

Webinar 5: Accommodations, Risk and Compliance

Thrive in Your Workplace | New York Legal
Assistance Group | 2020

Agenda

- 1) Mental Health Disabilities
- 2) Types of Reasonable Accommodations
- 3) Defenses: Essential Functions, Undue Hardship and Direct Threat
- 4) Interactive Process and Cooperative Dialogue
- 5) Testimonials
- 6) Risk and Liability
- 7) Practice Tips

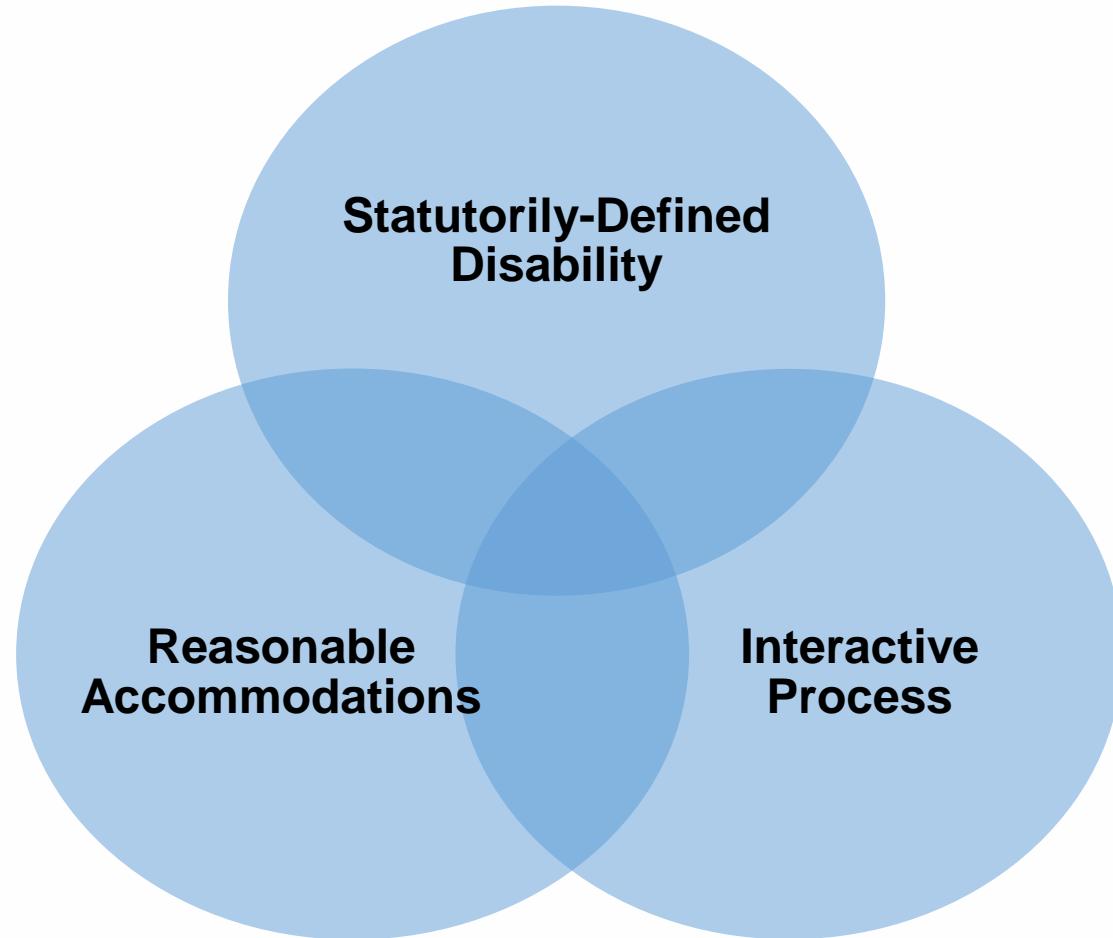
Talking about Mental Health in the Workplace



Duty to Provide Reasonable Accommodation

Americans with Disabilities Act (ADA)	New York State Human Rights Law (NYSHRL)	New York City Human Rights Law (NYCHRL)
The ADA specifies that an employer has a duty to provide a reasonable accommodation to a qualified individual with a disability, unless the accommodation would cause undue hardship. (42 U.S.C. § 12112(b)(5)(A)).	The NYSHRL requires an employer to provide a reasonable accommodation to qualified applicants or employees with known disabilities or pregnancy-related conditions, unless the accommodation would cause undue hardship. (N.Y. Exec. Law §§ 292(21-e), 296(3)(a)).	Under the NYCHRL, an employer must provide a reasonable accommodation for the known disabilities of any employee or applicant, as long as the accommodation: <ul style="list-style-type: none">• Allows the employee to perform the essential requisites of the job.• Does not cause the employer undue hardship (N.Y.C. Admin. Code §§ 8-102, 8-107(15)(a)).

