Presentation Overview

- ADA and WLAD coverage and definitions
- Disclosure of mental disabilities and appropriate inquiries
- Reasonable accommodation requirements
ADA and WLAD Coverage

- **ADA**: Employers with 15 or more employees, including state and local governments.

- **WLAD**: Employers with 8 or more employees.
  - However, regardless of size, a discharged employee can allege a claim for wrongful discharge in violation of public policy where the underlying policy is the WLAD.
Definition of "Disability" Under the ADA

"Disability," under the ADA, is defined as a mental or physical impairment that substantially limits a major life activity.
"Mental Impairment" Under the ADA

- "[A]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h)(2)

- Examples:
  - Major depression
  - Bipolar disorder
  - Anxiety disorders
  - Schizophrenia
  - Personality disorders
What is NOT a "Mental Impairment" Under the ADA

The ADA specifically excludes:

- Compulsive gambling
- Kleptomania
- Specific sexual behavior disorders
- Pyromania
- Psychoactive substance use disorders resulting from current use of illegal drugs
Case Example:
Current Addiction to Illegal Drugs

- Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001).
"Substantially Limited" Under the ADA

- Cannot perform a major life activity; or
- Is significantly restricted as to the
  - manner,
  - duration, or
  - condition under which the individual performs the activity compared to the average person in the general population.
"Substantially Limited" Under the ADA

- Mitigating measures must be taken into account.
- Short-term conditions are generally not substantially limiting.
- Chronic, episodic conditions may be substantially limiting
  - if substantially limiting when active
  - or
  - have a high likelihood of recurrence in substantially limiting forms.
Case Examples: Substantial Limitation

- Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001).
- Doyal v. Oklahoma Heart, 213 F.3d 492 (10th Cir. 2000).
- Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000).
"Major Life Activity" Under the ADA

- Definition is flexible.
- May include:
  - Interacting with others
  - Working
  - Caring for oneself
  - Speaking
  - Sleeping
  - Learning
  - Thinking
  - Concentrating
Work As a Major Life Activity

- Employee must be limited in a broad class of jobs and not just one particular job.
Case Examples:
Major Life Activity

- McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999)
- Sinkler v. Midwest Property Management, LTD, 209 F.3d 678 (7th Cir. 2000).
The WLAD prohibits discrimination based on disability, including sensory, mental, and physical disabilities.

Definition of "disability" contains the following elements:

- A sensory, mental, or physical "abnormality"
- That is medically cognizable or diagnosable or exists as a record or history, and
- That substantially limits the individual's ability to perform his or her job.
Case Example: Ability to Perform Job

Further Protections Under the ADA and WLAD

- "Regarded as"
- "Record of"
- Association with (ADA)
Disclosure and Appropriate Inquiries

- Different rules apply based on the stage of employment:
  - Application and interview
  - Job offer
  - During employment
Disclosure and Inquiries: Application and Interview

- **May not** require job applicant to take a medical examination or ask about a person's disability.

- **May** ask questions regarding applicant's ability to perform job-related functions.

- If applicant **voluntarily discloses** disability or if disability is obvious, employer **may only** ask questions regarding need for reasonable accommodation.
Disclosure and Inquiries: Job Offer

- **May** inquire as to whether the applicant will need **reasonable accommodations**, but **only if**:

- All entering employees in same job category are asked **same question**; or
- Applicant has **voluntarily disclosed** existence of disability and employer could reasonably believe applicant would need accommodation.
Disclosure and Inquiries: During Employment

- **May** make disability-related inquiry or request a medical examination of an employee if it is job-related and consistent with business necessity.

- Employer must show it had a reasonable belief that:
  - Essential job functions would be impaired by medical condition, or
  - Employee would pose a direct threat due to a medical condition.
Disclosure and Inquiries: Confidentiality

- All information concerning the medical condition or medical history of its employees.
- Includes voluntarily disclosed information.
- Limited exceptions:
  - Supervisors re work restrictions
  - First aid/safety personnel
  - Government investigations
Reasonable Accommodation
Under the ADA and WLAD

- **Duty to Accommodate**: Qualified individuals who can perform the essential functions of a job with an accommodation
- **No duty**: individuals who cannot perform the essential functions of a job even with accommodation
- **No duty**: individuals who pose a direct threat to the health and safety of themselves or others in the workplace
Reasonable Accommodation for Applicants

- Employers must provide reasonable accommodation to applicants
- Even if employer believes it will be unable to provide accommodation on the job
- May request limited documentation
Reasonable Accommodation for Employees

