confronted with invisible and intangible disabilities such as mental issues, workers' compensation injuries, learning disabilities, and other impairments that strongly

affect performance, attendance, relationships, and the in-office dynamic. I'm not implying that these disabilities aren't legitimate and protected by law. But due to their nuance and intangibility, determining which requests are legitimate and medically necessary becomes more difficult.

American employers are at a crossroads. We need and want to do what's right for workers, while still adhering to the ADA. However, the influx of requests increasingly include those filed by workers who are not disabled.

My big concern is that the energy dedicated to managing fraudulent or misguided accommodation requests is starting to erode the solid process, passion, and goodwill of human resources professionals. I see that many employers are suffering from what I've come to think of as "accommodation fatigue." This often leads to employers skipping procedural steps and/or providing different people with different processes, depending on perceived legitimacy. According to my observations over more than 15 years in this field, employers don't seem to be best prepared with the skills, tools, or knowledge needed to manage the complex world of workplace accommodation efficiently and correctly.

So what are the solutions to this growing crisis? How do we work to ensure that the pure and laudable intent of the ADA is realized? First, we need to empower employers with the knowledge and skill sets needed to expertly address these very complex accommodation issues. In this book, I'll give you strong resources to reduce confusion and streamline the process of managing accommodation requests. I'll help you set up a system to evaluate every request so that only those with genuine disabilities receive reasonable accommodations.

Next, we must reinvigorate our own and our colleagues' passion for this work, and reinforce how important it is. In this book, I'll offer suggestions to help keep perspective. Without a true calling to do what's right—create diverse workplaces and help those who most need it—this work is immensely trying and, sadly, can drain fantastic advocates from the field due to exhaustion and disappointment. However, with a clear focus and the right tools, I know personally that helping to administer the ADA process can be fulfilling on many levels.

Part of excelling in this field, as in any other, is knowing your stuff better than anyone else within your organization. This is a particularly exciting time in ADA administration history, because excellence and commitment from human resources professionals like you can help save a groundbreaking

piece of legislation from abuse. And guess what? Its intended beneficiaries are counting on you to do just that.

Help Is Here

In this book, I will show you best practices to create or enhance your organization's disability compliance program.

To do this, I first provide a four-step, streamlined process to help manage your disability obligations (the Disability Interactive Process Hallway) efficiently and effectively.

Next, I explain how to evaluate an accommodation and determine whether it is "reasonable" or not. I will show you how to make sound decisions that will both identify disabled individuals who can fully perform the essential functions of their positions and foster a diverse workplace.

Later on, I walk you through tried-and-tested management techniques and protocols for some of the most difficult reasonable accommodation requests, such as those related to mental disabilities, clashes of discipline and disability, workers' compensation claims, and FMLA intermittent leaves.

In all, this book will show you how to navigate disability compliance efficiently and effectively, for the benefit of organizations and employees. The information in each chapter builds on the last, so read this book chronologically to get a complete understanding of the ADA and the Disability Interactive Process Hallway.

At Shaw HR Consulting, my staff and I have honed our craft and refined the tools of our trade in thousands of cases and in hundreds of companies, large and small, public and private. With this book, I'm excited to share my expertise with an even wider network of human resources professionals so that, together, we will create a strong, diverse workforce in American organizations, while ensuring that the power of the ADA isn't diminished by those who don't need it.

Finally, in addition to sharing my proven approach to conquering the onslaught of employee accommodation requests in a fair and meaningful way, I write this book to reinvigorate your passion and purpose for the work. It's an endeavor that takes energy and focus on the big picture.

Why are you doing this? Why is it important? For people like Joley.

Ready to get started? Let's go.

Notes and Citations

1. Some names throughout this book have been changed to protect the privacy of the individuals.
2. “Congressman Challenges ‘Predatory Lawsuits’ Exploiting ADA,” DiversityInc.com, last modified March 21, 2016. http://www.diversityinc.com/news/jerry-mcnerney-ada-lawsuits/

CHAPTER ONE

A Brief History of the ADA and the State of Disability Accommodations Today

In 1990, the United States Congress enacted the federal Americans with Disabilities Act into law.[1] It was a landmark legislation more than 20 years in the making,[2] one that drastically improved the landscape for people with disabilities. Prior to the ADA's passing, Americans with physical disabilities had not been given proper access to schools, work, and other buildings. Those in wheelchairs or on crutches were somehow expected to navigate flights of stairs, reach door handles, and push open heavy doors—or depend on the kindness (or mere presence) of strangers who might help. Public transportation was inaccessible. As if these conditions weren't humiliating enough, those with physical disabilities were given very limited or no restroom access. On top of all these challenges, the necessary workplace infrastructure for those with disabilities, such as ergonomic desks or workstations, breaks, meal accommodations, and medical appointments, was almost never considered.

