

ADA

The Employment Aspects



ON THE FRONT LINES
OF WORKPLACE LAW™

THE AMERICANS WITH DISABILITIES ACT

THE EMPLOYMENT ASPECTS

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

To say that the Americans With Disabilities Act (ADA) is important legislation is an understatement. The law does much more than merely create a new category of protected individuals to be added to those already in existence (such as race, sex, religion, national origin and age). The law seeks to change the very nature of the way disabled individuals in our society are perceived. By forcing employers to focus on an individual's abilities rather than his or her limitations, the Act, in effect, forces all of us to ignore what may have been, at one time, major impediments to employment.

Title III of the ADA prohibits discrimination in public accommodations and is dealt with in a separate booklet in this series. Additionally, this booklet does not attempt to address the interaction of the ADA with state workers' compensation laws or the Family and Medical Leave Act of 1993. This booklet, covering only Title I of the ADA and the ADA Amendments Act of 2008, is intended to provide an over-view of the components of the employment aspects of this complex law. While an in-depth treatment is not possible within this space, it is hoped that busy executives and human resource professionals will find this a quick source of preliminary information.

Overview Of The Law

The ADA prohibits employers with 15 or more employees from discriminating on the basis of disability. The limited exemptions from coverage are confined to such entities as Native American tribes and private clubs. Even Congress is covered by this law.

Enforcement of the employment-related provisions is administered by the Equal Employment Opportunity Commission (EEOC) which investigates charges and makes determinations. As with the other types of discrimination it investigates, the EEOC will issue a Notice of Right to Sue to a charging party at the completion of its investigation, whether or not it has found evidence of discrimination. Thereafter, plaintiffs may pursue their claims in court.

The remedies available in court include orders of reinstatement, backpay, attorneys' fees, compensatory and – if the discrimination has been carried out with “malice” or “reckless indifference” – punitive damages.

Analysis Of The Act

The ADA prohibits an employer from discriminating against disabled individuals in regard to the terms or conditions of employment if the individual is qualified to perform the essential functions of the job with or without reasonable accommodation. The accommodation cannot be an undue hardship on the employer or create a direct threat of harm to the employee or others.

This prohibition is construed quite broadly and includes more than the obvious concerns such as who is hired, and at what rate of pay. It also extends to training programs, attendance at professional seminars, participation in company sponsored social events, and who gets the office with the window. In short, every employment decision can be affected by the terms of the Americans With Disabilities Act.

A Six Step Model for Resolving ADA Issues

In analyzing Title I situations, you should consider the following six questions:

- Do the individuals meet your *qualification standards*?
- Are the individuals *disabled*?
- Can they perform the *essential functions* of the job in question?
- If not, could they be performed with some *accommodation*?
- Would the accommodation cause an *undue hardship* on your company?
- Would placement of this person on the job, with or without accommodation, pose a *direct threat of harm* to the individual or others?

In the following pages you will see how answering these six questions can resolve most ADA situations.

A. Does The Individual Meet Your Qualification Standards?

You have the right to set minimum standards concerning education, experience, skill levels, and other job-related requirements. As long as these standards are realistic and do not tend to unfairly screen out individuals with disabilities or any protected categories, such as minorities or women, they will be upheld. But qualification standards based on uncorrected vision, must be job related and consistent with business necessity. Thus, a person who does not meet your reasonable qualification standards is not protected by the Act, even if they are disabled.

B. Is The Individual Disabled?

Under the ADA disabled individuals are those who:

- have a *physical or mental impairment that substantially limits one or more major life activities*, or
- have a *record* of such an impairment; or
- are *regarded* as having such an impairment; or
- while not disabled themselves, have a *relationship* with disabled individuals, are protected from discrimination under the Act but, as will be explained later, there is no requirement to extend reasonable accommodation to this class of persons.

Each of these criteria is further defined below.

1. Physical or Mental Impairment

This includes virtually any physical, mental, or psychological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body's systems if the disorder or condition affects a major life activity.

