

AMERICANS WITH DISABILITIES ACT(ADA):

*An updated employer guide
for Tennessee municipalities*

Includes Amendments under ADAAA

Bonnie Jones, Human Resource Consultant
August 2012

THE UNIVERSITY of TENNESSEE 

MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League



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MTAS OFFICES

Knoxville (Headquarters) (865) 974-0411
Johnson City (423) 854-9882
Nashville (615) 532-6827
Jackson (731) 423-3710
Martin (731) 587-7055

www.mtas.tennessee.edu

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works,

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MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a \$10 charge for additional copies of "Americans with Disabilities Act (ADA): An updated employer guide for Tennessee municipalities."

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Americans with Disabilities Act (ADA):

An updated employer guide for Tennessee Municipalities

Includes Amendment under ADAAA

Bonnie Jones, Human Resource Consultant

This publication incorporates MTAS' existing publication entitled ADA Amendments Act of 2008 (ADAAA) Back to Basics (2011). This publication primarily focuses on the employment and applicant accommodation process. It is not intended to provide comprehensive information on the spatial, physical, or construction issues surrounding ADA. For updated information on the new laws regarding swimming pools and service animals MTAS will have additional publications available in 2012.

INTRODUCTION TO ADA

The Americans with Disabilities Act is a significant wide-reaching civil rights law that was passed to prevent discrimination against individuals with disabilities. ADA applies to public and private businesses, state and local government agencies, and organizations offering public services, transportation and utilities. ADA was signed into law on July 26, 1990, with the goal of extending protections to individuals with physical or mental disabilities.

Here is a snapshot of how the ADA law is divided:

- Employment (Title I)
- Public transportation and state and local government services (Title II)
- Public accommodations (Title III)
- Telecommunications (Title IV)
- Miscellaneous (Title V)

TITLE I: EMPLOYMENT

The ADA prohibits employers from discriminating against a qualified person who has a disability. This protection extends to applicants as well as employees. Title I requires employers with 15 or more employees to provide qualified individuals with disabilities equal employment opportunities commensurate to that of others. The law requires that employers make reasonable accommodations to qualified individuals with disabilities.

This publication will guide you through the fundamentals of ADA for employment purposes, as well as the changes to the legislation entitled "ADAAA" that were passed in 2008 and went into effect January, 1, 2009.

ADA is enforced by the Equal Employment Opportunity Commission (EEOC) and requires that Title I complaints be filed within 180 days of the date of discrimination or 300 days if the charge is filed with a designated state or local fair employment practice agency.

This publication will review examples of what may qualify as a disability under the revised ADA regulations, the new law makes it clear that the focus should be on "accommodating employees and applicants" and not the impairment itself from which the individual suffers. Employers should not need extensive analysis to determine if a condition qualifies under ADA.



In 2010, the U.S. Census Bureau estimated that 54 million Americans had a disability. This represents 19 percent of our population. This staggering statistic combined with the fact that we have entered the “Silver Tsunami,” a time where more Americans are entering retirement age, but still actively working means that our workforce needs to be better prepared to deal with ADA accommodations. We know as people age, the percentage of those with disabilities significantly increases (www.census.gov). According to the Alliance for Aging Research, more than 10,000 Baby Boomers are turning 65 every year. By 2030, one out of every five Americans will be 65 years or older. This will have a substantial impact on the volume of actively working Americans with disabilities requiring work accommodations. More aging Americans in the workforce means more chronic conditions, more age-related health conditions, and more conditions such as cancer, and cardiovascular disease.

ADA does not say your city has to give preference to those with disabilities, or hire someone who is not qualified to perform the essential functions of the job. ADA simply gives a qualified person with a disability the same opportunity as a qualified person without a disability.

This protection covers all aspects of the employment process, including:

- application process
- assignments
- benefits
- compensation
- disciplinary actions
- evaluation
- hiring
- layoff/recall
- leave
- medical examinations
- promotion
- termination
- testing
- training

ADA AMENDMENTS ACT OF 2008 (ADAAA)

While the majority of Americans were preoccupied with the end of summer and an historic presidential election, Congress was busy passing a popular bipartisan bill that provides expanded protection

under the ADA. The extensive support for this bill allowed Congress to move quickly, passing it in the Senate on Sept. 11, 2008, and in the House on September 17, 2008.

On Sept. 25, 2008, President George W. Bush signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) with an effective date of January 1, 2009 (S. 3406). The ADAAA ensures protections for people with disabilities whose conditions have been denied as ADA eligible through years of Supreme Court ADA interpretation. The ADAAA greatly expands the number of persons eligible under the ADA of 1990.

On March 25, 2011, the final regulations implementing the ADAAA were made available on the Federal Register’s website www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as.

These changes to ADA are significant and impacted many cases that were previously thought to be settled. Two notable cases that were reversed are *Toyota Motor Manufacturing Kentucky, Inc. v. Williams* 534 U.S. 184 122 S. Ct. 681 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999). The ADAAA changed the Supreme Court’s interpretation of who is considered to be eligible under the new ADA, in effect, leading to a much larger segment of the American population that have conditions that now qualify as disabled under ADA.

More importantly for employers, the new laws bring central focus to employer compliance. “Did the employer reasonably accommodate the disabled employee?” rather than “Is the condition really considered a disability?”

