

Preventing Disability Discrimination: The Americans With Disabilities Act

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by
Toby Brink, Associate General Counsel
Banner Health

Provisions of the ADA

- **Protects individuals with a disability from discrimination based on their disability.**
- **What is a disability?**
 - A condition that substantially limits a major life activity
 - A history of such a condition
 - Being perceived as having such a condition
- **The ADA is to be construed broadly to offer maximum protection to disabled individuals. Focus on accommodations, as opposed to whether a person is disabled.**

Examples

- Your employee, John, is fully meeting expectations.
- You find out from another employee that John has Type 2 Diabetes.
- John has never asked for any accommodation or displayed any signs of the disease at work.
- You decide that John can't possibly do his high stress job if he suffers from diabetes, so you begin to watch him closely and criticize his work.
- You put John into corrective action for mistakes that you would accept from others.
- You finally terminate him. This is discrimination.

Examples

- You are interviewing a young woman for an RN position. You ask her why she wanted to become a nurse. She replies, “Because I had leukemia as a child and I got excellent care from my nurses and now I want to help others.”
- You decide that if she had leukemia as a child she won’t be able to keep up with the demands of a high stress RN job, and you decline to hire her.
- This is discrimination. You made the decision based on her history of a disability; also, you regarded her as disabled.

Provisions of the ADA

- **Employers must provide reasonable accommodation to enable employee to perform job and applicant to apply.**

Example:

- Employee takes medication for her anxiety disorder; the meds make her groggy in the mornings. You adjust her start time from 7 am to 9 am.
- A lab employee stands only 4 feet tall. You adjust her work space so that she can reach what she needs, and you provide step stools.
- An applicant for a dishwasher position has a developmental disability and needs help reading and understanding the application. You read her the application.

Examples

- An RN has rheumatoid arthritis. The medication that she takes affects her immune system. Her doctor says she should not have direct contact with patients. She asks for a transfer to a job where she will not have direct patient contact. You flatly refuse, telling her she is an RN and as an RN she must take care of patients.
- You have violated the ADA by refusing to consider a reasonable accommodation.
- A financial analyst has Attention Deficit Disorder. She tells you that the distractions at the office are too much, and has asked to work from home and participate in meetings via Live Meeting. You tell her that everyone would love to work from home and you will not give her any preferential treatment.
- You have violated the ADA by refusing to consider a reasonable accommodation.

Provisions of the ADA

- Employer must engage in “interactive process” with employee to determine what accommodation will work.
 - The interactive process is a discussion between the employee and the employer (usually the manager and HR):
 - What are the essential functions of the job?
 - What are employee’s limitations ?
 - What accommodation can Employer make to enable the employee to perform the essential functions of the job?

Examples of Interactive Process

- Danielle tells you, her manager, that she has a heart defect and can not lift more than 25 pounds or climb stairs.
- Since Danielle's condition is not obvious, you ask her to submit medical documentation to support her request for accommodation. The documentation should NOT go to the manager; HR or the company Occupational Health office should review it.
- You and HR create a list of the essential functions of the job. You talk with Danielle to see if she agrees.
- The essential functions require that she lift more than 25 pounds occasionally (2x per shift). The only time she has to climb up/down stairs is during a fire drill.
- You ask Danielle for suggested accommodations. You consider them and agree they are reasonable. Outcome: Coworker does heavy lifting for Danielle when it is required. You relocate Danielle's cubicle to first floor to avoid stairs.

Provisions of the ADA

- **Prohibits retaliation against a person with a disability or a person who has requested accommodation**
- **Prohibits discrimination or harassment of an individual because of his/her association with a person with a disability**

Provisions of the ADA

- **Prohibits employers from asking disability related questions or requiring medical exam unless at post-offer physical or if “job related and consistent with business necessity.”**

Provisions of the ADA

When is a medical exam/inquiry “job related and consistent with business necessity?”

Employer must have a *reasonable belief*, based on *objective evidence* that:

- Employee’s ability to perform essential job functions will be impaired by a medical condition; or
- Employee will pose a “direct threat” due to a medical condition;
- Also, if Employee requests an accommodation for a disability and the disability is not known or obvious, Employer can ask for limited medical information (what is the disability, what are the functional impairments).

Provisions of the ADA

- A **direct threat** is a *significant* risk of *substantial* harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- A small chance that someone could be hurt is not enough.

Provisions of the ADA

- When do you have objective evidence that employee presents a direct threat, or will be unable to perform the job due to disability?
 - You see an employee experience shortness of breath and have to sit down after lifting a patient.
 - An employee with a good record of performance begins making careless errors. When you ask her about the errors, the employee tells you that she is on a new medication and it is making her tired at work.
 - Several employees tell you that John, an RN, has said he is so depressed about his divorce that he wants to kill himself. The employees report that John said his method of suicide will be drug overdose on pain killers.

Provisions of the ADA

- When *don't* you have objective evidence that employee's ability to do job will be impaired by disability, or that employee will present a direct threat?
- Mary tells you that Joan confided in her that she has a lump in her breast and is afraid she has cancer. Joan's job performance is fine. You have no objective evidence that would allow you to send Joan for a medical exam.
- Jim underwent chemotherapy for lung cancer and has been released to return to work. Other employees are afraid he will suffer from "chemo brain" and that his cognitive abilities will be compromised. You have no objective evidence.

How do I know if someone is disabled?

If a condition causes a person to be substantially limited in a major life activity, he/she is disabled.

- **What is a major life activity? (This list is not exhaustive; other activities may be included)**
 - **caring for oneself**
 - **performing manual tasks**
 - **walking, speaking, seeing, hearing, eating, sleeping, standing, sitting, lifting, bending, breathing, reaching**
 - **learning, reading, concentrating, thinking, communicating, working, interacting with others**

How do I know if someone is disabled?

