

The ADA: Rules for the Workplace

This is a question and answer summary of the key employment discrimination provisions found in Title I of the Americans with Disabilities Act (ADA). The ADA prohibitions on employment discrimination against individuals with disabilities became effective July 26, 1992, for employers with 25 or more employees (July 26, 1994 for employers with 15 or more employees).

Who is prohibited from discriminating under the employment provisions of the Act?

Generally, public and private employers with 15 or more employees are subject to the prohibitions of the ADA.

Who is protected from employment discrimination under the Act?

Any qualified individual with a disability in regard to job application procedures, hiring or discharging, compensation, advancement, training and any other term or condition of employment.

What is the meaning of “qualified individual with a disability?”

The phrase means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires.

How does an employer determine if an individual with a disability is “qualified?”

The determination of whether an individual with a disability is “qualified” begins with deciding whether the individual satisfies the prerequisites for the position, such as possessing the appropriate education, experience, skills, licenses, etc. The next step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.

What are “essential functions?”

Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires. They do not include the marginal functions of the position.

A job function may be considered essential for any of several reasons, such as:

the reason the position exists is to perform that function; there are a limited number of employees available among whom the performance of that job function can be distributed; and/or the function is highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

What evidence should be considered in determining whether a function is essential?

Evidence of whether a particular function is essential includes, but is not limited to: the employer’s judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job actually performing the function; the consequences of not requiring the individual to perform the function; the terms of a collective bargaining agreement; the work experience of past employees in the job; and/or the current work experience of incumbents in similar jobs.

What is a “disability” under the Act?

The definition is very broad. With respect to an individual, “disability” means: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such an impairment.

What is a “physical or mental impairment?”

A physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting most body systems and mental or psychological disorders, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities. Impairments do not include physical characteristics such as height, weight or muscle tone that are within “normal” range and are not the result of a physiological disorder.

What is a “major life activity?”

Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reproduction and, if no other major life activity is substantially limited, working.

What is the meaning of “substantially limits?”

The term substantially limits means: (1) unable to perform a major life activity that the average person can perform; or (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the average person. Temporary impairments, such as broken limbs, sprained joints, concussions, appendicitis and influenza are usually not disabilities.

What factors determine whether a major life activity is substantially limited?

The factors include: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact or the expected permanent or long-term impact of or resulting from the impairment. The term “duration” as used in this context refers to the length of time an impairment persists, while the term “impact” refers to the residual effects of an impairment.

Example: A broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the impact of the impairment would be the resulting permanent limp.

What is the meaning of a substantial limitation on the major life activity of working?

With respect to the major life activity of working, the term “substantially limits” means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation.

Disability also is defined as having a “record of a physical or mental impairment that substantially limits a life activity.” What does this mean?

This provision is intended to ensure that people are not discriminated against because of a history of disability or because they have been misclassified or disabled.

Example: Former cancer patients are protected from discrimination based upon their prior medical history.

Disability also is defined as being “regarded as having a physical or mental impairment.” What does this mean?

Being regarded as having a physical or mental impairment means: having a physical or mental impairment that does *not* substantially limit major life activities but that is treated or perceived by an employer as substantially limiting; having a physical or mental impairment that substantially limits major life activities, but only as a result of the attitudes of others; or having no physical or mental impairment, but being treated by an employer as having a substantially limiting impairment.

Example: Suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated myths, fears or stereotypes that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

Does the Act obligate an employer to do anything for an employee with a disability that the employer is not required to do for the other employees?

The Act obligates the employer to make reasonable accommodations that would permit an employee with a known disability to perform the duties of the job unless providing such accommodations would result in an undue hardship.

What is a “reasonable accommodation?”

A “reasonable accommodation” is a modification or adjustment (1) to the job application process that enables a qualified applicant with a disability to be considered for the positions such qualified applicant desires; (2) to the work environment, or to the manner of circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position; or (3) that enables an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.

What type of modifications or adjustments may be involved?

Reasonable accommodations may involve, but are not limited to, making existing employee facilities accessible to and usable by employees with disabilities, job restructuring, modification of equipment, modification of work schedules or provision of readers or interpreters. Reassignment to a vacant position is also a possible reasonable accommodation when accommodation within the individual’s current position would pose an undue hardship.

What is an “undue hardship?”