The amendments restore benefits by making changes to the definition of the term disability that more



closely mirrors the intentions of the original act as passed in 1990. Perhaps just as significantly, the ADAAA overturns more than a decade of court cases involving those with conditions such as epilepsy, mental health disorders, diabetes, autism, attention deficit disorder, developmental delays, intellectual disabilities, muscular dystrophy, and cancer. Additionally, other illnesses that affect major life activities such as working, communicating, concentrating, thinking, reading, and other activities of central importance now fall under the protections of ADA and are considered a protected disability.

As stated in the new legislation, the purpose of this act is:

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.

In Section 3, DEFINITION OF DISABILITY under the regarded as section, coverage is now expanded to persons who are not truly disabled, but who may be regarded as disabled, regardless of whether the impairment or perceived impairment limits major life activity.

An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

The new 2008 ADA amendments ensure that those with serious conditions or conditions that substantially limit major life activities are now covered by ADA regardless of mitigating measures.

The new ADAAA legislation: prohibits consideration of mitigating measures other than "ordinary contact lenses or eyeglasses" when determining whether someone has a disability. The Supreme Court previously allowed medications or assistive devices people used to control their disability into account when determining if that person qualified as having a disability. The ADAAA will no longer allow such factors to be taken into consideration when determining whether someone is disabled under the ADA. Previously, a diabetic on medication to regulate his/her condition might have been deemed "not to have a covered disability." Now, items such as medication, cochlear implants, oxygen therapy, hearing aids, prosthetics, etc., cannot be taken into consideration when determining the definition of disability. Additionally, because the definition of disability has been expanded, that person would likely qualify as having a disability under ADA.

This change to the law overturns the intent of the Supreme Court ruling in *Sutton v. United Airlines*, which determined that people with disabilities were not covered by the ADA if their condition could be mitigated by medication, assistive technology and equipment, or learned behavioral adaptations. 527 U.S. 471 (1999).

The ADAAA says that the condition or impairment is a disability if it "materially restricts" a major life activity, more specifically, if it is a physical or mental impairment that substantially limits one or more major life activities. Previously, the courts held that a person had to be "significantly restricted" in order to qualify under ADA.

Congress deemed this standard too restrictive and attempted to correct more than a decade of unfavorable interpretation by passing the ADAAA, which includes "bodily functions" as part of major life activities. ADAAA provides that major bodily functions covered under the ADA include functions of the immune system, normal cell



growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. This drastically expands the list of conditions that fall under the protections of ADA. In the past, some serious conditions were not considered disabilities under ADA because they did not substantially affect a major life activity. Now, the ADAAA provides that major bodily functions are major life activities.

Employers will face a dramatic increase in the number of employees who qualify as having a disability under the ADAAA. While the primary effects on the educational system are outside the scope of this writing, consider the effects of a student who was previously not deemed substantially limited as a student, who is now transitioning into the workplace and needs reasonable accommodations under ADA in order to perform the essential functions of the job. Information and resources now need to be readily accessible to all employees.

THE INTERACTIVE PROCESS

Perhaps the most critical component of dealing with ADA is ensuring that employees and applicants are engaged in the interactive process and documenting that process. This can be an on-going process that may look like a series of conversations, meetings, correspondence, and hands-on problem solving. It may involve consulting with an ADA expert or checking with other employers to determine creative solutions to accommodating individuals with covered disabilities. It may involve observing the employee to determine what physical and spatial changes would best serve this individual. More often than not, the individual will have excellent suggestions as to what equipment or accommodations are needed to help the applicant/employee perform the essential job functions.

Employers don't want to be faced with a "she said/he said" situation in court. For this reason

employers should document the interactive process carefully. Courts will almost always look first at the interactive process to determine if the employer acted in good faith by working with the individual to identify barriers to applying for or performing job duties as well as reviewing the individual's limitations to determine possible accommodations. Additionally, the interactive process is the best tool employers have to avoid liability for disability discrimination and the failure to provide reasonable accommodations. Most problems occur during the interactive process, which is completely avoidable in most cases by simply making sure you engage in dialogue with the individual.

THE CHANGING LANDSCAPE OF A "DISABILITY" UNDER ADA

Presently, the ADA law defines a current disability as a medical condition or disorder referred to as an "impairment" that substantially limits one or more major life activities. For an impairment to rise to the level of a disability under ADA, it must substantially limit a major life activity. An impairment alone is not automatically a disability.

An "individual with a disability" is an individual who:

- has a physical or mental impairment that substantially limits a "major life activity," or;
- has a record of such an impairment, or;
- is regarded as having such impairment

SUBSTANTIALLY LIMITS

"Substantially limits" was revised under the new ADAAA. Previously, "substantially limits" was akin to "significantly restricted." During ADAAA in 2008, Congress asked EEOC to revise its regulations of "substantially limits" by lowering the standard and making it easier to qualify as "substantially limited" under ADA. Employers are directed to construe "substantially limits" broadly, providing individuals with the maximum benefit under the law.



It should be noted that recent court cases have shown that objective evidence is required to show that an individual is substantially limited in major life activities as compared to the general population (not to other disabled individuals). The Connecticut Labor & employment Law Blog recently covered a federal case *Rumbin v. Association of American Medical Colleges*. The court ruled that impairments that merely “affect” major life activities do not rise to the level of a covered disability under ADA (Mar-2011).

