



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

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How to Develop a Company Policy that Ensures Compliance with the ADA

An ADA compliance policy and management guideline are a critical part of an effective personnel management program. They also form the basis of a company's legal defense to disability discrimination lawsuits by documenting policies and procedures for addressing employment problems. Such programs, if written in a thorough, comprehensive, and precise manner, minimize a company's liability, while poorly designed compliance programs can greatly increase a company's exposure to legal claims. Furthermore, a company needs to ensure that it communicates the contents of such program to its decision-makers at every level and train them to thoroughly understand how to carryout the requirements of the ADA.

An ADA compliance policy should include a combination of guidelines, informational documents, and interactive training programs. The goal of such compliance plan is to:

- educate the decision makers as to the requirements of the law,
- assist them on what steps they need to take to ensure compliance with the law,
- provide them any tools they need, and
- communicate to employees their rights and responsibilities under the law.

Therefore, a complete ADA compliance policy will include the following documents:

1. Company Statement on People with Disabilities
2. Hiring Guidelines Under the Americans with Disabilities Act
 - How to Interview an Applicant with a Disability
 - Lawful and Unlawful Interview Questions Under the Americans with Disabilities Act
 - How To Determine Accommodations for the Testing and Selection Process
 - Guideline on Confidentiality of Disability Related Information
1. How to Determine Whether an Individual is Disabled
2. How to Determine the Pre-requisites and Essential Functions of a Job
3. Determination of Whether a Disabled Individual is the Most Qualified for a Job
4. How to Determine What Accommodation an Disabled Individual Needs
 - Reasonable Accommodation Worksheet
 - How to Provide Reasonable Accommodations
 - How to Cover the Cost of an Accommodation
 - Guideline on Making Work Facilities Accessible for Disabled Individuals
1. What Constitutes Discrimination Under the ADA and How to Avoid It
2. Checklist of Legitimate, Non-discriminatory Business Reasons for Actions that Appear to be Discriminatory
3. Accommodation Causing Undue Hardship

4. How to Determine Whether a Condition Causes a Direct Threat
5. Employees' Responsibilities under the ADA
6. Checklist of Managers' Responsibilities under the ADA
7. People with Disabilities: How to Prepare for Emergencies
8. How to Handle the Use of Drugs & Alcohol
9. Guidelines on Handling Individuals who are Covered by ADA, FMLA, & Workers' Comp
10. Interactive Training on the ADA for Managers and HR Professionals

Mr. Faillace developed IBM's Americans with Disabilities Act information site which provides managers and employees with numerous policy guidelines, such as how to determine whether an individual is disabled, how to respond to an employee's request for accommodation, what constitutes disability discrimination under the ADA, and more. He is also the author of numerous publications on the ADA, FMLA, and FLSA, including *Disability Deskbook: A Practitioners Guide to Title I of the Americans with Disabilities Act* (see enclosure), the *New York Law Journal's* "Intermittent Leave: A Guide to the Minefield," and *The Labor Lawyer's* "Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21st Century." Mr. Faillace is available for consultation, training, or policy development.

RISK-FREE MANAGEMENT OF DISABLED EMPLOYEES:

STAYING WITHIN THE ADA WITHOUT COMPROMISING PERFORMANCE

Introduction

The Americans with Disabilities Act ("ADA") is, in the words of Congress, "a broad remedial statute." In the nine years since the adoption of the ADA, litigants have constantly challenged Federal courts to define the breadth of the remedy it provides. Well-publicized "horror stories" involving court decisions under the ADA, such as an Iowa prison inmate whom the courts awarded cable television in his cell and a Chicago telemarketer who successfully sued under the ADA for an alleged "disability" which consisted of 18 missing teeth, have created serious concerns for employers. The reality, however, is that employers successfully can manage the risk of liability under the ADA.

Despite the extensive publicity that has accompanied adverse outcomes such as those mentioned above, statistics show that less than 14 percent of ADA lawsuits result in jury verdicts for the plaintiff. Moreover, litigants resolve more than 60 percent of such cases with minimal net costs to the employer. Finally, Federal courts base most of their ADA rulings on common sense reasoning. Employers readily can incorporate the guidance those rulings provide into their personnel policies without significant loss in performance.

This article suggests common-sense strategies that employers can use to lessen the likelihood of individuals filing discrimination claims against them and to minimize their liability once an individual files an ADA claim. It begins with an overview of the ADA and then discusses measures an employer may take to remain within each of the ADA's requirements and limitations. In addition, this article discusses other important issues, such as medical examinations, treatment of recovering substance abusers, and handling of employees who pose a direct threat to the health and safety of themselves or others.

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I. Overview of the Americans with Disabilities Act

Title I of ADA prohibits employers with 15 or more employees from discriminating in job application procedures, hiring, promotion, discharge, compensation, job training, or any other employment-related area, against disabled individuals who are qualified for the jobs they hold or desire. The ADA does not, however, apply to independent contractors.

Employers can defend themselves against a claim of discrimination by stating a legitimate business reason for their action or by demonstrating that the challenged policy or criterion is job-related or consistent with business necessity. In addition, employers can prove that the accommodation that the disabled individual requests imposes an undue hardship on the employer or that the individual's disability creates a direct threat to the health or safety of the individual or others.

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A. Definition of terms

The ADA uses a number of terms that are also common in everyday conversation; the statute defines many of these terms differently, however, from their everyday usage. Employers must be familiar with the terms as the ADA defines them in order to construct a coherent policy to manage the risk of liability under the Act.