The definition of impairment does not include physical characteristics that are within "normal" range and are not the result of a physiological disorder. For instance, eye color, hair color, left-handedness, height, weight, and muscle tone are not physical impairments covered by the Act. Similarly, personality traits such as poor judgment or quick temper (that are not the symptoms of a mental disorder) are merely mental characteristics, not impairments, and are thus not covered by the Act.

Example: An applicant who claims he cannot arrive at work in the morning in a timely manner because he is basically a "night" person is not considered disabled.

Likewise, predisposition to disease or illness is not a covered impairment. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are

also not impairments, nor are minor, temporary conditions such as cuts, bruises, sprains, simple infections, or short-term viruses. Finally, pregnancy alone is not an impairment.

a. Substantially Limits

Individuals are not disabled simply because they have an impairment. Rather, an individual's impairment must substantially limit a major life activity to be a disability. The ADA Amendments Act of 2008 (ADAAA) became effective January 1, 2009. The ADAAA specifically rejects the Supreme Court decision in which the Court stated that "substantially" meant that an individual had to be unable or severely restricted in performing activities that had central importance in most individuals' daily lives. Congress further indicated the standard was an inappropriately high standard that it had not intended. It directed the EEOC to redefine "substantially limits" to be consistent with the ADAAA, which indicates that Congress intended a more relaxed standard for proving disability.

The EEOC published its final regulations pertinent to the ADAAA in March 2011. These regulations state that individuals are disabled when they have an impairment that substantially limits them in a major life activity as compared to most people in the general population. According to the regulation, a substantial limitation does not mean the individual is significantly restricted in performing a major life activity but the impairment must be more than a temporary and non-chronic impairment with little or no residual effect.

Thus, substantially limited lies somewhere between temporary and non-chronic and significantly restricted. The EEOC further indicates that substantially limits is a "common sense standard," which should be broadly construed. The EEOC also states that an impairment neither is required to substantially limit activities of central importance in an individual's daily life nor to substantially limit a person in more than one major life activity. Moreover, an impairment that is episodic or in remission can be a disability if it is substantially limiting when it occurs.

Additionally, in analyzing whether an impairment is substantially limiting, the focus should be on the limitation rather than on what the employee has achieved despite the limitation. Finally, an impairment does not have to last at least six months to be substantially limiting. The EEOC has stated that an impairment lasting a short time may be a disability if it is sufficiently severe.

When evaluating whether the individual is substantially limited in a major life activity, the positive effects of measures used to correct, or to mitigate the effects of, a physical or mental impairment, cannot be taken into consideration. But the negative effects of mitigating measures do have to be taken into account. Thus a person who takes medication that completely controls a condition still may be disabled. Mitigating measures do not include ordinary glasses or contact lenses.

Example: An epileptic whose symptoms are completely controlled by medicine is covered by the Act. He is considered “disabled” if his condition in an unmedicated state would substantially limit one of his major life activities.

Example: An individual with vision impairment whose condition is corrected through the use of prescription glasses, however, is not disabled.

Example: An individual has an impairment that is not substantially limiting by itself. But the medication used to treat the impairment imposes a substantial limitation on the individual’s ability to sleep. The individual is disabled.

b. Major Life Activity

Major life activities include such things as caring for one’s self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, and working. Also included in this list are mental and emotional processes such as thinking, concentrating, and interacting with others, and working. Additionally, major life activities include

major bodily functions such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

c. Major Life Activity of Working

Given the changes to the definition of disability in the ADA, employees most likely will find it unnecessary to allege that they are substantially limited in working. Nevertheless, individuals are substantially limited in working when they have difficulty performing a class or a broad range of jobs in various classes of work. The class can be determined by reference to the nature of work or by reference to job requirements an individual may be limited in doing, e.g., prolonged exposure to cold. Employees are not substantially limited in working simply because an impairment limits their ability to perform some aspect of their job.

d. Some Conditions Are Presumed To Be Disabilities

In May, 2013, the EEOC revised its guidance relating to four categories of medical conditions – cancer, diabetes, epilepsy, and intellectual disabilities – to provide clarification regarding how employers should address such conditions. According to the EEOC, individuals having these conditions “should easily be found to have a disability” within the definition of ADA.

e. Some Conditions Are Not Covered By the ADA

As stated above, temporary non-chronic conditions with little or no residual effect are not disabilities. Moreover, people with certain conditions which would otherwise certainly seem to be disabling are specifically excluded. These include compulsive gamblers, kleptomaniacs and pyromaniacs for example.