MAJOR LIFE ACTIVITIES

Major life activities include walking, seeing, hearing, caring for oneself, breathing, performing manual tasks, eating, speaking, standing, lifting, sitting, learning and thinking, reading, concentrating, communicating, interacting, and working. Major life activities also include the operation of major bodily functions, functions of the immune system, special sense organs and skin, normal cell growth, genitourinary, digestive, bladder, bowel, respiratory, neurological, brain, circulatory, cardiovascular, endocrine, lymphatic, hemic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ with a body system.

Prior to ADAAA certain conditions such as gastrointestinal (GI) disorders and cancer may not have been consistently covered under ADA because it was not clear that bodily functions alone were classified as major life activities. These types of conditions mainly only affected bodily conditions as opposed to limiting primary activities such as walking, talking etc. Since the passage of ADAAA this confusion has been cleared up and bodily functions are now classified as major life activities.

REGARDED AS

An “individual with a disability” is an individual who:

- has a physical or mental impairment that substantially limits a “major life activity,” or;
- has a record of such an impairment, or;
- is regarded as having such impairment

The “regarded as” prong of ADA was meant to keep employers from making employment-based decisions based on myths, fears, and stereotypes. In 2008, ADAAA made changes to this third part of the definition of disability. An individual no longer must show that the employer believed the impairment substantially limited ability to perform a major life activity. Individuals are covered under this provision when an employer takes action prohibited by ADA such as making an adverse employment decision based on an actual or perceived impairment (i.e., not hiring someone due to a history of a brain tumor). This means an individual could take legal action against an employer who made an adverse employment decision as a result of erroneous information.

DOES “REGARDED AS” REQUIRE AN ACCOMMODATION?

According to the Federal Register, in the final regulations from 2011, the commission added a new provision to the final regulations (o)(4) in § 1630.2(o) which states that a covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of a disability solely under the “regarded as” prong (§ 1630.2(g)(1)(iii)). However, if the individual meets the “regarded as” prong and one or both of the other two prongs of the definition of disability, the employer is required to provide reasonable accommodations.

Impairments that are short term (six months or less) are considered transitory and do not fall under the “regarded as” part of the definition.



For example, an employer may choose not to hire an individual for a temporary position due to impairment such as a sprained ankle because it would prevent the individual from being able to perform an essential function of the job for the next four to six weeks.

EXAMPLES OF IMPAIRMENTS COVERED UNDER ADA

Please note that the ADA statute and regulations do not have a list of covered conditions. These are simply some examples of conditions that may be covered under ADA, provided the individual meets the additional criteria. With courts ruling more frequently on ADA, it is important to consider the impact of recent court decisions and interpretations under ADA.

Individuals should always be assessed on a case-by-case basis. There is no one size fits all approach to determining what conditions are covered. Most importantly, to qualify under ADA the individual must have an impairment that substantially limits one or more major life activities. Some examples of impairments covered under ADA may be: HIV, AIDS, brain tumors, severe accident trauma, migraines, certain mental health disorders, psychological disorders, specific learning disabilities, mental retardation, organic brain syndrome, epilepsy, diabetes, post traumatic stress disorder (PTSD), multiple sclerosis, cancer, hypertension, asthma, and heart disease.

WHAT IS NOT COVERED AS A DISABILITY UNDER ADA?

Some examples of impairments not covered under ADA may be: Appendicitis, short bouts of depression, weight conditions within normal ranges, normal height deviations, traits and behaviors, cultural or economic disadvantages, normal pregnancies, quick temper, poor judgment, irritability, physical characteristics such as being left-handed, hair color, eye color, homosexuality,

Bi-sexuality, gender disorders, broken limbs, gambling addiction, eye or hair color, height, weight, lack of education, old age, poor judgment, sprains, current use of illegal drugs, sexual behavioral disorders, and disorders caused by the use of illegal drugs.

STRESS

According to the EEOC, stress may be shown to be related to a mental or physical impairment. Similarly, traits such as irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.

OTHER EXAMPLES OF NON-COVERED CONDITIONS

Broken limbs, sprains, concussions, appendicitis, common colds, or influenza generally would not be disabilities. A broken leg that heals normally within a few months, for example, would not be a disability under the ADA. However, if a broken leg took significantly longer than the normal healing period, and during this period the individual could not walk, he or she would be considered to have a disability. Or, if the leg did not heal properly, and resulted in a permanent impairment that significantly restricted walking or other major life activities, he or she would be considered to have a disability.

This list is not all inclusive and does not cover all possible scenarios related to these conditions. Additionally, each individual should be assessed on a case-by-case basis. Complications to common non-covered conditions can often result in eligibility under ADA.

DURATION OF IMPAIRMENT

The regulations no longer include a six-month durational requirement in order to establish a disability.



It is often difficult to determine the duration of a medical condition or impairment. The EEOC says that if a condition is severe with an indefinite and unknown duration, it may qualify as a disability.

How long an impairment lasts is a factor to be considered, but does not by itself determine whether a person has a disability under the ADA. The basic question is whether an impairment “substantially limits” one or more major life activities. This question is answered by looking at the extent, duration, and impact of the impairment. Temporary, non-chronic impairments that do not last for a long time and have little or no long-term impact usually are not disabilities.

According to the EEOC, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities under ADA.