The key term which employers must understand in the context of the ADA is "disability." Under the ADA, a person must qualify as disabled in order to receive the Act's protection. To qualify as disabled, a plaintiff must demonstrate that he satisfies one of the following requirements:

1. The individual has a physical or mental impairment that substantially limits one or more of the major life activities of the individual; or
2. The individual has a record of such a substantially limiting impairment; or
3. The employer regards the individual as having such a substantially limiting impairment.

An individual is disabled if he meets any one of these conditions. Thus, a person who can establish that an employer has regarded him as disabled need not establish that he actually has a substantially limiting impairment. As discussed further below, employers should develop policies and train their managers on how to handle individuals with physical or mental impairments who are having difficulty with their jobs so as to avoid treating non-disabled employees in such a way that they can claim the employer regarded them as disabled.

Several elements in the definition of disability themselves require definition. A "physical or mental impairment" includes any physiological or psychological disorder, including cosmetic disfigurement and learning disabilities. It also includes, under certain conditions, alcoholism and former drug addiction. A physiological disorder may be an impairment even if it only disrupts body systems on the cellular level, such as asymptotic HIV. The term "physical or mental impairment," however, does not include physical, psychological, environmental, cultural, or economic conditions that are not the result of a disorder, such as eye or hair color, height, weight, or strength within normal ranges, normal pregnancies, or irritable personalities. Furthermore, the ADA specifically excludes from its definition of "disability" disorders such as compulsive gambling, kleptomania, pyromania, sexual proclivities, or disorders resulting from the current use of illegal drugs.

A physical or mental impairment must substantially limit a major life activity in order to be a disability under the ADA. Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, and working. An employer must keep in mind that this list is not exhaustive and that the Supreme Court recently expanded it to include procreation. The Supreme Court also made clear that the concept of "major life activity" does not depend upon personal choice; thus, a woman may be substantially limited in procreation even if she never intended to have children. In keeping with this more expansive definition of "major life activity," several lower courts have since held that sleeping is such an activity, although other courts have rejected claims that activities such as golfing, shopping, driving, concentrating, and doing yard work at home are major life activities.

An individual is "substantially limited" in one of these major life activities if he is unable to perform it at all, or is significantly restricted in its performance when compared to the average person in the American population. The factors courts use to determine whether an impairment is substantially limiting include the impairment's nature and severity, its duration, and its long-term impact. For instance, blindness, deafness, or substantial paralysis would qualify as substantially limiting impairments. Temporary impairments, however, are not disabilities; thus, a person who is wheelchair-bound for three to six months is not substantially limited.

A second important term under the ADA is "otherwise qualified." The Act states that an employer may not discriminate against an individual who is otherwise qualified for the position he holds or desires. Such an individual both meets the prerequisites for the job (e.g., skills, experience, and education) and can perform the "essential functions" of the job with or without reasonable accommodation. As discussed later, since the ADA only protects qualified individuals, employers successfully can resolve cases involving disabled individuals by demonstrating that they are not otherwise qualified.

An essential function is a duty or function that is critical or fundamental to the job the employee performs. An employer should develop a list of essential functions for every position in the company as part of the job description for each position. Such a list of essential functions will aid the employer in determining whether a disabled individual is qualified for the position in question and thus in defending against claims brought by individuals who cannot fulfill these essential functions. Creating a job description, in fact, is helpful in several areas of ADA risk management, and will be discussed more fully below.

The ADA, like every law, is subject to change and may differ in important respects depending on the Federal appellate court that holds jurisdiction over a given geographical area. Thus, before instituting a policy or taking an adverse employment action affecting a disabled individual, an employer must make certain that it complies with the most recent decisions under the ADA by consulting with an employment attorney.

B. Effect of Mitigating Measures on the Determination of an Existence of a Disability

During the first years after the enactment of the ADA, there was considerable confusion among Federal courts as to whether an impairment's effect on the individual was to be determined with or without considering the effects of mitigating measures, such as prosthetics and medications. A clear majority of circuits, following the guidelines issued by the EEOC, held that substantial limitation was to be evaluated without regard to the effects of

majority of circuits, following the guidelines issued by the EEOC, held that substantial limitation was to be evaluated without regard to the effects of mitigating measures such as prosthetic limbs, medication, hearing aids or eyeglasses. However, other courts took a different approach. Faced with this confusion, the Supreme Court granted certiorari in three cases that involved the issue of mitigating measures. The Court agreed with the minority position and held that mitigating measures were to be taken into account in evaluating whether an individual is substantially limited in a major life activity. Specifically, the Court held that an impairment is not an actual disability within the meaning of the ADA if the limitations resulting from the impairment are controlled successfully by mitigating measures. Instead, the determination of whether the condition substantially limits one or major life activities must be made taking into account mitigating measures.

In short, individuals with substantially limiting impairments are not disabled if the limitations resulting from those impairments can be controlled by mitigating measures. In addition, there appears to be few limitations on what can be considered a mitigating measure, as the Court has included internal as well as external mechanisms. Accordingly only those individuals who can demonstrate that they are substantially limited in a major life activity even after mitigating measures are taken into account qualify as actually disabled within the meaning of the ADA.

II. Identifying the Disabled Employee

Employers should develop procedures for determining whether individuals qualify for protection under the ADA, and insure that personnel are well trained in the policy implementation. For example, employers could revise company policies, handbooks, manuals, and brochures to insure that they include appropriate procedures for handling workplace problems created by or demands of individuals who argue that they qualify for protection under the Act. Another possible procedure is for employers to create committees composed of members of the legal, medical, management, and personnel departments to assess whether an individual who seeks accommodation is so entitled under the Act.

