

TPSA

October 2020 News

The Americans With Disabilities Act Turns 30! How the Landmark Federal Law Protects You On-The-Job

The Americans with Disabilities Act (ADA) recently turned 30 years old. Congress passed the bill and President George H.W. Bush signed it into law on July 26, 1990. When it was passed, the N.Y. Times declared it “the most sweeping anti-discrimination measure since the Civil Rights Act of 1964.” The law was based in part on the Fair Employment & Housing Act (FEHA) of 1959, a California state law that prohibits workplace discrimination based on a protected class, including a “disability.” The ADA extended those disability protections to workers nationwide. In the years since, it has brought about sweeping changes to various workplace rules and policies and has helped level the playing field for workers who need assistance on the job due to a medical condition. This month, we pay tribute to the ADA by looking at how disability law can help protect you in the workplace.

Who is Covered: Some had thought the law was designed to protect only those who are totally and permanently disabled. It does help these folks, but it goes much further. The ADA will likely benefit everyone at some point in their work careers, regardless of whether the law’s protections are visible to them or not. For example, many public employees perform dangerous work, including heavy manual or repetitive work that can frequently give rise to injuries on the job. This includes things like operating heavy equipment, and long hours sitting or working on a computer. Medical conditions may qualify as a disability, regardless of the source (whether on- or off-the-job), and the law protects both physical and mental disabilities, such as depression. Essentially, any major injury or serious medical condition (*e.g.*, cancer) may qualify for protection. Legally speaking, under Federal law, a “disability” is defined as an impairment that *substantially* limits a major life activity. State law is more generous – it defines “disability” as an impairment that limits a major life activity. On September 25, 2008, President George W. Bush signed the ADA Amendments Act into law. It expressly overturned several U.S. Supreme Court

decisions that narrowly interpreted “disability” under Federal law. The ADA has since been applied much more broadly, including to people “regarded as” being disabled.

How Am I Protected: As with other anti-discrimination laws, the ADA protects individuals from harassment, discrimination, and retaliation in the workplace. This is a noteworthy achievement by itself, but disability law is unique from other workplace discrimination laws because it affirmatively requires employers to engage in a good faith interactive process to reasonably accommodate an employee’s disability. This may include:

- restructuring a job
- permitting an alteration of when and/or how an essential function is performed
- modifying an employer policy
- providing a part-time or modified work schedule
- providing additional training
- permitting an employee to work from home
- providing unpaid leave for treatment or recovery
- reassignment to a vacant position
- adjusting the workstation (e.g., by providing special equipment or devices)

Whether an accommodation is “reasonable” depends on the specific circumstances. An accommodation is not reasonable if it places an “undue hardship” on the employer. It is important to know that an employer can still require you to perform the essential functions of your job. So, if you cannot perform those duties with or without an accommodation, you may need to look at other options such as reassignment.

What Should I Do If I Think I Need Assistance: If you have a serious medical condition and you need help at work, contact your Association leadership or professional staff right away! It is a good idea to do this *before* you contact HR or your employer and even before you send them your doctor’s note, if possible. The interactive process is fraught with perils, and each situation presents different challenges. No two cases are the same. This is primarily due to two factors. First, your job duties are often different from your co-workers, even if you are in the same job classification. Second, even if your job’s essential functions are identical to someone else, your specific medical condition and job restrictions are probably unique to your case.

It is generally not wise to attend an interactive process meeting without a representative. An employer may see this as a step towards legally terminating your employment. Without good representation, you may not understand all your options. Staff can help

you understand your specific situation and what is achievable. They can also help you identify your priorities, including returning to your regular job, accepting a reassignment, requesting a medical leave, retiring, or negotiating a separation agreement.

Your needs may also change throughout the interactive process. For example, you might gain greater insight into your job's essential duties, or how those can be performed differently. You might lose income (*e.g.*, exhaust paid leave, workers compensation benefits, or short- or long-term disability payments). Your medical condition may improve or get worse. Your work restrictions may change. In short, circumstances may cause you to re-think what you thought you wanted to get out of the interactive process.

In any event, the starting point is to identify the essential functions of your job. This may be – but is not necessarily – reflected in your official job description. The employer's evaluation of what duties are essential is given deference, but you often have keen insight into what exactly you do on a regular basis. Discuss with Association staff any discrepancy between what the employer says is essential and what you think is essential. Be sure to compare the essential functions with any medical restrictions you might have. If your condition is not covered by workers' compensation, this is likely memorialized in a note from your treating physician. The employer can provide your doctor with your job description and ask for clarity about any restrictions you might have in performing those duties but cannot require your doctor to disclose your condition or course of treatment.