EPISODIC CONDITIONS AND ILLNESSES IN REMISSION

The regulations were loosened with ADAAA to be more flexible with episodic conditions and illnesses in remission. ADA applies when an impairment or illness is active rather than dormant. When symptoms are in remission, individuals may still be covered if they require an accommodation to continue controlling symptoms. Episodic conditions and illnesses in remission could be impairments such as: Bi-polar disorder, depression, cancer, PTSD, multiple sclerosis, GI diseases, migraine headaches, etc.

OBESITY

While the original ADA statute makes no mention of obesity under ADA, the 2008 amendments to ADA make it more likely that obesity may be seen as a protected disability under ADA (provided one can prove it substantially limits one or more major life activities). Obesity and related conditions are being

seen in the court process at an increasing rate. In the past, courts have been hesitant to recognize obesity as a disability under ADA. It appears that this is changing and the courts are now more willing to render obesity as a covered condition under ADA. Pre-ADAAA cases generally concluded that obesity must be a result of a physiological condition to qualify as ADA protected.

A recent case, however, *Lowe v. American Eurocopter, LLC* (N.D. Miss, 2010) concluded that because of how broadly the ADAAA defines major life activities and “regarded as having” a disability, therefore the court said morbid obesity is covered irrespective of whether it is caused by a physiological condition. In another 2010 case, *EEOC v. Resources for Human Development* (E.D. LA2010), the EEOC claimed that basic obesity alone, sufficiently impacts the life activities of bending, walking, digestion, cell growth, etc., and qualifies as a disability or a perceived disability.

PREGNANCY

A healthy pregnancy is generally not considered a disability under ADA because it does not meet the definition of a disability on its own. However, a pregnant individual with complications resulting from pregnancy, or impairments provoked by pregnancy may be considered disabled under ADA. To be covered under ADA, the pregnant individual must have an impairment that substantially limits one or more major life activities.

Regardless of ADA status your agency should be attentive to other pregnancy protections such as Family and Medical Leave Act (FMLA), Pregnancy Discrimination Act (PDA), Title VII, and state discrimination laws.

GENERAL PREGNANCY ACCOMMODATIONS

It should be expected that individuals who are pregnant may have restrictions in lifting, walking, standing for long periods, sitting, and



being exposed to certain chemicals or conditions. As an employer you should consider offering accommodations such as: closer parking, rest breaks, a chair or stool for prolonged standing, ergonomic tools, a flexible work schedule, telecommuting, limited travel, relaxed dress code, and periodic rest breaks.

LIGHT DUTY AND REDUCED WORK SCHEDULES FOR PREGNANCY

Cities are not required to provide light duty work or part-time work to accommodate a pregnancy. However, an individual who is pregnant should be treated in the same manner as other individuals with non-work related injuries. If a health care provider indicates that a pregnant employee needs part-time work for health reasons, you may have to provide that schedule.

POSITIONS THAT MAY BE CONSIDERED DANGEROUS DURING PREGNANCY

Frequently cities ask if they can make their female police officer take leave for the safety of the fetus. The answer is No. According to the EEOC, if an employee is able to perform her job functions then she must be considered eligible for employment regardless of the presence of workplace hazards to the fetus. However, if the employee is unable to perform the essential functions of the job, an offer of accommodation in the form of a transfer to another position (if available) or offer the employee leave under FMLA and or your employer's policies.

Employers who have women in positions that might endanger a fetus must warn women of the potential risk and provide alternatives, if available. However, if a woman chooses to continue to work in her capacity, the employer may not interfere with her right to work unless she cannot perform the essential functions of the job. (*International Union v. Johnson Controls*, 499 U.S. 187 (1991)).

WHAT IF A HEALTH CARE PROVIDER DETERMINES SHE MUST STOP WORKING?

If at any point a health care provider deems it medically necessary for a female to stop working prior to delivery, the employer should accommodate that request by offering leave. While most women can work up to their due date, other women may experience health conditions that require them to stop working until delivery and post-partum recovery.

HYPEREMESIS GRAVIDARUM AND OTHER PREGNANCY COMPLICATIONS

Pregnancy affects all individuals differently. A woman who has severe morning sickness or hyperemesis gravidarum and is covered under ADA may have trouble with her work schedule. Consider flexible working arrangements, work from home, limited overtime, etc. Other severe symptoms may be morning sickness (all day sickness), fatigue, difficulty sleeping, back pain, migraines, gestational diabetes, and hypertension.

Pregnancy complications such as HELLP, ectopic pregnancy, placenta previa, pre-term labor, abnormal bleeding, placenta abruption, preeclampsia or toxemia are often dangerous and should be taken seriously.

TELECOMMUTING

Many courts have held that telecommuting is a reasonable accommodation under ADA. If a condition qualifies under ADA and telecommuting is not an undue burden on the employer then the employer may be required to allow it as a reasonable accommodation. If your organization allows other disabled employees to telecommute or allows similar positions the option of telecommuting it is likely that you would need to approve such a request. While some employers may resist this arrangement, if the critical elements of the job can be performed at home, the employer ought to approve this option.