A. Is the individual substantially limited in a major life activity?

Employers should be wary of accepting and acting upon an employee's claim that he is disabled without investigating the matter. Employers may challenge claims of disability, regardless of whether the condition may be one that is commonly believed to be a disability per se. Specifically, such challenges should focus on the fact that the condition does not, in that particular case, substantially limit any major life activity. For instance, although EEOC regulations indicate that diabetes is a disability, a number of courts have held that persons with mild cases of diabetes are not sufficiently impaired to be substantially limited in a major life activity.

I. Medical inquiries

Whenever an individual claims to have a condition that substantially limits a major life activity, employers should try to find evidence demonstrating that in the particular individual's case, the condition is either not severe or long-lasting, or does not affect the daily activities of that individual. Employers may strengthen their position by requiring the individual to provide medical certification of his alleged condition. In many cases, these medical certifications will provide the employer with a basis for arguing that the individual's condition does not meet the Act's definition of "disability" (e.g., the impairment the medical certification identifies is not a disability or the restrictions the certification imposes on the individual do not constitute a substantial limitation of any major life activity).

Furthermore, if the employer's medical department still considers the condition to be questionable, even after an individual has submitted a medical certification from his own health care provider, an employer may require the individual to undergo a medical examination with a doctor chosen by the employer. Employers also can require every individual who has accepted an offer of employment to undergo a full medical examination by a doctor of the employer's choice, so long as the employer requires this of all other individuals who have received an offer of employment. Moreover, courts generally have held that where the employer's doctor disagrees with the individual's claim of disability or his medical certification, the employer may reject the individual's claim. The EEOC recently has taken the position, nonetheless, that an employer may not challenge the validity of an employee's medical certification and may only require additional medical evidence if the originally submitted certification does not provide enough information to determine whether the employee is disabled. As the EEOC expressed its opinion in the form of "interpretive guidance," however, Federal courts are not bound to follow it and may decide to follow the precedent set by court decisions.

Employers may find that their rejection of an employee's medical certification leads to litigation, especially in light of the EEOC's recently expressed opinion. Therefore, the employer may find it more cost effective to grant the individual an accommodation. Employers who chose to grant such an accommodation should inform the individual in writing that the employer does not regard his condition as a disability.

II. The major life activity of working

Working is one of the major life activities in which individuals frequently claim to be substantially limited. Employers have several fortuitous options they may pursue when faced with a claim that an individual is substantially limited in the major life activity of working. Employers may gather evidence of other jobs in that geographical area that the individual can perform with the condition (e.g., if the condition makes an individual unable to stand for long periods of time, employers could find evidence of jobs in the area that the individual is qualified to perform that do not require standing). Alternatively, employers can try to find evidence that the particular individual has additional qualifications that make him qualified to perform a broad range of jobs (e.g., academic degrees, experience, and special skills). The mere fact that an employee's condition makes him unable to perform a single job or even a number of positions does not render him substantially limited in the major life activity of working. Rather, he must show that he is precluded from working in a class of jobs or a broad range of jobs, a burden few plaintiffs successfully have met.

to perform a single job or even a number of positions does not render him substantially limited in the major life activity of working. Rather, he must show that he is precluded from working in a class of jobs or a broad range of jobs, a burden few plaintiffs successfully have met.

Even if a plaintiff does manage to show that he is substantially limited in working, an employer still can triumph. If a plaintiff is successful in demonstrating that his condition makes him unable to perform a class of jobs or a broad range of jobs, an employer then may try to use the individual's evidence as a basis for its argument that the person is not otherwise qualified for the position in question (i.e., cannot perform the essential functions of the position with or without reasonable accommodation).

Since plaintiffs usually face great difficulties when claiming to be substantially limited in working, employers should train their personnel department and management to recognize that an individual who claims that a condition makes him unable to perform a single job or a few jobs is unlikely to meet the ADA's definition of disability.

B. Regarded as substantially limited

Plaintiffs who claim that their employer regarded them as disabled require evidence that demonstrates that their managers or the company's decision makers believed that they had a disability and discriminated against them as a result of this belief. For example, an employee must present evidence that a manager regarded him as unable to perform a class of jobs or a broad range of jobs in order to prove that the employer regarded him as substantially limited in working. Thus, an individual who can only show that his manager regarded him as unable to perform a particular job will not succeed in demonstrating that the employer regards him as substantially limited in working.

Employers should make their managers aware of potential problems they can create if they do not use caution in the choice of language when speaking with employees. For example, managers should refrain from making sweeping generalizations as to an individual's work capacities (e.g., a manager should not tell an individual that, because of his blindness, he has no business being on a factory floor). Also, managers should refrain from making comments about an individual's physical or mental conditions, even if they are not disabilities.

III. Determining Whether an Employee is Otherwise Qualified

An employee falls within the scope of the ADA only if he is otherwise qualified because he both meets the prerequisites for the job he holds or desires and he can perform the essential functions of the position with or without reasonable accommodation. Thus, employers should develop written guidelines to assist their recruitment departments in determining whether an applicant with a disability is otherwise qualified for the job for which he is applying. The recruitment department, working together with manager of the job for which the company is recruiting, should be able to reach the threshold conclusion of whether an applicant with a disability is qualified. Employers, however, should have a committee that reviews all cases in which an individual's qualification for the position is in question.

Employers can train their recruitment departments to reject applicants with a disability who, even with a reasonable accommodation, would be unable to perform the essential functions of the job for which they are applying. Moreover, an employer still has the discretion to choose the most qualified applicant for the position. Therefore, an employer may choose a non-disabled individual for a job over an individual who is disabled, provided that the employer can demonstrate that the non-disabled individual is better qualified for the position. For instance, an employer may hire a non-disabled applicant who has more experience or education over a disabled applicant who is qualified for the position in question.

