Americans with Disabilities Act (ADA):
  - ADA and subsequent statutory and regulatory changes.
  - ADA coverage: Qualified individual with a disability.
  - Definition of Disability
  - Definition of Qualified

Review processes for addressing requests for reasonable accommodation.

Medical Information and Confidentiality.
Signed into law in 1990.

Prohibits discrimination on the basis of (1) having disability or (2) being associated with someone with a disability.

Requires employers to provide reasonable accommodations to qualified individuals with a disability unless doing so would cause undue hardship.
Amended the ADA.

Signed into law by President George W. Bush on September 25, 2008.

Went into effect on January 1, 2009.

New regulations implementing the ADAAA became effective May 24, 2011.
Major expansion of who is covered under the ADA.

Definition of disability “shall be construed broadly.”

Definition of disability “should not demand extensive analysis.”
An individual is covered by the ADA if (s)he:

1. has a “disability” as defined by the ADA;
2. is “qualified” for the position sought or held.
DISABILITY
An individual has a “disability” for ADA purposes if (s)he:

- Currently has a physical or mental impairment that substantially limits a major life activity;
- Has a record of such an impairment; or
  - Does not currently have substantially limiting impairment, but had one in the past.
  - Individuals once misclassified as having a substantially limiting impairment (e.g.: someone erroneously deemed to have depression), qualify under this prong.
- Is regarded as having such an impairment.
  - An individual is regard as having a disability if the employer makes an employment decision -- e.g.: hiring, demotion, promotion, discipline, annual evaluation, compensation, termination -- based on an actual or perceived impairment that is neither (1) transitory (expected to last less than 6 months), nor (2) minor.
  - Does not matter whether the perceived impairment would actually qualify as a disability.
Major Life Activities

- Major life activities that can be “substantially limited” by an impairment:
  - “Major Life Activities”: Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.
  - “Major Bodily Functions”: Functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproductive. Also includes operations of an individual organ within a body system, such as the operation of kidney, liver, or pancreas.

- These lists are non-exhaustive.
Substantially Limited in a Major Life Activity:

- An impairment is a disability if it “substantially limits” an individual’s ability to perform a major life activity or major bodily function “as compared to most people in the general population.”

- Need not be a “severe” limitation or a “significant restriction.”

- Not intended to be a demanding standard. Determinations of whether an individual is substantially limited in a major life activity should NOT demand extensive analysis.

- HOWEVER, not every impairment will be a disability.
Mitigating measures may not be considered when determining whether a person has a physical or mental impairment that substantially limits a major life activity.

Examples of mitigating measures:

- medication, medical supplies, equipment or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies.

- use of assistive technology.

- reasonable accommodations or auxiliary aids or services.

- learned behavioral or adaptive neurological modifications.

EXCEPTION: eye glasses.

Example: Employee is profoundly deaf, but with cochlear implants is able to hear nearly 85% of the time. Without the implants, Employee has 90% hearing loss in both ears. For purposes of the ADA, Employee likely has a disability because without the mitigating measure (cochlear implants), his physical impairment (hearing loss) substantially impairs a major life function (hearing) as compared to the general population (90% hearing loss).
Impairments: “episodic” or “in remission”

- An impairments that is episodic or in remission – meaning it only impairs an individual when active - may constitute a disability under the ADA if it would “substantially limit” a major life activity or major bodily function when active.

- Employee was diagnosed with depression. Employee is relatively unaffected by the mental impairment, except that every 5-6 months, Employee will experience extreme fatigue, feelings of hopelessness, and difficulty doing basic self-care for 1-2 months. Once the downtime passes, the Employee is able to function without difficulty. Employee likely has an ADA disability because Employee has a mental impairment (depression) that when active substantially limits a number of major life activities.

- The ADAAA removes minimum time requirement on impairments (i.e.: 6 months or longer) for purposes of determining a disability.
EEOC provides a list of impairments which should “easily” be deemed “substantially limiting”:

- Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs.
- Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy.
- Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia.

Again, these lists are non-exhaustive. An individualized analysis for each potential case of disability should still be conducted, even if the impairment is listed here.
QUALIFIED
An individual with a disability is “qualified” if (s)he:

- has the job related skills, experience and education required for the position held or desired; and
- who, with or without reasonable accommodation, can perform the essential functions of that job.

“Essential functions” are those fundamental job duties of the employment position. Duty may be essential because:

- the reason the position exists is to perform that function;
- there exists a limited number of employees available who are able to perform the job function;
- the position is highly specialized and the employee was hired for his or her expertise or ability to perform the particular function.

IMPORTANT: accurate and detailed job descriptions, as well as understanding prior practice and practical import of function(s) to position, are necessary for determining whether a function is “essential.”
ACCOMMODATION REQUESTS
Requests for Accommodation

- Employee may make a request for workplace accommodation **orally** or **in writing** to a supervisor or a Human Resources (HR) professional.

- If the requesting employee has not already done so, the supervisor/manager or HR professional managing the accommodation request should access the University’s Procedures for Workplace Accommodation Requests and related forms here: [http://www.virginia.edu/eop/requestforaccommodation.html](http://www.virginia.edu/eop/requestforaccommodation.html)

- Request for accommodation should include:
  - Medical condition and duration;
  - Limitations of the condition and how it impedes performance of specific requirements of the position; and
  - Requested accommodation that will enable the employee to perform essential functions of the position.

