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ADA for Employers

Let's Talk About It!

"Let the shameful walls of exclusion finally come tumbling down."

President George W. Bush
Remarks on Signing the ADA
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Introduction

Congress passed the Americans With Disabilities Act (ADA) in 1990. This was really exciting legislation for People With Disabilities (PWDs). However, in 1999 and 2002 the United States Supreme Court issued opinions that sharply curtailed the ADA's reach. Disability advocates across the country generated a storm of criticism culminating in the ADA Amendments Act of 2008 (ADAAA), which expressly overruled several Supreme Court cases and neutralized the vast majority of lower court opinions decided over an 18-year period.

The ADA is divided into three parts.

1. Employment (private and public sector).

2. Access to government services, programs, and activities.

3. Public accommodations and services operated by private entities.

This training focuses only on employment.

What is required?

The ADA prohibits employers from discriminating against certain individuals with a disability (applicants as well as employees) in any employment-related matter. The law, as amended by the ADAAA, states:

> No covered entity shall discriminate against a *qualified individual with a disability* on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[1]

A. Pre-employment Requirements.

The law imposes three different sets of obligations on employers. The first set deals with the hiring process. Employers may not ask applicants whether they have a disability. However, if an applicant has an obvious disability or discloses that she has a disability, then the employer may ask the applicant whether she can perform the essential functions of the job with or without a reasonable accommodation. If the applicant states that she will require an accommodation, the employer may ask what type of accommodation would be needed.

Employers may require post-offer medical examinations only if the employer requires all employees in the same job category to undergo such evaluation. The examination itself does not have to be job-related; however, if the employer establishes any exclusionary criteria, then the criteria must be job-related and consistent with business necessity. Employers may require employees to undergo a medical examination at any time if it is job-related and consistent with business necessity.

[1] 42 U.S.C. § 12112(a).

B. Employment Benefits Requirements.

Once the employer hires an individual with a disability,[2] the employer must ensure that the employee enjoys the same benefits and privileges of employment as similarly-situated employees without disabilities, including: training programs; services (like an EAP, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation); and social functions. If the employer provides information about any of these benefits and privileges of employment, then the employer must provide the same information to employees with disabilities through some effective means, regardless of whether the employee needs the information to perform the job.

C. Harassment Prohibited.

The prohibition against discrimination with respect to the "terms, conditions, and privileges of employment" includes a requirement to provide a work environment free from harassment based on disabilities. Just as you would never harass an employee because of his or her race, color, sex, national origin, age, religion, or sexual orientation, you must not harass anyone because of a disability.

D. Requirement to Provide Reasonable Accommodations.

Finally, employers must provide reasonable accommodations to enable qualified individuals with disabilities to perform the job. Employers are excused from providing reasonable accommodations if it would be an *undue hardship* or if the applicant or employee would pose a *direct threat* to his own health and safety or the health and safety of others in the workplace. These issues are discussed in detail later.

[2] Referring to an "individual with a disability," as opposed to a "disabled individual," shows respect by putting the individual first.

Who is protected?

The ADA protects *qualified individuals with a disability* (QID). To be a QID, the individual must be able to perform the *essential functions* of the job with or without reasonable accommodation.

A. Three Definitions of Disability.

The ADA defines *disability* three different ways:

- a physical or mental *impairment* that *substantially limits* one or more major life activities;
- a *record of* such an impairment; or
- being *regarded as* having such an impairment.[3]

1. Impairment.

Impairments can be either physical or mental and are defined as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[4]

[3] 42 U.S.C. § 12102(1).
[4] 29 C.F.R. § 1630.2(h).

2. Major Life Activities.

The ADAAA identifies several activities within the definition of *major life activities*. The definition includes, but is not limited to:

> caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[5]

The ADAAA also added a whole new definition of major life activity related to *major bodily functions*. That section reads:

> a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[6]

The ADAAA also added five rules of construction regarding the definition of disability:

- "Disability" shall be construed in favor of broad coverage to the maximum extent permitted.
- "Substantially limits" shall be interpreted consistently with the findings and purposes of the ADAAA.
- An impairment only has to substantially limit <u>one</u> major life activity.
- Impairments that are episodic or in remission are a disability if they would substantially limit a major life activity when active.

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[5] 42 U.S.C. § 12102(2)(A).
[6] 42 U.S.C. § 12102(2)(B).

- **The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as:**

  - Medication, medical supplies, equipment, or appliances (other than ordinary eyeglasses or contact lenses);

  - Prosthetics, hearing aids, cochlear implants, and other auxiliary aids;

  - Mobility devices or oxygen therapy equipment;

  - Use of assistive technology;

  - Learned behavioral or adaptive neurological modifications.