What About Workers' Compensation? If you are injured on-the-job, you are entitled to workers' compensation benefits. If you are taken off work, you may receive wage replacement benefits known as "Total Temporary Disability" (TTD) payments. This is 2/3 of your pay, paid by your employer's workers' compensation carrier or third-party administrator. You may be able to use your own leave accruals to cover the difference. Once you are declared "permanent and stationary" (meaning your condition is not likely to improve with further treatment) by the workers' compensation physician, your TTD payments will stop. At this point, your employer will likely request an interactive process meeting if they have not done so already.

Be sure to look at any reports issued by the workers comp doctors. These reports are often titled "QME" (Qualified Medical Examiner) or "AME" (Agreed-upon Medical Examiner). It is important to look beyond the "on paper" restrictions and determine whether you can perform the essential functions *with* or without accommodation. Workers' compensation attorneys are focused on how to maximize your workers' compensation settlement or award. They are not focused on how to return you to work

with or without accommodation under the ADA. That is something you will need your Association staff to assist you with. But what you (or your workers' compensation lawyer) might say or do in your workers' compensation case *will* affect what you can do in the interactive process. With workers' compensation, the focus is on rating your level of permanent impairment (*i.e.* how disabled are you?). The key focus in the interactive process is whether your impairment impacts your ability to perform the essential duties of your job and how any reasonable accommodations may allow you to return to work.

Medical Leave: The California Family Rights Act (CFRA) and the Family Medical Leave Act (FMLA) allow up to 12-weeks of job protected leave for a serious medical condition. These leaves run concurrently. Neither the ADA, nor the FEHA, specifically provide a right to medical leave. But courts have held that additional medical leave may be a reasonable accommodation under both the ADA and FEHA. If you exhausted your 12-weeks of protected leave, your employer may request an interactive process meeting. If you need more time off, consider asking for a medical leave. Indefinite leave is not considered "reasonable," but a finite amount of leave (*e.g.*, to recover from surgery) can be so long as it does not last more than 6 months and will help you return to work at the conclusion of the leave. If you still have accrued paid leave, you might ask to defer the interactive process meeting and remain on leave until you have exhausted your accruals. An employer does not have to provide paid leave as an accommodation but should allow employees to use their own leave or allow leave without pay, absent an undue hardship. Under the ADA, an employer may have to grant leave that is longer than the ordinary internal policy would permit if it is necessary to rehabilitate the disabled employee.

Fitness for Duty Exams: Under the ADA, your employer may not require a medical exam unless it is "job-related and consistent with business necessity." Your employer must have a "reasonable belief based on objective evidence" that a medical condition impairs your ability to perform essential functions, or that you pose a direct threat due to a medical condition. Your employer cannot rely on general assumptions. If you have trouble seeing, a medical exam may be warranted. But if you have cancer, and your job performance is not affected, then requiring a medical exam could violate the ADA. The California Confidentiality of Medical Information Act (CMIA) allows disclosure of your "functional limitations" to your employer, but not your medical history or diagnoses.

Reassignment: If you cannot perform the essential functions of your job with an accommodation, but you want to remain employed with your Agency, look at what other positions are available. Reassignment is often considered the accommodation of last resort. But still request a list of open positions, including a description of the work and

any qualifications or requirements. If there is a current recruitment for a vacancy and you meet the minimum qualifications, you may be entitled to transfer or demote into it under certain circumstances. You do not have to be the “best qualified” unless it is a promotion. The employer does not have to create a position, or let you “bump” another employee, but they may have to grant an exception to their rule or policy. At the very least they should treat you as favorably as other similarly situated non-disabled employees.

Medical Retirement: If you cannot perform the essential functions of your regular job with or without accommodation, and you cannot identify any other reasonable accommodation (medical leave, reassignment, etc.), you might consider retirement. If you are over 50 years old, and have more than 5 years of service credit, a service retirement may be the way to go. Otherwise, you might consider a disability retirement. Disability retirement provides up to 1/3 of your salary. Your Agency may even initiate the disability retirement process if they feel there is no other accommodation available.

Under Gov’t Code Section 21153, “an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement.” In *Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, a California appellate court held that the County was required to apply for disability retirement on behalf of a deputy sheriff who the County effectively separated when it determined that her disability prevented her from being able to perform her job duties. The court said the County, not the employee, had the duty under Section 21153 to file the disability retirement paperwork. If your Agency gives you a letter saying they are filing for your disability retirement, be sure to respond right away if you want to elect a service retirement or keep your contributions in the plan.

Conclusion: The ADA has transformed HR policies and procedures and revolutionized workplaces nationwide. It also reduced the stigma that people have long associated with those who struggle from a disability. It serves to protect the dignity of all workers and make it possible for everyone to reach their full potential. It is a law worth celebrating. If you need assistance due to a medical condition at work, contact your Association staff. They can help you navigate the complex “interactive process” and identify any reasonable accommodations that may be available to you.