- Required to provide reasonable accommodation to qualified individuals for all privileges and benefits of employment.
- This includes:
  - Training
  - Services (cafeterias, EAPs)
  - Parties or other social functions
"Qualified Individuals" Under the ADA and WLAD

A "qualified individual" is one who:

- Meets the definition of "disability" and
- Can perform the essential functions of the employment position
- With or without reasonable accommodation
Case Example: "Qualified Individual"

- **Weyer v. Twentieth Century Fox Film Corp.**, 198 F.3d 1104 (9th Cir. 2000).
Notice

- **ADA**: Employers must accommodate *known* limitations.
  - Employee must advise of disability and need for accommodation

- **WLAD**: Knowledge that disability is or may be interfering with ability to perform job.
  - Employee need not request accommodation
The Interactive Process

- Discuss essential job functions
- Discuss limitations with employee
- Discuss workplace barriers
- Discuss possible accommodations
- Obtain medical opinion
- Employee has duty to cooperate
Interactive Process: "Essential Functions"

- Critical to identify "essential" and "marginal" functions.
- EEOC – job may be essential if:
  - Position exists to perform function
  - Limited number of employees available to perform function
  - Function is highly specialized
Interactive Process: "Essential Functions"

Relevant to the decision of what is an "essential function" are:

- Employer's judgment
- Written job description
- Amount of time spent performing function
- Consequences of not requiring someone to perform the function
- Work experience of people who are performing the job.
Case Example: Essential Functions

Interactive Process: Obtaining Medical Information

- Request only if need for accommodation is not obvious
- Limited to how medical condition affects job performance
- Provide employee's provider with written job description
- Follow up if necessary
- Obtain only necessary documentation
What is "Reasonable"?

- Effective
- Allows employee to meet "average productivity or performance standards"
- Not necessarily the employee's preferred accommodation
- Medically necessary – WLAD
Case Example: Medically Necessary

"Undue Hardship"

- Not required to grant an accommodation that would be an undue hardship.
- Factors include:
  - Nature of the accommodation
  - Net cost
  - Financial resources
  - Operational impact
  - Violation of seniority rights under CBA
Case Example: Undue Hardship

"Direct Threat"

- No duty to employ individuals who present a direct threat.
- Not "direct threat" simply by having psychiatric disability.
- Factors:
  - Duration of the risk
  - Nature and severity of potential harm
  - Likelihood that the potential harm will occur
  - Imminence of potential harm
  - Availability of reasonable accommodations to minimize or eliminate the risk.
Case Example: Direct Threat

Overview of Possible Reasonable Accommodations

- Job restructuring
- Reassignment to open positions
- Leave
- Light duty
- Modified or flexible work schedule
- Equipment or devices
- Work station placement
- Shift changes
- Supervisory methods
- Modified policies
Job Restructuring

- Not required to reassign or eliminate essential functions of a position.
- May consider redistributing, trading, or eliminating nonessential, marginal functions of a position.
Reassignment

- Last resort
  - Equivalent pay and status or
  - Lower paying position if no equivalent jobs available.
- Employee must be qualified.
- Employer must affirmatively assist in search for new position.
Case Example: Reassignment

Leave Options

- FMLA if "serious health condition"
- Paid or unpaid
- Short- or long-term disability programs
- Lengthy or indefinite leave
- Intermittent or sporadic leave
- Must be returned to same position unless:
  - undue hardship or
  - medically unable to return to former position even with reasonable accommodation
Possible Reasons for Denying Leave

- Undue hardship
- Another reasonable accommodation offered;
- Granting leave would not render employee qualified for the position
Light Duty

- Employers are not required to create a light duty job where no such position currently exists.
- If a vacant light duty job exists for which the employee is qualified, the individual should be offered the position.
Work Schedule and Shift Changes

- Generally not required to provide open-ended work schedule.
- Generally not required to provide shift change where the particular shift is an integral part of the job.
- Employers may consider:
  - Altering arrival/departure times
  - Providing additional unpaid breaks during the day
  - Changing time of day that particular functions are performed
Workplace Policies and Misconduct Issues

- Employers are generally not required to modify a workplace policy as a reasonable accommodation.
- Employers are generally not required to excuse misconduct, even by an employee with a disability.
Reasonable Accommodation
Does Not Require:

- Eliminating essential job functions
- Creating a new job
- Bumping other employees
- Promoting an employee
- Violating collective bargaining agreement
- Providing or transferring to a new supervisor
Case Example: Accommodations Not Required

Continuing Duty to Accommodate

- If accommodation is unsuccessful, consider whether a more effective alternative is available.
- Interactive process must begin again when employer aware that first accommodation not working.
- BUT, employer's duty ends when employee rejects reasonable accommodation offer.