



## Transcript of Session 1: 4<sup>th</sup> Thursday ADA Talks

### ADA Title I: Employment, Disclosure and Reasonable Accommodation

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**Presenter:** Barry Whaley, Project Director, Southeast ADA Center

>>**Jason:** Welcome to the 4<sup>th</sup> Thursday ADA Talks. We partner with the Burton Blatt Institute at Syracuse University and the Southeast ADA Center. This started as an outreach opportunity for us, a training opportunity for the Center for Accessible Technology Services, the Katz Center at the University of Kentucky's Human Development Institutes. There'll be ten sessions this year. We go until October, through October. And hope there'll be many special guests as we go through the year.

Just a heads up. If you need an accommodation when you register for these, please give us a 48-hour notice. We apologize. We were we were not aware that there was a need for an ASL interpreter today until the last minute, and we struggled trying to find someone and we're not able to secure someone before today. So, in future, if you could just let us know two days in advance before we'd really appreciate it.

Next month, we will be talking about Emergency Preparedness and the ADA with special guest Christine Woodell. And with that, I'm going to turn it over to my colleague Barry Whaley from University of, I 'm sorry. Syracuse University, Southeast ADA Center. Thanks for being here today.

>> **Barry:** Thank you, Jason. I appreciate being here and I appreciate the work you do. Hi, everybody. I'm Barry Whaley. I'm the Project Director of the Southeast ADA Center. We are one of ten centers in the ADA National Network. Wherever you are in the country, there are nine other centers similar to ours that provide guidance on the Americans with Disabilities Act and associated disability rights laws. We provide training. Obviously, that's why I'm here today. We provide print and electronic guidance. And we conduct research on the ADA.

So as a quick commercial were funded by NIDILRR, the National Institute on Disability, independent Living and Rehabilitation Research, which is within the Center for, within the Administration for Community Living in the Department of Health and Human Services. Two things to be aware of. Number one, under our agreement with the federal government, we do not provide legal advice, we can only provide informal guidance. And the other thing to remember is that the Southeast ADA Center and the other nine centers in the National Network, we do not have enforcement responsibility. We can only advise you. If your rights have been violated what your next steps might be.

Oftentimes, people have this misunderstanding of what the Americans with Disabilities Act is. Oftentimes they think that it is a law of preferential treatment for people with disabilities and that's simply not true. The ADA is a law that provides equal treatment for people with disability, leveling the

playing field. ADA is a landmark civil rights law, and it applies for people who have disabilities, as well as people who may have an association with somebody who has a disability.

Often when the general public thinks about the ADA, what do they think about? They may see a ramp on a building, or they may see an accessible parking place or an accessible restroom. But really there are five titles to the ADA. The title we're going to focus on today are the employment protections. That's Title one (I) of the law, but there are other Titles as well.

Title two (II) is public entities and transportation. What do I mean there? That's state and local government, it would apply to public transportation facilities. It would also apply to I've already mentioned state and local government.

I'm sorry, Title three (III) are places of public accommodations and commercial facilities. So those are banks, stores, restaurants, arenas, any place that the general public goes to access goods and services are covered under Title three (III) of the law.

Title four (IV) are the telecommunications provisions. This provides us with TTY/TTD relay services, captioning on our televisions.

And then Title five (V) are the technical provisions of the law. And included in the technical provisions, outlining who has enforcement responsibility for the ADA.

You know, Title one (I) for purposes that we'll discuss today, enforcement generally at the federal level is the EEOC, the Equal Employment Opportunity Commission. There may be state entities, state civil rights entities that may also help with enforcement of the law. Title two (II) public

entities and public transportation, and public accommodations under Title Three (III) generally, those enforcement falls to the Department of Justice or the Department of Transportation. Or it could include the Department of Education.

So, the ADA was passed in 1990. Beautiful day on the South Lawn, July 26th. Almost immediately from the time that the ADA is passed, what we saw were the courts, specifically the Supreme Court, narrowing the definition of disability to the point where people had to prove that they had a disability rather than they were a victim of discrimination or that they had experienced discrimination.

So, In 2008. We see the AD triple-A (AAA), Americans with Disabilities Act Amendments Act, which restored that definition of disability. And among other things, the ADAAA said "No" you should have a broad interpretation of what disability is. So, the focus returns to "did you experience discrimination" rather than "do you have a disability." Another thing that the ADAAA did is that it required that mitigating measures not be considered when determining somebody's disability. So, if you have some sort of device that aids you in your disability, then you still are considered to have a disability under the ADAAA.