A. Essential functions and job descriptions

If an employer rejects an applicant with a disability because the disability prevents him from performing the essential functions of the job with or without reasonable accommodations, the employer should document the specific functions which the applicant could not perform and the accommodations that the employer considered but determined did not resolve the problem or imposed undue hardship. The employer should have a list of the essential functions of the job prior to determining that the individual is not qualified for the job because courts have given less credence to lists of essential functions employers prepared after rejecting a disabled individual. Thus, employers should develop job descriptions that clearly define the essential functions of every job before advertising the job or interviewing applicants.

Employers may use a number of factors to determine whether a function is essential, including the employer's judgment, job descriptions, the amount of time on the job spent performing the function, the consequences of not performing the function, the terms of any collective bargaining agreements, and the work experience of past holders of the position or incumbents in similar positions.

Although the ADA does not require employers to have a job description in order to determine that a disabled individual is not qualified for the position in question, good job descriptions can be valuable in managing liability under the ADA. Employers have substantial discretion in defining the essential functions of any position prior to challenge. A list of specific essential functions will provide the employer with evidence to present to a court to demonstrate that a disabled individual was not qualified for the position he held or sought.

The job description should explicitly state the manner in which the employer expects an individual to perform the job. For example, a description of a position that requires client contact should include not only that the job requires the handling of client inquiries, but that the inquiries must be handled in a prompt, efficient, and friendly manner.

In addition, employers should ensure that job descriptions include regular attendance and timeliness as essential functions of any jobs that require regular and punctual employee presence. Employers successfully have used the fact that attendance and punctuality are essential functions to deny requests for work at home, delayed arrival time, and part-time jobs. Employers should be aware, however, that the EEOC has recently taken the

requests for work at home, delayed arrival time, and part-time jobs. Employers should be aware, however, that the EEOC has recently taken the position that attendance and punctuality are not essential job functions, although this position is not binding upon the courts. Several courts also have deferred to employers' designation of overtime work as an essential function of a job.

Moreover, job descriptions should include as essential functions general requirements that are basic to the performance of any job. These include functions that employers generally assume but employees often challenge, such as the ability to work under stress or meet deadlines, to interrelate with co-workers and supervisors, and to take criticism from management.

Job descriptions also should include the quality and quantity of work expected from an individual holding the position. Courts have upheld employers' right to terminate disabled employees who do not meet the employer's performance standards. Employers also periodically should update job descriptions to reflect the essential functions of altered positions or any change in the circumstances in the workplace (e.g., fewer employees to perform the duties, or new equipment or technology).

Finally, job descriptions should be accurate. Employers should have teams, consisting of members of the personnel department, managers, and employees, prepare the job descriptions. Such teams should combine the input of all team members to ensure a balanced and defensible list of essential functions.

B. Consistent treatment

A uniform policy of discipline is crucial in controlling liability under the ADA. An individual whose condition causes him to be insubordinate or disruptive is not otherwise qualified so long as the employer does not tolerate such behavior from non-disabled individuals. Thus, employers should be consistent in disciplining employees who commit misconduct in the workplace, in order to avoid any possibility that a discharged employee might claim that his misconduct was only a pretext for firing him on the basis of his disability. Generally, an employer may discipline or discharge a disabled employee for violating any reasonable rule of workplace conduct, as long as he metes out equal discipline to similarly situated employees without disabilities.

C. Effects of Claims of Total Disability

An important issue that has arisen in ADA litigation concerns whether an employee's representation of total disability in an application for disability insurance benefits precludes her from subsequently claiming to be qualified under the ADA. Employees who are discharged at least in part due to a disabling impairment often apply for disability benefits either through their former employer's long-term disability insurance plan or through the Social Security Administration's Supplemental Security Income (SSI) program. Frequently, these applications require the employee to represent that he is totally disabled or otherwise unable to work in order to obtain benefits. Since an employee who is totally disabled is not qualified for his position under the ADA, statements on benefit applications often appear to directly contradict the employee's allegations in his ADA complaint that he was otherwise qualified to perform his job.

During the first years following the enactment of the ADA, Federal appellate courts took a variety of positions concerning the effect of a claim for disability benefits on a subsequent ADA lawsuit, ranging from an absolute bar to a finding that a benefit application was merely a prior inconsistent statement which could be used against the plaintiff at trial. However, the Supreme Court in Cleveland v. Policy Mgmt. Systems resolved the controversy over the effect of prior representations of disability in a manner that is generally favorable to employees.

Thus, the Court held that an employee has an obligation, at the summary judgment stage, to explain any inconsistencies between her SSA benefit application and her ADA claims. An ADA plaintiff may not simply disavow an earlier sworn statement on a benefit application, but must set forth evidence showing that "assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation."

Such an explanation is not necessarily an onerous burden. It might consist, for instance, of evidence tending to show that the plaintiff could have performed her job with a specific accommodation but that her condition was severe enough to render her disabled under the definition used by the SSA. However, if such an explanation is not proffered, then an employee's representation of total disability on her SSA benefit application remains sufficient without more to justify summary judgment for her employer.

IV. Reasonable Accommodation and Undue Hardship

If an employer hires a disabled employee, or if an employee becomes disabled while employed, the ADA requires the employer to provide reasonable accommodation for that employee's disability if such accommodation is necessary for him to perform his job. Employers who are aware of an individual's disability should determine whether the individual can perform the essential functions of the job he holds or desires with or without reasonable accommodation and make a good-faith attempt to accommodate the individual. Courts are more likely to require full jury trials (rather than simply dismissing the claim because the plaintiff was unqualified) where employers fail even to attempt to accommodate individuals who were having trouble performing their job as a result of their disabilities.

