AMERICANS WITH DISABILITIES ACT (ADA)

The Americans With Disabilities Act (ADA) prohibits discrimination in employment against qualified individuals because of disability. What makes ADA difficult to interpret are the definitions of "qualified individuals" and "disability."

A qualified individual is defined as "one who, with or without reasonable accommodation, can perform the essential functions of the position."

A person is considered to have a disability under three circumstances:

- The person has a physical or mental impairment that substantially limits one or more major life activities

OR

- the person has a record of such an impairment (such as cancer, now in remission)

OR

- the person is regarded as having such an impairment (such as a congenital birth defect which the individual, himself, does not consider a disability)

"Major life activities" include (but are not limited to):

- walking
- breathing
- sleeping
- talking
- seeing
- hearing
- caring for oneself...

Conditions that are generally considered disabilities are:

- Substantial orthopedic, visual, speech or hearing impairment
- tuberculosis
- HIV infection or AIDS
- cerebral palsy
- muscular dystrophy
- multiple sclerosis
- cancer
- heart disease
- diabetes
- mental retardation
- emotional or mental illness
- arthritis
- recovered drug usage or alcoholism

An employee or applicant is "regarded as having such an impairment" if he or she has a condition that would generally limit a person's ability to do certain activities. This would be true even if the employee doesn't personally consider him/herself to be disabled. For example, a person born without arms would be considered, under ADA to be entitled to certain accommodations and protections. So would a person with a disfiguring facial deformity.

An employee has a record of impairment if they had a disability that has - permanently or temporarily - gone away, such as a cancer patient who is now in remission.

TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)

It was signed-into law on July 26, 1990 and it represents the broadest expansion of civil rights since the Civil Rights Act of 1964.

I. Title I requires all covered employers to make Reasonable Accomodations for "qualified individuals with disabilities".
It prohibits employers from discriminating against employees or job applicants when making employment decisions.

All aspects of the employment process apply, including: **BATH MAP**

Benefits
Application
Testing
Hiring
Medical Examinations
Assignments
Promotion

Employers are excused if the accomodation would impose an "undue hardship" on the operation of their businesses.

With regard to the employment process of hiring, ADA compliant job descriptions are those where the essential functions or tasks, not the customary method for doing them, are defined. Task vs. Method.
Ex. An essential function of a computer programmer job may be described as "ability to manually write programs". Since programs can be developed directly on the computer, the fact that a person currently performing the job may write the programs by hand is not the essential function.

Addendum B in the packet provides guidelines for managers on how to implement an office's employment process which does not discriminate against qualified individuals with disabilities.

II. Who Must Comply?

Private employers, state and local governments, employment agencies, labor unions and joint management committees.
Covered employers include those with 15 or more employees.

III. Effective Dates of Title I:

Employers with 25 or more employees: July 26, 1992
Employers with 15 or more employees: July 26, 1994.

IV. Who is protected by Title I?

Discrimination against "qualified individuals with disabilities" by employers is prohibited under Title I.

Qualified Individual with a Disability

An individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accomodation can perform the essential functions of a job.

Cases

Several cases have been heard in the courts which further define what behavior constitutes sexual harassment in practise under Title VII.

In June, 1986, Meritor Savings Bank v. Vinson was the first sexual harassment case to be heard by the U.S. Supreme Court. A female employee commenced a lawsuit under Title VII after her supervisor dismissed her, claiming that she was subjected to unwanted sexual advances by the supervisor for three (3) years. It is undisputed that she earned promotions during this period strictly based on merit. Two months after she notified her male supervisor that she was taking an undefined period of sick leave, the supervisor fired her for excessive use of sick leave. She stated that she felt intimidated by her supervisor's actions to engage in sexual intercourse with him on many occasions (40 or 50 times). Furthermore, she claimed that he fondled her in the presence of other employees. She never suffered any monetary loss as a result of the harassment.
The majority ruled that Title VII is not limited to discrimination with only economic or tangible effects. **The Court held that the supervisor's conduct unreasonably interfered with the female employee's work performance and created an offensive work environment.**
TEST: Whether the sexual activity was unwelcomed.
Furthermore, the employer was not insulated from liability even though a grievance procedure existed and the female employee failed to use the procedure.

