SHRM Webinar
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ADA
IN THE WORKPLACE
An Introduction

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Training Goals

- Gain a general understanding of the employment provisions of the Americans With Disabilities Act ("ADA")
- Understand that after the recent ADA Amendments, the law applies to a much broader category of persons
- Review the basic principles and procedures for handling requests for accommodations
Training Goals

- Understand how the ADA affects and limits medical examinations and inquiries of applicants and employees
- Understand how the ADA might affect a wide range of employment decisions, and the different defenses
Part 1: Introduction to the ADA
The ADA and the ADA Amendments Act

- The ADA became law on July 26, 1990
- The ADA Amendments Act (“ADAAA”) became effective on January 1, 2009, and applies to all decisions made after that date
- The Equal Employment Opportunity Commission’s (“EEOC”) Final Regulations—which interpreted the ADAAA—took effect on May 24, 2011
- There are some *major changes* under the ADAAA
Who is Covered?

• Employers with 15+ FT or PT employees in 20+ workweeks in this, or the prior year
  ▪ Some state and local laws have a much lower threshold

• Protects job applicants, employees, and former employees
“Disability”

• In 1990, when the ADA was first passed, “disability” was defined as a person who has:
  ▪ a physical or mental impairment that substantially limits one or more major life activity (“MLA” ) of such individual;
  ▪ a record of such an impairment; or
  ▪ is regarded as having such an impairment

• This definition has not changed, but the ADAAA significantly changed the interpretation and scope of what is a “disability”
“Regarded As” and Prohibited Actions

- “Regarded as” having a disability now “means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both ‘transitory and minor’”
- When an individual is not challenging a covered entity’s failure to make reasonable accommodations and does not require a reasonable accommodation, the individual only needs to show an impairment, and does not have to show that the impairment substantially limits a major life activity
“Disability” and Reasonable Accommodation

• When individuals are seeking accommodations, they must show a substantial limitation on a major life activity, but the scope of what is covered has expanded, and this is a much lower burden

• Congress wanted to shift the focus from who is covered to whether the accommodation is reasonable.
Requirements Under the ADA

- Employers cannot refuse to hire, discipline or fire an employee based upon a disability if they are qualified to perform the essential functions of the job.
- Employers must provide reasonable accommodations needed by applicants or employees unless doing so would impose an “undue hardship”.
- Employers are limited in how they can obtain medical information on applicants and employees, and how that information can be used.
Four Basic Types of Claims

1. *Disparate Treatment* — outright, intentional discrimination. Includes harassment. These types of claims are no different than other type of discrimination (race, sex, etc.)

2. *Disparate Impact* — prohibits qualification standards that tend to screen out individuals based on disability, either in initial selection or in promotions. There tend to be more ADA claims challenging neutral requirements.
Four Basic Types of Claims

3. *Retaliation* — prohibits unfavorable treatment of an employee because of prior complaints about discrimination or other “protected activities”. One difference under the ADA is that “protected activity” includes requests for accommodations.

4. *Failure to make Reasonable Accommodation*. There is also a duty to make accommodations for religion, but the ADA’s standards are higher.
Enforcement and Remedies

- The ADA is enforced by the EEOC (and Department of Justice for public sector employers)
- Process starts with a Charge to the EEOC or a state or local agency
- The agency conducts some form of investigation (often just written submissions)
- Next step depends on the agency and the employee—either an administrative hearing or a notice of right to sue
Enforcement and Remedies

- Right to a jury trial
- Under the ADA, employees can receive injunctive relief; compensatory damages; punitive damages (capped at $300,000); and their attorneys fees
  - Employers can recover their fees only in rare cases
Part 2: Who is Covered After the ADA Amendments for Reasonable Accommodations?
Coverage Depends On the Issue

- The duty to provide “reasonable accommodations” extends to those with an actual disability or a record of disability.
- Most applicants or employees who suffer an adverse job action (such as discharge) because of a physical or psychological medical impairment, can challenge the decision under the ADA.
Physical Impairment

• Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, *such as* neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine
Mental Impairment

- Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities
- In the future, there will be more emphasis and guidance from the EEOC on mental impairments
What are Not Impairments

- Physical characteristics that are within normal range and not from a disorder (e.g. eye color, hair color, left-handedness, or height, weight, or muscle tone)
- Predisposition to illness or disease
- Common personality traits such as poor judgment or a quick temper that are not symptoms of a mental or psychological disorder
- Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record
What are Not Impairments

- Pregnancy is not an “impairment” but pregnancy-related impairments are potentially covered if other requirements are met
- Advanced age is not an impairment, but various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis, would constitute impairments
Changes in “Substantial Limitation” and “Major Life Activities”