That was not acceptable. So parents challenged school districts when their disabled children were denied access to equal education. Proponents of independent living rebuffed the idea that people with disabilities should be sent to institutions. These are the folks who laid the groundwork for an ideological shift in thinking, one that is now common sense: that people with disabilities should have equal access to transportation, public restrooms, shopping,

voting booths, and the workplace. It's through the advocacy of these individual Americans and grassroots groups that the ADA was born.

A Civil Rights Issue Emerges

The grassroots movement gained major momentum in the 1970s, when advocates and activists correctly identified their fight as a civil rights issue[3] and began taking lawmakers to task. They wrote letters, filed lawsuits, lobbied elected officials, drafted legislation, held protests, and even got arrested.

After years of struggle, advocates celebrated a major win: In 1973, a profound and historic shift in disability public policy occurred with the passage of Section 504 of the 1973 Rehabilitation Act. Section 504 banned federal fund recipients from discriminating on the basis of disability. It was modeled after previous laws that banned federal fund recipients from discriminating on the basis of race, ethnic origin, or gender. This law declared:

> *No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.*

Now any institution receiving federal financial assistance—including the federal government, public schools, post offices, public libraries, airlines, and many colleges—had to protect disabled individuals against discrimination by law.

The Rehabilitation Act was a start, but it didn't go far enough. Most significantly, the law excluded private employers from protecting the disabled against the same discrimination, even though protections were just as needed in the American workplace. For example, back in the 1970s, it wasn't uncommon for an employee to be fired after losing an arm while on the job, or suffering from a hand or foot crushed by machinery.

Activists Fight Opposition and ADA Passes

Though the disability rights movement had made great strides by the 1980s, many still avidly opposed the cause. Among them were business leaders and owners who objected to the costly changes needed to accommodate people with physical disabilities. They argued that retrofitting America's businesses with ramps, elevators, lifts, wheelchair-accessible restrooms, and

other accommodation instruments was too pricey an endeavor that would cut into companies' bottom lines. Others feared impending lawsuits—which they thought might backfire and cause companies to hire fewer people with physical disabilities. Ultimately, some reasoned, requiring equal access in the workplace could cause a spike in unemployment for the demographic. Other business owners simply believed that people would abuse disability rights by requesting superfluous accommodations.

But advocates were undeterred. As the 1980s wore on, so did the court cases, college protests, and the tireless work of the National Council on Disability. Finally, in 1988, the first draft of the ADA made its way through Congress.

But more work was needed: By March of 1990, the ADA was still stalled in the House of Representatives. To call attention to their plight and help get the bill passed, disability rights activists and hundreds of physically disabled people converged at the base of Capitol Hill in a phenomenal protest that became known as the "Capitol Crawl."[4] People with physical disabilities of all kinds shed their crutches, slid out of their wheelchairs, dropped their assistive devices, and bravely hoisted their bodies up all 100 of the Capitol's front steps, literally crawling their way to governmental recognition, chanting, "ADA now!" and "Vote now!" Some activists who couldn't complete the crawl remained at the bottom of the steps, holding signs and yelling encouragement to the Capitol Crawlers.

Many disability activists now refer to this historic event as the public action most responsible for forcing the ADA's passage. And by July 26, 1990, President George H.W. Bush finally signed the bill into law.

In its simplest interpretation, the ADA made it illegal to reason, "I'm not going to hire that person in a wheelchair or that person who clearly has a physical disability because I believe he or she will be less effective, reliable, or productive." The practice, formerly common and quite accepted, became just as illegal as rejecting candidates based on gender or ethnicity.

The ADA: Where Are We Now?

Since the passage of the ADA, the law now strives to provide necessary protections to a segment of the population that experiences great barriers to continued, long-term employment: the disabled. In turn, it's geared to create much more diverse workplaces. So how has the ADA done overall?

