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Americans with Disabilities Act

Introduction

The Americans with Disabilities Act (“ADA”) is a sweeping piece of federal legislation signed into law on July 26, 1990. The purpose of the law is to protect the disabled from discrimination in employment, the use of public accommodations and transportation, and communications. This *Legal Advisory* focuses on the ADA’s provisions regarding employment of individuals with disabilities.

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008, which is effective January 1, 2009. The Equal Employment Opportunity Commission (EEOC) is charged with issuing regulations to implement these amendments, so there may be further revision to some of the definitions and guidance outlined in the sections that follow. For businesses with 15 or more employees, the Act became effective on July 26, 1994. The Act bars discrimination against a qualified individual in job application procedures, hiring, advancement, and discharge. It also covers compensation, job training and other privileges and conditions of employment. The ADA protects only those disabled individuals who are “qualified” to do any given job. It defines a qualified individual as one who, with or without “reasonable accommodation” is able to perform the “essential functions” of the job.

Disability

The Act defines a person with a disability as one who:

1. Has a physical or mental impairment that substantially limits one or more of his or her major life activities; or
2. Has a record of such impairment; or
3. Is regarded as having such impairment.

The ADA Amendments Act of 2008 redefines “disability” under the Act by rolling back the recent case law that more narrowly defined disability and limited eligibility for protection under the Act. Congress found that the courts had improperly narrowed the scope of the Act and incorrectly found in many cases that individuals were not qualified individuals with a disability despite having a wide range of substantially limiting impairments.

Congress found that the Equal Employment Opportunity Commission (EEOC) regulations created too high of a standard of proof for an individual to establish that they were “substantially impaired,” by requiring the person to show that he or she was “significantly restricted” in the manner or duration performing a particular major life activity. Therefore, an employee will have an easier time establishing that he or she is “substantially limited” by an impairment under these amendments.

The definition of “major life activities” has been expanded, but not exhaustively defined, through the following lists of “general” and “major bodily functions” major life activities:

- a. General categories of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- b. Major bodily functions that qualify as major life activities: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The new amendments also state that determining whether a major life activity is substantially limited shall not be determined by taking into account the improvement or assistance obtained through mitigating measures, such as medication, prosthetics, mobility devices, assistive technology, or other reasonable accommodations.

The 2008 amendments also provide that even if an impairment does not qualify as a disability under the Act because it did not impair a major life activity, so long as the employee was “regarded as” disabled because of the perceived impairment, the employee is protected by the Act. The 2008 law broadens the concept of “regarded as” having a disability under the Act. However, if the impairment is minor or transitory, the employee may not have ADA protection for “being regarded as” disabled if the actual or expected duration of impairment is six months or less.

A person may be considered a qualified individual with a disability under the ADA even if the impairment is in remission or only episodic in nature, because the impairment is evaluated as if it were active instead.

Essential functions

The first issue to be addressed by the employer regarding a disabled employee or applicant is whether the person can, under any circumstances, perform the essential functions of the job. The “essential functions” of a job are the tasks or responsibilities which are necessary to satisfy the fundamental characteristics of the job. A job function may be considered essential for several reasons, including:

1. The position exists solely to perform that function.
2. There are a limited number of employees available among whom to distribute the responsibility for that function.
3. The function is so highly specialized that it requires a specific expertise in order to perform it.

Evidence of whether a particular function is essential may include its prominence in a written job description, the amount of time spent on the job to perform the function, the consequences of the function not being performed, the terms of a collective bargaining agreement, the incumbent’s description of the job, the

job as described by others in similar positions, and the employer’s judgment as to which functions are essential. Job descriptions put in writing before a position is advertised are for more credible than those developed following application by a disabled individual.

Reasonable accommodation

“Accommodation” of a qualified disabled person may involve any of a number of things, including altering existing facilities or procedures to make them readily accessible by disabled employees. It may also involve reassigning job tasks, modifying work schedules or work stations, acquiring adaptive equipment or devices, installing ramps or handrails, or even providing qualified readers or interpreters.

An employer is required to make reasonable accommodation to disabilities of employees or applicants only. Whether an accommodation is “reasonable” depends upon the employer’s particular situation. An accommodation is not “reasonable” if it imposes an “undue hardship” upon the operation of the employer’s business—in other words, significant difficulty or expense. However, the employer must give the disabled person the opportunity to pay the portion of an accommodation that constitutes the undue hardship, if other options have been eliminated.