- If initial request does not include this information, employer may question the employee **ONLY** to the extent necessary to obtain the information needed to process the request.
When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation, including medical information.

Sufficient documentation provides enough information to substantiate why an accommodation is needed and describes:

- The nature, severity, and duration of the employee’s impairment;
- The activity or activities that the impairment limits; and
- The extent to which the impairment limits the employee’s ability to perform the activity or activities.
When Not To Ask

- Both the disability and the need for reasonable accommodation are obvious; or

- The individual has already provided the employer with sufficient information and/or documentation to substantiate that (s)he has an ADA disability and needs the reasonable accommodation requested.
Interactive Process

- If both the disability and accommodation requested are obvious and granting the accommodation would not create an undue hardship – grant the request promptly.

- If you are unsure that the impairment is an ADA disability, contact the ADA Coordinator, EOP or the General Counsel’s office before deciding.

- If the accommodation needed is not obvious or if the requested accommodation would be an undue hardship, actively discuss potential alternatives with the employee until either a solution is reached or it is determined that no alternatives exist. DOCUMENT your efforts.

- Ensure all decisions are communicated in writing to the employee, explaining the basis for the decision.

- In all circumstances, contact the ADA Coordinator before denying a request for accommodation.
Undue Hardship

- Would impose “significant difficulty or expense.”

- Employer has the burden of establishing undue hardship. Must be based on individualized assessment of the employer’s current circumstances.

- Proof that one specific accommodation would impose an undue hardship does not absolve an employer from considering other proposed or potential reasonable accommodations.

- Generally “cost” will not constitute undue hardship – consult the ADA Coordinator if money is an issue.
Typical Accommodations

- Making physical modifications to the workplace, acquiring equipment or assistive devices, or modifying existing equipment.
- Making exceptions to policies.
- Using different supervisory methods or modes of communicating.
- Job restructuring (swapping or eliminating non-essential functions).
- Part-time work or modified work schedules.
- Sign language interpreters or readers.
- Telework.
- Leave (unpaid leave where accrued leave, Family Medical Leave Act (FMLA) leave, etc. are exhausted or unavailable).
- Potential reassignment to vacant position.
EEOC has been suing companies regarding leave policies. Strict leave policies may result in ADA violations.

**ADA vs. FMLA**

- Under ADA, absent undue hardship, employer must hold employee’s position open during absence and permit employee to return to original position (not equivalent position as permitted under FMLA) if employee is still “qualified.”

- Absent undue hardship, an employer may be required to allow leave and hold the employee’s position open beyond 12 weeks of FMLA leave.

- Absent undue hardship, an employee who does not qualify for FMLA leave may still be entitled to leave as a reasonable accommodation under ADA.
Requests for Leave

Each leave request, regardless of the employee’s status under FMLA, must be assessed under ADA standards too:

1. is the employee a qualified individual with a disability?
2. if yes, is the need for leave because of that disability?
3. if yes, is there an alternative, but equally effective accommodation to the requested leave?
4. if no, would permitting the leave or holding the employee’s position beyond that required by FMLA cause an undue hardship? If no, grant the request.
Reassignment

- If no other reasonable accommodation is available, the employer may be required to determine whether the employee can be reassigned to a vacant position of similar pay and status, for which the employee is “qualified.”

- Please contact the ADA Coordinator or EOP BEFORE ending the interactive process, in order to determine if reassignment of an employee is required.
Actions Not Required as a Reasonable Accommodation

- Removing an “essential function” or hiring someone else to perform it:
  - **IMPORTANT**: Do not presume a job function is essential (or not) – review the job description and gather information about the practical importance of the function to the position, as well as whether any similarly situated employees have been excused previously from performing it.
- Lowering performance or production standards.
- Excusing misconduct.
- Providing “personal use items,” such as eyeglasses, wheelchairs, or prosthetic limbs.
- Changing the employee’s supervisor.
Reasonable Accommodation – Resources

• The University’s Procedures for Workplace Accommodation Requests and related forms:
  http://www.virginia.edu/eop/requestforaccommodation.html

• Extensive information regarding accessibility and the resources available to persons with disabilities across the University: http://www.virginia.edu/accessibility/

• Questions? Concerns?
  • Contact:
    Melvin Mallory, ADA Coordinator
    (434) 924-3295
    mm6b@virginia.edu
Reasonable Accommodation – Practical Tips

- Communicate, exchange information, search for solutions, consult resources as needed.
- Employee must cooperate in providing legitimately requested information.
- If employee only knows the problem, not the solution, employer should help search for possible solutions.
- If employee specifies a particular solution, but it cannot be provided, employer should search for and consider alternatives.
- If more than one possible accommodation exists, employer has discretion to choose among equally effective alternatives.
- DOCUMENT, DOCUMENT, DOCUMENT your process and good work!
Employers must keep medical information about employees confidential. Employee medical information must be maintained in a confidential file, separate from employee personnel files.

Employees do not have a right to know about a co-worker’s medical condition and disability, even when reasonable accommodations that affect them are involved.
QUESTIONS?