Unfortunately, for many, the ADA has fallen short of expectations. Some economists argue that the ADA has failed to meet its goals, pointing to what

they call an "unintended consequence" of the law. Since its passage, fewer people are being hired with known or "visible" disabilities.[5] Many argue that the law has created more barriers for disabled people who are looking to enter the workforce, as employers fear that the cost of accommodation is too great or believe that those with disabilities are more prone to sue.

As the definition of "disability" continues to evolve, and as more people are now defined as "disabled," I have personally seen that employees already in an organization are evoking the ADA more often. Requests for accommodation are growing from within organizations through workers' compensation injuries, stress claims, fragrance sensitivities, ongoing intermittent leave requests, dog accommodations, and more.

As employers tackle the growing number of people within their workforces who are asking for accommodations, and as the demands of managing employee accommodation requests grow and become more complex, employers seem less willing to hire disabled people to join their teams. An increased volume of disability cases—and their growing complexities—means that human resources professionals now spend an unprecedented amount of time managing complicated accommodation requests, some legitimate and some not.

Though it's nearly impossible to scientifically prove, there is no question, from my experience, that the unintended consequences of the ADA stem from the law being used by many people who are likely not in need of its protection, and who may aim to use the ADA to better their employment experience, not to level the playing field. Employers who regularly manage questionable disability claims often are less willing to be flexible, creative, and compassionate to the applicants and employees whom this law is intended to protect.[6]

In light of this challenge, how do we ensure that our organizations continue to hire and accommodate employees with disabilities, as the ADA intended? How do we ensure that people who are not entitled to the protections of this law are kept out, so that there is room to accommodate those who are? How do we ensure that our organizations don't lose millions of dollars for failing to comply? The answer is actually quite simple. We need to create, implement, and consistently apply a process that addresses these questions when an employee triggers an organization to start the disability interactive process under the ADA. By applying and following a consistent process, employers will ensure that they accommodate those who are entitled to the protections of the ADA—and remove from the process those who are not.

This book is going to teach you the very process to achieve just that. But first let's start with a few ADA basics.

Who Is This Law Intended to Cover?

The ADA is a wide-ranging civil rights law. One of its purposes is to provide a clear and comprehensive national mandate for eliminating discrimination against individuals with disabilities.[7] The ADA also requires employers to provide *reasonable accommodations* to disabled employees and applicants. It's these provisions that put the act at the center of the human resources universe.

The ADA defines a covered disability as "a physical or mental impairment that substantially limits one or more major life activities; a history of having such an impairment; or being regarded as having such an impairment."[8] Meanwhile, there's a complicating factor: The ADA requires *injunctive relief* (a court order for accommodation) and for the losing party to pay attorneys' fees, which are costly. Plaintiffs can also evoke various state laws to win penalties and punitive damages.

The ADA is also famously dogged by ambiguity. The act doesn't include an exhaustive list of disability types that it's intended to cover. What's more, ADA language strongly implies that policymakers considered only *physical* disabilities when making the law—those that affect appearance, ambulation, body strength, and the like—and did not implicitly consider those with non-physical disabilities, such as mental and learning disabilities.

It's not that the law didn't also *intend* to cover those with unseen or invisible disabilities or those that do not impact mobility, such as depression. But it has become historically evident that the lawmakers who passed the ADA didn't foresee that the act would eventually be used to cover people with a wider spectrum of disabilities, including those related to work injuries, mental disabilities, and learning disabilities. As this spectrum evolves, deciphering who may be covered becomes increasingly tricky. It's no wonder that human resources workloads have grown.

Updates to the Act

The ADA has been updated since first being passed in 1990, specifically to expand its protections to Americans.

Many believe that the ADA update was pushed forward by California's enhancement of its state disability law, the California Fair Employment and Housing Act (FEHA). First passed on September 18, 1959, the law was greatly

amended on September 30, 2000, with the goal of substantially expanding protections to disabled Californians. Most notably, these reforms intentionally separated the FEHA from its national counterpart, the ADA. The FEHA continues to track the ADA in certain ways, like adopting ADA guidelines for physical examinations and considering ADA provisions or related case law that would provide even wider protections than its own. (The ADA still preempts "inconsistent" requirements established by state or local laws for safety or security-sensitive positions.[9]) Human resources professionals widely interpret the FEHA as providing the broadest protection against disability discrimination among state laws.