The Reasonable Victim Standard evolved from Ellison v. Brady.
Facts: A male IRS agent sent notes, letters, and flowers to a female IRS agent. The female agent claimed that the male IRS agent's actions constituted sexual harassment and sued.
Holding: The lower court held that no sexual harassment took place, by applying the Reasonable Person Standard. This standard was developed by male judges and it permitted male bias to be applied in the analysis.
The female agent appealed the case to the Court of Appeals, who ruled that sexual harassment took place, using the Reasonable Woman Standard.

It is now believed that the Reasonable Victim Standard is the best approach, because one must put himself or herself in the body of the person claiming discrimination, when analyzing the facts. Hoveves, this standard has not been implemented by the courts.
The problem with the Evaluation Standards applied in Ellison v. Brady was that what women find offensive may be acceptable to men.

Robinson v. Jacksonville Shipyards
Facts: Nude and semi-nude pictures of women were posted in a formerly all male workplace and sexually demeaning remarks and jokes were common by male co-workers.
Holding: In 1991, the Federal Court held that Title VII was not intended as a shield to protect pre-existing abusive work environments.
Hence, the boys-will-be-boys attitude which existed in some workplaces is no longer condoned by the courts.

V. Employer's Obligation to Reasonably Accommodate

Reasonable accommodation is any change in the work environment or in the way things are usually done that results in equal employment opportunity for an individual with a disability. There are three basic types of reasonable accommodation:

- to ensure equal opportunity in the application process;
- to enable a qualified individual with a disability to perform the essential functions of a job; and
- to enable an employee with a disability to enjoy equal benefits and privileges of employment.

An employer must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodations would cause an undue "hardship" on the operation of its business.

The concept of "undue hardship" includes any action that is unduly costly, extensive, substantial, disruptive or that would fundamentally alter the nature and operation of the business. In determining "undue hardship" factors to be considered include the nature and cost of the accommodation in relation to the size, the financial resources, the nature and structure of the employer's operation, as well as the impact of the accommodation on the specific facility providing the accommodation.

VI. Making An Employer's Facilities Accessible and Usable

The concept of "reasonable accommodation" is most evident where an employer must ensure that the physical office space is both accessible to and usable by disabled individual applicants or employees. The employer's obligation under Title I is to provide access for an individual applicant to participate in the job application process and for an individual employee with a disability to perform the essential functions of his/her job, including access to the building, to the work site, to needed equipment, and to all facilities used by employees. The employer must provide such access unless it would cause an undue hardship.

Under Title I an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modification should meet the individual's work needs.[1] The employer does not have to make changes to provide access in places or facilities, e.g., desks or doorways, that will not be used by that individual for employment-related activities or benefits. (In contrast, Title III of the ADA requires that places

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[1]The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process. The employer may, therefore, find it helpful to state in an initial job notice and/or on the job application form that applicants who need accommodation for an interview request it in advance.

U.S. Department of Justice
Civil Rights Division
Office on the Americans with Disabilities Act

The Americans with Disabilities Act

Questions and Answers

Employment

Q. What employers are covered by the ADA, and when is the coverage effective?

A. The employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees will be covered starting July 26, 1992, when the employment provisions go into effect. Employers with 15 or more employees will be covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected against employment discrimination?

A. Employment discrimination is prohibited against "qualified individuals with disabilities." Persons discriminated against because they have a known association or relationship with a disabled individual also are protected. The ADA defines an "individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment.

The first part of the definition makes clear that the ADA applies to persons who have substantial, as distinct from minor, impairments, and that these must be impairments that limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An

individual with epilepsy, paralysis, a substantial hearing or visual impairment, mental retardation, or a learning disability would be covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.