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: The Agency had a vacant unrepresented Management Analyst position. The job bulletin required a bachelor's degree or higher. Today, the Agency conducted interviews for this position. Well, I found out that one of the applicants interviewing for this position did not have the required bachelor's degree. Several people in the office did not apply for this position because of the required bachelor's degree. Are they allowed to do this?

Answer: Most agencies – especially those with civil service or personnel commissions – have merit-based rules for hiring and promotions. This likely includes a rule for determining who is eligible. Job Specifications outline the minimum requirements and the recruitment rules typically do not give management discretion to waive these requirements on a case-by-case basis. To do so likely violates the rules and undermines the entire purpose of having merit-based rules in the first place.

Violations may be challenged under the grievance procedure. In this case, there may be a question as to who has standing to file the grievance, *i.e.*, who may claim a violation of the rules. Certainly, anyone

who applied but was denied for lack of the degree may grieve it, but even those who didn't apply because they relied in good faith on the Agency's stated minimum qualifications, might argue they have standing, too. If someone is qualified and passed over for an interview and is in a different protected status (*e.g.*, race, gender, age, etc.) under civil rights laws than someone who is not qualified but did interview, the person who was passed over may also have grounds for a civil rights claim.

The remedy for any grievance is to demand that the Agency follow the established procedure. That may include running the recruitment all over again (but correctly this time). But before you take any action, investigate to see whether there *is* a violation here. It could be that the person without a Bachelor's degree either has years of experience to supplement, or previously held the same position somewhere else. Or perhaps it is not clear, and that is something the Agency asked about in the interview. The bulletin or rules may also allow for years of experience to supplement for having a Bachelor's degree or higher, or the interviewee could have a Bachelor's

degree and others do not know it. Only the employer usually knows the specifics. Also, consider asking your Association leaders to reach out to management to see if the degree is required. Even if it cannot be legally challenged, the Association may still be able get more information about what has occurred.

Question: My boss called me into his office today. He asked to speak to me, but he did not say what it was about. When I sat down at his desk, he gave me a document that said, "Written Counseling Memo." Basically, I got written up. It is a long story, but in short, about the underlying incident, I am not responsible for any misconduct. This is the first time I have ever been in trouble. I am a good employee. He told me to sign the last page. The memo is several pages long and I said I need to read it and consult with my union representative first. He said I had to sign right there on the spot. I told him I was uncomfortable with this and that I would not sign it. I walked out of his office and he sent me an email saying that I need to sign and return it by the end of the day. Can he force me to sign it when I do not agree with it? Doesn't my union representative have to be in this meeting? I feel like my rights are being violated. I refuse to sign this.

Answer: If the meeting is simply to give you paperwork, you do *not* have a legal right to a representative at that meeting.

You *do* have a right to a representative to challenge the discipline or if you are called into an investigatory meeting that could reasonably lead to your discipline (*e.g.*, you are the subject of the interview and not merely a witness).

Your boss can require that you sign the document, assuming that, as with most of these forms, you are merely signing to acknowledge that you have received it. It often says, "I ___ acknowledge that I received a copy of this Memo and understand it will be placed in my personnel file." With acknowledgments such as this, you are not admitting to the facts or assertions in the document, or that you agree with the discipline. You are just acknowledging you received it. You may also write next to your signature that you disagree or intend to appeal it.

Whether you sign or not, it will be placed in your file. But contact your Association staff right away. They can review your paperwork and let you know how best to respond. For reprimands, you may be limited to filing a rebuttal that is attached to the Memo and becomes part of your personnel file. Doing so helps set the record straight, which is important if you think they want to use the Memo as justification for a higher penalty for any future alleged misconduct. But do not wait to respond – there are often short timelines for you to be able to do so.

Question: Do I have to wear a mask inside City Hall at all times? I understand the rules are set by the County, but is there any leeway for those of us that sit at a cubicle all day (even if no one is around or more than 6ft away)? Those that have an office, have the option of closing their door and removing the mask to take a breather, but I do not have that luxury. Do I have any say in this matter? If I sit at a cubicle and there is no one around me (or more than 6 ft away), can I pull my mask down to take in some fresh air? I have been told no, that the City's policy requires it be on with no exceptions. Not only do I need some air, but it also affects my job when I need to proofread documents, because it affects my peripheral vision. I have also tripped on the stair several times because I cannot see properly. I just want a little bit of reasonableness and consistency. I mean, we do not wear masks in the breakroom!

