



Corporate Consulting Services, LTD.

Employee Benefits and HR Specialists

Americans with Disabilities Act Updates

Presented by

**Corporate Consulting
Services, Ltd.**

605 Third Avenue

New York, NY 10158

www.ccsbenefits.com

Balancing Human and Financial Needs

Agenda



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- **ADA Overview**
- **What's Changed with ADAAA**
- **Complying with ADAAA -Impact on Employers**
- **Employer Preparation**

Americans with Disabilities Act



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- **Americans with Disabilities Act (ADA) 1990**
- **ADA Amendments Act of 2008 (ADAAA)**
 - **Final Regulations published March 25, 2011**
 - **Final Regulations become effective May 24, 2011**

Impact of Americans with Disabilities Act



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- Why do we care:
 - 25,000 disability discrimination claims in FY 2010
 - 25% of all EEO claims filed
 - Increasing over 20% for the past two years
 - Employers paid out \$75mm in claims
 - EEOC actively investigating both individual and 'systemic' claims
 - **Before issuance of EEOC final ADAAA regulation**



Stated Goal

- **Reduce the burden of proving an individual is disabled**
 - Make it easier for an individual seeking protection under the ADA to establish that he or she has a disability
 - Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of 'disability' too narrowly
 - The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals

ADA Amendments Act



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Definition of disability

Traditional definition	ADAAA changes
Physical or mental impairment that <i>substantially</i> limits one or more Major Life Activity (MLA)	Liberal definition of 'substantially'
Prior precedent traditionally required limits to be for more than one MLA	–now can be just one
List of MLAs was confined to 'basic life' activities	Expands the definition of MLA e.g. major bodily functions
Limited list of physical and mental impairments	List of impairments expanded
	Certain conditions are 'per se' disabilities: Deafness, Intellectual disability, Mobility, MS/MD, Depression, OCD, Missing Limb, HIV, Cancer
Prior precedent did not include temporary ailments as a qualified disability	No requirement that an ailment last a particular length of time
Disability had to be present for protection	Episodic or in remission ailments are covered if it would substantially limit an MLA if present
	Employers can NOT consider mitigating measures (medication, etc.) in determining disability
	Covers individuals who do not currently have a disability but are 'Regarded as' having a disability



Impact on determination of disability

- **Virtually everyone is protected by ADA –if they want to be**
 - Liberal guidelines
 - Broad coverage
 - Covers past disabilities
- **Employer can challenge**
 - Ordinary prescription lenses as –Mitigating Measure
 - ADA does not protect illegal drug use
 - Normal pregnancy is not an impairment and not an ADA disability
 - Individual ‘regarded as’ having a disability not likely to be entitled to a reasonable accommodation
 - Single MLA impairment can not be job function only



Employer Responsibilities Title VII (covers organizations with 15 or more employees)

➤ **Do not discriminate**

- The law forbids discrimination re: any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment

➤ **Do not harass**

- Harassment can include, for example, offensive remarks about a person's disability
- Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)
- Does not prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious



Employer Responsibilities

➤ Do not retaliate

- No retaliation toward any individual who has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter
- Unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter

➤ Careful use of medical questionnaires and exams

- Prohibits pre-offer examinations
- Post-offer examinations –only if required for all applicants for specific or like positions
- Information must be kept separate from personnel file



Employers –avoiding discrimination claims

- **Articulate and document legitimate and non-discriminatory reason for actions**
- **Consistent treatment for same actions**
 - Same for all employees
 - Consistent with what employee is/was told
 - Consistent with company policy and documentation
- **Awareness of proximity of adverse employment action to notice**
- **Process in place to handle complaints**



Employer Responsibilities

➤ Engage in meaningful interactive process on reasonable accommodations

- Adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed
 - Restructure the job
 - Use of devices or technology to make the work easier to accomplish
 - Modify work schedules
 - Provide time off
 - Assign to different vacant position



What is a reasonable accommodation?

- **Change in work environment that is:**
 - Accomplished at a reasonable cost
 - Not disruptive to business operation
 - Allows individual to perform essential functions of position
- **Consider**
 - Are existing mitigating measures (medications, prosthesis) sufficient?
 - What is being requested ?
 - Is the request reasonable?
 - Is there a more reasonable/convenient solution available?
 - Does the request cause the employer undue hardship?
 - What is the cost?
- **Resource**
 - Job Accommodation Network (JAN)
www.jan.wvu.edu



Legitimate reasons to decline an accommodation

- Individual cannot perform the essential functions of the job even with accommodations
 - Employee is not required to provide 'light duty' if no such jobs exist and for which there is no need
 - Punctuality accommodations are generally considered reasonable, absent undue hardship to the employer (does it cause production issues, overtime, impact customers, impact colleagues)
 - Attendance -in prior reviews courts have held regular and reliable attendance is a necessary element of most jobs
- Individual not disabled (perhaps 'regarded as' but not a disabled individual)
- Employee insists on a specific accommodation when others are available
- Individual is current illegal drug user
- Limitation to MLA is for that specific work



Discussion of Cross-over and Interaction

- Definitions –regulation with time-off impact
 - Disability benefits (STD/LTD) cover paid benefit for time off due to illness or injury
 - Workers' Compensation covers work place injury
 - FMLA covers serious health condition job description
 - ADAAA covers disability
- FMLA serious medical condition
 - FMLA condition could become a disability –entitling employee to request ADA accommodation
 - Employees who have a disability, but do not have a qualified serious health condition can request FMLA-like accommodations
 - Intermittent time off
 - Extended time off



Discussion of Cross-over and Interaction

➤ Precedence

- Workers' Compensation claims –filed as claim/managed under FMLA
- Sickness/Disability claims –filed as claim/managed under FMLA
- ADA request, that is covered by FMLA –use FMLA first
- ADA accommodation either a serious health condition or Workers' Compensation claim, that extends beyond FMLA protected period
 - Is accommodation reasonable
 - Can the employee perform the essential duties



Employer Preparation

- Prepare for increased accommodation requests and claims of discrimination
- Pre-define the essential functions of your job (consider expanded definitions of disability)
- Review for one-size-fits-all policy, that EEOC may judge as systemic discrimination
- Review all job related testing and examinations regarding new ADA compliance
- ADA and GINA have impacts on Wellness Programs



If you get a complaint

- Don't spend a lot of time/energy trying to disqualify the employee's alleged disability
- Remember covers broad conditions including employees with conditions that are episodic or in remission, or in some cases just regarded as disabled
- Research all the facts -Be aware of 'cat's paw' rulings
- Consider the individual circumstances –do not rely on overarching business policy
 - we 'don't rehire formerly terminated employees,
 - all employees are terminated automatically upon expiration of their FMLA time off bank, etc.
- Consider your actions from the prospective of an outsider
- Document
 - Reason for action
 - Prior notices

In Closing



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EEOC ADA AAA WebPage

http://www.eeoc.gov/laws/statutes/adaaa_info.cfm

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Contact Sharon Schoenberg

SharonS@ccsbenefits.com

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