

# ADAAA and Managing the Absent Employee

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# I couldn't make it to work because

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- I had a headache from going to too many garage sales.
- I thought I had won the lottery, but it turns out I didn't.
- I was poisoned by my mother-in-law.
- I'm too fat to get into my work pants.
- I accidentally flushed my car keys down the toilet.

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# **Why is Managing the Absent Employee so Difficult?**

## Laws Affecting Absences

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- FMLA
- Disabilities Act (ADA)
- State Leave Laws
- Workers' Compensation
- Basic discrimination laws
- Retaliation laws
- Also, your Company's sick leave and paid time off policies

**ADAAA =**

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**“ADA Amendments Act of 2008”**

**Effective January 1, 2009**



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ADAAA is intended to provide a “clear and comprehensive national mandate for the elimination of discrimination”

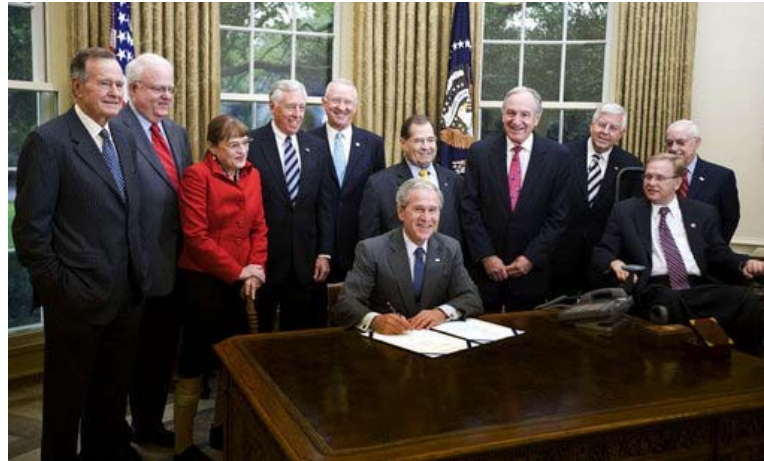
and

**“clear, strong, consistent enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA**



# The New ADAAA

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- Signed into law September 25, 2008 by former President George W. Bush
- Provisions of the ADAAA became effective January 1, 2009
- Considered an expansion of the ADA
- Will most likely result in increased legal and administrative expenses for employers

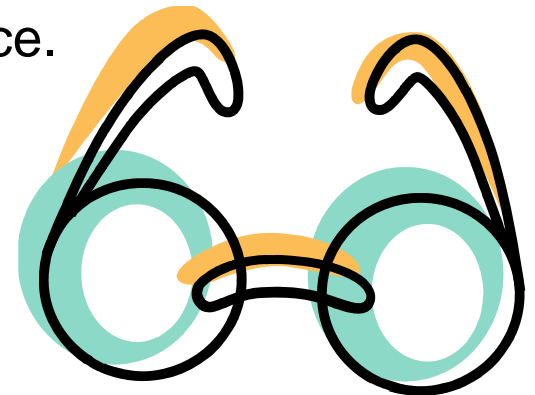
# Purposes of ADAAA

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To expand the **definition of “disability”** which was narrowed by USSC decisions:

Sutton v. United Airlines: Disabilities that are effectively controlled by medication or corrective devices do not warrant protection under the ADA (the case of nearsighted sisters with eyeglasses)

Toyota Motor v. Williams: An individual must have an impairment that prevents or severely restricts the individual from doing activities of central importance.





# How ADAAA Achieves Its Purposes

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1. Clarifies terminology used in definition of “disability.” The definition of disability will be construed in favor of broad coverage to the maximum extent permitted by the terms of ADAAA.
2. Redefines and broadens scope of “major life activities”

## 3 Prongs to ADA's Definition of Disability

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1<sup>st</sup> prong of definition of disability:

A physical or mental impairment that **substantially limits** one or more **major life activities**

2<sup>nd</sup> prong: **A record** of such an impairment

3<sup>rd</sup> prong: **Being regarded as** having such an impairment



ADAAA clarifies meanings intended for each prong of the definition and overturns Sutton & Williams and their companion cases and progeny.