Legal Framework for Reasonable Accommodations



Definition of a Disability



Definition of a Disability

ADA	NYSHRL	NYCHRL
<ul style="list-style-type: none">• A physical or mental impairment that “substantially limits” one or more major life activities.• A record of an impairment.• Being regarded as having an impairment. (29 C.F.R. § 1630.2(g)(1).)	<ul style="list-style-type: none">• A physical, mental, or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions that prevents the exercise of a normal bodily function; or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.• A record of impairment.• A condition regarded by others as an impairment. (N.Y. Exec. Law § 292(21).)	<ul style="list-style-type: none">• A physical, medical, mental, or psychological impairment, including an impairment of any bodily system.• A history or record of impairment.• Being perceived as having a disability. (N.Y.C. Admin. Code § 8-102.)

Mental Health Conditions Commonly Covered

- Anxiety disorder/Panic disorder
- Bipolar disorder
- Major Depression
- Post-Traumatic Stress Disorder (PTSD)
- Schizophrenia
- Phobias
- Obsessive Compulsive Disorder (OCD)
- Seasonal Affective Disorder (SAD)
- Alcoholism, but not recreational use of alcohol or current use of alcohol
- Drug addiction, but not if currently using



Mental Health Conditions Not Covered

The ADA explicitly excludes:

- Pyromania
- Kleptomania
- Compulsive gambling
- Current use of illegal drugs

General psychiatric symptoms not the result of an underlying disorder, such as:

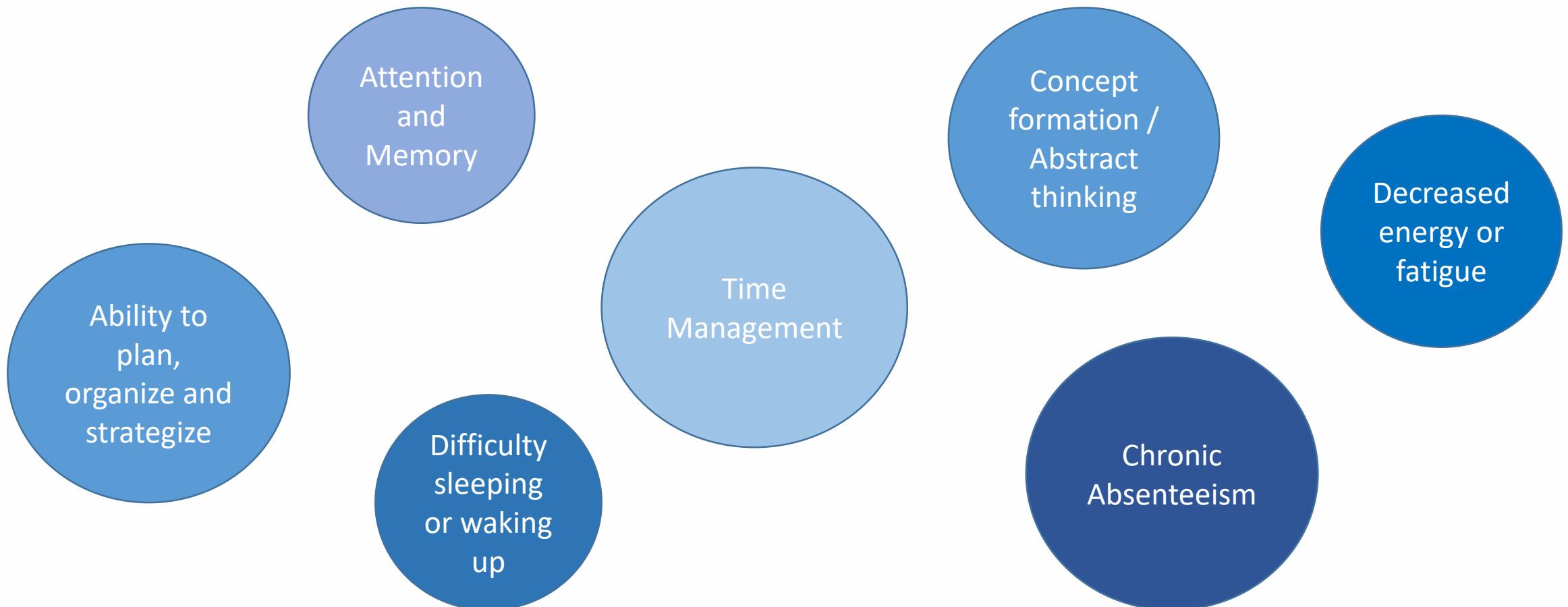
- Poor impulse control
- Generalized stress
- Short temper/irritability
- Difficulty with short term memory
- Inability to get along with peers