Among the factors which will be considered in determining whether an accommodation would impose “undue hardship” are the following:

1. The nature and cost of the proposed accommodation.
2. The financial resources of the particular facility or facilities involved.
3. The financial resources of the business overall, its size, and the number of employees.
4. The type of operation, its structure, function, and geographic or administrative separateness.

Obviously, what may constitute undue hardship for a new business with little capital, but may very well be required of a more established business with greater available resources.

The reasonable accommodation process is an interactive, methodical process. Employers should docu-

ment what communications were exchanged with the employee, any evaluation of options performed, and the justification for rejecting any options presented. Employers should maintain such documentation in a form that could be shown to an employee, the employee's attorney, a judge or a jury, if necessary, at some later date.

Discrimination

An employer may be liable under the ADA for discrimination against a qualified disabled employee or applicant if it does any of the following:

1. Limits, segregates, or classifies a job applicant or employee because of his or her disability in any way that adversely affects the job opportunities of that individual.
2. Fails to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee, unless the reasonable accommodation would cause an undue hardship to the employer.
3. Participates in a contractual or other arrangement (such as with an employment agency, labor union, training organization, apprenticeship program, etc.) that has the effect of discriminating against the employer's applicants or employees.
4. Maintains standards, criteria or promotion methods that directly or indirectly discriminate on the basis of disability, unless those criteria are directly job related and consistent with business necessity, and cannot be met even after reasonable accommodation.
5. Denies equal-opportunity jobs or benefits for a qualified individual because of his or her relationship to or association with a disabled person. (For example, an employer may not discriminate against an applicant because his or her spouse is disabled.)
6. Uses tests or other selection criteria in a manner which, when administered to an employee or applicant with a disability, do not accurately reflect the skills or aptitudes that the test purports to measure. In other words, the test results should reflect the individual's actual skills or aptitude rather than merely the individual's impaired sensory, manual or speaking skills.

7. Retaliates against any individual because that individual has opposed any act or practice made unlawful by the Act or because that individual has participated in any manner in a procedure to enforce any provision contained in the Act.
8. Conducts medical examinations or inquiries of applicants and employees, except when done in accordance with the specific provisions of the ADA.

The Equal Employment Opportunity Commission (EEOC) regulations which implement the ADA make it clear that employers can obtain information about pre-existing injuries to provide to a "Second Injury" Fund if the information is obtained after a conditional offer of employment is made of all applicants in the same job category. However, since the Second Injury Fund in Minnesota has been abolished, screening for the Second Injury Fund by Minnesota employers is now a violation of the ADA.

Direct threat

The Act also provides that an employer may refuse to hire or employ an individual who poses a "direct threat" to the health or safety of other individuals in the workplace if that threat cannot be eliminated by a reasonable accommodation. "Direct threat" means a significant risk of substantial harm to the health and safety of the individual or others.

The determination that an individual poses a "direct threat" is based on a case-by-case assessment of the individual's present ability to safely perform the essential functions of the job, with the determination relying heavily on medical evidence.

The following factors will be considered in determining whether an individual would pose a direct threat:

1. The duration of the risk.
2. The nature and severity of the potential harm.
3. The likelihood that the potential harm will occur.
4. The imminence of the potential harm.

Speculation that the individual may not be able to perform the job safely in the future is not permitted, and a generalized fear of reinjury is insufficient to support a direct threat defense.

Conclusion

In many ways, the ADA overlaps with the requirements imposed on Minnesota employers prior to July of 1992 by the Minnesota Human Rights Act (“MHRA”). Recently, the MHRA was amended to reflect the ADA even more closely. For instance, now the MHRA requires employers with 15 or more employees to make reasonable accommodation. (Although the earlier version of the MHRA prohibited discrimination against the disabled by all Minnesota employers, its requirements that reasonable accommodation be provided to disabled workers was limited to employers of 50 or more full-time employees.) It is important to note, however, that while the MHRA reflects the ADA very closely, the MHRA actually applies to more employers. The MHRA applies to employers with one or more employees. Therefore, smaller employers that are not covered

by the ADA may still have the same requirements pursuant to the MHRA.

Many prudent employers are taking steps to make sure they are in compliance with the ADA and the MHRA. Such steps might include reviewing or creating written job descriptions for each position for the purpose of identifying “essential functions.” Review of hiring and promotion policies and procedures is also recommended. In fact, all benefits, privileges and conditions of employment should be looked at anew with an eye for whether they comply with the ADA.

Consultation with your regular corporate or employment law attorney may be helpful if you have questions on what the Act may require at your particular place of employment.