## Broad Interpretation of the Term “Disability”

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- The regulations state that the focus of an ADA case should be on *whether discrimination occurred*, **NOT** whether an individual meets the definition of "disability."
- The proposed regulations note that "because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted **quickly** and **easily**, and will consistently result in a determination that the person is substantially limited in a major life activity."

# Major Life Activities

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- The ADAAA includes a **non-exhaustive** list of major life activities, to which the regulations add *sitting*, *reaching*, and *interacting* with others.
- The ADAAA also states that major life activities include the operation of **major bodily functions** and lists some bodily functions considered to be major life activities. The proposed regulations add several examples to the ADAAA's list of bodily functions.
- Additionally, the regulations state that an individual whose impairment substantially limits a major life activity is **not also required** to show that he or she is limited in the ability to perform activities of central importance to daily life to be considered an individual with a disability.



## “Substantially Limited in Working”

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- The regulations provide that the determination of whether an individual is substantially limited in working should be made by addressing whether an individual is limited in the ability to perform a "**type of work**" (such as commercial truck driver).
  - This definition replaces the concepts of a "class" or "broad range" of jobs from the 1991 ADA regulation.
- The Interpretative Guidance further notes that in using the "type of work" standard, "evidence from the individual regarding his educational and vocational background and the limitations resulting from his impairment may be sufficient for the court to conclude" that he is substantially limited in performing a type of work.
  - Thus, the statistical analysis previously required by some courts will not be needed in order to establish that an individual is substantially limited in working.

## Bottom Line for Employers

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- Like the ADAAA, the regulations emphasize that the determination of whether an individual is disabled **should not** be the primary focus of ADA cases.
  - Instead, the focus should be on whether prohibited discrimination has occurred.
- Thus, from a practical standpoint, employers in most situations will be better able to defend an ADA lawsuit by showing that they made a **good faith effort to accommodate** the employee, rather than by challenging the employee's disability.



# What impact will the ADAAA have on the workplace?

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- **Increased** number of individuals in the workplace who are protected by the federal law.
- Range of coverage and protections afforded under the amended ADA will **expand** significantly.
- Likely to be an **uptick** in litigation:
  - Involving the employer’s “undue hardship” defense;
  - Individuals claiming to be “regarded as” disabled” and
  - First two prongs of the “disability” definition, in the event employers resist the broad coverage envisioned by Congress as incorporated in the ADAAA.
- The ADAAA’s broad coverage and protections remove the focus from a “disability” inquiry, and place it squarely on the **interactive process**.



# Strategies for ADAAA Compliance: Document, Document, Document!

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- It is absolutely critical that employers have the documentation to back up their actions with regard to disabled employees or applicants. In particular, make sure you:
  - Have current, detailed job descriptions that specifically identify the job's essential functions.
  - Always initiate the interactive process and follow it through to a good-faith resolution.
  - Make sure you contemporaneously document all employment actions and decisions, no matter how mundane. This is absolutely crucial in proving that the real motivation for your actions was legitimate and not discriminatory.

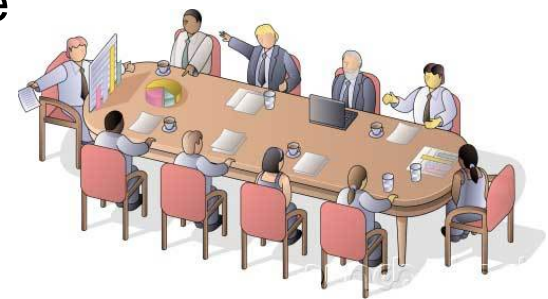




# Strategies for Compliance: The Interactive Process

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- Employers should review their policies and practices governing the ADA's interactive process, and **focus** on their reasonable accommodations procedures.
- Upon request for a reasonable accommodation, **engage** in an interactive process with employees or applicants regardless of whether medication, aids, or other mitigating measures may be available to them.
- If an employee or applicant demonstrates a physical or mental impairment that would limit his or her ability to request an accommodation, **initiate** an informal interactive process to accommodate the employee.