Eight years after the amendment of the FEHA, the ADA was amended and its protections broadened with the passage of the ADA Amendments Act (ADAAA) of 2008, which President George H.W. Bush signed into law.[10] Many also believe that the ADA sought to better align itself with states that had greater protections for disabled people, such as California. More pointedly, the changes to the ADA were prompted in response to several Supreme Court decisions that had narrowly interpreted the ADA's definition of "disability." This narrow interpretation resulted in the denial of the law's protection for many individuals with impairments such as cancer, diabetes, and epilepsy—people who had been the subject of adverse actions due to their disabilities.[11]

Specifically, the amendment broadened the definition of "disability," thereby extending the ADA's protections to a greater number of people on a federal level. It also defined "major life activities," including but not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Further, it defined the performance of several specified major bodily functions. With these changes, the ADAAA moved closer to aligning itself with California's FEHA and a more inclusive take on the wide spectrum of disabilities.

Today: It's Complicated

The ADA remains a critical and necessary piece of legislation. But an evolving and growing definition of disability, an overflow of accommodation requests, and abuse of the law has made for a complicated landscape. For one, employers have never spent more time managing workplace disability issues—and they're rightfully frustrated. Yet the law is supporting fewer Americans with visible or known disabilities to enter into employment. For a practitioner in this field, it can often feel like the laws are protecting many of the wrong

people and leaving less space for those for whom the legislation was originally intended.

As if the above weren't complex enough, leave laws, such as the Family and Medical Leave Act, signed into law in 1993 by President Bill Clinton, pose their own set of issues for employers. Like the ADA, the FMLA is often misused and abused. The Society for Human Resource Management says the FMLA is consistently the top issue for employers who call its hotline.[12] Frustration is mounting as ongoing, intermittent leave usage grows.

We need to establish a much better balance between the FMLA's original, laudable purposes and the way the current regulations operate in practice. Employers require strategies and solutions to manage the sometimes career-long intermittent FMLA (popularly known as the "Friday, Monday Leave Act" or "forever leave") leave periods that plague our workplaces. (See chapter ten for a full discussion of this important topic, along with practical solutions for your organization.)

Reducing Rights Isn't the Answer

Removing the protections of the ADA and FMLA isn't the answer to these dilemmas. Instead, we must manage requests in a way that determines who is entitled to protections and who is not. This will ensure that the time, energy, and compassion needed to properly implement the ADA in our organizations are available. As human resources professionals, we have to voice our concerns about abuse and fraud. We must vigorously work to ensure that our organizations allow disabled people to equally compete and perform.

In the big picture, we want to deal compassionately with all employees but swiftly identify those who don't require protection and move them into another process (such as discipline, performance improvement, or an employee assistance program). Rising human resources management caseloads absolutely drain our creativity and energy—reducing our ability to find reasonable accommodations for those who actually need them. Further, by accommodating people who don't need protection, we reduce our ability to help those who do. As a reminder: Employers do not have to "do for all what you do for one." The ADAAA and the various state disability accommodation laws clearly allow human resources professionals to manage requests on a first-come, first-served basis.

As frustrated as human resources managers may be with accommodation requests and intermittent leaves that aren't medically necessary or are manipulated to drag on endlessly, employee groups are seemingly even more upset.

Workplace dysfunction is one of the biggest ills of our failed disability management system.

Workgroups are directly impacted by the intermittent leaves taken by employees; they grow increasingly frustrated with each Monday and Friday taken off by workmates who seem to be gaming the system. The same workplace frustrations spring from situations in which employees who, even if legitimately in need, will never again work full time; co-workers know they will be asked to pick up the slack, many times without additional compensation. Ditto for instances in which workmates perceive that someone without a legitimate medical need receives a get-out-of-jail-free card every time he or she wants to lengthen a weekend or obtain a vacation request that would otherwise be rejected. Many human resources professionals report that workgroup productivity goes down in these scenarios. What's more, the same issues exist with legitimate use for chronic "forever leave" users. No wonder workplace bitterness, hostility, and resentment are rampant.

Like with most workers' compensation laws that offer necessary protection for those who need it, ADA and FMLA are problematically accompanied by fraud and abuse. Ultimately, a legislative solution is needed, and I don't see one coming soon. But here's the good news: Even without a legislative solution, we can still manage leave and workplace accommodation requests more efficiently. In this book, I'll show you how.

The Solution

Without major legal overhauls of the disability system, we must create our own platform (within the current laws) designed to implement a more efficient and effective disability compliance program. I've performed this service for hundreds of businesses, customizing and streamlining the process into a highly effective, field-tested system I call the Disability Interactive Process Hallway.