We need to keep in mind that the ADA defines disability in a legal sense, as a legal term, not a medical term. So, what is disability? Under the ADA, a disability is a physical or mental impairment that substantially limits one or more major life activities. This is important because we need to consider that disability may be defined differently by Social Security or by vocational rehabilitation or by the V-A [veterans administration].

So, for instance, Social Security would define disability as the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairments, which can be expected to result in death or that has lasted or can be expected to last for a continuous period of time longer than 12 months.

Vocation Rehabilitation, for instance, defines disability as someone who has a physical or mental impairment that constitutes or results in a substantial impediment to employment. Then if there are any people who are veterans listening today, you know that the V-A has an entire, entirely different interpretation of disability. Under the V-A, it's an, it's an impairment to one's earning capacity is the result of the disease of, disease or injury. You don't actually under the V-A system have to prove any loss of earnings to qualify for V-A disability benefits. So, you may have two veterans and both of them may have heart disease. But they don't necessarily receive the same benefit under the V-A system.

But getting back to the definition of the ADA, again, it is a physical or mental impairment that substantially limits one or more major life activities. We also need to keep in mind that when we're considering disability, that most disability is non-obvious. And yet it still has an impact on our daily lives. Arthritis, for instance, is the number one disabling condition in the United States. Somebody who has an intellectual disability. Or may have a mental health diagnosis. That is an invisible disability, not obvious to the general public. People who have HIV or AIDS. People who have a seizure disorder. People who have substance abuse disorder and are in treatment, may have protection under the law. And that is a non-obvious disability.

So, we need to consider that because if we don't, then that just leads to greater misunderstanding or greater stigmatization. You know. One of the social media things that I lurk in is a site called NextDoor. And I was reading just the other day. Some guy with a disability parked in an accessible parking place, got out of his car. started to walk into a Kroger and somebody began to harass him because they said, "Oh, you don't have a disability, where is your wheelchair?" Not considering this issue of non-obvious disability.

So, what are the basics of Title one (I) of the ADA? Under Title one (I), employers cannot discriminate against people who have disability in any employment practice or the terms of employment, the conditions of the employment, or the privileges of employment. And this would cover all aspects of the employment process. You don't just get protection. when you are on the job. You have, if you have a disability, you may have protection in the pre-employment phase. You may have protection before you ever have an interview with somebody.

You know, I spent a number of years doing employment services for people with disabilities. And that would require employment professionals or job coaches, in some cases, had to accompany somebody to the job interview to maybe interpret what the employer was asking in the interview. So, under those circumstances, and the EEOC has backed this up, if you provide employment services for people with disabilities, you are, what's called a reasonable accommodation. And we're going to talk more about reasonable accommodation in a minute. Excuse me.

So, when we consider disability, we need to understand that the ADA has three prongs to disability determination. The first is that you have a

documented disability that impacts one or more major life activities. Pretty simple, right? I mean, that's the fundamental definition of disability. But you can always, you can also have a record of having a disability. And here are a couple of examples of that. One might be that at one time you experienced cancer and that cancer is in remission or has been cured. Although you do not have impact now, because of that cancer diagnosis, you have a record of having that disability. And as such, you may also qualify as having protection under the law.

Here's another example. I'd mentioned before with invisible disability, substance abuse disorders. If somebody is in recovery from substance abuse disorder, they've gone through a treatment program, and they have recovered from that substance abuse disorder. They have a record of having disability and would have protection under the law. This would also extend to people who are in medically assisted treatment programs. So, let's say somebody, who at one time had an opioid addiction, and they may be in a medical, medically assisted treatment. They would have protection under the law. We have seen cases where employers have gone to somebody in medically assisted treatment and say, "you need to get off methadone or I'm going to terminate you." Under the law, I mean, looking at methadone to treat a disability is no different than somebody who's diabetic being treated with insulin.

The third prong of disability determination is you could be regarded as having a disability. So, what do I mean there? Perhaps you were in a car wreck, or you have some sort of disfigurement that you believe that somebody took a discriminatory action against you because of your appearance, then you may have protection under the law. This test focuses

less on the extent of an actual impairment, but how people perceive that individual.

Here's another example you might recall last year, I think it was the Academy Awards, Excuse me. Jada Pinka Smith. She has alopecia, right? Was the victim of just a really awful joke. Right. Although she has alopecia. she was being regarded as having a disability. Doesn't impact a major life activity. Right. But she was regarded as. So, you may have protection under that third prong of disability determination.