Implementing Reasonable Accommodations for Mental Health Conditions



The aim of a reasonable accommodation is to enable a qualified person with a disability to perform the essential functions of that position, and to enjoy the same privileges and benefits of employment as employees without any disability.

Understanding Mental Health Impairments



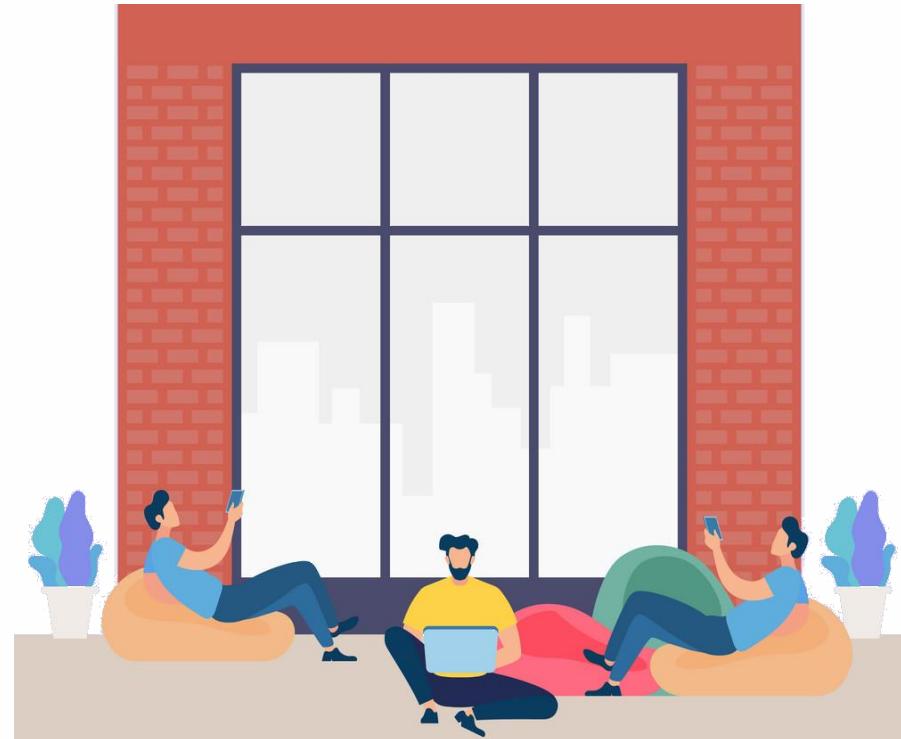
Common Reasonable Accommodations

- **Modified schedule, such as adjusting start and end times or increasing frequency of breaks**
- **Telework**
- Rest Area/Private space
- Modifying work environment
- Changing supervisory methods
- Restructuring job duties
- Temporary leave
- Reassignment to a vacant position



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Accommodations Not Required

- Removing an “essential function”
- Actions that would cause “undue hardship”
- Where the employee poses a “direct threat”
- Providing rehab program or therapy
- Providing for a personal care assistant
- Lowering performance or production standards

Essential Functions Defense

A job function may be considered essential for any of several reasons, including:

- The reason the position exists is to perform that function
- There are a limited number of employees available to perform that job function
- The function is highly specialized so that the employee in the position is hired for a particular expertise or ability

Factors relevant to whether a job function is essential include:

- The employer's judgment as to which functions are essential
- The written job description for that position
- The amount of time an employee spends performing that job function
- The consequences to the employer's business of not requiring performance of that function
- The terms of a collective bargaining agreement.
- The work experience of individuals who hold the same position or held it previously
- Whether other employees could be assigned the function through job restructuring