Similarly, individuals with certain sexual disorders such as pedophilia or voyeurism are not covered. Homosexuality and bi-sexuality are also not covered, because they are not considered to be disabilities.

Special care must be used in assessing the Act's coverage of those with drug or alcohol problems.

(i) Drug Use

The ADA excludes from the definition of disability the *current illegal use* of drugs. "Current use" is use that has occurred recently enough to indicate that the individual is actively engaged in such conduct. Thus, current drug users do not have the protection of this Act. Individuals who have over-come drug addiction (those who are in rehabilitation or who have completed rehabilitation and who are *not* current drug users) are protected, however. This applies only to those with a serious enough problem to rise to the level of an addiction. An individual who had a history of mere casual drug use would not be protected.

(ii) Alcoholism

Alcoholism is *not* expressly excluded by the ADA, and the EEOC considers alcoholism to be a protect-ed disability. Although this means that you may not discriminate against an applicant or employee simply because he or she is an alcoholic, you may certainly prohibit employees from using or being under the influence of alcohol while at work.

Alcoholics and former drug addicts, even though within ADA's protection in general, will not be protected if they fail to meet your regular employment standards. You may be required, however, to pro-vide reasonable accommodation to give them an opportunity to do so.

2. Record Of A Covered Impairment

The ADA also protects as disabled, those individuals with "a record of such an impairment." This would include someone who

- had a physical or mental disorder but no longer has that impairment; or
- was simply *misclassified* as having such an impairment.

Example: Former cancer patients may not be discriminated against because of their prior medical history.

Example: An individual of normal intelligence who was mistakenly classified as “mentally retarded” or “learning disabled” is protected.

The impairment indicated in the record must be one that would be otherwise covered under the Act.

Note: Even though an individual has a record of being a “disabled” veteran or on a “disability retirement,” or is classified as disabled for other purposes such as workers’ compensation, he or she may not satisfy the definition of disability under the ADA. In making a disability determination, other statutes sometimes apply a different standard than the ADA.

3. Regarded As Impaired

Individuals who are “regarded as having such an impairment” are those who are subjected to an employment action based on:

- a physical or mental impairment that is not transitory (lasting less than six months) and minor; or
- not having a physical or mental impairment but being treated as though they have one that is not transitory and minor.

The employer does not have to perceive the individual’s impairment as substantially limiting. Rather, if an employee can show that the employer took an adverse employment action against him because of an actual impairment or because the employer thought he had an impairment, the employee meets the definition of having a “perceived as” disability.

An employer may defend against a perceived as claim by proving the impairment is transitory and minor. The employer will not meet this test by showing that it subjectively believed the condition was temporary and minor.

Instead the employer must prove its belief was objectively reasonable. For example, an employer could not simply assert that it believed PTSD was temporary and minor because that belief is not objectively reasonable.

Example: An employer refuses to hire an individual for a sales position because the applicant has severe skin graft scars. The employer has perceived the employee as disabled.

Example: A restaurant fires an employee whose partner has HIV because it believes the employee must have it too. HIV is not a transitory and minor impairment. Therefore, the employer has perceived the employee as disabled.

Example: An individual who is not hired because he has a broken leg that is healing normally is not regarded as disabled because the broken leg is transitory and minor.

4. Relationship With Disabled Individuals

While the law prohibits discrimination against persons in this category, it does not require reasonable accommodation (explained below) to meet their needs. For example, a mother applying for a job may have responsibility for a child who needs periodic visits to a hospital to treat a medical condition. You may not discriminate against this person by failing to hire her merely because you fear her child will occupy too much of her time and attention.