There are some exemptions to Title one (1) we need to be aware of. The first is Title one (I) only applies to employers who have 15 or more employees. So, if it is a private employer that has 14 or fewer employees, they are exempt from Title one (I) of the ADA.

Now you need to know this also does not apply to state and local governments, they could be of any size and would still have responsibility under Title one (I) of the law, the employment protections. The federal government is exempt from the ADA. But why is, why is that it's federal law, right? Well, the federal government, we have to look back to the foundational law that led to the ADA. And that's the Rehabilitation Act of 1973. So, although the federal government may not, may not have to, the ADA may not apply to the federal government, certainly, Section 503 in the hiring practices of the federal government apply in this case.

I'm going to make a shameless plug for a commercial here for a second. This year, 2023 is the 50th anniversary of the passage of the Rehabilitation Act of 1973. So, over the last year, we conducted a series of interviews with influential people in the disability rights movement. And we created a website, it's called Section 504 at 50. And just some really fascinating



interviews. So, I urge you to take a look at that site, listen to some of these interviews. Among them, Lois Curtis, who is, who is the plaintiff in Olmstead versus L.C., which led to the Supreme Court Olmstead decision. We interviewed Lois, and many of you may know that Lois died just a few months ago. So, very poignant that we likely were the last people to get to interview Lois before, before her death.

So, corporations fully owned by the federal government don't have to comply with the ADA. So that would include like the FDIC and organizations like that, private membership clubs do not have to comply with the ADA. And again, we're talking private membership clubs. U.S. government executive agencies don't have to comply. The 573 recognized tribal nations do not have to comply with the ADA. And then finally, businesses that are operating in a foreign country. You know if for some reason compliance with the ADA may violate a foreign law then they would have an exemption as well.

So, when we talk about ADA Title one (I), we have to talk about qualified applicants. So, what is a qualified applicant? Well, the law says that an employer cannot discriminate against qualified applicants. And what we mean there is that to be qualified, you have the skill, you have the experience, the education, other job-related requirements. And this is important. You can perform the essential functions of the job with or without a reasonable accommodation.

So, we have to differentiate here between essential job functions which are the reasons why the job exists, and tertiary or marginal functions. So, employers, you know, if somebody is having difficulty performing the

essential functions of the job, then employers are required to provide a reasonable accommodation.

So, when I say reasonable accommodation, what am I, what do I mean here? Anytime we change the work environment or how a job is done, that results in an equal opportunity for somebody with a disability. We have provided a reasonable accommodation. Now, businesses must make reasonable accommodations to a known physical or mental limitation that somebody has. So, applying the definition of disability to the law. But I've known a lot of employers over the years. I have never known one of them to be a mind reader.

When we say a known physical or mental impairment, what do we mean here? Well, it means that the person with a disability has disclosed that disability to the employer. And it's important to remember a couple of things about disclosure.

First, is that somebody with a disability never has to disclose their disability unless they are seeking reasonable accommodation. So, I've known a lot of people over the years who have a disability. However, they can perform the essential functions of the job. So, they chose not to disclose that disability. But it's important to note that if you believe that you need that accommodation, then it would be best to disclose sooner rather than later. Because if you get into a situation where you are having write-ups, or some sort of disciplinary action being taken on the part of the employer. We need to keep in mind then if at some point, I do disclose my disability, what happened in the past, write those disciplinary actions, they don't go away, they are still there.

The other thing to remember is that employers are required to investigate accommodation with somebody unless it would cause an undue hardship on the business. And depending on the business and the situation, that bar is set pretty high, how is this an undue hardship to provide that reasonable accommodation?

So, here's some examples of reasonable accommodation. People who are blind or have low vision, they may require screen readers or JAWS, or audio tech software. In my family, we have a history of macular degeneration. And in my generation, my brother David was the one with macular degeneration and he was able to continue working the last years of his life with the aid of screen reader technology.

Change in schedules and other calm and reasonable accommodation. One of my co-workers has a mental health diagnosis and takes some pretty significant medication first thing in the morning. And because of that, she does not function well first thing. So, you know, our standard work hours, except in the summer months is 9:00 A.M. to 5:00 P.M. however, she begins her day at 10:00 A.M. because it's taken her that long for that medication to take effect and not impact her in a negative way. Now, does that mean that she gets to leave at 5:00? No, that means that she's adjusted her schedule. She's beginning at ten than she is leaving, it's six or later.