Undue hardship is defined as an action requiring significant difficulty or expense. The factors to be considered include: (1) the nature and cost of the accommodation needed under the Act; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility and the effect on expenses and resources; (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees and the number, type and location of its facilities; (4) the type of the operation or operations of the covered entity, including the composition, structure and functions of the work force of such entity and the relationship of the facility or facilities in question to the covered entity; and (5) the impact of the accommodation upon the

operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

What employment criteria and tests can an employer use without violating the Act?

The Act still permits employers to devise physical and other employment tests if they are job-related and consistent with business necessity. Importantly, the Equal Employment Opportunity Commission (EEOC) has stated that an employer's business judgments about production standards will not be second-guessed. When the employer applies employment criteria and tests, it must determine whether reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business.

Is reasonable accommodation required in order for an individual with a disability to take a qualification test?

Reasonable accommodation can be required in the administration of a qualification test if: (1) the employer knows that the individual has a disability impairing sensory, manual or speaking skills that will prevent the employee from taking the test or that will negatively influence the results of the test; (2) the impaired sensory, manual or speaking skills are not necessary to perform the essential functions of the job, with or without reasonable accommodation; and (3) the reasonable accommodation in the format of the test or otherwise can be provided without undue hardship.

Example: An employer can require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure for the performance of an essential function of the job. Otherwise, an alternative oral test should be administered.

May the employment of a person with a disability be denied because of an increased risk to the safety of that person or others?

An employer may adopt a qualification standard that an employee not pose a direct threat to the health or safety of the individual or others. Such a standard must apply to all individuals, not just those with disabilities. An individual may be denied employment because the individual poses a direct threat to the health or safety of the individual or others if the threat cannot be eliminated by reasonable accommodation. However, the determination of the threat to safety must be made on a case-by-case basis supported by valid medical analysis or other objective evidence. It cannot be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies. Moreover, the threat must pose a significant risk — a high probability of substantial harm. Speculative or remote risk is insufficient.

What is the effect of the ADA on drug testing of employees?

The ADA attempts to be neutral on drug testing. It provides that drug testing shall not be considered a prohibited medical examination. It further excludes from the definition of “qualified individual with a disability” any employee or applicant who is currently engaging in the illegal use of drugs when an employer acts on the basis of such use.

What remedies would be available to an individual with a disability who is discriminated against by an employer?

The Act provides the remedies that are available under Title VII of the Civil Rights Act of 1964. These include injunctions, back pay and lost benefits, reinstatement, front pay when reinstatement is not appropriate, attorneys’ fees and costs, other make-whole relief and limited actual and punitive damages in some cases.

How will the Act be enforced against employers?

The EEOC will be responsible for processing and investigating charges under the Act. Civil actions may be filed against the employer by the EEOC, the Attorney General or an aggrieved individual.

What sort of actions by a health plan sponsor may be viewed as “subterfuge” to evade the purposes of the Act?

It seems likely that an employer who amends a health plan to reduce coverage for a specific disabling condition shortly after learning of an employee who is afflicted with that disability would be vulnerable to a charge of attempting to evade the purposes of the Act.

Example: A law firm may not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual’s mental illness.

May an employer inquire of an applicant concerning the existence, nature or severity of a disability?

Employers generally are not permitted to conduct pre-offer medical examinations or make inquiries to elicit this information. Additionally, employers may not inquire at the pre-offer stage about an applicant’s workers’ compensation history. However, an employer may make preemployment inquiries into the ability of an applicant to perform job-related functions. This can be accomplished by narrowly and specifically describing what the job entails and asking if the individual can perform the job with or without reasonable accommodation. Employers may also require a medical examination after offering employment and before the applicant begins working. The examination may be made a condition of an offer of employment if all employees are subject to such an examination regardless of disability and information obtained regarding the medical condition or history of

the applicant is collected and maintained on separate forms and in separate medical files that are treated as confidential.

May an employer take any steps to determine whether an individual with a known disability can perform the job in question?

An employer may ask an individual with a known disability that may interfere with or prevent the performance of a job to describe or demonstrate how, with or without reasonable accommodation, the individual will be able to perform job-related functions. If the disability is not one that may interfere with or prevent the performance of the job, the individual can be required to explain or demonstrate performance only if the employer routinely makes such a request of all applicants in the same job category.

Example: An employer may state the attendance requirements of a job and inquire whether an applicant can meet them, but may not ask how an individual became disabled, the prognosis for the disability, how often the individual will use leave for treatment for the disability or how the individual will use leave as a result of incapacitation due to the disability.