# What to Expect Litigation Uptick

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- “Undue hardship”
- Reasonable accommodation issues
- Perhaps on the new definitional meaning of “disability”



## Recurring Theme

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The definition of “disability” shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

# Major Life Activities

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- 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**
- Working

## Not finished yet...

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- The operation of a major bodily function, including 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 functions
- Operation of a major bodily function includes the operation of an individual organ within a body system

## Other Considerations

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- EEOC anticipates that courts will recognize other major life activities
- The term “major” shall not be interpreted strictly to create a demanding standard for disability
- No longer determined by “activities that are of central importance to most people’s daily lives”

## “In virtually all cases...”

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- Autism
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple Sclerosis
- Muscular Dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Schizophrenia

## By The Way . . .

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Definition of impairment does not include common personality traits such as poor judgment or a quick temper where there are not symptoms of a mental or psychological disorder.



# The General Rules

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- An employer must engage in an interactive problem solving process with the employee to determine if reasonable accommodations are available that would allow the employee to fully perform the essential functions of the job.
- A reasonable accommodation must be provided unless it causes an undue hardship for the employer.

# Undue Hardship Analysis

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- Does the accommodation involve significant expense for the business (focus on the resources and circumstances of the entire company not a department or particular site)?
- Is the accommodation unduly disruptive to business operations?
- Factors to consider: the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.
- Remember: Burden of proof on employer

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**Under the ADAAA “the use of accrued paid leave or unpaid leave is a form of reasonable accommodation when necessitated by an employee’s disability.”**

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**Courts are in nearly uniform agreement with the EEOC that under the ADAAA, “the use of accrued paid leave or unpaid leave is a form of reasonable accommodation when necessitated by an employee’s disability.” (*EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02)*)**

# The General Rules

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- There is no one-size leave fits all.
- Whether the length of leave is “reasonable” requires an individualized assessment.
- One case said 17 months was reasonable. Another said 4 months was not reasonable.

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**Courts consider reassignment an accommodation of “last resort.” Adjustments to work schedules and even time off as unpaid leave to recover should be considered first.**

## The ADAAA may require leave beyond the leave required by the FMLA

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- Leave may be a form of reasonable accommodation and may be required even if the employee has exhausted his or her FMLA leave.
- Permitting use of accrued paid leave is a form of reasonable accommodation, but the employer does not have to provide paid leave beyond what is given to similarly situated employees. Unpaid leave may also be a reasonable accommodation.
- Employers cannot penalize an employee for leave taken as a reasonable accommodation. The fact that your policy says X, Y, or Z may not be enough to prove you could not have accommodated the employee.
- The EEOC has said “The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are [sic] over.”

## The ADAAA may require leave beyond the leave required by the FMLA, **continued**

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- Frequent issue: No-fault attendance policies. An employer cannot assess a point for leave taken as a reasonable accommodation. Modifying a no-fault policy may be a reasonable accommodation unless there is another effective accommodation or there is an undue hardship.
- **REMEMBER THE RULES:**
  - Employers have a duty to provide a reasonable accommodation unless undue hardship. The duty may arise because of a request for an accommodation and knowledge of the disability
  - If an employee has requested a reasonable accommodation, you must engage in the interactive process. The employee is entitled to a reasonable accommodation, not the reasonable accommodation he or she requests.
  - Undue hardship requires significant difficulty or expense considering the nature and cost of the accommodation, the employer's finances, and the impact of the accommodation.



## The ADAAA may require leave beyond the leave required by the FMLA, **continued**

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- Indefinite leave is not required.
- Determination of whether an employee must be given leave comes down to two issues: Is the requested leave a reasonable accommodation? Does it impose an undue hardship. The better of these two issues for employers is reasonableness. Get verification from the employee's physician that the requested leave will enable the employee to perform the essential functions of the job and will give the employee clear prospects for returning to work.
- It is much easier to prove that you acted reasonably if you have a well-documented interactive process.