Changes in break times. Somebody who experiences Crohn's, for instance, might need to take more frequent breaks or somebody who has fatigue. And we're seeing this a lot with post-COVID symptoms. That one of the common post-COVID symptoms is continuing or ongoing fatigue, which

may need additional break times in order for that person to do the essential job functions.

And speaking of the pandemic, who knew prior to 2020 that work from home would, would accommodate all of us. This has become the universal accommodation. You know, and many people still continue to work from home. Job aids is another reasonable accommodation. Changes in a work location or a work environment. And again, this is not an exhaustive list. This is just to get you thinking about reasonable accommodation, a piece of equipment, or a change in equipment, elimination, or exchange of marginal job functions.

So again, we need to keep in mind that when accommodations are put in place, they are put in place so the individual can perform the essential functions of the job. But there may be marginal job tasks and those could be eliminated, or they can be given to somebody else. A friend of mine tells a story of a lady that, was a receptionist at the place where she worked. And so, the primary, the essential functions of the job was answering the phone, greeting people when they came in. But there was a marginal job task. She had to take the mail to the mailbox which was down a flight of stairs and across the street. And this lady had some physical disability that I think it was fatigue actually, that prevented her from doing that. But that was not an essential job function. That is a tertiary marginal function. So that was just assigned to somebody else.

These last two, reassignment and leave, are reasonable accommodations. But the EEOC has always been very clear. These should be considered accommodations of last resort. That you've looked at other accommodations, nothing else has worked. Then you might look at

reassignment to a position, a lateral position. You can't have somebody move into a position that would be considered a demotion or promotion. We also need to keep in mind that there may be collective bargaining agreements at play in businesses that might prevent reassignment.

Leave, you know, this is kind of the interplay between the ADA and FMLA. You may need to take extended leave and that's okay. However, some circuit courts have ruled that that extensive, that extensive leave may lead to you no longer being a qualified individual. There is a case. I'm blanking on it right now. Severson vs. Heartland Woodcraft in Wisconsin. Where the Circuit Court ruled that the individual, the plaintiff, was no longer a qualified individual.

So again, the ADA does not apply to just being on the job, right? It could be pre-employed people who oftentimes somebody may need some help doing some pre-employment testing. So that would be a reasonable accommodation. It also applies to full-time employees. It can provide, it can apply to part-time employees. The ADA also applies to seasonal workers and temporary workers.

So again, talking about essential job functions, that's the reason why the job exists. That few people are hired to do that job and that it is specialized. Those are essential job functions. Now, I'm going to contradict myself for a second because I said that you never have to disclose your disability unless you're seeking a reasonable accommodation. But I want to differentiate between disclosure and self-identification.

So, disclosures, voluntarily sharing information about your disability. And I know we have a broad audience here. We have about looked like 235 plus people listening in today. And if some of you are employment specialist or

job coaches, you know, it is not our role to disclose disability to an employer. Now certainly it's going to come up right by the very nature of the work you do. If you are representing people with disabilities to employers. It's, it's there, it's the elephant in the room. So, it is important that you understand that your role when you meet somebody or you're in the discovery phase of employment, that you're having a conversation with that individual and saying, Look, disability is going to come up, how are we going to address it? What are we going to say when? To whom?

Now, again, I want to differentiate disclosure from self-identification. Because often you will see on employment, excuse me, employment applications where a question is asked, Do you have a disability? Well, again, this comes down to I don't have to disclose. Why are you asking me this? Well, there are a couple of reasons. There may be an affirmative action plan in place. Perhaps the employer gives preferential hiring to veterans with disabilities, or maybe that employer is a federal contractor. And under Section 504 of the Rehabilitation Act, federal contractors are working what's called toward what's called the 7% utilization goal. Where 7% of their workforce is composed of people with disabilities. So, you see in these situations, it may be advantageous to somebody to disclose their disability. But again, this is self-identification. This is not voluntarily sharing.

**>> Jason:** Barry, we've got a question.

**>> Barry:** Yes, sir. Jason: It says that private employers don't have to comply with the ADA. Does that mean they're allowed to discriminate? You're, you're referring to employers with 14 or fewer employees. Under that scenario, if you have 14 or fewer, fewer employees, then yes, you are exempt from the Americans with Disabilities Act.

>> **Jason:** But then someone said, exemptions for fewer than 15, Why is this? Because it's cost prohibitive or there are too many small businesses for government oversight.

>> **Barry:** I'm sorry, could you repeat that question for me, Jason?

>> **Jason:** It says. Is this because it's cost-prohibitive, or are there too many small businesses? Government?