REGULAR ATTENDANCE AS AN ESSENTIAL FUNCTION

Courts have held that regular attendance is an essential function of many jobs. Therefore some cases of chronic absenteeism can prevent an employee from being able to perform the essential functions of the job. However, it is important to look at the individual's position and duties and determine how much absenteeism can be accommodated. Courts have ruled that certain positions such as bank manager or restaurant manager simply require more regular attendance in order to be able to fulfill the essential job functions. If the severity of absences requires the organization to hire a new staff member, that is not a reasonable accommodation. On the other hand, ADA-related absences in positions that may allow for more flexibility (flexible work hours, telecommuting etc.) may not make them automatically unqualified to perform essential functions of the job. Courts emphasize that there is no specific formula for determining length of leave as a reasonable accommodation. It is important to look at each position on a case-by-case basis.

Note: Please use caution with using regular attendance as an essential function of the job. Some employers are under the false notion that adding a line to each job description listing regular attendance as an essential function means that they will not have to accommodate unprotected and extended absences.

ESSENTIAL VS. MARGINAL FUNCTION

When discussing ADA the term "essential function of the job" is used quite frequently. This is because all individuals are required to be able to perform the essential functions of their job either with or without accommodations.

It is important to be able to distinguish between an essential function and a non-essential function such as a marginal function.

To determine this, employers should consider the following items:

- Does the position primarily exist to perform that function? For example, if someone works as a bank teller supervisor, is the reason this position exists to have someone who can be present during bank hours to provide direction to tellers? If so, the ability to be "present" is an essential function of the job.
- Are there other employees who can perform those tasks or that function? Example, if filing is an insignificant part of the job, can someone else file for Judy since she is visually impaired?
- Is the function highly specialized requiring specific expertise, training, and education? Was this person hired for expertise in this area? For example, does the customer service position require the employee to speak Spanish?
- Will the absence of this function require the employer to have to hire an additional person or find a replacement? (If an accommodation would require the employer to hire additional staff, than it is likely not a reasonable accommodation).

MITIGATING MEASURES

ADAAA says mitigating measures can no longer be used as a factor in determining if someone's impairment qualifies under ADA. This is a significant change from ADA prior to ADAAA. Mitigating devices can be things such as: medication, medical supplies and equipment, prosthetics, hearing aids and other hearing devices such as cochlear implants, mobility devices, oxygen, and vision devices (except ordinary eyeglasses or contact lenses). Additionally, mitigating measures could also mean assistive technology, behavioral and neurological modifications, psychotherapy, therapy etc. For example, an individual who has insulin dependent diabetes and takes an insulin regulator will still be covered under ADA, and the employer may not use



the mitigating measure (prescription) to determine limitations.

Askjan.org says, “The ADAAA states that the ameliorative (i.e., beneficial) effects of mitigating measures are ignored; if the mitigating measure itself causes any limitations, then those will be considered. Evidence showing that impairment would be substantially limiting without mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types.”

REASONABLE ACCOMMODATION

Cities and towns that fall under ADA are required to make reasonable accommodations for those applicants and employees with disabilities. This is a critical component of ADA administration. Notably, there is always much discussion surrounding what “reasonable” means.

Reasonable accommodation is any change in the work environment or in the way things are usually done that result in equal employment opportunity for a qualified individual with a disability. An individual with a qualified disability is not entitled to the accommodation of his choice, but only to a reasonable accommodation under ADA.

An employer must make a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business.

Some examples of reasonable accommodation include but are not limited to:

- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials, or policies;

- Change in work hours, shifts, or schedules;
- Division of tasks among employees: (i.e. allowing a bookkeeper who is deaf to trade phone duties with another employee in exchange for filing duties.)
- Job restructuring;
- Lowering shelves, chairs or raising furniture;
- Making existing facilities used by employees readily accessible to, and usable by, an individual with a disability;
- Modifications of job tasks: i.e. allowing a blind office worker to substitute transcription and duplicating duties for proofreading and filing;
- Provide large-button touch-tone telephone for someone who has low vision or poor hand coordination;
- Providing a quiet room for someone who suffers from migraine headaches to rest for a few minutes after taking medication;
- Providing qualified readers or interpreters;
- Reassignment to a vacant position;
- Replacing handles or knobs to make opening and closing of cabinetry more accessible;
- Telecommuting;
- Allowing flexible use of leave;
- Providing closer parking;
- Dimming lights/ brightening lights;
- Time off and or an extension of approved leave

An employer is not required to lower quality or quantity standards to make an accommodation. Nor is an employer obligated to provide personal use items, such as glasses or hearing aids, as accommodations. However, there may be limited circumstances where a personal use item is appropriate. Employers should be mindful about setting precedence, as the law does not require you to provide personal items as an accommodation under ADA.

Keep in mind, the city should always have documented dialogue(s) with the individual requesting the accommodation.



When can an employer not provide a reasonable accommodation?

- If an employer is unaware of the need.
- If providing the accommodation would cause undue hardship.
- Employers are free to choose accommodations and can provide those less expensive or easier to obtain.

The employee or individual bears the burden of identifying a workplace barrier and communicating that to the employer. Once an accommodation is requested, the individual must also take responsibility for demonstrating how the accommodation assists him or her in performing the essential job functions.

Due to the ADAAA, which is discussed later in this publication, the law is less concerned with the condition the employee suffers from and has shifted the focus to “how a city is accommodating an employee.” While some disabilities may be obvious, others may not. When performance issues or reasonable suspicion arises, dialogue with employees is critical. If you are unsure if the individual’s issue is covered under ADA, your safest bet is to treat the condition as an ADA covered disability. (See ADAAA for more information.)