These new rules of construction boil down to this: **If an employee asks for a reasonable accommodation, a wise employer assumes the disability exists (with proper documentation from a health care provider if the disability cannot be seen) and focuses on the reasonableness of the accommodation requested.**

B. Having a "Record Of" Disability.

Even if an individual does not have a disability as described above, he can still be protected under the ADA if he has a *record of* being disabled. We sometimes create a *record of* an employee's disability in the ordinary and necessary course of business. For instance, an employee who takes FMLA leave could provide a medical certification from her doctor that discloses that the employee has multiple sclerosis. An employee could also become disabled as a result of an on-the-job injury; thus, the employee could argue that his workers' compensation file is a *record of* his disability.

To limit this exposure, employers should keep medical information about employees in separate medical files. **Further, keep this private information private. Share it only on a strict "need-to-know" basis.**

Avoid facing these types of ADA claims by watching what you write. An unwary supervisor might unnecessarily create a *record of* a disability or evidence that an employee was *regarded as* disabled in routine employment documentation.

PRACTICE TIP:

Focus on behavior and work performance.
Do not diagnose.
State facts, not conclusions.

C. Being "Regarded As" Disabled.

Under the ADAAA, individuals can fall within the *regarded as* definition of a disability if:

- the individual establishes that he or she has been subjected to an adverse action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

- But it does not apply to impairments that are transitory and minor, i.e., with an actual or expected duration of 6 months or less.

In either case, the employer must have a **misperception** about the person. Such misperceptions often result from stereotypic assumptions not truly indicative of individual ability.

To avoid liability for a "regarded as" claim, employers must be very careful when dealing with employees who are behaving erratically. Often the supervisor or the employee's co-workers will jump to the conclusion that an employee is an alcoholic or is mentally impaired. Rushing to judgment is never good in employment law matters. Even if the employer ultimately prevails, the cost of defending such claims is expensive.

That is not to say that employers should ignore behavior problems. On the contrary, the sooner the employer deals with the behavior, the better. Always remember to focus on the unacceptable behavior when managing employee performance. And withhold judgment. Instead of telling an employee that he "needs help" or "is obviously depressed," keep an open mind about the employee's ability to work.

The ADA allows employers to require employees to submit to a medical examination to determine whether an employee is capable of performing job-related functions. One appropriate way to make such an inquiry is to send a list of the employee's job duties to the doctor with a letter asking these questions:

- Can the employee do each item on the list with or without a reasonable accommodation?

- Are there any restrictions on the employee's ability to do any of these tasks? If so, please identify those restrictions.

- If there are restrictions, are any of the restrictions permanent?

PRACTICE TIP:

Do not contact an employee's health care provider without the employee's permission.

D. Qualified Individual with a Disability.

ADA analysis does not end just because an individual has a disability. If the disabled person is not *qualified*, the ADA does not apply. Whether an individual is a QID is a two-pronged issue.

1. The individual must have the skill, experience, education, and other job-related requirements of the position he has or wants.

2. The individual must also be able to perform the essential functions of the position with or without a reasonable accommodation.

One way to satisfy the first prong is to show that the person previously held the position. But the person can not rely on past performance to show that he can perform the essential functions of the job now.

E. Essential Functions of the Job.

Essential functions are the fundamental job duties, not marginal functions. A particular job function can be essential for several reasons:

- the position exists to perform that function;

- the employer has a limited number of employees who can absorb that function; and/or

- the function is highly specialized so that the person who fills the position is hired for his expertise or ability to perform that function.

Identifying essential job functions is not as easy as making a list of what an employee does every day, though making such a list is a very good place to start. Courts give substantial deference to job descriptions written before the *essential function* issue arises. But just because a responsibility is

itemized on a job description doesn't guarantee that it is an essential function of the job. In addition to written job descriptions, courts consider a variety of factors to determine whether a function is truly essential, including:

- the employer's judgment as to which functions are essential;
- the amount of time spent on the job performing the function; and
- the work experience of past and present employees in the job.

The following cases demonstrate how courts analyze whether a particular job function is truly an *essential function.*

- Defensive and high-performance driving is an essential function of an evidence technician position in a police department. *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999) (the evidence showed that the successful applicant had to be a certified peace officer and all peace officers were required to have training in defensive and high-performance driving before being employed, all officers spent at least their entire first year in patrol where job analysis showed driving was required 60% of time, and nobody was hired straight into a "desk job").

- Fighting fires is <u>not</u> an essential function of a firefighter assigned to fire alarm and fire prevention bureau if employees never called upon to fight fires. *Stone v. City of Mt. Vernon*, 118 F.3d 92 (2nd Cir. 1997).