>> **Barry:** I'm not sure I understand the question.

>> **Jason:** Under the 15-employee exception, right.

>> **Barry:** Right. So, you know, originally the law was for 25 or greater employee. So, if you had 24 or fewer and then we revised, and it went to 15 or greater. That was certainly a compromise in the development of the law at the time. Anything else, Jason?

>> **Jason:** That's it right now.

>> **Barry:** Okay. Thank you. So why disclose a disability? [unintelligible]

We may want to disclose a disability because we have an obvious disability and we want to address those concerns head-on, right. So, if you have an obvious disability as opposed to a non-obvious, you may want to disclose immediately and, you know, what are some ways to do that? [for example] Well, "yes. I know, I have blindness, but I am eager to go to work. I use screen reader technology that allows me to do my job just like anybody else."

Again, we've mentioned this before. If somebody needs an accommodation to participate in a job interview or pre-employment testing, then there may need to be a reason to disclose. But again, disclosure is a very personal

decision, right? And you need to weigh what are the benefits versus what are the risks in disclosing.

Again, disclosure might offer a competitive advantage. We go back to those affirmative action plans or, you know, those federal contractors, those 504 entities. Somebody wants to bring their whole self to work. They, you know, disability is not a bad word. In this session, we're not going to get into biases or the negative biases that people have against people with disabilities. Other than to say that they are real, and they are out there.

But, you know, the social model of disability in the world I live in, disability should be embraced, and it should be celebrated because it's part of the human condition. We need to consider that all of us are just temporarily abled. We're one birthday, one accident, one medical procedure away from acquiring disability. It should be celebrated. It's part of who we are. I have a very dear friend of mine, one of my best friends who's an autistic and she will tell you, "I am an autistic, I am not a person with autism." "Your width, "she will say, "is my problem." And she wants, she identifies as an autistic because she's bringing her whole self.

Again, participation of a job coach or employment specialists may be a reason to disclose. Under the ADA, there's no standard form or set of information required. Now certainly businesses may have processes in place, and they should have processes in place for how to handle accommodation requests.

But we need to keep in mind, excuse me. We need to keep in mind that the law, in the broadest sense, doesn't prescribe how somebody can ask for accommodation. Accommodation can be made verbally, it could be written, it could be an email. Somebody could make the request for you. It could be



a coworker, or it could be an employment specialist, could be somebody else. So, we need to keep in mind that there are no magic words either. We may never say, "I need a reasonable accommodation." If somebody says, "I need help," then an employer should recognize that this could be a request for reasonable accommodation.

So, what aren't employer's responsibilities when an accommodation request has been made? First, as I said, you recognize that that request for accommodation has been made because they may, the employee may not be using those magic words. Employers are required then to engage in what the law says is the interactive process. What is this? What's, practically what does this mean? Well, the interactive process is good faith conversation. It's sitting down with somebody and listening to why they are having problems with the essential functions of their job. And working between employer and employee, having a good faith conversation as to what accommodation might be put in place to help this person have an equal employment opportunity.

Employers can confirm that there is a disability, and they can ask for documentation of that disability, and we'll talk more about that in a second. The employer has a responsibility to determine, are we talking about essential job functions here? Or are we talking about marginal job functions? Employers have responsibility to investigate solutions. What sort of accommodation might be put in place to implement that accommodation? To document that that accommodation is put in place.

And it's important to remember in documenting disability disclosure and accommodation, that information does not end up in somebody's personnel file. It needs to be in a separate encrypted file somewhere separate from a personnel file.

The other thing that an employer should do is they should reevaluate that accommodation over a period of time. You know what? Especially this is true for people who have progressive disabilities that an accommodation that may have worked well for somebody in 2017 may not be an accommodation that works well for somebody in 2023. So, there may be an adjustment that needs to be made there. And keeping in mind adjustment.

Employers don't have to be perfect. You know, they shouldn't be scared of trying and accommodation. And if it doesn't work, then what other accommodation can we try? Remember, it goes back to those accommodations of last resort. That we are making a good faith effort and we don't always get it right the first time. Sometimes it takes some tweaking or sometimes re-evaluating.

Now, this is important to remember about accommodation. Is that at the end of the day, the employer has the right to decide what accommodation is put in place so long as it is effective for the individual. Now, with that, with that said, we need to keep in mind who are the experts, right? Well, people with disabilities are the experts and perhaps they've used some other accommodation at some other time. You know, we should always consider that opinion as the expert opinion. But if, if an employer believes that another accommodation could be put in place, that's equally effective, then that might be considered as well.