A. Undue hardship

An employer need not provide a reasonable accommodation if such an accommodation would cause undue hardship to the employer. Undue hardship, however, is an objective standard, and an employer who denies accommodation based on undue hardship may later find himself second-guessed by a court or jury. Thus, an employer must make a decision not to accommodate on the basis of undue hardship carefully and with reflection,

guessed by a court or jury. Thus, an employer must make a decision not to accommodate on the basis of undue hardship carefully and with reflection, rather than as a quick decision by a line manager. Employers should keep records of every step taken in an attempt to accommodate an individual with a disability. If the employer then decides not to provide the accommodation, proof will be available to demonstrate that the decision was not a casual one, but that it closely followed the requirements spelled out in the statute, legislative history, and regulations. If an employee rejects an accommodation, or if the employee offers to pay part of the cost of an accommodation, the employer should document the circumstances leading to such a decision.

Employers may wish to consider creating a special budget or fund for reasonable accommodations so that management's tendency to see every cost increase of their department as proscribed will not affect their decision to accommodate or create animosity toward the disabled worker.

Undue hardship may consist of financial or non-financial hardship. For example, the ADA does not require an employer to implement an accommodation which would undermine the integrity and effectiveness of management, such as when an employee with dysthymia and agoraphobia requests to have no contact with his immediate supervisor. The factors that are considerations in evaluating undue hardship include the nature and cost of the proposed accommodation, the overall resources of the employer, the size of the employer and facility, and the impact on the facility's ability to conduct business. Employers should also keep in mind that large companies are generally expected to make more difficult or expensive accommodations than small businesses with less significant resources. Regardless of the size of the employer or the reasonableness of the accommodation requested, however, courts agree that toleration of an employee whose disability causes him to be disruptive in the workplace or to commit other misconduct constitutes an undue hardship.

B. The employee's responsibility to self-identify and request an accommodation

Employers should remain aware that it is the employee's responsibility to initiate the accommodation process by identifying himself as having a disability and requesting an accommodation. Courts generally find employers liable for failing to provide an accommodation only when the employee requests one. The ADA only requires employers to inquire whether an employee's job performance problems are the result of a disability if the disability is known or apparent. If the disability is known or apparent to the employer, however, it should take the initiative in approaching the employee and offering to discuss reasonable accommodation.

The ADA also does not require employers to provide an accommodation to an individual who does not disclose that he has a disability or that he needs a particular accommodation until the time immediately preceding his termination for misconduct or performance problems. Before employers rely upon the defense of lack of timely notice, however, employers should make a thorough investigation to assure that the employee's management was not aware of the individual's need for this particular accommodation as such denials often result in litigation. Employers also should have evidence demonstrating that they took similar negative employment actions against other non-disabled employees under similar circumstances.

C. The accommodation process

The process of developing a reasonable accommodation under the ADA is an interactive one. Once an employee with a disability requests an accommodation, an employer's policy should provide for a well-defined, straightforward sequence of events. The first step in the reasonable accommodation process should be that the employer consults with the individual with a disability. After the individual with a disability and the employer have developed a preliminary list of possible accommodations, the employer should consult with experts on accommodations or seek the assistance of services which can inform the employer as to what different products are available to accommodate the individuals with a disability.

Many potential accommodations are readily available on the market. For blind and visually impaired persons, examples of accommodations include adaptive computer hardware and software, electronic visual aids, Braille devices, talking calculators, magnifiers, audio recordings, and Braille printed material. For hearing-impaired persons, examples of accommodations include telephone handset amplifiers, telephones compatible with hearing aids, and telecommunication devices for the deaf. For persons with limited physical dexterity, examples of accommodations include gooseneck telephones, speakerphones, headsets, mechanical page-turners and raised or lowered furniture. Many other reasonable accommodations are similarly available, inexpensive, and readily suggest themselves. Keep in mind that an employer has the discretion to choose the least expensive or easiest way to reasonably accommodate an employee; he need not provide the exact accommodation that the employee requests so long as the alternative accommodation is effective.

A reasonable accommodation may also take the form of eliminating nonessential job functions or assigning them to others. Employers should have evidence that a job function is essential before denying an individual's request for its elimination or the reassignment of that function.

Once the employer decides to provide an accommodation to the individual, employers should begin the potential accommodation on a trial basis and document any problems that arise. If the employer ultimately decides not to provide the accommodation, evidence of actual difficulties will be more persuasive than mere speculative arguments. Thus, if the accommodation involves purchasing equipment, the employer may wish to ask the producer of the equipment to allow for a trial period.

The employer's record-keeping and documentation process does not end when the employer decides to provide the accommodation permanently. An employer should maintain records of all accommodations it provides to all employees. Thus, if an employer denies an overly expensive accommodation or decides that an individual with a disability is unqualified, the employer will be able to demonstrate its willingness to accommodate employees with disabilities.

D. Part-time work, flexible schedule work, work at home as accommodations

Employees also frequently request to work part-time, on a flexible schedule, or at home as a reasonable accommodation. Employees requesting work at home as an accommodation should have medical evidence demonstrating that it is medically impossible for the individual to work at the workplace

Employees also frequently request to work part-time, on a flexible schedule, or at home as a reasonable accommodation. Employees requesting work at home as an accommodation should have medical evidence demonstrating that it is medically impossible for the individual to work at the workplace or that doing so would cause serious medical consequences. In addition, employees may need to demonstrate that the employer has allowed other employees performing similar jobs to work at home, that the essential functions of the job do not require face-to-face contact with co-workers or customers, that the employer can provide the facilities needed to make possible the necessary contacts with co-workers and customers (e.g., e-mail, fax, and speaker phones), and that working outside the office does not adversely affect the employee's quality of work (e.g., a successful trial run period). Employers should keep in mind that courts historically have been reluctant to require employers to accept the productivity loss that results from part-time work or telecommuting and that the judiciary tends to give credence to employers who define attendance and punctuality as essential job functions. As discussed above, however, the EEOC has taken the position that attendance and punctuality are never essential job functions and that a request to work at home or on a modified schedule is only unreasonable if it creates an undue hardship. Although this position is not binding upon the courts, employers should be aware of it and prepare, if possible, a fall back analysis demonstrating that the employee's request would create undue financial or operational costs.