On the other hand, her requests for excessive time off to secure treatments for the child are not protected under the ADA. Of course, in such a case the Family and Medical Leave Act (FMLA) must also be taken into consideration.

C. Can The Person Perform The Essential Functions Of The Job?

A function is “essential” to a job if it is a major or important part of the job as opposed to being secondary or merely desirable. Taking away an essential function fundamentally alters the position.

In deciding which functions normally assigned to a position are actually essential for that position, consider:

- Does the position exist primarily to perform that function?
- How much time do either the people currently filling the job or people who filled the job in the past spend on that function?
- What duties are included on the written job description?
- Is there is a collective bargaining agreement? If so what does it say about the duties of the job?
- Can the function be assigned to other employees? (Consider the number of employees available, the particular skills involved, and demands of the job or business.)
- How often is the employee required to perform the function?
- What are the consequences of failing or being unable to perform the functions or of the employee being unable to perform them?

Example: A fire fighter must be able to carry an unconscious adult from a burning building. While many fire fighters will never actually be required to perform this function, the consequences of being unable to do so would be serious.

D. If The Individual Cannot Perform The Essential Functions Of The Job, Could They Be Performed With Some Accommodation?

A qualified disabled person is one who can do the essential functions of a job with or without *reasonable accommodation*. One of the most important questions under this law is exactly what is “reasonable accommodation”?

An accommodation is a modification or adjustment either in the way the work is customarily done, or in the work environment itself, or to the employer's policies and procedures. The purpose of the accommodation is to enable employees with disabilities to be tested and apply for work without unfair disadvantage, and to perform the essential functions of the job, while still enjoying the same benefits and privileges of employment as other employees.

Modification of the way the work is customarily done could include changes to the shift on which the work is performed, the use of helpers (either human or mechanical), allowing an employee the option of not performing marginal functions of the job, or similar adjustments.

Thus, if a blind or visually impaired person applies for work as a guard whose main function is to inspect name tags and allow entrance to a plant only to those with proper identification, it is unlikely any reasonable accommodation can be made. The person would not be a "qualified" disabled person since he could not perform the essential function of the job, nor would it be possible to modify the job to eliminate that particular requirement.

Importantly, an employer may consider the positive effect of any mitigating measure in determining whether the employee needs the requested accommodation. If the employee uses a mitigating measure that does not have negative side effects and that eliminates any limitations the impairment imposes, the employee may not be entitled to a reasonable accommodation. Employers are not required to accommodate "perceived as" disabilities.

E. Would The Accommodation Cause Your Business An Undue Hardship?

Reasonable accommodation does not require an *undue hardship* on the employer. "Undue hardship" refers to any accommodation that would be unduly costly, expensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

Unfortunately, there is no clear standard in this area, although courts are currently providing guidance on a case-by-case basis. Determining whether an accommodation is an undue hardship is based on a number of factors including the size of the facility, the expense of the accommodation requested, the number of employees, the impact on the organization as a whole, potential disruption, whether a single accommodation will benefit more than one disabled person and similar concerns.

Additionally, employers are not required to create a new position for a disabled individual, nor to hire an extra employee to assist the disabled individual. These are generally considered to be unreasonable.

In each situation the courts consider not only size but also the profitability of a particular business. Thus, what is reasonable for one company may be an undue hardship for another.

F. Would Placement Of The Individual On The Job Result In A Direct Threat Of Harm?

You are not required to employ an individual with a disability who poses a direct threat to the health and safety of himself or others and who cannot perform the job at a safe level even with reasonable accommodation. This is a *very narrow* exception on which the company will bear the burden of proof.

A direct threat is defined as “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.”