**>> Jason:** Barry, we've got another question.

>> **Barry:** OK.

>> **Jason:** Says, what if HOE? I'm not sure I understand. What if HOE would you assist a person with reading and comprehension disability and their job requires them to go over legal contracts and requires them to read and comprehend and answer questions. Does this relate to the bona fide occupational qualification?

>> **Barry:** Well, I mean, I mean, this goes, I'm not sure what HOE is. If I understand your question directly. If somebody has difficulty with comprehension in one of the essential functions of the job is to comprehend complex documents, then I would believe that that person is not qualified under the law.

>> **Jason:** Yeah, it was what if and how would you assist a person with reading and comprehension disability that their job requires. They just clarified that. But I think you answered the question.

>> **Barry:** Okay. Anything else, Jason?

>> **Jason:** No. They said thank you.

>> **Barry:** Thanks. So, employers have a right to ask for documentation, as I mentioned before, but that documentation has to be job related and consistent with a business necessity. I'm not so Pollyanna that I don't understand that we live in a very litigious society. In fact, the ADA itself is formed by case law. And so, because of that, employers tend to believe that they should receive every bit of documentation of somebody's disability. No, again that documentation must be job-related, consistent with business necessity, We need to keep in mind people may have three or four different disabilities. But if only one disability is resulting in a need for

reasonable accommodation, then that employer only should have access to that documentation that is specific to that disability and how he or she would accommodate that person. Again, any sort of disability documentation must be kept confidential. And as I mentioned before, it must be in a secure file separate from somebody's work file.

Now, we need to understand that. Again, the ADA is not a law of preferential treatment, it's a law of equal opportunity. We have to understand that granting a reasonable accommodation doesn't result in eliminating those essential functions of the job or reducing the performance standard of a job.

So, you know, if I run Whaley's widgets and the essential functions of the job call for Jason Jones to assemble 20 widgets a day. And Jason comes to me and says, "You know, I'm having trouble getting 20 widgets done a day." As an employer, I don't have to say "Oh Jason, don't worry about it. You just have to do 17." No. That's not accommodating. That's reducing the employment standard, and an employer does not have to do that. So, the essence of a reasonable accommodation is that it is a means by which somebody can perform essential job functions to do those 20 widgets a day.

Now, are employers required to honor any accommodation requests that's made? No. First, if it creates an undue hardship for the business. Meaning it's extensive, it's disruptive, it's too costly, or that it fundamentally changes those essential job functions, then an employer is not obligated to grant that accommodation. Second, if it's dangerous or illegal, then that accommodation would not need to be made.

So, employers have obligations under disability inquiry. And what do I mean here? Under disability inquiry, it is a conversation or questions that an employer engages in to learn about somebody's disability or related medical condition.

We need to be aware that there are different rules that apply in different aspects of employment. And there are three phases of the employment process. The first, pre-employment, before an offer has ever been made. The second phase of employment is pre-employment post offer. An offer has been made, but that individual has not begun work yet. And then the third is employment.

Under pre-employment, before an offer has ever been made, employers cannot engage in a disability inquiry. After an offer is made, however, an inquiry is allowed, but only if it has that same inquiry made of all candidates for the job category. So, here's a good example of this, right. Drug testing. If you believe that somebody may illegally be using drugs, you could not single, no that's a bad example. Let me let me rephrase this. If that classification of job requires drug testing, then everybody, all those candidates in that job category have to then participate in that drug testing. So, you can ask those disability inquiries, but it's the same inquiry that you are asking of all people in that job category.

The third is employment. And under employment, disability inquiry can be made if it's job-related and it's of a business necessity. So, if somebody is not performing the essential functions of the job and you have concerns as an employer. You can have a conversation with the person and say, "Look, I see we're having some difficulties here. You are, you're not getting your

job done. You know. Is there something we need to talk about and look for a way that we might be able to help you."

So, in disability inquiry, employers can ask about your general well-being. They can ask about a non-disability-related impairment. They can ask if you can perform the essential functions of a job. They can also ask if you've been drinking alcohol and we're not going to go down this rabbit hole today. But the ADA looks at alcohol addiction differently than illegal drug use. And that's a presentation for another day. And Jason, maybe you'll have me back for that.

You can ask about current illegal use of drugs. You're going to ask you about pregnancy information in a very general sense, although a lot of that is protected. You can ask about emergency contact information. An employer can ask if you have or if you have had a disability. Under, you know, in disability inquiry, they're not asking for medical documentation or genetic information. They're not asking about your prior worker compensation history. And they cannot ask about your past prescription medication use.