Undue Hardship Defense

Factors to be considered in determining whether an accommodation constitutes an undue hardship:

- The nature and cost of the accommodation
- The overall financial resources of the facility or facilities providing the reasonable accommodation
- The number of persons employed in the facility
- The overall size of the business of a covered entity as compared to the number of employees
- The impact of the accommodation on the facility's expenses, resources, and operation

Direct Threat Defense

Factors to Consider:

- the duration of the risk
- the nature and severity of the potential harm
- the likelihood that the potential harm will occur
- the imminence of the potential harm

An employer may not deny employment to an individual with a disability “merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient.” *EEOC Interpretive Guidance on Title I of the ADA.*

Interactive Process and Cooperative Dialogue



Interactive Process and Cooperative Dialogue

ADA	NYSHRL	NYCHRL
Generally, the individual with a disability must inform the employer that an accommodation is needed so that the interactive process can begin. In cases where the disability is obvious, the employee need not explicitly request the accommodation for the interactive process obligation to be triggered. (29 C.F.R., pt 1630, app., § 1630.9).	A disabled applicant or employee may (but does not have to) request an accommodation at any time, even if his medical condition has not changed. The employee must: <ol style="list-style-type: none">1. Make the employer aware of the disability and need for accommodation.2. Cooperate with the employer in considering and implementing a reasonable accommodation.3. Cooperate in providing medical or other information (which must be kept confidential) necessary to: verify the disability; or evaluate an accommodation (N.Y. Comp. Codes R. & Regs. tit. 9, § 466.11(k).)	An employer has an obligation to engage in “cooperative dialogue” to arrive at a reasonable accommodation regarding: <ol style="list-style-type: none">1. Any known disability.2. Any disability which the employer should have known about. (N.Y.C. Admin. Code § 8–107(15)(a).) <p>This obligation should take the form of a good faith written or oral cooperative dialogue with the individual, addressing:</p> <ol style="list-style-type: none">1. The individual’s accommodation needs.2. Potential alternatives to the requested accommodation.3. The difficulties that the potential accommodation may pose for the employer’s business. <p>Once a cooperative dialogue has taken place, employers must provide a written final determination identifying any accommodation that has been either granted or denied within a “reasonable time” of granting or denying such. Failure to engage in a cooperative dialogue is its own separate cause of action. (N.Y.C. Admin. Code § 8–107(28)(d)).</p>

Violation of Cooperative Dialogue Requirement

- (1) whether the covered entity has a policy informing employees, residents, or customers how to request accommodations based on disability
- (2) whether the covered entity responded to the request in a timely manner in light of the urgency and reasonableness of the request
- (3) whether the covered entity sought to obstruct or delay the cooperative dialogue or in any way intimidate or deter the individual from requesting the accommodation. An indeterminate delay may have the same effect as an outright denial.

Standards for Documentation Requests

A request for documentation of a disability should:

- 1) confirm the existence of a disability,
- 2) identify the employee's limitations, and
- 3) identify the accommodations that would resolve the employee's needs

But should NOT ask for complete medical records or unrelated information.



DOCUMENTATION

Confidentiality of Employee Health Information is Critical

Requirements:

- Only shared with essential staff who need to know of the accommodation and relevant changes
- Kept in a file separate from the employee's personnel file

Exceptions:

- (1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- (2) first aid and safety personnel may be told if the disability might require emergency treatment
- (3) government officials investigating compliance with the ADA may be given relevant information on request
- (4) employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers
- (5) employers are permitted to use medical information for insurance purposes.

How Not to Talk to Someone with Mental Health Challenges



How to Talk to Someone with Mental Health Challenges

- **Partnership:** honoring that the person has their own reason for things and valuing their viewpoint
- **Affirmation:** giving positive reinforcement and praise where appropriate
- **Compassion:** don't make assumptions about their feelings or abilities; instead ask, "What is it like from your perspective? How has it been for you?"
- **Autonomy:** give them a sense of control over their situation and concrete steps for improvement



How to Talk to Someone with Mental Health Challenges



“It’s so important to feel listened to. My client was the only one at my job who, when I came to talk to her about my struggles, silenced her phone, took out a notepad, and made it clear she was going to do something about it. It made me feel like I mattered. If company management had done the same thing for me, you and I would not be talking right now.”