## TO DO LIST:

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1. Meet with the employee to confirm need for reasonable accommodation.
2. Confirm that employee has a disability if necessary.  
**REMEMBER:** You have a right to have medical confirmation of the disability and the need for accommodation.
3. Request possible accommodations from employee. It is critical not only to seek accommodations from the employee, but also to document the employee's suggestions.

## TO DO LIST: **continued**

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4. Consider options and determine which accommodation you will provide. The employee is entitled to an effective accommodation, not necessarily the accommodation he or she wants. Make sure that the accommodation you select is effective. This may require follow up with the employee's physician. Consider undue hardship before refusing a leave request.
5. Document each step of the process.

# Triggering Events:

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## ADAAA:

- According to the EEOC, an employee must let the employer know that s/he needs an adjustment or change concerning some aspect of his or her job duties for a reason related to a medical condition.
- The request does not have to include any special words, such as “reasonable accommodation” or “disability.”
- The employer should ask the employee whether s/he is requesting a reasonable accommodation if the nature of the initial communication is unclear.
- Request can also be made “on behalf of” employee (doctor, family member, etc.)

## “Constructive Notice” Under ADAAA:

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Constructive notice under the ADAAA generally means that the employer has “reason to believe” that leave or an accommodation may be warranted.

- Employers must look for inconsistent behavior that could be attributable to a serious health condition, and when appropriate, have to inquire delicately if this inconsistent behavior is impacting performance.
  - Employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to leave or a job accommodation- **even if the employee is unaware that he or she suffers from a specific qualifying serious health condition or that he or she is entitled to an accommodation.**
- Constructive notice clues:
  - Changes in production
  - Changes in attitude
  - Requests for assistance
  - Requests for changes in responsibilities
  - Recurring leave requests.

## Case Example

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- Trucking company paid \$4.8 million to end an EEOC disability bias suit (November 2012), where the EEOC claims that the trucking company automatically terminated any employee who was out of 12 weeks of FMLA leave, rather than determining whether additional leave may be a reasonable accommodation for the an employee's disability.
- The EEOC also alleged that the company violated federal law by refusing to make exceptions to a “no restrictions” policy that did not allow employees to return to work with any medical restrictions.
- The EEOC said: “This settlement demonstrates the need for employers to have attendance policies which take into account the need for paid or unpaid leave as a reasonable accommodation for employees with disabilities.” *(Nancy Sienko, EEOC Field Director)*

## Examples of Reasonable Accommodations:

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- A deaf applicant may need a sign language interpreter during the job interview.
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
- A blind employee may need someone to read information posted on a bulletin board.
- An employee with cancer may need leave to have radiation or chemotherapy treatments.

## What isn't required by the ADA:

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- An employer does not have to provide a reasonable accommodation if it imposes an “undue hardship.” Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.
- An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.



## Documentation Requirements:

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**ADAAA:** Employer may request medical certification regarding the nature, severity, and duration of the condition, and request an opinion on whether employee can perform the essential functions of his or her job, with or without an accommodation.

If an accommodation is needed, the employer can seek recommendations on the types of accommodations that would suffice. Additional correspondence with the physician is allowed for clarification purposes.

# Comparison of Reinstatement Protocol Under ADAAA and FMLA

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**Question:** What are the employee's reinstatement rights under the ADAAA and the FMLA?

**Answer:** Under the ADAAA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship, or that the employee can no longer perform the essential functions of that job, with or without a reasonable accommodation. Under the FMLA (with a few minor exceptions), an employee must be reinstated to the same position or to an equivalent position.

## Verizon – \$20,000,000 Settlement

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- Alleged that unlawfully denied reasonable accommodation to employees
- Disciplined/fired them pursuant to “no fault” attendance plan.
- Once an employee accumulated a designated number of “chargeable absences,” employees were disciplined
- No exception if “chargeable absences” were caused by disability
- Importance of engaging in an individualized interactive process.”