To reject an applicant on this basis, you must be able to prove not only that there is a high probability of substantial harm, but also that no reasonable accommodation could eliminate the risk or reduce it to an acceptable level. You must also identify which aspect of the disability currently poses the direct threat, and may not speculate on the risk which *might* be posed by the individual’s condition at some future time. The following four factors must then be considered in light of valid medical

analyses or other objective evidence individualized for the particular person and job:

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

Example: An employer in the construction industry may not be required to hire an individual disabled by narcolepsy (a condition causing sudden sleepiness) for a carpenter's job, the essential functions of which require the use of power saws and other dangerous equipment.

Example: The FBI would not be required to hire an insulin-dependent applicant for a special agent position.

Pre-Employment Inquires

While the law requires a careful analysis of the exact needs of each disabled person, it is improper to inquire whether an applicant has a disability, or about the nature or severity of a disability.

A. Applications And Interviews

It is important not to make any pre-employment inquiries about the existence, nature, or severity of an applicant's disabilities prior to a conditional offer of employment. Your employment applications should be carefully reviewed to ensure they do not inadvertently violate the law by asking questions relating to prior injuries, diseases, disabilities and so on.

Pre-offer inquiries about the ability of an applicant to perform job-related functions are permitted, however. For example, if a job requires assembling small parts, you may ask whether the applicant can perform that function, with or without reasonable accommodation.

You may also state, before making a conditional offer of employment, the requirements of your company's attendance policy, and ask whether the applicant can meet them. On the other hand, do not ask an applicant how often he will need to take leave for treatment because of incapacity resulting from a disability. Questions about an applicant's general attendance record on other jobs, however, and inquiries designed to determine if he or she abused leave (such as asking how many Mondays or Fridays he or she was absent from work) are legitimate.

B. Physical Examinations

The ADA permits physical examinations but only under fairly limited circumstances. A physical examination may not be used to pre-screen applicants for employment. Only after a conditional offer of employment has been made will a physical examination be allowed.

The offer of employment may be contingent upon passing the physical but, obviously, if a conditional offer is withdrawn this immediately raises questions of whether or not a reasonable accommodation was possible. Further, if a job offer is withdrawn and challenged, the company will have to show that its decision was job related and consistent with business necessity.

C. Drug And Alcohol Screens

A pre-employment drug screen is not considered to be a "physical examination" and is therefore permissible under the Act. If doing pre-offer drug testing, an inquiry concerning prescription medication should be made only if the applicant tests positive. The medical review officer can ask if the applicant has a valid prescription to explain the result. Alcohol screens, however, are medical examinations and are prohibited at the pre-employment stage.

Post-Employment Physical Examinations

Once the hurdles of a conditional offer and a pre-placement physical examination are cleared, you may conduct examinations required by other laws (DOT physicals, OSHA or MSHA tests, etc.) and offer voluntary wellness programs. You are restricted in requiring your employees to undergo additional physical examinations, however, to those which are job-related and consistent with business necessity. A physical examination is job-related and consistent with business necessity when the employee:

- is having difficulty performing his or her job effectively;
- becomes disabled; or
- requests an accommodation on the basis of a disability.

All results of such pre- or post-employment physical examinations – indeed all medical information gathered on employees – must be kept confidential and stored in a medical file separate from the employee’s regular personnel file. Access to such records should be controlled and limited to those who have a genuine “need to know.”

The Practical Response

With a law as complex as the ADA, it is not sufficient merely to be in good faith, nor to try and treat disabled individuals with courtesy and respect, although this is obviously common sense. It is also imperative that you review and revise your applications for employment; update internal policies; consider carefully the use of pre-employment physicals; institute (or change if necessary) a safe and effective substance abuse policy; educate supervisors on the need to accommodate qualified disabled individuals; adopt a formal policy announcing compliance with the law; and review, and update if necessary, all written job descriptions, carefully delineating essential job functions.

Only after instituting preventive measures such as these can you take any assurance that the more common sense measures – such as welcoming disabled individuals into your workplace based on their skills–will reduce liability under the ADA.

For further information about this topic, contact any office of Fisher Phillips or visit our website at www.fisherphillips.com.

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