In a nutshell, it lays out steps to:

- manage every request for accommodation or leave using the same standardized process;
- communicate honestly when concerns about the validity of a leave or work accommodation request arise or when it's thought that reasonable accommodation does not exist; and
- work within a formal yet flexible structure, using documentation and communication tools to manage the full workforce.

Deploying this tool will correct some of the missteps being taken in our organizations and allow us to return to a manageable and reasonable accommodation program that doesn't negatively impact workforce morale or gut bottom lines. What's more, this tool will reduce your organization's wasted resources and exposure to litigation. And, most importantly, the actions within will maximize reasonable accommodations for those whom the ADA and related laws are intended to protect, while reducing unnecessary accommodations and fraudulent requests. I'll show you how, step by step, in the coming chapters.

Reset Your Program and Reset Your Focus

The current state of ADA and FMLA compliance is broken and needs to be corrected, and I know that everyone in our industry is working harder than ever before. There are entire professions, including mine, that have grown as a result of these laws and their current use to accommodate ailments that weren't considered disabilities in 1990. A reminder: I'm not a lawyer. I'm a disability compliance practitioner. I highly recommend you check with your legal counsel before implementing changes to your organization's ADA practice. I'm confident, however, that my many years of field experience and the groundbreaking Disability Interactive Process Hallway will bring your organization tremendous relief and new success. Together, we can create a sea change in American disability compliance.

When overloaded with accommodation requests and navigating an increasingly complex legal field, it's easy to get lost in the minutia. Remember, we do this work to help level the playing field and because diverse workforces really are more profitable and productive in the long term.

To help keep perspective, I remind myself of why I do this work. I do my best to let go of the daily frustrations and craziness and remember the Joleys of the disability world (page 1). I focus on being part of a critical diversity and fairness movement. I find joy in helping to increase understanding and creating space for people who can and want to work but require some help to do so due to a disability.

If you find yourself exasperated by an onslaught of accommodation requests, both legitimate and bogus, I encourage you to regularly remind yourself of why you do this work. Find a colleague or mentor in the field to talk with and, sometimes, unload on. Take care of yourself in whatever ways make sense to you. If you don't, the tough stuff that you have to do in this line of work will leave you skeptical and jaded. Bitterness runs counter to the work

we do, and it's not healthy for us. So find the joy in your work! Remember your mission! Join me in this vital and important endeavor.

Notes and Citations

1. 42 USC § 12101 (1990). Prior to ADA enactment, the major piece of federal legislation prohibiting employment discrimination on the basis of mental and physical disability was the Federal Rehabilitation Act of 1973, 29 USC § 793 (1973).
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CHAPTER TWO

Title I of the ADA: Understanding Employer Obligations and Triggers to Act

Title I of the Americans with Disabilities Act[1] applies to all U.S. businesses that employ 15 or more people. It also applies to state and local governments, employment agencies, and labor unions. The law prohibits discrimination against what it calls "qualified individuals with disabilities" in job application procedures; hiring; firing; advancement; compensation; job training; and other terms, conditions, and privileges of employment. Per the ADA:

> *[A] qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.*

Many in the human resources field view the ADA as a complex law that's difficult to comply with because implementation instructions are unclear. This book represents an effort to remedy the understandable confusion and frustration, and to interpret the law in a way that restores its original simplicity and power. The ADA is much easier to understand and apply once you know how to decode it and sift through its legal jargon. I know it sounds like a complicated feat—but it's more manageable than you'd think. Even though the ADA itself doesn't provide implementation instructions, human resources professionals can find a wealth of guidance from common case law and historical precedents of the ADA in action.

Essentially, the ADA requires two things of employers:

- to engage in a disability interactive process with an employee or applicant with a known disability; *and*
- to provide reasonable accommodations for such employees and applicants.

Employers must do both. It is not enough to simply provide reasonable accommodations to employees; under the ADA, the process and documentation used to support decisions is just as important. This is critical to understand. Failure to engage with an employee in a timely, good faith disability interactive process (or to be able to provide documentation of such engagement), places your organization at the same level of risk as denying otherwise reasonable accommodations. The struggle for many employers is in identifying ADA obligations as they arise and starting the obligations process without delay.

ADA/ADAAA MANDATES

- Employers must engage in a disability interactive process with employees and applicants with known or perceived disabilities.
- Employers must provide reasonable accommodations.

Employers must do both, and without delay.

