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Know the Facts: The EEOC and the ADA

Nadine Vogel - 2/28/12

Changes to the Americans with Disabilities Act have broadened the definition of disability. Employers need to ensure they hire the most qualified individuals, irrespective of difference.

On March 25, the Equal Employment Opportunity Commission (EEOC) issued its final revised Americans with Disabilities Act (ADA) regulations and accompanying interpretive guidance to implement the ADA Amendments Act of 2008 (ADAAA), which became effective Jan. 1, 2009.



In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability. This has led many employers to worry that virtually all employees now will be considered disabled. While this is not the case, with the definition of disability interpreted in favor of broad coverage, including cancer, diabetes and epilepsy, more individuals will be able to request accommodations from employers under the act.

Expanding a Definition










The ADAAA and the final regulations use a three-pronged approach to define disability as:

- A physical or mental impairment that substantially limits one or more major life activities. This is sometimes referred to in the regulations as an “actual disability.”
- A record of a physical or mental impairment that substantially limited a major life activity. This is sometimes referred to as a “record of.”
- When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor, often referred to as “regarded as.”

This definition often leaves employers with more questions than answers. For instance, what does “substantially limits” mean? Essentially, it means someone’s impairment does not need to prevent or significantly restrict a major life activity to be considered substantially limiting. As was true prior to the ADAAA, the final determination of whether someone’s impairment meets this definition requires an individualized assessment but should not require extensive analysis. As with many issues of this nature, there is one exception. The determination of whether an individual’s impairment substantially limits a major life activity shall be made without regard to the corrective or ameliorative effects of mitigating measures such as medication, prosthetic devices or hearing aids.

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The next question most employers have is what defines a “physical or mental impairment” under the ADA. This is defined as 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. It also covers an intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities.

The last question relative to definition typically is what defines a “major life activity?” Activities include major bodily functions such as those for the immune system, normal cell growth and brain, neurological and endocrine functions. Protection under the ADA also includes impairments that are temporary, episodic or in remission if when in an active state, they would substantially limit a major life activity.

The aforementioned regulations were designed to broaden the definition of disability and simplify the determination of who has a disability while shifting the employers’ focus from determining whether the individual has been discriminated against due to disability to whether the individual needs an accommodation. The ADA also has made it easier for individuals seeking protection under the “regarded as” part of the definition as previously described. This states the basis for protection under the ADA is on how a person has been treated because of a physical or mental impairment rather than on what an employer may have believed about the nature of the person’s impairment.










For example, a large employer in North Carolina, Wieland Copper Products LLC, rescinded an offer of employment in 2008 when a new hire reported for the first day of work as a caster. A human resource specialist noticed the employee was missing fingers, and immediately rescinded the offer of employment due to concern he could not do the job. The EEOC said he was fully qualified and could perform the job, but was denied the job because the employer “regarded” him as disabled. Not only did the company pay the employee \$84,750, it also had to post a copy of its anti-discrimination policy in its facilities, provide training on the ADA and Title VII of the Civil Rights Act of 1964 to all managers and supervisors and notify the EEOC of any applicants who disclosed a disability or were disqualified from employment as a result of a post-offer medical examination by the company over the next two years. Making employment decisions based on myths, fears and stereotypes about certain conditions, rather than an objective analysis of a person’s capabilities is disability discrimination and is a violation of federal law.

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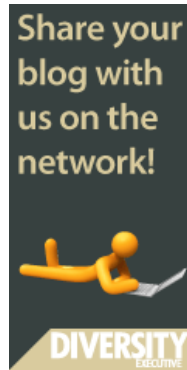
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In another instance, telecommunications global giant Verizon Communications was forced to pay \$20 million to settle a nationwide class disability discrimination lawsuit settled with the EEOC in July — the largest disability discrimination settlement in a single lawsuit in EEOC history. The lawsuit states the company denied reasonable accommodations to hundreds of disabled employees and disciplined or fired them for absences directly related to their disabilities.

Protection Under the Law

Leave is generally a reasonable accommodation under the ADAAA, and the EEOC has been taking a hard look at this issue, especially terminal leave policies when employers require their employees to return to work when the leave under their policy expires, or fire them if they don't. In some instances, flexibility on leave can enable a worker with a disability to remain employed and productive, but an inflexible policy may deny workers with disabilities a reasonable accommodation to which they're entitled by law.










Employers will want to examine their leave policies and practices carefully to determine whether there is an inflexible maximum limit to the leave that results in the employee being terminated if unable to return to full duty. Such policies are likely to be found to violate the ADA and should be amended.

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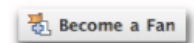
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Engaging in dialogue between the employer and employee in every disability situation is a wise HR practice, and these actions should be well documented. For example, the employer and the individual with the disability should work together to identify what barriers exist relative to that individual's performance of a particular job function. This analysis should include a review of the individual's abilities and limitations and a determination as to which factors in the work environment or job tasks pose difficulties.