E. Reassignment as an accommodation

An employee also may request reassignment to a different position as an accommodation. For instance, an assembly line worker who suffers a back injury might request her employer transfer her to a desk job. Employers are not required to create new jobs for disabled employees or to waive legitimate, job-related qualifications such as experience or education. Moreover, employers are not required to "bump" or to remove other employees from another position in order to transfer a disabled employee to that position. Instead, the employee has the burden of showing that the employer has a vacant position for which he is qualified. Employers also need not waive provisions of a universally applied seniority policy or a collective bargaining agreement that provides that the company assigns jobs according to seniority. Finally, employers should grant an employee's request for a reassignment to a vacant position only after they have determined that the request is based on the effects of the individual's disability on his ability to perform the essential functions of the job. An employer need not grant a request for transfer that results from an individual's inability to perform a job due to such factors as incompetence, misconduct, or poor performance unrelated to the disability. The EEOC has taken the position, however, that if a disabled employee is eligible for transfer, an employer *must* transfer him to any vacant position for which he is qualified, even if there are other more qualified candidates for that position. The EEOC also has rejected the courts' near-unanimous position with regard to collectively bargained seniority systems, arguing instead that collective bargaining agreements are merely "relevant evidence" of undue hardship.

V. Discrimination and Retaliation

The ADA prohibits employers from discriminating against individuals with disabilities on the basis of the disabilities in any employment-related decision or in any term, condition, or privilege of employment. Employers still may, of course, take adverse employment actions against disabled employees, so long as the action is not discriminatory. An employer may discriminate against a disabled employee in a number of ways.

A. Disparate treatment

An employer may not engage in "disparate treatment," where it treats employees with disabilities differently from non-disabled employees in a way that negatively impacts their employment. Employers are best served by the uniform enforcement of their policies and practices so that no differentiation in treatment exists. For instance, an employer may criticize a disabled employee's work performance, even if that criticism exacerbates the employee's condition, as long as it would criticize other individuals who are performing similarly.

An employer may defend itself against a disparate treatment claim by showing that it took similar actions against non-disabled employees under similar circumstances. Written documents, such as a record of an employee's poor performance, are useful in the effort to show no discrimination existed.

B. Limitation, segregation, or classification of individuals with disabilities

An employer must not limit, segregate, or classify applicants or employees with disabilities in a way that adversely affects their employment opportunities or status. For instance, an employer should not segregate a mentally ill employee by making him work apart from the other employees.

C. Contracts/relationships with contractors

A company also cannot enter into contractual relationships which result in discrimination against the company's employees with disabilities. Whenever a company's contractor will have interaction with the company's employees, the arrangement should include a written contract which requires the contractor to refrain from discriminating against employees of the company with disabilities and to insure that it makes the necessary accommodations for employees with disabilities. For instance, an employer renting a hotel for a meeting should require the relevant rooms to be accessible to people with disabilities. In addition, these contracts should have a clause that makes the contractor liable to the company for any damages or legal costs it incurs if the contractor breaches the nondiscrimination clause.

D. Reasonable accommodations

An employer cannot fail to make a reasonable accommodation (that does not cause undue hardship) to an employee or applicant with a disability that the individual needs to perform an essential function of their job, to enjoy a privilege or condition of employment, or to compete on equal grounds for the job. An employer also cannot deny job opportunities to an individual with a disability on the basis of the need to make reasonable accommodations.

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Employers should remain aware that the ADA only requires them to provide reasonable accommodations. The ADA does not require employers to take any other employment action (e.g., find a vacant position for a laid-off employee) which confers special treatment on disabled employees solely on the basis of their disability.

E. Employee relationships to an individual with a disability

Employers cannot exclude or deny equal jobs or benefits to individuals because of their relationship to an individual with a disability. For instance, an employer cannot refuse to hire an applicant whose spouse the employer knows has a disability because the employer assumes the spouse's disability will result in greater absenteeism for the worker.

F. Standards, criteria, and tests

The ADA prohibits an employer from basing employment decisions on standards, criteria, or tests that screen out disabled individuals and are not job-related and consistent with business necessity. For instance, an eye test might be job-related and consistent with business necessity for a street patrolling police officer but not for a computer programmer, who could use screen reading software. In addition, tests must accurately measure the characteristic for which the test is designed, rather than producing results that reflect a limitation of the individual's disability (unless testing that limitation).

Employers should review job tests and selection criteria to determine if they only measure the skills necessary to perform the essential functions of the job. If a test fails to measure only the necessary skills, the employer should redesign the test to measure more closely the necessary skills or arrange reasonable accommodations for applicants with disabilities.

G. Employee benefits

Employers may wish to review health benefit plans to ensure that restrictions apply equally to employees with and without disabilities. There is no requirement, however, that such plans provide greater coverage to employees with disabilities. In fact, courts have uniformly upheld employer-provided health plans that provide lesser coverage for mental conditions, when challenged by individuals claiming mental disabilities.

