

Americans with Disabilities Act

Monica L. Rausch
Policy Analyst
DAS/HRD, Office of Policy Development

What is the ADA?

- **Title I:** prohibits disability discrimination in the workplace.
- **Title II:** provides that no qualified individual with a disability shall "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."
- **Title III:** prohibits discrimination in the "enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."
- Section 504 of the Rehabilitation Act of 1973

Who is a person with a disability?

A person with a disability is one who:

- Has a physical or mental impairment that substantially limits a major life activity;
- Has a record or history of such impairment;
OR
- Is “regarded as” having such an impairment.

Purpose of ADAAA

- “To carry out the ADA’s objectives...by reinstating a broad scope of protection to be available under the ADA.”

Definition of Disability ADAAA

“The definition of disability...shall be construed in favor of broad coverage...to the maximum extent permitted by the terms of this Act.”

Physical Impairment

- Any physiological disorder or conditions such as: cosmetic disfigurement, anatomical loss, carpal tunnel, severe back pain, vision or speech problems, hearing impairments, cerebral palsy, epilepsy, MS, cancer, heart disease, diabetes, HIV, tuberculosis and issues with cardiovascular, digestive, lymphatic and endocrine systems.

Mental Impairment

- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional illnesses such as anxiety or depression and learning disabilities

Conditions that are NOT impairments under the ADA

- Physical characteristics
- Personality characteristics
- Compulsive gambling
- Use of illegal drugs
- Gender identity issues
- Sexual conditions such as pedophilia or exhibitionism
- Sexual preference
- Social conditions
- Obesity
- Stress

Ameliorative Effects Ignored

- Employer can no longer consider mitigating measures such as medicine or machines when considering whether a person is disabled.
- EXCEPTION: eye glasses and contacts.

Example:

- Prosthetic leg; before no, now yes.
- Take insulin, before not disabled; now yes
- Take drugs for epilepsy, before not disabled; now yes.
- Hearing aids, before not disabled; now yes.

Mitigating factors cont'd

- If the mitigating measure creates limitations, those CAN be considered...

Example:

- Employee has cancer so she is disabled
- Requests accommodations due to nausea and fatigue from treatment
- Must consider the accommodation because the mitigating factor, treatment, is causing other limitations.

Episodic or Conditions in Remission

- The ADAAA extends coverage to conditions that are in remission or are only episodic.
- If the person would be disabled when the condition is present, they are always disabled.

Substantially Limits

Targeted specifically by Congress for redefining as it was too strict a standard

- EEOC is yet to define but it does NOT mean “significantly restricted” or “severely restricts.”

Gray Area...

- Individual who must walk slowly and has trouble walking up stairs.
- Before: not protected.
- Now: may be!

Major Life Activity

- Only one activity needs to be limited

Includes: caring for oneself, performing manual tasks, walking, seeing, hearing, eating, sleeping, walking, standing, lifting, thinking, concentrating, breathing, bending, speaking, learning, and working

ADAAA Expands Life Activity

Now includes “major bodily function,” so processes such as digestion, cellular growth, bowel function, liver function if substantially limited, can be a disability.

Must be a “Qualified Individual” to be covered by the ADA

A “qualified individual” is a:

- Person with a disability, who with or without a reasonable accommodation, can perform the *essential functions* of her job.

Essential Function Tips

- Update your PDs
- Make sure employees are properly classified
- Add qualifications with PSMQs if needed

What is an Essential Function of a Job?

- Duties that are fundamental to the performance of the job.
- Consider:
 - Does position exist to perform the function in question?
 - What is included in the position description
 - Actual functions performed
 - Frequency and duration of functions
 - Employees available to perform the position

Before considering a reasonable accommodation, determine:

- 1) is the person disabled?
- 2) is there a record of the disability

Then.....

Reasonable Accommodations

The Interactive Process

- Interaction between employer and employee to determine if there is an accommodation.
- Does not have to be officially requested.
- Cost/benefit analysis

The Interactive Process Cont'd

- Employee might simply state they need a change at work due to a medical condition.
- If the employer is not aware of a disability, then an employee's request for a change in working condition may not require the employer to engage in the interactive process.

The Interactive Process Cont'd

- Not typically required to ask whether a reasonable accommodation is needed when an employee has not asked for one.
- **HOWEVER**, do so if:
 - Knows that the employee has a disability;
 - Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; or
 - Know, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Employer's responsibilities

- Initiate the interaction.
- Work with the employee to come up with a reasonable accommodation.
- Keep the employee updated as to the status of the accommodation request.
- Process the request in a timely manner.
- Protect confidentiality of all medical information.
- Document the process for any future litigation.

Employee's Responsibilities

- Inform the employer that they need an accommodation.
- Work with the employer to come up with a reasonable accommodation.
- Provide necessary medical documentation if requested by the employer.

Choosing the Accommodation

Decided on a case-by-case basis.

- If more than one accommodation is acceptable, the employer has the right to choose the option that would be less expensive or easier to implement.
- Ensure that the accommodation enables the employee to perform the essential functions of the job.

Choosing the Accommodation

■ EEOC suggests using the following:

- Examine the job and determine its purpose and essential functions;
- Ask the employee to determine their physical or mental abilities and limitations as they relate to the essential job functions;
- Identify potential accommodations and determine the effectiveness of each.

Types of Accommodations

- Changes in existing facilities to make them readily accessible Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Leave of absence
- Equipment Modification, Purchase
- Light duty jobs
- Changes in environment
- Changes in communications
- Changes in supervision
- Training
- Provision of Aides, Interpreters
- Provision of Parking Space.

Undue Hardship

Refusing to grant an accommodation to an employee or applicant if the requested accommodation is not reasonable or would cause an hardship on your business.

ADA/ADAAA

Defines “undue hardship” as significant difficulty or expense when considered in light of the nature and cost of the accommodation and overall finances of the employer.

When does an accommodation become an “undue hardship”?

- Factors to consider:
 - The nature and cost of the accommodation
 - The impact on the work area
 - The impact on the employer

Undue Hardship

■ Scenarios:

- Is it required to modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?
 - No.
- Can an employer deny a request for leave when an employee cannot provide a fixed date of return?
 - It depends.

“Regarded As” Disabled

- The ADAAA expands the reach of “regarded as” claims.
- Must only show an adverse job action because of a perceived physical or mental whether it is true or not.
- The impairment DOES NOT have to substantially limit the person.
- Does not apply to conditions of 6 months or less.
- Not required to consider accommodations.

Example:

- Waitress with a facial scar.
- Impairment, but not a disability.
- Under the ADA, the employer could fire/transfer her maintain a certain image
- Under the ADAAA, cannot fire or take other adverse action against the waitress because of the scar.
- Won't have to allow accommodation for treatments

ADA and the Hiring Process

- Before the Interview:
If applicant asks for accommodation, and you can grant it, do it!

ADA & the Hiring Process

- **During the Interview...**
 - Questions about disabilities?
 - NO! Even if it is obvious
 - Medical or worker's comp questions?
 - NO!
 - Questions about *current* illegal drug use?
 - Yes, but...

During the interview, cont'd.

- Questions about ability to do the job?
 - Yes, but not if will need accommodation
- Questions about attendance?
 - Yes, but...

ADA & the Hiring Process

- After the interview, before the offer...
 - Medical Exams?
 - NO!
 - Drug Tests?
 - Yes
 - Alcohol Tests?
 - No!

ADA & the Hiring Process

- After the offer...
 - Medical Exams
 - Can ask if they need accommodation

A word of caution about medical exams

- Any medical information received must be kept **PRIVATE**.
- Medical documentation should be kept separate from personnel files.