RECOGNIZING AN ACCOMMODATION REQUEST

If you suspect a potential disability it is critical that you engage in dialogue asking employees if there is anything that the employer can do to help them perform in their jobs. This will often open the door for the employees to advise you of any potential disabilities covered under ADA. Employees and applicants do not have to use legal language such as “reasonable accommodation” when expressing workplace barriers and the need for an accommodation. According to the EEOC, an individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation” when requesting

an accommodation. A need may be indicated by an employee stating something such as “I am having trouble hearing customers due to my recent hearing loss, as a result of treatment for XYZ.” This should be enough to prompt interactive dialogue and should be considered a request for an accommodation.

INTERSECTION OF GINA AND ADA

The Genetic Information and Non Discrimination Law (GINA) was signed into law by President Bush in May of 2008 and took effect November 21, 2009. As one could imagine GINA and ADA commonly intersect because disabilities are often the result of genetic issues.

GINA prohibits discrimination based on the possibility that someone will acquire a condition in the future. ADA protects individuals who currently have impairments or who are perceived as having impairments if they meet the definition of disability under ADA.

GINA restricts employers and insurers from acquiring and using genetic information except in limited circumstances.

With respect to employment, GINA:

- prohibits discrimination and harassment on the basis of genetic information;
- prohibits employers from obtaining genetic info except in narrow circumstances; and
- requires employers to keep genetic information confidential.

When an employer requests medical information in the course of administering ADA, there is a potential to obtain information that could be protected by GINA, including genetic information such as: results of genetic tests for cancer genes, hereditary diseases, and other disorders. Results of genetic information on family members are also protected under GINA. GINA protections include



requests for genetic information by an employer about employees or their family members as well as genetic information regarding a fetus or embryo. It also includes the manifestation of a disease or disorder that may pertain to employees or their family members.

If you do use ADA accommodation forms, be sure to provide a disclaimer stating you are not soliciting genetic test results from employees or their family members or anything that may not be applicable to the ADA and covered by GINA.

For more information on GINA please see MTAS Publication on GINA (Genetic Information Non-Discrimination Act).

Tests that are not considered genetic are:

- tests for the presence of a virus not composed of human DNA, RNA, proteins;
- metabolites;
- tests for the presence of alcohol or illegal drugs;
- cholesterol tests, liver function tests, and complete blood counts.

INTERSECTION OF FMLA AND ADA

The FMLA regulations define son or daughter as the “biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis, who is under 18 years of age.” The definition is expanded to include a child 18 years of age or older if the child is incapable of self-care because of a mental or physical disability. The FMLA defers to the ADA’s definition of the term “disability.” As an employer you need to proceed cautiously when FMLA and ADA intersect.

The new legislation makes it clear that an employee who performs well also may be substantially limited in one of the major life activities of learning, reading, writing, thinking, and speaking. This employee will still need to establish that he or she has limitations and needs a “reasonable” accommodation.

Some clarifications have been made since the ADA Amendments Act of 2008 was passed those include:

- ADA amendments do not apply retroactively (Sixth Circuit Milholland).
- The regulations clarify that “major life activities” include “major bodily functions” such as functions of the immune system, normal cell growth, brain, neurological, and endocrine functions.
- Under the old ADA, not every impairment will constitute a disability.
- The new ADA standards will allow more adult children of your employees to qualify as being disabled. This will result in more employees requesting FMLA to care for their adult children with disabilities.

SOCIAL MEDIA AND ADA

As referenced in MTAS’ *Social Media as a Tool for Tennessee Municipalities* (2010), employers are increasingly using social media as a way to screen and learn more information about potential job candidates. Absent a social media hiring policy and a qualified screener, this is problematic because the employer may view protected information such as what disabilities individuals or their family members may have. Once the employer sees this information there is no way to un-do this. This information is protected, and not job related, it is information that should not be used during the application process. If an adverse employment decision is made, individuals may claim it was due to the employer seeing their disability status. Having a qualified, third party, or a non-hiring authority screen social media avenues would prevent this protected information from being passed on to hiring authorities or to those in decision making positions and greatly reduce the employers liability.

LEAVE TO CARE FOR ADULT CHILDREN UNDER ADA/FMLA

With the recent expansion to the scope of ADA by the ADA Amendments Act, it is easier for an employee to take leave to care for an adult child



who has a serious health condition under FML. Under FML, parents may be eligible to take family leave (FML) to care for adult children who are not in the military and are not veterans if the children are “incapable” of self-care and have a disability defined by ADA. Generally this means the adult children must require direct assistance or supervision providing self-care in three or more activities of daily living such as grooming, hygiene, bathing, dressing, and eating. These could also include instrumental activities of daily living such as essential errands, cooking, cleaning, shopping, transporting, paying bills, using communication devices, and maintaining a residence. There are many different disabilities or conditions that could deem an adult child incapable of self-care. Conditions such as developmental disabilities including Down Syndrome, brain damage, paralysis, and any other long-term serious illness are just a few examples. If an adult child is incapacitated in a car accident this could also provide the opportunity for an eligible parent to provide care under FMLA. Temporary conditions or illnesses such as pregnancy related restrictions or routine surgeries would likely not result in someone being “incapable of self-care” as defined by the regulations. If you are an employer who is not subject to FMLA, this may not apply to you.