What is a major life activity? (This list is not exhaustive)

- **Operation of major bodily function such as immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, lymphatic, cardiovascular, hemic, genitourinary, special sense organs and reproductive functions**

How do I know if someone is disabled?

- **If a condition causes a person to be substantially limited in a major life activity, he/she is disabled.**
- **Does the condition “substantially limit” a major life activity?**
 - **A “significant” or “severe” restriction in a major life activity is not required. Thus a broken leg might be a disability.**

How do I know if someone is disabled?

- Even if a condition is corrected or mitigated by medication, equipment, prosthesis, etc., individual is still considered disabled. So even if diabetic's blood sugar is controlled by medication, diabetic is still disabled.
- Exception: if sight is corrected by eyeglasses, the individual is NOT disabled.

Regulations: Nine Rules of Construction to Determine If a Condition Substantially Limits a Major Life Activity

Broad construction; not a demanding standard

Significant/severe restriction in “major life activity” not required

Substantial limitation should not be primary object of attention

Conduct Individualized assessment (but standard is low)

Compare individual with “most people in general population,” but don’t need medical or statistical analysis

Do not consider whether medicine, prosthetic devices or other treatments help control the condition

Impairments that are episodic or in remission are viewed when they are active

Substantial limitation in only one major life activity is enough

Effects of an impairment can be substantially limiting even if duration is under six months

IN MOST CASES, ASSUME THE DEFINITION IS MET, AND FOCUS ON WHETHER YOU CAN PROVIDE A REASONABLE ACCOMMODATION.

How do I know if someone is disabled?

In virtually all cases, the following will be considered disabilities under the ADA

- Deafness, blindness
- Intellectual disability
- Autism
- Cerebral Palsy
- Diabetes, Cancer (even if in remission), Multiple Sclerosis, Muscular Dystrophy
- Missing Limbs
- Mental Disabilities (major depressive disorder, bipolar disorder, schizophrenia, OCD, PTSD)
- Back Injuries (depending on how severe)
- Epstein- Barr
- Infertility
- Irritable bowel syndrome (IBS)

Provisions of the ADA

- What About Pregnancy?
 - Pregnancy in and of itself is not a disability, but pregnancy-related conditions (such as hypertension, or even a high risk pregnancy) may be.

Blanket Leave Policies

- “Blanket Leave” policies say that employee will be fired if he/she can’t return to work after a specified period of time on a leave of absence.
- EEOC: These policies violate ADA. Must conduct individualized assessment to determine whether accommodation can be made to enable employee to do the job.

Blanket Leave Policies

- EEOC has entered into Consent Decrees with employers who had “blanket leave policies.” Cases involve numerous employees affected by the blanket leave policy. In one case the Consent Decree was \$3.2 million. In another case it was \$6.2 million.
- Lesson learned? Do not assume you can fire employee because his/her short term disability, FMLA or Medical LOA has expired.

Provisions of the ADA

- **What isn't a disability?**
 - sexual orientation
 - gambling
 - transsexualism
 - current users of illegal drugs

Provisions of the ADA

- **What about alcoholism?**
 - **Alcoholics are protected under the ADA, but:**
 - **may not use alcohol at work**
 - **must adhere to the same standards of performance and behavior required of other employees**

Reasonable Accommodation

- **What is a reasonable accommodation?**
 - **If accommodation will cause undue hardship on Employer, it is not reasonable.**
 - **Consider the size of the Employer: does Employer have substantial economic resources? If so, it will be difficult to show undue hardship.**

Reasonable Accommodation

- **Employer must sit down with employee and discuss accommodations (“interactive process”). Examples of accommodations:**
 - **Light Duty for limited period of time**
 - **Modified Schedule**
 - **Placing Employee in vacant position**
 - **Leave of Absence**
 - **Coworker assistance performing functions of job**
 - **Lifting devices; computer enhancements**
 - **Special chairs or other office equipment**

AMERICANS WITH DISABILITIES ACT AND FMLA

Employee is out on Family Medical Leave. Under FMLA, job is only protected for 12 weeks.

However, under ADA Employer may be required to accommodate the employee by holding the job open an additional period of time.

Do not assume that because FMLA has ended, you may fill the employee's position.

ADA Policy Provisions

- Employers should have ADA Policy that:
 - Defines disability, essential functions, major life activity, interactive process, direct threat and other relevant terms;
 - States that Employer will conduct the interactive process and provide reasonable accommodation to disabled employees/applicants if necessary;
 - Prohibits discrimination/harassment on the basis of disability;
 - Prohibits discrimination/harassment against employee/applicant who has requested reasonable accommodation;
 - Prohibits retaliation for reporting discrimination, harassment or retaliation; or for assisting in a claim or investigation of such conduct;
 - Prohibits discrimination/harassment against employee/applicant because of his or her association with a person with a disability.

ADA Policy Provisions (Cont'd)

- Prohibits medical exams and disability related inquiries unless job related and consistent with business necessity, or post offer;
- States that conduct prohibited by this policy will be investigated promptly by HR;
- Gives names and phone numbers of individuals to whom reports of disability discrimination, harassment or retaliation can be made;
- States that complaints of discrimination, harassment or retaliation on the basis of disability will be treated with the maximum feasible confidentiality.
- States that Employer will conduct an individualized assessment of an employee who is out on a leave of absence if the employee is unable to return at the end of the leave—and does not have automatic termination at end of leave.
- States that employees who violate this policy will be subject to corrective action up to and including termination.