## Case Study Questions

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- Can an employer have a set policy that requires termination after a certain number of months on leave?
- Can an employer require that an employee only return to work when they are 100% fit?

## ADA Requires an Individualized Inquiry

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- Enforcing per se employment policies that mandate termination of employees after a set period of time on leave can violate the ADA, as individualized assessments are “essential” to disability claims.
- A related per se policy that has been held to violate the ADA is one where employers require that employees be “fully healed” or “100%” to return to work after leave.

## Absence Without a Good Reason

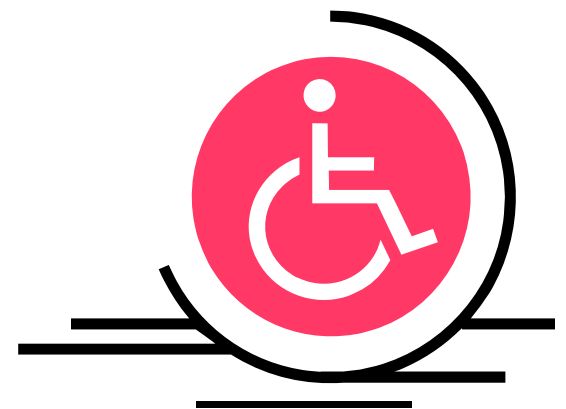
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Employee calls to report she will be absent from her shift today for medical reasons. Company policy contains a no-fault point assessment system. May employer assess points for this absence?

# ADA

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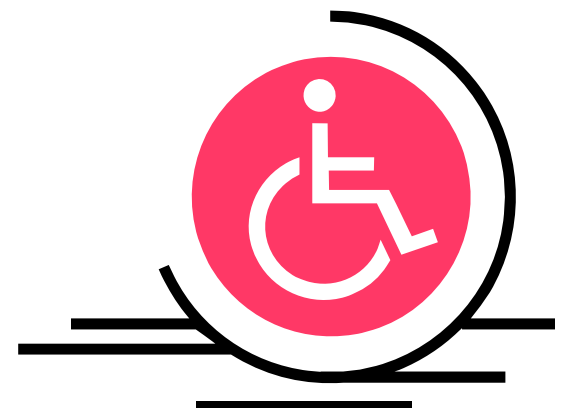
Generally employer is free to enforce its policies. But if the employee is disabled and the failure to call in is related to the disability and employer is aware of that, adjustment of the policy (no points applied) may be a reasonable accommodation.



## ADA, continued

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Attendance has been considered an essential job function. However, if employee can show the absence was related to her disability and employer was aware of that, employer may have a duty to accommodate.





## Excessive Absenteeism

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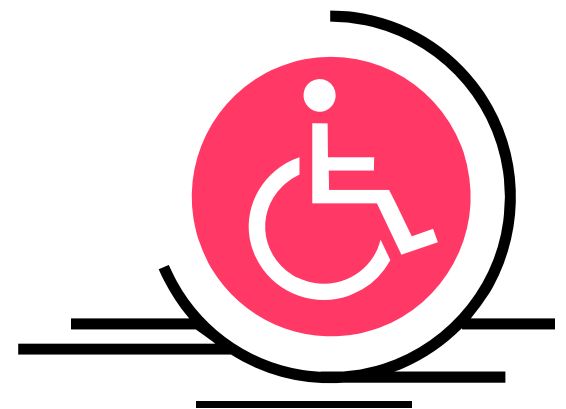
Employee has missed 25 days in the last six months. Employee produced an acceptable excuse for each absence, but company policy requires no more than 12 absences per year. May employer discipline or discharge employee?



## ADA, continued

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Attendance is considered an essential job function, but if absences are related to disability and employer is aware of that, employer may have a duty to accommodate excessive absenteeism. The duty depends on the circumstances.



# The Process

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- Identify essential functions of the job
- Identify what the employee can and cannot do (either in total or partially)
- Identify all potential accommodations
- Explore effectiveness of various accommodations
- Conduct undue hardship analysis
- Select an effective accommodation/Advise employee no effective accommodations are available absent undue hardship