TITLE II

Title II of ADA addresses the right of access to public services by individuals with disabilities. In some cases an accommodation may be as simple as providing assistance filling out utility forms, or as complex as making sure bathrooms, drink fountains, hallways, and other spaces can accommodate those in wheelchairs.

Public entities include any state or local government and any of its departments, agencies, or other instrumentalities. All activities, services, and programs of public entities are covered, including activities of state legislatures and courts, town meetings, police and fire departments, motor

vehicle licensing, and employment. Unlike section 504 of the Rehabilitation Act of 1973, which only covers programs receiving federal financial assistance, Title II extends to all the activities of state and local governments whether or not they receive federal funds. Public transportation services operated by state and local governments are covered by regulations of the department of transportation.

QUALIFIED INDIVIDUALS

DOT’s regulations establish specific requirements for transportation vehicles and facilities, including a requirement that all new busses must be equipped to provide services to people who use wheelchairs. A “qualified” individual with a disability is one who meets the essential eligibility requirements for the program or activity offered by a public entity.

The “essential eligibility requirements” will depend on the type of service or activity involved. For some activities and essential job requirements the ability to meet specific skill and performance requirements may be “essential.” For other activities, such as where the public entity provides information to anyone who requests it, the “essential eligibility requirements” would be minimal.

This means that a city may not refuse an individual with a disability from participating in events, parks and recreation facilities, and anything else that could be discriminatory toward those individuals with a disability. This may include such things as:

- allowing working dogs to be in buildings, events, and facilities;
- providing supporting aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result;
- ensuring facilities are easily accessible to those with disabilities;
- not charging or penalizing those with disabilities for using services; and



- removing barriers that would adversely impact those with disabilities (i.e., requiring a driver's license as a sole means of ID).

SAFETY CONCERNS

Restrictions due to documented safety hazards may be imposed, as long as they are valid and not speculative in nature.

A city may not charge a person with a disability for the use of an auxiliary aid. Cities are required to furnish auxiliary aids unless the purchase or creation of the auxiliary aid would result in an undue burden (financial or administrative). A city is not required to provide auxiliary aids that would translate to a fundamental change in the nature of a service, program, or activity.

E-911 AND EMERGENCY SERVICES

Emergency telephone services, including 911 services, must provide direct access to individuals with speech or hearing impairments.

BUILDING ACCESSIBILITY

Cities should continually check building standards and architectural standards, as they have been revised since the inception of ADA.

Note the Safe Harbor provision of Title II requires that public entities ensure their programs are accessible to individuals with disabilities. This does not always mean the city is required to make structural changes to buildings. The determination of whether a program is accessible is made by looking at the totality of circumstances for each activity or program.

The department's Title II regulations for state and local governments are found at Title 28, Code of Federal Regulations, Part 35 (abbreviated as 28 CFR pt. 35). The ADA Standards for Accessible Design are located in Appendix A of Title 28, Code of Federal Regulations, Part 36 (abbreviated

as 28 CFR pt. 36 app. A). Those regulations, the statute, and many helpful technical assistance documents are located on the ADA website at www.ada.gov and on the ADA technical assistance CD-ROM available without cost from the toll-free ADA Information Line at 1-800-514-0301 (voice) and 1-800-514-0383 (TTY).

This publication is not intended to provide comprehensive information on the spatial, physical, or construction issues surrounding ADA. For information related to these issues please check with your MTAS consultant for additional publications or resources.

TITLE III

Title III covers public accommodations, commercial facilities, and private entities that offer certain opportunities to the public. Places of public accommodation include restaurants, hotels, theaters, convention centers, retailers, shopping centers, dry cleaners, laundromats, pharmacies, provider's offices, hospitals, museums, libraries, theaters, parks, zoos, amusement parks, private schools, day care centers, health spas, and bowling alleys. Entities controlled by religious groups including churches, and places of worship are not covered. Private clubs are not covered, unless aspects of that club are open to the public. State and local governments are not covered by Title III regulation, but are covered by the department of justice's Title II regulation.

TITLE IV

Title IV amends the Communications Act of 1934 to require that telephone companies provide telecommunication relay services. Also included under Title IV are Closed Captioning (CC) services, namely, televisions 13 inches or more in size must provide CC services.

TITLE V

Title V is miscellaneous provisions. This section provides supplemental regulations that are not



covered elsewhere in the act. Title V includes state immunity, retaliation, attorney's fees, coverage of Congress, and other federal and state laws.

DOS AND DON'TS FOR EMPLOYERS

- Don't ask an applicant about disabilities. You may, however, ask if they can perform the essential functions of the job.
- Don't have supervisors contact healthcare providers.
- Do address conduct prohibited in the handbook even if that conduct is a result of a disability.
- Don't allow supervisors to determine ADA eligibility. Supervisors should not be determining if someone has a disability; but they should be able to recognize plain language that may infer the need for an accommodation based on a workplace barrier.
- Don't collect information that may violate GINA.
- Do put descriptions in writing and identify the essential tasks of each job.
- Don't keep medical information in regular HR files. Keep medical information separate and secure.
- Do review application forms, interviewing practices, and selection procedures to assure that uniform questions are asked of all applicants, and that disabled individuals are evaluated on whether or not they can perform the fundamental tasks of the job.
- Don't deny someone a reasonable accommodation unless you have explored all possible options.
- Do review office layout to determine reasonable accommodations that could be made to existing facilities to permit accessibility and use by the disabled. This includes identifying auxiliary services for the visual and hearing impaired and considering job restructuring.
- Don't make assumptions about performance issues being a result of a disability.
- Do review personnel policies to assure that none adversely impact the disabled in terms of the workplace and benefits.

