The Americans with Disabilities Act – An Overview for Employers

The Americans with Disabilities Act (ADA) (Title 1 and Title II) prohibits discrimination by covered entities in all phases of employment (including hiring, promotion, discharge, compensation, training and other employment terms and conditions) and mandates accessibility for the disabled in public places. The ADA Amendments Act (ADAAA) was passed by Congress in 2008 and broadened the scope of the original law. The Equal Employment Opportunity Commission (EEOC) is the agency which has oversight and enforces the ADA.

Covered entities are private and public employers (state and local governments) with 15 or more employees. Many states have adopted employment discrimination laws that include disability using lower employee thresholds for private employers, for example, 5 rather than 15. In addition, states may have a broader definition of a "disability" thus providing further protections for individuals with medical conditions. Whenever the state and federal law conflict, that which provides the greatest protection for the employee will apply.

Also prohibiting disability discrimination in employment is the 1973 Rehabilitation Act which applies to public employers, federal contractors and recipients of federal funding. Section 501 and Section 503 of the Act mandates affirmative action policies and non-discrimination in employment by Federal Agencies of the Executive Branch and Federal contractors.

Under both federal and state laws an employer may not retaliate against a person who exercises his or her ADA rights or opposes a practice made unlawful under the ADA.

What is a disability under the ADA and ADAAA?

1. A physical or mental impairment that substantially limits one or more major life activities (sometimes referred to as an "actual disability,"), or

2. A record of a physical or mental impairment that substantially limited a major life activity ("record of"), or

3. When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as").

Employers are also prohibited from "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual has a relationship or association. A caregiver may be subject to unlawful disparate treatment if they are discriminated against based on the employer's belief that: the disabled individual will result in a higher cost to their health plan; the employee may actually contract disability of the person they are associated with; or that the employee will be distracted or inattentive because of the disability of someone they are associated with. Employers must ensure employees are not treated discriminatorily or subject to adverse action based on their association with an individual with a disability.

Pregnancy is not a disability, however, certain impairments arising from pregnancy may be substantially limiting and be a disability, e.g. gestational diabetes.

Definitions

Physical or Mental Impairment - A physical impairment is a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the major bodily systems. A mental impairment is any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities. An impairment which is episodic or in remission may be a disability if it would substantially limit a major life activity when active. Examples include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia.

Major Life Activities (non-exhaustive list):

- caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, sleeping, standing, lifting, bending, learning, reading, concentrating, thinking, communicating, interacting with others and working.
- the operation of major bodily functions, including (but not limited to) functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

The EEOC has said that certain impairments should easily be concluded to limit a major life activity. These include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder and schizophrenia.

A person is limited in the major life activity of working if they have difficulty performing either a "class or broad range of jobs in various classes." Being substantially limited in performing the unique aspects of a specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

Substantially Limits – To have an actual or record of a disability, an individual must be (or have been) substantially limited in performing a major life activity as compared to most people in the general population. In determining whether a person is substantially limited in performing a major life activity, the final ADAAA regulations issued the following "rules of construction."

- An impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting."
- The term "substantially limiting," should be construed broadly.
- Determining if an impairment substantially limits a major life activity requires an individual assessment.
- The determination of a disability should not require extensive analysis and usually will not require medical evidence, but it may be requested if appropriate.
- An individual must only be substantially limited in one major life activity to be covered under the first or second prong of disability.

An impairment may be transitory (lasting fewer than six months) and minor, however, if its effects are substantially limiting, it would be considered a disability.

Mitigating Measures – Mitigating measures eliminate or reduce the symptoms or impact of an impairment, e.g. hearing aids, medication, or prosthetic limbs. However, with the exception of ordinary eyeglasses or contact lenses, the ADAAA states that the positive effects from an individual's use of one or more mitigating measures must be ignored in determining if an impairment substantially limits a major life activity.

"Regarded As" – A covered entity "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g. failure to hire, termination, or demotion) based on an individual's impairment or an impairment they believe the individual has.

Drug Use and the ADA

Generally, current illegal drug use is excluded from the definition of disability. However, an employee may be considered to have a disability if they:

- have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs, or have otherwise been rehabilitated successfully and are no longer engaging in the illegal use of drugs; or

- are participating in a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs, or
- are erroneously regarded as using illegal drugs when in fact they are not engaging in such use.

Employers may develop policies and procedures, including drug testing, to ensure that employees are not engaging in the use of illegal drugs and may require follow up testing for an employee who participated in or completed supervised drug rehabilitation program as a condition of continued employment.

Employer Responsibilities
Employers must engage in the interactive process toward identifying reasonable accommodations that enable an applicant or employee with a *known* disability to perform the *essential functions* of his or her job. In order to be eligible for a reasonable accommodation, an individual must either have an actual or record of a disability. If an employer does not know of a disability, under the ADA, they are not required to accommodate it unless and until the employee brings it to their attention.

Federal regulations define "reasonable accommodations" as:
- modifications or adjustments to a job application process; work environment; or to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to be considered for, or perform the essential functions of the position; or
- modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Reasonable accommodations may include, but are not limited to:
- making existing facilities used by employees readily accessible to and usable by individuals with disabilities
- job restructuring
- part-time modified work schedules
- reassignment to a vacant position
- acquisition or modification of equipment or devices
- appropriate adjustment or modification of examinations, training materials or policies
- the provision of qualified readers or interpreters
- flexible attendance policies (*e.g.,* making exceptions to "no fault" or "point system" attendance policies
- unpaid leave (beyond any time off available under the FMLA, state leave laws and employer-provided leaves)
- telecommuting

Generally, an employer's duty to engage in the interactive process begins at the time an applicant or employee requests an accommodation for his or her disability. There are no "magic words" that an employee must use to request a reasonable accommodation. An employee need not specifically use the words "reasonable accommodation"; any "plain English" request, whether written or oral, is sufficient. However, an employer may have a duty to initiate the interactive process of its own accord when the disability of an applicant or employee is obvious (for example, a paraplegic).

The purpose of the interactive process is for an employee with a disability and his or her employer to jointly identify a range of reasonable accommodations that would enable the employee to perform the essential functions of his or her job. Additional analysis or information from a medical provider may not be necessary due to the nature of the disability and should only be requested if appropriate using the Physician/Health Care Provider Form. Information from the employee's physician may be necessary if the employee's limitations are unclear or you guidance regarding an accommodation.

Often, an employer and employee to can arrive at unique accommodations that benefit all involved. However, an employer is not required to grant employee's request for a particular accommodation if

another is less expensive or easier for the employer to provide, so long as the accommodation chosen is effective.

For practical tips on how to effectively engage in the interactive process, click here.

Employers should generally avoid asking employees about their health or medical conditions and should not unnecessarily gain knowledge of an employee disability exposing the employer to liability for disability discrimination. Asking employees about their health or medical conditions is a particularly dangerous (and possibly unlawful) practice in regard to job applicants. Employers may not ask job applicants about the existence, nature or severity of a disability.

Undue Hardship
Employers need not make accommodations that would require *undue hardship.* Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation. If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship. Proving an undue hardship is difficult and an employer considering this stance should consult with legal counsel.

The above information is a summary providing guidance on the key aspects of the law. For more information, please contact an employment law attorney or a human resource professional.

More Information
Equal Employment Opportunity Commission