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**ADA:
The
Employment
Aspects**

Second Edition

This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel 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 unique state requirements that extend beyond the scope of this booklet.

THE AMERICANS WITH DISABILITIES ACT: The Employment Aspects

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T

o 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 ADA, 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, is intended to provide an overview of the most important 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 need not 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:

1. Does the individual meet your *qualification standards*?
2. Is the individual *disabled*?
3. Can he or she perform the *essential functions* of the job in question?
4. If not, could they be performed with some *accommodation*?
5. Would the accommodation cause an *undue hardship* on your company?

6. 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 issues.

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 any protected categories, such as minorities or women, they will be upheld. Thus, those who do not meet your reasonable qualification standards are 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.
- Additionally, individuals who, 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 explained 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 a “night” person is not considered to be 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.

a. Substantially Limits

An impairment must either actually prevent an individual from performing a major life activity, or significantly restrict the duration, manner, or condition under which the major life activity is performed, as compared to the average person in the general population.

The Supreme Court has held that if an individual is taking measures to correct for, or mitigate, a physical or mental impairment, the positive and negative effects of such measures must be taken into consideration when evaluating whether the individual is substantially limited in a major life activity. Mild restrictions that result in minor inconveniences do not rise to the level of a physical or mental impairment.

Example: An epileptic whose symptoms are completely controlled by medicine is not covered by the Act. He is not considered “disabled” even if his condition in an unmedicated state would substantially limit some of his major life activities.

Example: An individual with a vision impairment whose condition is corrected through the use of

prescription glasses is also not covered, and is not considered to be disabled, and is not covered by the Act.

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, sleeping, reproduction, and working. Also mental and emotional processes such as thinking, concentrating, and interacting with other people are major life activities.

c. Some Conditions Are Not Covered By The ADA

People with certain conditions which would otherwise 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.

- **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 overcome 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 casual drug use would not be protected.

- **Alcoholism**

Alcoholism is *not* expressly excluded by the ADA, and the EEOC considers alcoholism to be a protected 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 protection in general, will not be protected if they fail to meet your employment standards. You may be required, however, to provide reasonable accommodation to give them an opportunity to do so.

2. Record Of A Covered Disability

The ADA also protects as disabled, those individuals with “a record of such an impairment.” This includes someone who

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

The past impairment must be one that would otherwise be covered under the Act.

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.

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 worker’s 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 Disabled

An individual who is “regarded as having such an impairment” is someone who:

- has a physical or mental impairment that does *not* substantially limit a major life activity but who is treated as though it does;

- has a physical or mental impairment that substantially limits a major life activity *only as a result* of the prejudices of others toward the impairment; or
- does *not* have a physical or mental impairment but is treated as though they do.

Example: A disfigured individual would be covered under this section, as would a male homosexual applicant who is assumed to be infected with HIV merely by virtue of his sexual orientation.

Example: If an employee with controlled high blood pressure that is not, in fact, substantially limiting, is reassigned to less strenuous work due to the employer's unsubstantiated fears that the individual might suffer a heart attack, there is an ADA violation.

An individual will also be regarded as impaired by showing that the employer or prospective employer made an employment decision based on “myth, fear, or stereotype” about the perceived disability.

Example: An employer discovers that an employee's mother has Huntington's disease (an incurable neurological disorder). The employer terminates the employee because he knows the employee has a 50% chance of developing the condition.

4. Relationship With A Disabled Individual

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 assigned to a position are actually essential, consider:

1. Whether the position exists primarily to perform that function;
2. How much time people currently filling the job or people who filled the job in the past spend on that function;
3. What duties are included in the written job description;
4. If there is a collective bargaining agreement, what does it say about the duties of the job;
5. Whether the function can be assigned to other employees (consider the number of employees available, the particular skills involved, and demands of the job or business);
6. How often the employee is required to perform this function; and
7. 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. The purpose of the accommodation is to enable employees with disabilities to take employment tests 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. Modification of the work environment could include such things as the widening of doorways, changing of light levels, raising or lowering desk surfaces, etc.

An accommodation need not be the “best” accommodation possible nor the one that the employee desires the most. It must merely be sufficient to meet the job-related needs of the individual being accommodated.

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 an essential function of the job; nor would it be possible to modify the job to eliminate that particular requirement.

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, burdensome, 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 affected, the impact on the organization as a whole, potential disruption to the work of the company, whether a single accommodation will benefit more than one disabled person, and similar concerns.

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 you 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:

1. The duration of the risk;

2. The nature and severity of the potential harm;
3. The imminence of the potential harm; and,
4. 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.

PRE- EMPLOYMENT INQUIRIES

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 or she will need to take leave for treatment or 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 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.

C. Drug Screens

A pre-employment drug screen is not considered to be a “physical examination” and is therefore permissible under the Act.

Once the hurdle 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.

POST- EMPLOYMENT PHYSICAL EXAMINATIONS

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, or to try and treat disabled individuals with courtesy and respect, although this is obviously a good idea. 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 to delineate essential job functions more carefully.

Only after instituting preventative measures such as these can you have any assurance that the more common sense measures — such as welcoming disabled individuals into your work place based on their skills — will reduce liability under the ADA.

For further information about this topic, contact any office of Fisher & Phillips LLP.

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