And we're at 10:48. And I want to pause. And Jason, if you want to join me, we'll see if there are any questions.

**>> Marsha:** You have quite a few questions, Barry.

**>> Barry:** Marsha, you want to, you want to throw them at us.

**>> Marsha:** Unless I know this is about employers, but if government agencies are breaking laws and discriminating such as against visually impaired persons?

**>> Barry:** Sorry. Is there a question here?

>> **Marsha:** Yeah. They were related to this is about employers but about government agencies. How are they covered?

>> **Barry:** Which, it's going to depend on the government agency.

>> **Marsha:** Okay.

>> **Barry:** If it's a state or local government and they are discriminating against people or someone with a visual impairment than yeah, you know, certainly that that individual may have protection under the law. And I would say that that person with a visual impairment probably should call the Southeast ADA Center or their regional ADA Center and seek guidance on what they should do next. And that number is 1-800-949-4232. It'll be on the next slide after this.

>> **Marsha:** And then how does reasonable accommodation apply to caregivers of children or adults with disabilities?

>> **Barry:** I think that's going to depend on what the employment status is with that individual. Depending on the size of the business. Let me think here. You know, if it is a business where the ADA applies and you are a caregiver of children, then yeah, you may have protection under the law.

>> **Marsha:** Alright. And then they were seeking clarification,

>> **Barry:** Actually, hold on. Hold on one second. Cheri, are you with us? Can you, can you talk? [pause]

Cheri is not muted that I see. Cheri is one of our technical assistance people, and I want to make sure if she has something to add that she does.

>> **Marsha:** Becky...Becky is here.

>> **Barry:** Oh, Becky is here. Okay. Great. Can you bring Becky in?

>> **Marsha:** She's coming in.

>> **Barry:** All right. I see. Okay. How are you?

>> **Rebecca:** Oh, hi. Yeah. This is Rebecca. I'm the Lead Information Specialist with the Southeast ADA Center. So, the ADA does say people are protected against discrimination based on association of somebody with a disability. However, an employer would not need to accommodate an employee without a disability in order to take care of a family member with a disability.

>> **Barry:** I misunderstood that question entirely.

>> **Rebecca:** I'm not sure that's what they meant. You know, if that's what they meant, then right. If you have a child with a disability, you're not entitled to an accommodation to take care of that child, but you can't be terminated because you have a child with a disability.

>> **Barry:** That is correct. Yes. Thank you. I was I was looking at that a completely different way.

>> **Rebecca:** Sure.

>> **Barry:** And thank you for joining us.

>> **Rebecca:** Oh, absolutely.

>> **Marsha:** And then they were seeking clarification. Did they hear you say a reassignment can't be a demotion?

>> **Barry:** Reassignment is lateral. Right. So, it's moving into a similar classification? Yes.

>> **Rebecca:** Barry, yeah, this is Rebecca again? Yes. As much as possible. That is absolutely true. But there could be a time and the only



way to keep that employee employed may be a lower position. The EEOC doesn't, doesn't like to have that happen. I mean, but if that's the only way to keep that employee employed, that is permissible. And the employer does not have to maintain that employee's salary if the previous position was a higher salary.

>> **Barry:** That is correct.

>> **Rebecca:** Then the transfer position.

>> **Barry:** That's good clarification. Yes, ma'am.

>> **Rebecca:** And to go back on that question though, about the, maybe a family member with a disability. That could be maybe where FMLA kicks in, which is a completely different law. But just to let your listeners know, listeners know there could be some options if an employee finds himself in that position.

>> **Barry:** True.

>> **Rebecca:** And thank you, Cheri.

>> **Marsha:** And then let's see. Would the ADA administrator, be the person making the determination about the employee being qualified for the role or is this organization specific?

>> **Barry:** Meaning if there is a designated person within a business who addresses accommodation requests, is that what the question is?

>> **Marsha:** They did not specifically say that.

>> **Barry:** Yeah. I mean, you will see that, you will see that employers may have somebody at the business, somebody within the HR department that

is responsible for those accommodation requests. You know, but, but not all businesses have that.

>> **Marsha:** And must an employer accommodate an employee with a temporary restriction? For example, an employee is recovering from surgery and must work in a total sedentary capacity for three months, Would it be permissible to keep them on a protected leave during this time instead?

>> **Barry:** Becky, I'm going to let you answer that.