• In reasonable accommodations cases the applicant or employee must show an actual disability or a record of an actual disability to be eligible for accommodations, i.e. that a physical or mental impairment that “substantially limits” one or more “major life activities” of the individual

• The ADAAA lowered the standard of what is a “substantial limitation” and expanded the list of major life activities
Nine Rules to Determine if an Impairment is “Substantial”

• “Substantially limits” is not a demanding concept, and “shall be construed broadly in favor of expansive coverage”
• A impairment must substantially limit just one major life activity “as compared to most people in the general population”
• This threshold question “should not demand extensive analysis”
• Primary focus is on the employer’s obligations
The Nine Rules

- Must be an individualized assessment
- Usually, this will not require scientific, medical or statistical evidence
- Do not consider the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses)
- An impairment that substantially limits one major life activity need not substantially limit other major life activities
The Nine Rules

• An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
  ▪ Includes epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia
  ▪ Cancer that is in remission but may return in a substantially limiting form
• The effects of an impairment lasting, or expected to last fewer than six months, can still be substantial
Major Life Activities

• The ADAAA’s *non-exhaustive* list identifies: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. EEOC adds “interacting with others”

• The House Report also lists writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and fine motor coordination
Major Bodily Functions as MLAs

- ADAAA’s non-exhaustive list includes: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
- EEOC adds special sense organs and skin; and cardiovascular, hemic, lymphatic, musculoskeletal, functions
“Virtually Always” Disabilities

- Deafness (hearing)
- Blindness (seeing)
- Intellectual disability (brain function)
- Missing limbs and mobility/wheelchair use (musculoskeletal)
- Autism (brain function)
- Cancer (normal cell growth)
- Cerebral palsy (brain function)
- Diabetes (endocrine function)
“Virtually Always” Disabilities

- Epilepsy (neurological function)
- HIV infection (immune function)
- Multiple sclerosis (neurological)
- Muscular dystrophy (neurological)
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (brain function)
- Many of these impairments may substantially limit other MLAs, but only one is needed
Part 3
Reasonable Accommodations
Definition of Reasonable Accommodation

One that will enable an otherwise qualified individual with a disability to perform the essential functions of a job
Examples of Common ADA Requests

- Specialized equipment/tools (e.g. ortho chair)
- Medical leave or time off for medical appointments
- Changes in job duties, schedules and breaks
- Alternative format on materials
- Sign language interpreters for interviews
- Modifications of facilities for persons with mobility impairments
Basic Principles

• The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person’s disability
• A reasonable accommodation need not be the best accommodation available or the one requested, as long as it is an effective accommodation
• Employers do not need to lower production or performance standards
What are the Limits of Providing Accommodations?

• *Essential Functions*—that the request would change essential, not marginal functions

• *Undue Hardship*—a particular accommodation would impose an undue financial or administrative hardship, considering the cost, financial resources of employer and any related parent or subsidiaries, the impact on the operation or co-workers

• *Fundamental Alteration of the Program or Service*—that the modification would change the nature of the job or the services provided
Employee’s Duty to Ask for an Accommodation

• It’s the employee’s obligation to inform the employer of the need for an accommodation
  ▪ No “magic words” are required
• This is supposed to be an “interactive process” between the employer and employee to determine potential accommodations.
• The EEOC says that failure to engage in this process is a violation
Documentation and Confidentiality

• Employers *can*:  
  ▪ require medical documentation  
  ▪ require employees to sign releases of information  
  ▪ require second opinions or independent medical exams, where appropriate  

• ADA has strict requirements for maintaining confidentiality of all medical information  
  ▪ Medical information should be shared only with those with a need to know
Step 1—Assume the Individual Might be Covered by the ADA

- If an applicant or employee says that they want or need *something* because of a physical or mental condition, assume that the ADA might apply, because under the ADA Amendments it might.

- *Never ignore or reject out of hand such requests*, even if they are made orally or informally.
Step 2—Consider Essential Functions and Precedent

• Is the request something you have done for others? For how long?
• Does it relate to essential functions?
• Is it something that does not impose much of a burden—at least temporarily?
• If the burden is not great, accommodate, but document for how long.
Step 3—ADA Analysis

- If the burden is more than you would normally agree to, then do a more formal ADA analysis:
  - Is the individual covered under the Amendments?
  - Are they qualified to perform essential functions with the accommodation?
  - Is there another defense (undue hardship or fundamental alteration)?
Examples

• Serious Car Accident; employee requests part-time and/or telecommuting; time off for PT; some modified duties (less travel)