Who Is Eligible for Protections?

We've already established that an organization has two obligations under the ADA: to engage in the interactive process with an employee or applicant who has a known or perceived disability and to provide reasonable accommodations for employees with qualifying disabilities. Fair enough. But how on earth are organizations to determine who is eligible for such accommodations?

Eligible applicants and employees are those who have a disability that impacts applying for, accessing, or performing a particular job or set of jobs. Formally, the ADA defines eligible applicants or employees as having a physical or mental impairment that "substantially limits" one or more "major life activities"[2] as determined without regard to mitigating measures (such as eyeglasses or medical equipment). Working is a "major life activity." So if an applicant or employee has a disability that impacts his or her ability to do work in the way that others without disabilities would do it, then he or she is considered eligible for protections under the ADA. It's a pretty broad definition of "disability."

Because the ADA's definition of "disability" is so encompassing, it is not uncommon for an employer to begin a disability interactive process before it has "proof" that someone has a covered disability. But here's the thing: An employer should not wait for proof before the disability interactive process begins. Waiting for evidence will leave employers at risk of not beginning the necessary work to evaluate reasonable accommodation needs in a timely fashion.

Instead of waiting for proof that someone has a covered disability, organizations are recommended to know when an employee *triggers* them under the ADA to start a timely, good faith disability interactive process. The process will support the employer to determine early on whether an employee's accommodation need or request is covered under the ADA.

Starting the disability interactive process does *not* mean that your organization will have to provide accommodations to every employee engaged in the process, so don't worry about starting the process before obtaining proof of a disability. If you find that someone is not disabled and/or in need of workplace accommodations down the line, then you will not need to provide reasonable accommodations. You can always close down the process if you discover you don't need it. However, you can't make up for lost time after having waited to start your first obligation, the disability interactive process—and that starts with fine-tuning your organization's radar for triggers.

WHO IS TECHNICALLY COVERED BY THE ADA?

- People with a physical/mental impairment that "substantially limits" one or more "major life activities" as determined without regard to mitigating measures. ("Major life activity" includes working and other tasks and functions of central importance to daily life.)
- People with a record of such impairment.
- People being regarded as having such impairment.

Know the Triggers to Start the Disability Interactive Process

Since the ADA defines disabilities so broadly, the key is to know when an employee triggers the organization to start the timely, good faith disability interactive process.

There are three ways employees or applicants can trigger an organization to act under the ADA. When they occur, employers must recognize that they have been triggered and start the engagement process. The three triggers are:

1. **Request for accommodation.**

   An applicant or employee verbally communicates an accommodation need or makes a request for a job change.

2. **Perception of a disability, which impacts an applicant's or employee's successful or safe performance of work (also known as "being regarded as having such impairment").**

   A supervisor within the organization holds a belief that an employee may have a disability that impacts his or her ability to fully or safely perform the assigned duties.

3. **Knowledge of work restrictions and/or functional limitations that impact an employee's work (also known as having a "record of such impairment").**

   An applicant or employee provides a medical note or files a workers' compensation claim.

ADA TRIGGERS

There are three typical ways in which an applicant or employee triggers an organization to engage in the disability interactive process:

1. Request for accommodation:

- Applicant or employee communicates a need, regardless of the specific words used

2. Perception of disability impacting work ("being regarded as having such impairment")

- Performance changes
- Attendance problems and/or changes
- Rumors, along with an impact on work performance or availability

3. Knowledge of work restrictions/functional limitations impacting work (having a "record of such impairment")

- Medical note listing work restrictions

Trigger 1: Request for Accommodation

The most common type of trigger is an employee request for accommodation. This type of trigger may seem straightforward, but it's fraught with ambiguity. It's important to know that when an employee (or applicant) requests an accommodation, he or she will most likely not cite language used in the ADA. Instead, the employee will use plain, everyday language when making this request. Oftentimes, the casual nature of the request can fail to trigger an organization to start the interactive process, as required by law. For example, if an employee mentions that working on a new project has caused her back to hurt, but doesn't outright ask for specific accommodation, your organization is still triggered to start the disability interactive process (and likely offer the employee workers' compensation paperwork).

Some employee or applicant disclosures may be even less clear: If an employee casually tells a supervisor that his thumbs have been bugging him since the IT technician changed his keyboard or mentions that getting to work has been difficult since starting chemotherapy, then under the ADA these comments should trigger an organization to start the disability interactive process.