The second part of the definition would include, for example, a person with a history of cancer that is currently in remission or a person with a history of mental illness.

The third part of the definition protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such an impairment. For example, this provision would protect a severely disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others.

Q. Who is a "qualified individual with a disability"?

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, if two persons apply for a job opening as a typist, one a person with a disability who accurately types 50 words per minute, the other a person without a disability who accurately types 75 words per minute, the employer may hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What is "reasonable accommodation"?

A. Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has the same rights and privileges in employment as nondisabled employees.

Q. What kinds of actions are required to reasonably accommodate applicants and employees?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person becomes disabled and is unable to do the original job. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards in

order to make an accommodation, nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Q. Must employers be familiar with the many diverse types of disabilities to know whether or how to make a reasonable accommodation?

A. No. An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of the job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one. If a disabled person requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The disabled individual requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as "an action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommoda-

tion in relation to the size, resources, nature, and structure of the employer's operation. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.

Q. Must an employer modify existing facilities to make them accessible?

A. An employer may be required to modify facilities to enable an individual to perform essential job functions and to have equal opportunity to participate in other employment-related activities. For example, if an employee lounge is located in a place inaccessible to a person using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers.

Q. May an employer inquire as to whether a prospective employee is disabled?

A. An employer may not make a pre-employment inquiry on an application form or in an interview as to whether, or to what extent, an individual is disabled. The employer may ask a job applicant whether he or she can perform particular job functions. If the applicant has a disability known to the employer, the employer may ask how he or she can perform job functions that the employer considers difficult or impossible to perform because of the disability, and whether an accommodation would be needed. A job offer may be conditioned on the results of a medical examination, provided that the examination is required for all entering employees in the same job category regardless of disability, and that information obtained is handled according to confidentiality requirements specified in the Act. After an employee enters on duty, all medical examinations and inquiries must be

job related and necessary for the conduct of the employer's business. These provisions of the law are intended to prevent the employer from basing hiring and employment decisions on unfounded assumptions about the effects of a disability.

Q. Does the ADA take safety issues into account?

A. Yes. The ADA expressly permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk – to the health and safety of others, if that risk cannot be lowered to an acceptable level by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is genuine risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Can an employer refuse to hire an applicant or fire a current employee who is illegally using drugs?

A. Yes. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when an action is taken on the basis of their drug use.

Q. Is testing for illegal drugs permissible under the ADA?

A. Yes. A test for illegal drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

Q. Are people with AIDS covered by the ADA?

A. Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q. How does the ADA recognize public health concerns?

A. No provision in the ADA is intended to supplant the role of public health authorities in protecting the community from legitimate health threats. The ADA recognizes the need to strike a balance between the right of a disabled person to be free from discrimination based on unfounded fear and the right of the public to be protected.

Q. What is discrimination based on "relationship or association"?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person with a disabled spouse from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. Will the ADA increase litigation burdens on employers?

A. Some litigation is inevitable. However, employers who use the period prior to the effective date of employment coverage to adjust their policies and practices to conform to ADA requirements will be much less likely to have serious litigation concerns. In drafting the ADA, Congress relied heavily on the language of the Rehabilitation Act of 1973 and its implementing regulations. There is already an extensive body of law interpreting the requirements of that Act to

which employers can turn for guidance on their ADA obligations. The Equal Employment Opportunity Commission will issue specific regulatory guidance one year before the ADA's employment provisions take effect, publish a technical assistance manual with guidance on how to comply, and provide other assistance to help employers meet ADA requirements. Equal employment opportunity for people with disabilities will be achieved most quickly and effectively through widespread voluntary compliance with the law, rather than through reliance on litigation to enforce compliance.

Q. How will the employment provisions be enforced?

A. The employment provisions of the ADA will be enforced under the same procedures now applicable to race, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964. Complaints regarding actions that occur after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, back pay, and court orders to stop discrimination.