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# ADA COMPLIANCE: WHAT EMPLOYERS NEED TO KNOW

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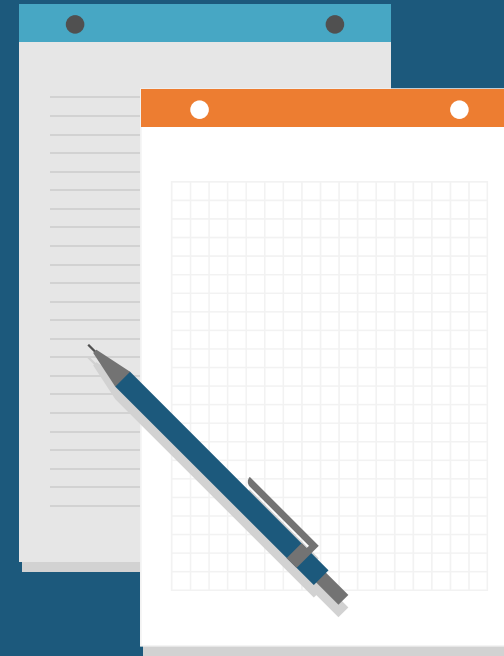
THE INTERACTIVE PROCESS  
AND THE TOUGH ADA ISSUES

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# AGENDA

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- The High Cost of ADA Litigation
- ADA Background
- The Interactive Process
- Difficult ADA Issues
- Most Common Pitfalls
- How to Comply with the ADA



# PRESENTER

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**Janell Stanton**

HR Attorney

WAGNER, FALCONER & JUDD, LTD.

# THE HIGH COST OF HR LITIGATION

Press Release

10-04-2023



## PNM Reaches \$750,000 Settlement with EEOC in ADA Disability and Retaliation Case

Settles Federal Charges PNM's Policies and Practices Discriminated Against Its Employees With Disabilities

ALBUQUERQUE, N.M. – Public Service Company of New Mexico and PNMR Services Co. will pay \$750,000 to settle an employment discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency announced today.



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# AMERICANS WITH DISABILITIES ACT

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- The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability.
- Applies to companies with 15 or more employees



# STATE LAWS APPLY TO SMALLER COMPANIES

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Watch for state equivalents of the ADA that apply to smaller companies and have expanded definitions of disability:

- **The Minnesota Human Rights Act** applies to companies with more than 1 employees
- **The Connecticut Fair Employment Practices Act** applies to companies with 3 or more employees:
  - Protects individuals with mental disabilities, intellectual disabilities, learning disabilities, or physical disabilities, including, but not limited to, blindness



# AMERICANS WITH DISABILITIES ACT

The ADA makes it unlawful to discriminate in all employment practices such as:

- recruitment
- pay
- hiring
- firing
- promotion
- job assignments
- training
- leave
- lay-off
- benefits
- all other employment related activities.



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# DEFINITIONS

“Disabled” means an individual with to an impairment that substantially limits a major life activity, or a record of (past history) of a substantially limiting impairment

Applies to “qualified individual”: someone who, with or without a reasonable accommodation, can perform the essential functions of a position

# UNPAID, JOB-PROTECTED LEAVE

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**Additional leave is often a reasonable accommodation.**

ADA Leave is a form of reasonable accommodation for a disabled individual .

**An employer must allow an employee with a disability to use accrued paid leave, and to obtain additional unpaid leave, for reasons related to a disability, unless doing so would result in undue hardship to the employer.**



# ADA INTERACTIVE PROCESS

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- Employers have a duty to engage in the “interactive process” when:
- Employee asks for an accommodation or change to how the employee does their job
  
- Employer’s steps in interactive process:
  - Determine essential functions of the employee’s job
  - Establish the individual’s limitations
  - Explore potential accommodations with the employee
  - Select most reasonable accommodation

# REASONABLE ACCOMMODATION

## Reasonable Accommodation:

Assistance or changes to a position or workplace that will enable an employee to do their job despite having a disability

## Examples:

- Modifying the job to remove marginal functions (not primary functions)
- Reassignment (accommodation of last resort)



**Employers do not have to provide accommodation if it would be an undue hardship**

# ACCOMMODATING MENTAL ILLNESS



- Examples of psychiatric diagnoses include **anxiety disorder, depression, ADHD, bipolar disorder,** among many others

- The ADA defines disability as a **physical or mental impairment that substantially limits one or more major life activities.** When job applicants or employees have a mental health condition that meets this criteria, they have workplace rights under the ADA.

# ACCOMMODATING MENTAL ILLNESS

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Examples of accommodations for workers with psychiatric disabilities are:

- Concentration or distraction issues: More frequent reminders of tasks and due dates; a quieter work environment; more frequent short breaks; work from home (if this doesn't cause undue hardship to the employer).
- **Managing treatment and medication:** **Flexible schedule to allow for appointments; more frequent breaks for medication; allow for use of water bottle during worktimes; part-time schedule until medication plan stabilizes.**
- Anxiety: Use of white noise headphones; attend meetings remotely; work from home part-or full- time; exchange non-essential job tasks with another employee; change in management style of supervisor.

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# ACCOMMODATING EMPLOYEE DRUG ADDICTION

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Although alcoholism and drug addiction may both be disabilities under the ADA, they are, in some respects, treated differently.

An alcoholic is generally a person with a disability under the ADA, **whereas someone who is addicted to drugs is protected under the ADA only if the employee is not currently using illegal drugs.**

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# ACCOMMODATING EMPLOYEES FOR LONG PERIODS OF TIME

- **ADA is silent as to the amount of time that an employer must provide an accommodation - including unpaid, job-protected leave**
- **ADA leave is not meant to substitute other protected leave like FMLA or state equivalents**
- **You must look to what is reasonable under the circumstances**



# DISCIPLINING AN EMPLOYEE WHO IS BEING ACCOMMODATED

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The EEOC guide explains that **employees with disabilities must meet the same production standards, quantitative or qualitative, as non-disabled employees in the same position.**

The EEOC suggests giving clear notice of such standards to all employees. While lowering production standards isn't required, a reasonable accommodation, such as eliminating marginal job duties (or finding alternative duties), may be required to assist an employee in meeting a specific production standard.



# DISCIPLINING AN EMPLOYEE WHO IS BEING ACCOMMODATED

- The EEOC guidance also confirms that under the ADA, **employees with disabilities must meet the same conduct standards as employees without disabilities.** If an employee's disability causes the violation of a conduct rule, the employer may still discipline them if the conduct rule is job-related and consistent with business necessity, provided it holds other employees to the same standard .
- The ADA doesn't protect employees from the consequences of violating conduct requirements even though the misconduct was caused by a disability



# **MOST COMMON PITFALLS**

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- Retaliation
- Failing to realize an employee has requested an accommodation
- Denying an accommodation without engaging in the interactive process



# PENALTIES FOR VIOLATIONS

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## Penalties:

- Non-monetary: hiring, reinstatement, promotion, reasonable accommodation
- Monetary: back pay, front pay, restored benefits, attorneys' fees, court costs, civil penalties, compensatory damages, punitive damages

## Civil penalties can be steep

- \$55,000 for a first violation
- \$110,000 for each subsequent violation
- Plus the compensatory and punitive damages



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# HOW TO STAY ON THE RIGHT SIDE OF THE LAW

- Train managers to understand when the ADA is triggered
- Develop a solid interactive process policy and procedures

Enlist the help of your friendly neighborhood employment attorney, when needed



# QUESTIONS?



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