Having identified various possible accommodations, the employer should assess the effectiveness of each accommodation and the preference of the individual to be accommodated, then determine whether the accommodations would pose an undue hardship upon the employer. Failure to participate in the interactive process — a legally required dialogue between an employer and an employee or applicant with a disability to determine whether a reasonable accommodation would enable the individual to perform the essential functions of the job — in good faith deprives the employer of its immunity from damages for failure to reasonably accommodate an employee. The Family and Medical Leave Act, state workers' compensation laws, or short-term or long-term disability insurance policies do not define or limit the employer's obligations concerning leave as a reasonable accommodation for employees with disabilities under the ADA.










Under the original ADA, not all impairments constitute a disability, but some that do include HIV infection, diabetes, epilepsy, cancer, autism, blindness, post-traumatic stress disorder and bipolar disorder. Pregnancy, though not considered an impairment or disability, can result in impairments such as gestational diabetes, but only can be considered a disability under the ADA if it results in substantially limiting a major life activity or by meeting one of the other two definitions of disability. Further, while the ADA excludes protection for someone who currently engages in use of illegal drugs, a person who no longer uses such drugs may be considered an individual with a disability if he or she has successfully completed a supervised drug rehabilitation program, is participating in such a program or has otherwise been rehabilitated successfully.

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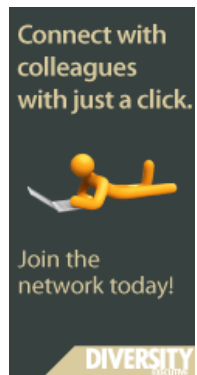


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To minimize the company's risk for disability discrimination, diversity leaders should encourage or work with HR leaders to reassess all job descriptions and job qualification standards. Even more importantly, they should do a comprehensive assessment of their reasonable accommodation process — something many employers don't have. The same goes for all types of medical examinations, skill and qualification tests and testing procedures including physical ability tests, drug testing, blood pressure screening or other tests that may adversely impact people with disabilities or require accommodation upon request. For example, if an employer does not offer employees an opportunity to explain a positive drug test result related to medication for a disability, the employer may find itself facing a charge of disability discrimination.

A Need for Culture Change

Successful implementation of diversity and ADA initiatives requires change in corporate culture and attitudes. Both may require staff training on nondiscrimination practices, disability etiquette and awareness, flexibility in work schedules as a workplace support or accommodation and investigation of employee evaluation and reward structures.

The parallel nature of these strategies suggests combining disability and diversity initiatives is possible and likely would be advantageous to both efforts. For instance:










- Diversity initiatives should include the active recruitment and retention of individuals of all backgrounds with disabilities.
- Develop targeted job/internship programs for minorities with disabilities.
- Develop a mentoring program for employees with disabilities.
- Make training, development and opportunities for promotion available to all minorities seeking job advancement. For individuals of all backgrounds with disabilities, this may include supplying needed supports to enable them to access training, considering new positions or retraining when a disability occurs that prevents a return to the original job position.

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- Integrate the nondiscrimination requirements of the ADA and Title VII of the Civil Rights Act for people with disabilities in all facets of staff training and human resources practices.

As always has been the case, documentation of employer/employee meetings that discuss workplace support decisions and their effectiveness in removing/reducing employment barriers and staff training are critical. At a minimum, train managers, human resource professionals and recruiters so they have at least basic knowledge about the existence of the law and its requirements with a focus on practical, everyday applications of the legislation. More specific information should be directly relevant to specific departmental or role responsibilities, which might be impacted by the requirements for a particular ADA provision.

Selected topics, such as specific accommodations for people with particular disabilities, may be best presented by coupling information from an instructor familiar with the ADA with that from a professional with expertise on accommodating such people. Some examples of these professionals might be an ergonomist, physical or occupational therapist, rehabilitation counselor, employment specialist, mental health or drug and alcohol abuse therapist/counselor or rehabilitation engineer.

Other training topics which may not directly relate to ADA requirements, but may support the ADA's intent, are: attitudes toward people with disability; disability as a facet of cultural diversity; effective disability management; prevention of disability; and effective recruitment of people with disabilities.










If a supervisor fails to recognize an employee's request for accommodation, the employer could be liable, even absent evidence of intentional discrimination. Supervisors play a key role in the interactive process. They're unlikely to be responsible for making the final decision on an accommodation — this is usually made by HR and the legal team — but they're on the front line and may be called on to kick off the interactive process.

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If they get it right, an organization will be recognized for respecting disabled worker rights. If they get it wrong, the company may wind up in court trying to explain why it didn't provide reasonable accommodation for a hard-working employee who needed some help.










Nadine Vogel is president of Springboard Consulting LLC and the author of Dive In: Springboard into the Profitability, Productivity, and Potential of the Special Needs Workforce. She can be reached at editor@diversity-executive.com.

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