>> **Rebecca:** Okay. Generally, temporary disability or temporary impairments, individuals are not protected under the ADA. The EEOC generally says six months or less. However, there may be situations where that temporary impairment does rise to the level of disability. If you look at it it wouldn't be a long-term disability or long-term condition, let's put it that way. If it would be a long-term condition, would that employee be eligible or entitled to accommodations? If yes. Then an employer may need to consider accommodations for temporary impairment. And again, as Barry said earlier, it's always case-by-case basis. You look to see what's going on.

>> **Barry:** Next one.

>> **Marsha:** Yes, quite a few here. So, what about an employee who self discloses to their coworkers but are not disclosing for an accommodation. What are the expectations of the manager organization?

>> **Barry:** Meaning? Meaning that they have not disclosed a disability to their employer and the need for accommodation, then they're there, you know, again, I mean, you would treat it like the disclosure was never made

to the employer. Now, if there is a scenario where an employee discloses a disability and the need for accommodation, then, you know, and is asking a co-worker to make the accommodation requests for them, then that is allowable as well. Go ahead, Becky.

>> **Rebecca:** Okay. And what I wanted to throw on there. So right. So, an employee may just decide to disclose to their fellow coworkers what I would caution an employer would say. I wouldn't employ, I wouldn't even address, addressed that. Employee who disclosed at all, right. Because you don't want to get into the regarded as situation. There are lots and lots of cases where somebody did not have a disability or did but didn't ask for an accommodation. You just don't want to an employer doesn't want to start asking questions about disability if they haven't been approached.

Now, it would be different if the employer knows that the employee disclosed to coworkers and then notices, work quality has gone down, or work production has gone down. Coming into work late, falling asleep at the desk or the job. So now they may be, okay, they haven't come to us. But to be a good employer, we may want to say, "Hey (but don't mention disability), but say, "Hey, we've noticed your production is not where it was a month ago. Is there something we can help you with?" And open the door for that interactive conversation if the employee wants to have it.

>> **Barry:** If they choose to.

>> **Rebecca:** Yes. And the employer needs to document, document, document that they offered, and what the employee's response was.

>> **Barry:** And that was that, was that element before when I was discussing disability inquiry.

>> **Jason:** We've got about 1 min left for questions Barry.

>> **Barry:** Okay. Let's do one more and Marsha. And then oh, no, we don't we don't have time because Marsha needs to do so the housekeeping. So quickly. Again, if you want to contact your regional ADA Center, 1-800-949-4232. You can also email us at [adasoutheast@syr.edu](mailto:adasoutheast@syr.edu). We invite you to check out our website, [adasoutheast.org](http://adasoutheast.org). There are all these groovy social media things you can, you can go to and learn more about us. And so here are some disclosure tools. This will be in the material. And Marsha, I'm going to punt it over to you and that beautiful pit bull.

>> **Marsha:** Well, thank you all for joining us for today's first session in the fourth Thursday ADA Talk Series. And the topic today was ADA Title one (I), employment disclosure and reasonable accommodation. A certificate of participation is available.

To receive a certificate, you must meet four requirements. You must be registered. You must listen to all of the webinar. Your attendance to the webinar must be verified and you must complete the online post-test eval with the verification of attendance.

This link to the post-test eval will be emailed to all registered participants within the hour and will be available within the hour. And after you submit the post-test eval and verify your attendance, you will get a link to print your certificate of participation. A copy of the certificate of participation will also be sent to the email address you gave for the post-test eval.

And Barry, if you can go back just one slide to make sure again about the Easter egg. Please note this bow-wow from Poppy, who is very beautiful, pit bull. So that may come into play on the post-test eval. [comment on

Poppy by Barry, "She's a lover"] Marsha: And we look forward to you joining us next month on February 23rd, Thursday from 10-11 AM [Eastern Time]

[comment on date by Barry, "It's Cheri's birthday.]

>> **Marsha:** Yes. For the second session. In this series, it will be Emergency Preparedness and the ADA. And an archive with the materials will be posted and available for this session. Again, we will send a link out when that is available.

>> **Jason:** And from the University of Kentucky. I would like to thank everybody for coming today. I look forward to spending the fourth Thursday of every month with you-all through October.

>> **Barry:** Bye everyone.

>> **Marsha:** And we will also any questions that weren't answered. Well again, you can contact your ADA Center at 1-800-949-4232 or contact us directly at 404-541-9001. And we'll look to get all those questions answered.

>> **Barry:** Have a great day, everybody.

## Questions?

**Southeast ADA Center**

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