H. Retaliation

The ADA protects employees who assert their rights under the Act. Thus, employers may not retaliate against the employee by taking adverse employment action against them for filing a complaint with the EEOC, participating in an EEOC investigation, or suing under the ADA. Individuals who bring retaliation cases must have evidence of conduct or statements that show that the employer's actions were subsequent to and in retaliation for the protected activity. A mere showing that the employer's adverse employment action suggests retaliatory motives are not sufficient to prove retaliation under the ADA. For instance, courts have uniformly held that an employer taking adverse employment action against an employee subsequent to the employee's filing of an EEOC charge or an ADA lawsuit is not, by itself, adequate to prove retaliation. An employer can defeat a retaliation claim by showing a legitimate, nondiscriminatory reason for the adverse employment action, as the paper later discusses. Written documentation of such reasons is desirable.

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VI. Medical Examinations

The ADA divides company-sponsored medical examinations into three categories: pre-employment examinations the employer requests prior to an offer of employment, employment entrance examinations taken subsequently to an offer of employment but prior to starting work, and examinations taken at any time after the employee has begun work.

A. Pre-employment medical examinations and inquiries

The ADA prohibits pre-employment medical examinations. An employer cannot even inquire whether an individual has a disability or about his worker's compensation history. Employers may, however, question the job applicant about his ability to perform job-related functions.

B. Post-offer/ entrance examinations

Employers should require all applicants to take a post-offer medical examination prior to the individual's entrance into the company. An employer may conduct any tests he desires as part of an employment entrance examination. The exam does not have to be job-related and consistent to business necessity.

The post-offer medical examination can obtain information that is very valuable to the employer. The employer can determine, for example, if the individual is disabled, qualified to perform the essential functions of the job, constitutes a direct threat to the health or safety of himself or others at the workplace, uses illegal drugs, or is in need of an accommodation.

The employer may make the job offer contingent upon the results of the examination provided that it makes all applicants for the same job category undergo the examination regardless of whether or not they are disabled. If an employer screens out an individual because he cannot meet the qualifying standards for the job, the employer must show that the standard is job related, consistent with business necessity, and that no reasonable

qualifying standards for the job, the employer must show that the standard is job-related, consistent with business necessity, and that no reasonable accommodation will enable the individual to perform the essential functions of the job.

C. Examinations of existing employees

If an employer requires an employee to undergo a medical examination subsequent to the beginning of employment, the ADA requires the examination to be job-related and consistent with business necessity.

A business necessity may exist, for instance, where an employee has claimed that he is disabled but provides no medical data in support of his position. An employer need not rely on the employee's assertions or the opinion of the employee's own physician; it is entitled to determine whether the employee is in fact disabled.

Other examples of business necessities where the employer may, in its discretion, require the employee to undergo a medical examination include when the employee has difficulty performing the functions of his job or when he has a high level of absenteeism.

In addition, if the employee has exhibited behavior that constitutes a direct threat to the health and safety of himself or others (e.g., violent behavior, threat of suicide), the employer may require her to undergo a medical examination to ensure that she no longer poses the direct threat or to determine if an accommodation can eliminate the threat.

D. Disclosure of Medical Information by employer's medical department

Employers should ensure that their medical departments understand that they may disclose an employee's medical records to the company's legal counsel when the counsel has need of such information. Such instances include when legal counsel evaluates whether an individual is disabled and when legal counsel is concerned about an individual filing a discrimination charge or lawsuit. Medical departments can allow employer's legal counsel access to an employee's medical information because the employee has not engaged the company's physician as his personal physician, and thus no doctor-patient privilege exists.

Medical departments must be cautious, however, not to reveal the medical information of any employee to other company departments, such as personnel or management. The ADA only allows company medical personnel to reveal to such departments any necessary restrictions on the work or duties of the employee and any necessary accommodations. Managers should then, with the help of the employer's personnel and legal departments, be able to determine whether the individual can perform the essential functions of the job with or without reasonable accommodation.

E. Employee refusal to submit to company medical examination

In circumstances where an employer is entitled to require an employee to undergo a medical examination, it may discipline an employee who fails or refuses to take such an examination. Employers should develop a procedure for handling employees who refuse to take a required medical examination (e.g., lowering performance appraisal and eventual termination). An employer may take negative employment action against employees who refuse such medical examinations even when it is highly probable or apparent that the reason for the individual's work problems is a disability.

VII. The Alcoholic or Recovered Drug Addict

An alcoholic or a recovered drug addict is disabled under the ADA. The ADA protection of recovering substance abusers, however, is subject to limitations. In order to receive the ADA's protection, a recovered substance abuser must actually have been addicted to drugs or alcohol, rather than having been a mere casual user. In addition, several other limitations exist in deference to an employer's right to maintain a drug and alcohol-free workplace.

For instance, employers may reject an applicant or terminate or discipline an employee who tests positive for an illegal drug, regardless of whether the individual immediately enters a drug rehabilitation program and seeks to avoid the negative action by claiming that he is now in rehabilitation and no longer uses drugs illegally. An individual, however, who personally discloses his drug use to the employer prior to the employer discovering his use and immediately enrolls in a rehabilitation program is protected by the ADA if he can demonstrate he was an addict rather than merely a casual user.

An employer may also fire or refuse to hire an individual with a history of alcoholism or illegal drug use if it can demonstrate that the individual poses a direct threat to the health or safety of himself or others because of the high probability that the individual would recommence illegal drug use or alcohol abuse. The employer must be able to demonstrate that such use would result in a high probability of substantial harm to the individual or others that a reasonable accommodation could not eliminate. In addition, an employer need not provide an accommodation that is unlikely to work, such as a second drug rehabilitation leave for an employee who has previously relapsed after undergoing rehabilitation. Statistics alone, however, will not be sufficient to prove high probability of a relapse.

An employer may hold alcoholics and drug addicts to the same performance and conduct standards to which it holds all of its other employees. For example, if an individual who is an alcoholic is often late to work or is unable to perform the responsibilities of her job, an employer can take disciplinary action on the basis of her poor job performance or conduct. The employer bases the discharge upon the misconduct, rather than the condition.