- NYLAG client diagnosed with major depression, agoraphobia, and panic disorder

Check Your Biases

“In one recent study of 600 people with disabilities, roughly half involving mental health, about a quarter of the respondents said they received negative responses to revealing their problems — such as not being promoted, being treated differently or being bullied.”

The New York Times, “Deciding Whether to Disclose Mental Disorders to the Boss,” by Aline Tugend, November 14, 2014.

Illegal Adverse Actions:

- Failure to promote
- Reduction in hours or responsibilities
- Assigning less desirable work
- Harassment
- Termination

	DEPRESSION	BIPOLAR MANIA	PSYCHOSIS	ANXIETY	EATING DISORDER
WHAT TO SAY	<p>"Let me know if there's something I can help you with, even if it's trivial."</p> <p>"You're not a bad person."</p> <p>"It's OK to be weak right now."</p>	<p>"Are you able to take care of yourself?"</p> <p>"What triggers you to have an episode like this?"</p> <p>"I'm sorry. What you're saying doesn't make sense to me."</p>	<p>"It sounds like you're having a hard time. Tell me about what's going on."</p> <p>"Do you have a plan in place for what to do to help you feel better?"</p> <p>"I'm not judging you for what's happening right now."</p>	<p>"Please tell me if it helps to talk about something, or if it doesn't."</p> <p>"You don't deserve to feel like this."</p> <p>"I'm not able to completely understand what you're going through, but I know it must be difficult."</p>	<p>"Your eating disorder is a very serious disease."</p> <p>"Let's hang out. I like doing things with you."</p> <p>"Could seeing a counselor help you when you feel stressed out?"</p>
WHAT NOT TO SAY	<p>"I was depressed after my last breakup."</p> <p>"You just need to change your perspective."</p> <p>"Low periods are a normal part of life."</p>	<p>"Settle down."</p> <p>"I saw a TV/movie/miniseries about bipolar disorder."</p> <p>"You want to feel this way."</p>	<p>"It's hard not to feel paranoid in this day and age."</p> <p>"What do the voices say?"</p> <p>"I can understand what it's like to have an active imagination."</p>	<p>"You just need some time off."</p> <p>"Chill out."</p> <p>"What are you so worried about?"</p>	<p>"You look great!"</p> <p>"Talk about a first-world problem."</p> <p>"I know what would be the healthiest food for you."</p>

Practice Tips



- Establish a standard procedure for requesting accommodations and ensure all employees are aware of this procedure
- Train managers and supervisors on cooperative dialogue and relevant legal requirements
- Document everything and respond to all requests in writing
- Explore all possible accommodations
- Monitor employees after giving an accommodation to ensure needs are being met
- Prepare accurate, detailed job descriptions that reflect the essential functions of each position

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- Webinar 5: Accommodations, Risk & Compliance
- Webinar 6: Offering High Quality Benefits
- Webinar 7: Supportive Management Practices
- Webinar 8: Addressing Burnout in the Workplace
- Webinar 9: Building a Peer Support Program
- Webinar 10: Creating a Vicarious Trauma Informed Workplace

Tools & Resources

- The [Job Accommodation Network](#) provides a database on reasonable accommodations best suited to each type of mental health conditions/symptoms:
- [Workplace Strategies for Mental Health](#) created a guidebook to facilitate the reasonable accommodation process, including templates and worksheets
- [The Partnership for Workplace Mental Health](#) includes overviews of common mental health disorders and strategies to address their impact on the workplace
- [The Workplace Accommodations Toolkit](#) contains actionable accommodation policies and processes, a suite of accommodation forms, training presentations, and role play videos modeling inclusive behaviors

References

- [NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability](#)
- [EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act No. 915.002](#)
- [EEOC Notice Concerning The Americans With Disabilities Act \(ADA\) Amendments Act of 2008](#)
- [Thomas Reuters Disability Accommodation Under the ADA Practical Law Practice Note 9-503-9007](#)
- [Thomas Reuters Interactive Process Under the ADA Practical Law Practice Note 5-509-4840](#)
- [Thomas Reuters ADA, NYSHRL and NYCHRL Disability Comparison Chart, Practical Law Checklist 5-555-0867](#)
- [“Applying Motivational Interviewing Principles with People with Serious Mental Illness in Crisis Situations”, webinar produced by the Substance Abuse and Mental Health Services Administration and U.S. Department of Human Services](#)
- [U.S. Commission on Civil Rights: “Sharing the Dream: Is the ADA Accommodating All?”](#)
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