

## SPRING 2017 NEWSLETTER

In our [Winter 2017 Newsletter](#) we addressed the topic of Anti-Discrimination in your medical practice. We're continuing our focus on important employment issues, this time focusing on the Americans with Disabilities Act (ADA). Patti Bartis, an employment law attorney and partner with Parker Poe Adams & Bernstein LLP in Raleigh has provided the following valuable and practical insights.



Margie Satinsky

### AVOID AN AMERICANS WITH DISABILITIES ACT LAWSUIT

#### A Case in Point

In 2015, a North Carolina jury awarded nearly \$1 million to a physician who claimed his practice discriminated against him on the basis of a disability – Parkinson's disease. The case highlighted the tension between a practice's interest in ensuring patient safety and an individual's right to be free of disability discrimination. It also highlights the risks associated with failure to comply with the Americans with Disabilities Act.

If your practice employs 15 or more people, you are subject to the ADA. The Act not only affords protection to individuals with permanent, physical disabilities, but also applies to many other physical and mental impairments. To avoid exposure for ADA violations, an understanding of the terms of the original law and its 2008 Amendments and how they apply in your practice setting is essential.

#### Start with a Good Understanding of the Basic Provisions of the Law

Start by understanding the basic terms of the law. Contrary to what you may think, it's far from simple.

The ADA prohibits employers with 15 or more employees from discriminating against **qualified individuals with disabilities** in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment

A **qualified employee** or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

A **reasonable accommodation** may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities;
- Restructuring jobs, modifying work schedules and offering reassignment to a vacant position;

- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an **undue hardship** on the operation of the employer's business.

In the years following passage of the ADA in 1991, the courts interpreted the definition of disability in such a restrictive manner that the vast majority of individuals deemed disabled were not capable of performing the essential functions of most jobs, even if provided with an accommodation – the ADA's own Catch 22. If an employee was impaired enough to be disabled, he/she was almost necessarily not qualified to perform the job at issue.

To rectify the problem, in 2008, Congress passed the ADA Amendments Act, mandating a broader definition of disability. The effect of these amendments was to bring almost any serious health condition within the sweep of the ADA. Here's a partial list of conditions that should be considered as disabilities under the ADA: autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder and alcoholism.

The list above is not exclusive! Consequently, employers should consider their legal obligations under the ADA whenever they learn that an employee has a serious physical or mental health condition that might require an accommodation on the job. Once an employee requests an accommodation or an employer is on notice that an accommodation might be needed, the employer and the individual with a disability should engage in an informal, interactive process to clarify what the individual needs and an appropriate reasonable accommodation.

The ADA requires employers to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause an undue hardship for the employer. Undue hardship means that the accommodation would be too difficult or too expensive to provide in light of the employer's size, financial resources and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost. An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

### The ADA in Practice

Here are examples of common workplace scenarios where the ADA may come into play.

- **Scenario 1**

RN Sue has been employed by the practice for one month. She fails to report for work on Monday or Tuesday. On Wednesday, the practice receives a faxed note from Sue's neurologist indicating that over the weekend, she was hospitalized for severe migraines and is undergoing evaluation and treatment. The note indicates that her condition will be reassessed within four weeks. Sue has no accumulated sick or vacation leave.

As an employer, what should you do? In all likelihood, Sue's condition is a "disability" under the ADA, and she is entitled to a reasonable accommodation. One of the most common forms of accommodation is leave. While four weeks leave will certainly be inconvenient and disruptive to the practice, it will be viewed as "reasonable" from a legal perspective. Enlist the assistance of your HR manager or attorney to communicate with Sue and get additional information about the nature of her condition, the expected duration of her leave and whether there are other accommodations to consider. Keep the lines of communication open!

- **Scenario 2**

Your practice is located in an office park where construction is under way on an adjacent lot. In recent weeks, Billing Specialist Mike has been complaining that dust from the work site is exacerbating his asthma. He has asked the practice to allow him to work from home until the construction has ended.

Are you required to provide this requested accommodation? Not necessarily. First, you can ask Mike to provide documentation from his physician verifying his condition and whether or not the construction site affects it. Second, you can discuss with Mike other potential accommodations. For example, would it be helpful to provide him with a parking space close to the building, a face mask or an air purifier. Each of these options may be alternative, reasonable accommodation that adequately addresses his condition. Again, keep the lines of communication open and engage in a productive, interactive process.

### The Bottom Line

The next time an employee or job applicant notifies you of a health condition that may constitute a disability under the ADA, step back and consider your legal obligations as an employer. Resist the urge to make assumptions or deny requests reflexively. Instead, communicate with the employee or applicant to be sure you understand his or her needs and to ensure that you are complying with the law. Remember these additional helpful tips:

- The ADA prohibits certain types of medical inquiries and examinations, so check with your HR resource or attorney before seeking medical information from employees!
- If you employ more than 50 people, employees may be eligible for twelve weeks unpaid FMLA leave, which should be coordinated with ADA rights.
- If there is a workplace injury or illness, file a workers' compensation report and notify your carrier.

## For Additional Assistance

Be mindful that this article is not considered to be legal advice. Should you need legal guidance, reach out directly to an attorney. **Thanks to Patti Bartis for her assistance on this article.** She provides employment law advice and counseling to healthcare practices of all sizes and defends employers before agencies such as the EEOC and in court. For additional information, please go to [www.parkerpoe.com](http://www.parkerpoe.com).

**For assistance with the following**, please contact us at 919.383.5998 or [margie@satinskyconsulting.com](mailto:margie@satinskyconsulting.com).

- Medical Practice Start-up & Expansion
- Assistance in Setting Up Concierge, Direct Pay, & Integrative Medicine Practices
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