• Psychological disability; employee requests less work and less stress, and change of supervisor or transfer
ADA/FMLA/Workers’ Comp

• These three sets of requirements overlap, and require lots of coordination.
• As a general rule, worker’s comp rights come first, but ADA will affect reinstatement, light duty and other issues.
• In other cases, o the FMLA analysis first. That will usually be more generous regarding intermittent leave and reinstatement rights. When accrued leave and any FMLA rights are exhausted, if the employee wants/needs more leave, you need to do an ADA analysis.
Part 4: How to Conduct Medical Exams and Interviews
Pre-Offer Inquiries

• ADA is the only federal law that expressly limits what can and cannot be asked pre-employment. These rules must be part of your “Do’s and Don’ts” for Interviewers

• Employers *cannot* inquire at the pre-offer stage whether an individual has a disability

• Employers *can* ask questions that relate to the applicant’s ability to perform job-related functions
Pre-Offer “Don’ts”

Do Not Ask About . . .

- Current or past disabilities or medical history
- Physical or mental conditions
- The prognosis or diagnosis of a condition
- Past medical problems
Pre-Offer “Maybes”

*If* the applicant has an obvious disability, or has disclosed a disability, and the employer believes it may interfere with his ability to perform the essential requirements of the job, the employer *may* question the applicant.

If you do:

--Stick to the questions regarding knowledge, skills and abilities

--Avoid any discussion of undue hardship
Post-Offer Medical Exams
-When To Do

• Employers can do medical exams or inquiries only after a conditional “offer of employment” has been made to the applicant, and before the applicant has started work

• This means after all other steps have been completed (such as background checks or drug tests)
Post-Offer Medical Exams—How To Do

- Employers can condition admission on the results of a medical examination if:
  - the examination is given, or the inquiry is made, to *all* entering employees;
  - medical information is segregated and kept confidential; and
  - the results of the examination “are used only in accordance with” the ADA
Medical Exams and Inquiries of Current Employees

- There must be a legitimate reason (job-related and consistent with business necessity). Examples:
  - To determine accommodations
  - Fitness for duty after leaves
- Information must be kept confidential
Part 5: ADA Claims in Prohibited Action Cases
For ADA Claims that do not Involve Accommodations, Impairment is Enough

- This is the greatest change made by the ADAAA. If an employer allegedly takes an action based on an actual or perceived *impairment* is not both ‘transitory and minor’” then, unless there is some other defense, it violates the ADA
- This means that the employer’s own actions can trigger coverage under the ADA
What are Prohibited Actions?

- Any act of discrimination, other than denial of an accommodation, that would violate the ADA in the absence of a defense
- Includes, but is not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment
The Exception for Transitory and Minor Impairments

- There is an “exception” for “transitory and minor impairments”
- “Transitory” is defined in the ADAAA as having an actual or expected duration of six months or less
- The EEOC says this is an affirmative defense that the employer must raise and prove, based on objective evidence
What is “Transitory and Minor”?

- EEOC eliminated most examples of what are “minor” impairments, other than citing Congress’ concern that the ADA not cover the common cold or flu.
- The EEOC provides three examples:
  - Conditions that are virtually always disabilities, such as bipolar disorder, can never be minor.
  - An employer who misperceives a transitory and minor hand wound as a symptom of HIV is “regarding” the employee as having an impairment that is not minor.
  - An adverse action based upon a minor back injury that lasts more than 6 months is not within the exception because it is not “transitory.”
Legal Reasons to take Adverse Actions Based on Medical Conditions

- The applicant or employee cannot to perform the essential functions of the job or the program even with reasonable accommodations
- The requirement is job-related and consistent with business necessity
- The individual poses a direct threat to the health or safety of him/herself, or others, that cannot be reduced through reasonable accommodations
Direct Threat Issues

The term “direct threat” means:
• a significant risk of substantial harm to health or safety of the individual or others, considering the nature, severity, duration, imminence and likelihood of the risk
• that cannot be eliminated or reduced by reasonable accommodation
Direct Threat Issues

This determination:

• must be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job

  • must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence
Handling Adverse Job Actions

• When a potential employment decision relates in any way to a physical or mental condition, assume the individual is covered by the ADA.

• Focus on ability to perform essential functions with accommodations. Most decisions will relate in some way to accommodations, or to the employees claim they can do the job without any accommodations.

• If the issue relates to health and safety, you will usually need to meet the direct threat standard.
Examples

• Layoff or discharge that employee claims is due to disability
• Hiring decision where there is concern about the applicant’s risk of injury to self or others
• Termination for excessive medical leave
• Poor performance or rule violations where the employee claims a medical excuse
Questions