- Meeting milestone deadlines (as opposed to final deadlines) is not necessarily an essential function. *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996), *cert. denied*, 522 U.S. 1112 (1998) (where written job description did not include

meeting "milestone" deadlines and evidence showed that defendant had adjusted "milestone" deadlines for other employees and that only final deadlines were mandatory, plaintiff raised fact issue as to whether meeting milestone deadlines was an essential function of the job).

F. Direct Threat Defense.

Employers do not have to provide reasonable accommodations if the employee would still be a direct threat to safety. A *direct threat* is:

> a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.[7]

The regulations list several factors to consider when determining whether an employee is a *direct threat*. They are:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.[8]

Courts consider medical or other objective evidence available at the time when deciding whether a disability poses a significant risk. Further, when making the reasonableness assessment, the opinions of public health authorities (Center for Disease Control, U.S. Public Health Service, National Institutes of Health) have special weight.

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[7] 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r).
[8] 29 C.F.R. § 1630.2(r)(1)-(4).

Other *direct threat* cases:

- Diabetic a *direct threat* in job working with complicated machinery and chemicals.

- Physician with short term memory problem a *direct threat* to patients.

- Caseworker with severe depression a *direct threat* to others when, among long list of inappropriate behavior, he threatened, "You're a** is mine, bit**!"

What Do QID's Get?

A. Reasonable Accommodations.

The ADA requires employers to provide *reasonable accommodations* to qualified individuals with a disability. The Act does not require the employer to do anything for a QID unless the employer knows about the disability and knows that the employee needs help.

Once the employee has requested a reasonable accommodation, the employer **must** engage in an "informal, interactive process" with the employee or applicant. If the employee is responsible for breaking down that interactive process, the employer will not be liable. The same goes for the employer! Further, if more than one reasonable accommodation exists, the employee does not get to choose the reasonable accommodation he prefers, as long as the reasonable accommodation the employer offers is effective.

The ADA regulations define *reasonable accommodation* as:

- modifications or adjustments to the application process that enable a qualified applicant with a disability to be considered for the position he wants;

- modifications or adjustments to the work environment or to the manner or circumstances under which the position held or desired is customarily performed that enable a QID to perform the essential functions of that position; or

- modifications or adjustments that enable employees with disabilities to enjoy equal benefits and privileges of employment as similarly situated, but non-disabled, employees.[9]

Sometimes, identifying reasonable accommodations is quite simple: raising the desk of an employee who uses a wheelchair so she can roll up to the desk; providing amplifiers on the telephone of an employee who is hearing-impaired; or exempting an employee with diabetes from a policy prohibiting employees from eating at their desks. Sometimes employers and employees have bitter disputes over what is a reasonable accommodation. Here is what the courts have said.

- Employers are not required to give an employee with a disability his job of choice especially when there are better-qualified individuals who desire the same position.

- Employers are <u>not</u> required to eliminate or exempt an employee from performing an essential function of the job.

- Employers are <u>not</u> required to allow an employee to work at home where productivity inevitably would be greatly reduced.

[9] 29 C.F.R. § 1630.2(o)(1)(i)-(iii).

- Employers are not required to grant indefinite leave or to wait indefinitely for an employee's medical condition to improve.

- Employers are not required to create a job to accommodate an employee's disabilities.

- Employers are not required to relieve an employee of any essential functions of the job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so.

1. No Reasonable Accommodation Required if Undue Hardship.

Even if an accommodation is reasonable, an employer is not required to provide it if doing so would be an *undue hardship*. An *undue hardship* is:

- An action requiring significant difficulty or expense when considered in light of the following factors:[10]

  1) nature and cost of the accommodation needed;

  2) overall financial resources of the facility; number of persons employed at the facility; effect on expenses and resources; or the impact otherwise;

  3) overall financial resources of the employer; overall size of the business with respect to number of employees; number, type, and location of employer's facilities; and

  4) type of operation or operations of the employer, including composition, structure, and functions of the workforce;

[10] 42 U.S.C. § 12111(10)(A).

geographic separateness, administrative, or fiscal relationship of the facilities in question to the employer.[11]

Conclusion

As you can see, the ADA imposes significant responsibilities on covered employers. Fulfilling your obligations requires the help of every first-line supervisor. They are the ones who are going to get the first request for a reasonable accommodation.

Finally, remember that the ADA sets an employer's **minimum** obligations to employees. Employers often want to go beyond what is legally required to retain loyal and hardworking employees.

Additional Resources.

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act:
http://www.eeoc.gov/policy/docs/accommodation.html

EEOC Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities:
http://www.eeoc.gov/policy/docs/psych.html

Job Accommodation Network
https://askjan.org/

[11] 42 U.S.C. § 12111(10)(B)(i)-(iv).