Answer: You raise good points about how the policy, if interpreted too literally, does not make a lot of practical sense. The starting point is to closely examine your policy to see if there is any ambiguity or exceptions. Consult Human Resources or your management about how you read the policy as applying in specific instances. You might ask if they can provide clarification or guidance in writing (*e.g.*, that allows you to pull the

mask down when you are at your cubicle and no one is nearby).

If the rules really are too strict, and the City is not willing to make any exceptions, you should contact your Association leaders or professional staff to see if there is any way to renegotiate the policy. Most of these policies track current local, state, or federal guidelines, which do change based on how the virus is affecting your community. It could be that the policy was put in place in the spring when conditions called for stricter guidelines. As conditions improve, it is reasonable for your Association to request more flexibility with the rules.

Recent guidelines require masks when:

- Interacting in-person with any member of the public; or
- Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time; or
- Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities; or
- In any room or an enclosed area where other people are present and unable to physically distance.

Some people are exempt, such as:

- Anyone with respiratory issues if it impedes their breathing; or

- Anyone with a medical condition, mental health condition, or disability that necessitates it

Regardless of what the policy or guidelines say, if you need a medical accommodation, reach out to your Association leaders or professional staff who can help evaluate your specific situation and request an appropriate accommodation. Absent a medical exception, keep in mind that, given the nature of COVID-19, stringent rules may need to be enforced to mitigate the potential spread to or from people who may come into contact with you at work.

Question: I was hired on as Full Time Limited Term employee two years ago and have worked for my Agency for twenty-four straight months with no end in sight. Can I buy into the pension system using my own funds? If so, could this go back to the date of hire? I know the Full Time Permanent employees pay into it, and I am willing to do the same. I am not asking for anything different. I think it is only fair that I get the same chance to participate in the retirement program that is offered to other Full-Time employees. How do I go about it?

Answer: You probably cannot voluntarily “buy-in” to the pension system. Most of the pension rules – *e.g.*, for CalPERS, or the County systems – do not allow for anyone to opt-in to the defined benefit plan. You must be a member of the plan.

But you raise a good question about whether you should be (or should have been) enrolled all along. Your Agency may be legally obligated to put you into the plan, and if so, it is possible that this might be retroactive to the initial start date of your employment.

The key will be how the pension system views your employment status. Limited Term employees are often excluded from membership, but it is possible you might still qualify. For example, you might be subject to the “1,000-hour rule,” which says you have to work at least 1,000 hours in a fiscal year, and membership is effective no later than the first full pay period after completing 1,000 hours.

But it could be that you really are not “Limited Term” as the Agency says. Typically, these positions are for a specific hiring need of a set duration. They are not permanent. But if you are full time and have worked two years with no end in sight, the pension system might question whether you truly are “Limited Term.” The Agency cannot circumvent the pension rules by calling full time permanent employees “Limited Term.”

This may be something that the pension system has to sort out with your Agency. Consider reaching out to the pension system directly and explain your situation. You can also contact Human Resources to see why they have not enrolled you in the plan. If you really are

exempt from the pension plan, know that most agencies have defined contribution retirement accounts (*e.g.*, 401(a)'s or 457's) where you can still contribute on a pre-tax basis to save for retirement.

Question: Can I be disciplined for sharing that I had a COVID-19 Test? I was talking with others in the break room and I mentioned that I had been tested and immediately got a few odd looks. I believe one of my co-workers went to management about it. I am now wondering if this is something I can be written up for. I know we have a COVID policy that says we have to self-report based on symptoms, but I do not think there is anything in there about sharing if I had a COVID-19 Test. Please advise.

Answer: No, you probably cannot be written up for disclosing you had a COVID test. Medical privacy laws – *e.g.*, HIPAA, and CMIA – prevent others from disclosing your medical situation without your consent. They do not prohibit you from disclosing your own status. But check with your Association leaders or professional staff about what your Agency's COVID policy says. It is unlikely that the COVID policy prohibits voluntary disclosure, but it may require that you contact management if you test positive or have reason to think you may be positive. If you disclosed that you tested positive, but you had not first informed management, the Agency will probably discipline you. But this will not be for

discussing this with co-workers; it will be for coming to work without letting management know that you are possibly contagious (even if asymptomatic).

Also check if there are any work rules that might apply. Most pre-COVID work rules do not speak to this issue, specifically. But it is possible there are rules about talking with other employees (who are on the clock) while you are on break, or something of that sort. Assuming you did not create a disruption in the workplace, they probably do not have any grounds to discipline, even if your Agency or your co-workers prefer that you not overshare.

But even if there is nothing wrong with you sharing this with co-workers, just realize that doing so may get back to management, who may then investigate to see if you pose a risk to others by being at work. The Agency may want to ask you all kinds of questions (*e.g.*, why did you get tested, did you come into contact with someone who is positive, etc.) that you would rather not discuss.