Also realize that an employee who shares triggering remarks may not even realize that he or she is doing so. But by simply making such remarks (whether casually or formally) with a supervisor or other employee in a leadership position within the organization, the employee is putting the employer on notice.

Finally, be aware that most employees don't make informal and casual requests for accommodation directly to human resources. Instead, they discuss these issues with the people they work most closely with, such as crew leads and supervisors. For most organizations, this stream of communication makes responding to triggers especially tricky because most front-line supervisors, managers, and crew leads are often the *least* likely to be trained to identify ADA obligations. So be sure to train supervisors on what constitutes a request for accommodation and what to do with the information once they hear it. By training supervisors and managers to better understand what an ADA trigger is, you will ensure that employee concerns are addressed quickly. This will better serve your full organization, as employee concerns and complaints don't get better with time. Issues left unattended can grow and worsen, which makes resolving them more time consuming and complicated.

Your best bet in mending this communication gap? Train supervisors to have two response options when employees casually and verbally trigger the organization to act. Supervisors may use either response, based on how comfortable they are in approaching the employee.

Approach #1: Ask the Employee

After a front-line supervisor hears triggering language from an employee, the supervisor must check in with the employee to make sure that he or she is safe and to see whether the language was intended to trigger an accommodation discussion. Specifically, I recommend the following script options:

- **If your supervisor does not otherwise perceive the employee to have a work-impacting disability,** the following script would be appropriate: "I overheard *[or was told by one of your colleagues]* that you said *[list exactly what the employee said or what was reported to be said]*. If you *did* say this, it's possible you may need assistance with this medical issue while at work. If so, I would like to refer you to *[name]* in Human Resources, who can discuss our organization's reasonable accommodation program. Would that be something that would benefit you?"
- **If your supervisor is concerned about the employee's safety due to the comments made or overheard,** the following script would be appropriate: "I overheard *[or was told by one of your colleagues]* that you said *[list exactly what was said or what was reported to be said]*. If you *did* say this, I want to be sure that you are safe at work. Are you okay to continue working?"

After discussing the above with the employee, the supervisor must report the conversation to Human Resources immediately, either through an email or phone call.

Approach #2: Refer the Matter to Human Resources

Another option is to simply train front-line supervisors to contact human resources within 24 hours of an employee having made triggering remarks. The supervisors should provide Human Resources with a description of what was heard and how it was overheard. This approach allows trained human resources professionals to determine whether the comment was a flippant remark or a request for accommodation—and decide what type of outreach is appropriate. If the comment was a request for accommodation, then the human resources professional should begin the Disability Interactive Process

Hallway immediately (a complete breakdown of The Hallway can be found in the next chapter).

Trigger 2: Perception of Disability That Impacts Work

Perhaps the scariest and riskiest trigger for organizations to respond to is one in which the organization suspects that a disability *may* be impacting an employee's ability to fully or safely perform his or her job. We train leaders in our organizations not to stereotype employees, yet now I'm advocating for you to start a timely, good faith interactive process if you perceive that an employee has a disability—even when no proof is available. To be clear, your organization is not triggered if you simply *think* that someone has a physical or mental condition—only if a person in a leadership role (such as a lead, supervisor, manager, or human resources professional) believes that the condition could be impacting successful or safe performance of the job.

So given the above, why are perceptions considered to be triggers to start the disability interactive process? They ensure that the right tool is used to support an employee to be safe and successful in the performance of his or her job. If an employee's performance deficiency is due to will or knowledge, then discipline becomes the right tool to use. However, if the issue is fully or even partially related to a disability, then reasonable accommodation exploration is the right tool to use. You cannot fix a disability with discipline. Thus, the ADA primes organizations to hold off on disciplinary measures and instead start the disability interactive process whenever a disability could be a contributing factor in an employee's performance or safety issue.

Using the right tool to support the employee in the safe and successful performance of his or her assigned work is paramount to establishing a happy and healthy workforce. But there's another critical reason to do so: compliance with the law.

Using the wrong tool can violate the ADA. If someone's disability is suspected to be an underlying cause of a performance or safety failure, then it would be absolutely inappropriate, and potentially illegal under the ADA, to discipline that person for his or her disability. The fact is, someone who is unable to perform an aspect of his or her job due to a disability isn't going to be able to do the job right just because he or she is told to do so. Applying a disciplinary action in such a case won't remedy the issue, much less inspire improvement. Instead if, as an employer, you perceive that a person's safety or ability to successfully perform his or her job is hindered by a disability, and you react by addressing that perception, then you have a real shot at correcting the

issue and maintaining or improving employee-employer relations in the process. But in order to do so, you must use the right tool—the ADA disability interactive process.