The ADA does not require employers to provide an opportunity for rehabilitation in place of discipline or discharge to employees who abuse drugs or

The ADA does not require employers to provide an opportunity for rehabilitation in place of discipline or discharge to employees who abuse drugs or alcohol, even if the employee requests rehabilitation as a reasonable accommodation under the ADA. Employers that do offer alcohol rehabilitation as a reasonable accommodation should establish in advance that the individual is an alcoholic, otherwise the employee may be able to claim that the offer of rehabilitation establishes that the company regards him as disabled. An alternative approach would be to put the employees who violate the company's alcohol rules on notice that if the conduct is repeated the company will terminate them and then offer them the opportunity for rehabilitation.

VIII. Direct Threat, Workplace Misconduct, and Legitimate Nondiscriminatory Reason Defenses

A. Direct Threat

The ADA does not require employers to tolerate employees who pose a "direct threat" to the health or safety of themselves or others in the workplace. A direct threat is a significant risk of harm that a reasonable accommodation does not eliminate. Examples of direct threats are violent or belligerent employees, employees with contagious diseases, or employees with other conditions that render them unable to perform their jobs safely (such as an epileptic driver or an alcoholic doctor who treats patients while intoxicated).

Factors employers may consider when evaluating whether a direct threat exists include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Not all of these factors need weigh against the employee; thus, several federal appellate courts have concluded that HIV-positive surgical technicians posed direct threats due to the extreme severity of the risk despite the low probability that the disease would in fact be transmitted.

Employers must base their evaluation of a direct threat upon the best available objective evidence. Employers cannot assume that an individual with a certain condition automatically poses a direct threat, but must determine the existence of the threat on a case-by-case basis. The employer may base its determination on non-medical as well as medical evidence. For instance, an employer may discharge an employee who assaults or threatens another person without waiting for a medical evaluation of his condition. Objective evidence, however, *must* exist. Thus, the Supreme Court held that a dentist could not base a determination that an HIV-positive dental patient was a direct threat solely upon speculation and inconclusive studies.

Courts generally have held that an employer is entitled to require an employee who may pose a direct threat to take a medical examination to determine whether he in fact poses such a threat. For instance, employers could require an employee with a contagious disease to take a medical examination that evaluates the risk of transmission, the severity of the disease, and the possibility of the curing of the disease.

B. Workplace misconduct

Workplace misconduct is grounds for adverse employment action regardless of whether the misconduct results from a disability. Courts uniformly have held that employers are not required to tolerate violence, theft, or other inappropriate behavior merely because that behavior is linked to a physical or mental impairment. For example, an employer legally discharged an alcoholic assistant coach for outlandish behavior caused by his intoxication, including driving while intoxicated, being combative with the police, and leaving his pants unzipped in public. Employers, however, should differentiate between the condition and the behavior it causes. An employer should not fire or refuse to hire an individual solely on the basis of a condition that may result in violent or disruptive behavior; instead, employers should base their actions on evidence that the individual has specifically expressed signs of such behavior at his current or previous workplace. In that way, the employer bases his decision on the employee's *conduct* rather than his condition.

C. Legitimate nondiscriminatory reasons

Employers also can justify their negative employment actions by articulating a legitimate nondiscriminatory reason for their conduct that is independent of the disability in question. For example, an employer defended itself against a claim of discrimination by a laid-off disabled individual by articulating that it based its decision on the individual's seniority level, in the same manner as it did for other laid-off employees.

An employer's lack of knowledge of the disability is another defense based upon a legitimate nondiscriminatory reason. As discussed previously, an employee has the responsibility to inform his employer of his disability. Thus, where the employee fails to inform the employer or where the employee notifies the employer only in a last minute attempt to avoid discharge, the employee cannot recover under the ADA.

Conclusion

The Americans with Disabilities Act, and the myriad issues that arise in compliance or litigation under the Act, can bewilder an employer at first glance. An employer, however, can manage and minimize the risk of liability under the ADA, and avoid litigation in the first place, by means of straightforward, common sense measures. Essentially, an employer's strategy must be twofold: 1. Develop and implement policies that insure compliance with the goals of the ADA and 2. Train managers and personnel advisors on the requirements of the Act and the manner in which to handle issues related to disabled individuals at the workplace.

Employers and managers should be aware that they must make decisions concerning disabled employees on a case-by-case basis. Employers should develop teams composed of management and members of the medical, legal, and personnel departments to analyze and resolve issues raised by individuals who claim to be disabled. The resolution of these issues will follow a simple step-by-step approach:

1. Is the individual disabled;

1. Is the individual disabled;
2. Is the individual qualified;
3. Is there a reasonable accommodation that can assist the individual in performing the essential functions that he is unable to perform due to his condition;
4. Is the employer treating the individual in the same manner as other similarly situated individuals;
5. Does the employer have a legitimate reason for any adverse action it is taking against the disabled employee;
6. Does the accommodation pose an undue hardship on the employer's business; and
7. Does the employee's condition create a direct threat to the health and safety of the individual or others at the workplace?

A well-trained team will apply these steps, document the bases for its decisions, and resolve most cases, thus reducing the risk of liability the employer faces without compromising performance.

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Our publications include a comprehensive disability deskbook on the Americans with Disabilities Act. This deskbook provides advice on how employers can develop policies and practices to minimize ADA liability, an in-depth analysis of disabled employees' rights and obligations in the workplace, and techniques to identify and resolve even the toughest issues in any ADA case with minimum difficulty and maximum effectiveness. We have also developed comprehensive turn-key solution packages on sexual harassment, Family and Medical Leave Act, Fair Labor Standards Act, and other employment laws.

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