Another important reason to bypass discipline for the right tool (the disability interactive process) when trying to support improved employee safety or performance is to maintain positive relationships and morale. Say you discipline someone who is disabled. If that employee believes that the organization had previous knowledge of his or her disability and yet responded with disciplinary action, then the employee is likely to become distrustful, angry, or litigious. Using the wrong tool when an employee triggers your organization with a disability that may be partially responsible for a performance or safety issue increases the likelihood of litigation and makes your job of resolving the issue even harder.

We will further explore managing disability and disciplinary matters under the ADA in chapter eight.

Trigger 3: Knowledge of Work Restrictions/Functional Limitations Impacting Work

The third trigger for the disability interactive process occurs when an employee provides a health care provider note or other document listing work restrictions or accommodation suggestions. Receiving such written notice does not ultimately mean that the person will be eligible for or in need of reasonable accommodations, but it does qualify as a trigger to start the disability interactive process.

Finally, I'll note one more point that bears repeating: Starting a disability interactive process and discussing potential accommodation needs with an employee doesn't necessarily mean that the person will be proved to be disabled or that accommodations will need to be implemented down the road. It simply means that your organization is taking a responsible and proactive approach by catching triggering moments as they happen and initiating action to determine eligibility by starting the disability interactive process. Rather than focusing on the endgame, remember this: The disability interactive process is the most important aspect of the law because it will guide you in making sound decisions—either to reasonably accommodate or not.

Don't Wait for Proof to Start!

Yes, I've said this before. Still, I can't emphasize enough just how important it is for your organization to recognize being triggered by an employee to start

a timely, good faith disability interactive process. Don't wait for proof that an employee or applicant is disabled to start. By the time you know for sure whether a person is actually entitled to protections under the ADA, you've wasted precious time. The later you begin the process after being triggered, the more inefficient and difficult managing it will be. Issues don't get better with time, and waiting to start the process could cause additional injury to the employee or hurt relationships, which will make solving the problem more difficult.

How do I know this? I've managed ADA cases for more than 15 years and seen just about everything. Too often, employers focus on the end result—what is and is not reasonable to implement. It seems logical to think, "Initiating the disability interactive process may put my organization at risk, so I'm going to do the safe thing and wait for an employee's proof of disability." It's understandable logic. But compliance with the ADA requires a more nuanced approach.

It's true that back in the day, the industry standard was to wait for proof before starting the disability interactive process. The adage *used* to be "Show me first, and then I'll take action." But that approach no longer works because it sets everyone up for failure. By the time someone has proved a disability, the organization has lost the opportunity to manage the disability interactive process in an efficient and effective way.

The "sit and wait for proof" approach also compromises an organization's ability to support those who really need accommodations to safely and fully perform their job requirements—something that ultimately compounds workloads and invites anger and frustration from all parties. Waiting for proof also destroys the opportunity to document a personal injury before it can be claimed as a work-related injury. Acting as soon as an employee triggers the disability interactive process is also a major time-saver that leads to the speedier conclusion of the process itself. Chiefly, by starting the disability interactive process early, you are likely to more quickly and easily discover which employees are and are *not* in need of reasonable accommodations.

Bottom line: The time to start the disability interactive process is as soon as an employee has triggered your organization to act under the ADA—even if you're not sure whether an employee is disabled (or even strongly suspect the contrary). The key to complying with the ADA, to helping those who need accommodation and weeding out those who don't, and to managing heavy workloads is all found in the Disability Interactive Process Hallway (which we

will discuss in depth in the following chapters). Use and follow the Disability Interactive Process Hallway, and you will make better decisions with better results and in less time. As we move through the next chapters, we'll delve more deeply into how to navigate the Disability Interactive Process Hallway and make reasonable accommodation decisions.

Notes and Citations

1. ADA.gov. "Employment (Title I)." https://www.ada.gov/ada_title_I.htm
2. U.S. Department of Labor. "What is the expanded definition of 'major life activities' under the ADAAA?" https://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm#Q5

Thank you!

I hope you enjoyed this free sample of *The Disabled Workplace*. The book will be available for order soon in both a print and an ebook version at amazon.com.

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