- Don't require medical exams until after an offer is made.
- Do educate employees and supervisors about ADA.
- Don't refer to someone's disability during a discussion about work-related performance issues.
- Do consider creating an ADA reasonable Accommodation Request Form.
- Don't require employment tests that may violate ADA.
- Do discipline someone appropriately for being unable to perform the essential functions of the job, which may include attendance for many positions.
- Do not count absences protected by FMLA or ADA.

FREQUENTLY ASKED QUESTIONS

Q1: Are individuals who engage in illegal drugs protected by ADA?

Individuals who currently engage in the use of illegal drugs are not protected by the ADA when an action is taken on the basis of their current illegal use of drugs. Individuals who currently use illegal drugs are not individuals with disabilities protected under the act when an employer takes action because of their continued use of drugs. This includes people who use prescription drugs illegally as well as those who use illegal drugs.

However, people who have been rehabilitated and do not currently use drugs, or who are in the process of completing a rehabilitation program may be protected by the ADA.

Q2: Are Homosexuals or Bi-sexuals protected by ADA?

The act states that homosexuality and bisexuality are not impairments and therefore are not disabilities under the ADA. In addition, the act specifically excludes a number of behavior disorders from the definition of "individual with a disability." However, if homosexual or bi-sexual employees ask for an



accommodation under ADA they should be treated the same as any other employee.

Q3: Are temporary conditions covered under ADA?

How long impairment lasts is a factor to be considered, however, it does not by itself determine whether a person has a disability under the ADA. The basic question is whether an impairment “substantially limits” one or more major life activities. This question is answered by looking at the extent, duration, and impact of the impairment. Temporary, non-chronic impairments that do not last for a long time and have little or no long-term impact usually are not disabilities.

According to www.askjan.org “The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage does not apply to the “actual disability” prong or the “record of” prong. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

For example, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability.

At the same time, “the duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.”

Q4: Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer allegedly failed to hire, terminated,

or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009. (Source: EEOC)

Q5: Do I need a special recordkeeping process for ADA information?

Although the ADA and GINA have different exceptions to confidentiality, employers may keep genetic information in the same confidential file as medical information subject to ADA.

Q6: Who is a “qualified individual with a disability?”

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodation. Requiring the ability to perform “essential” functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job. (Source: www.ada.gov)



Q7. What limitations does the ADA impose on medical examinations and inquiries about disability?

An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a “direct threat” in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the direct threat level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current fitness to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

*Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.
(Source: www.ada.gov)*

Q8: Does the ADA require employers to develop written job descriptions?

No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Note: MTAS recommends that you have job descriptions on file for each position.
(Source: www.ada.gov)



Q9. Is testing for the illegal use of drugs permissible under the ADA?

Yes. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests. If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record. (Source: www.ada.gov)

Q10. How does the ADA affect workers' compensation programs?

Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments that heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response

to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his condition or worker's compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements. (Source: www.ada.gov)

Q11. Is time off under ADA a reasonable accommodation? What if the employee already exhausted all other protected forms of leave such as FMLA?

*Generally, the FMLA gives eligible employees up to 12 weeks of unpaid leave per year. Employers are free to discharge employees who cannot return to work after that time is up — that's legal under the FMLA. (**Note:** In some cases FMLA can go up to 26 weeks)*

But before you fill out that pink slip, consider whether the employee may be disabled under the ADA. If so, he may be entitled to more time off as an accommodation.

The FMLA allows leave for a serious health condition, which may or may not be a disability under the



ADA. That's because "serious health condition" and "disability" aren't synonymous. Under the ADA, disability is defined as a condition that substantially limits a major life activity.

Thus, a disabled employee (even one who wasn't eligible for FMLA leave because he hadn't worked for his employer for a year or more, or for 1,250 hours in the last year) may be able to take time off.

Recent case: Robert Hines worked for Harrison Township for 25 years before being diagnosed with depression and anxiety. His doctors advised him to take some time off. He was unable to return for seven months. The township terminated him after he used up his FMLA and sick leave entitlements.

Hines sued, alleging an ADA violation. He argued that extra time off was a reasonable accommodation. The township argued that regular attendance was an essential function of Hines' job, and therefore being unable to work for months on end meant he couldn't perform those essential functions.

The court said Hines should get a trial. It concluded that a disabled employee who needs time off so that he can return to work sooner might be entitled to that time as a reasonable accommodation. Each case must be judged individually. *Hines v. The Township of Harrison*, No. 07-0594, WD PA, 2007. (Source: thehrspecialist.com)

Q12. Should we be using an ADA request form?

An ADA Reasonable Accommodation Request form for current employees is helpful for your organization. It will also allow you to put a GINA disclaimer on there if necessary. Have your legal counsel review any forms prior to use. Here is a link to a sample form that the state of Alaska uses: <http://labor.alaska.gov/ada/forms/addendumA-CADAsop.pdf>.

Q13. Can an employer use additional information such as scientific, medical or statistical evidence to help determine if a condition is covered under ADA?

According to askjan.org, the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing prohibits the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

Q14. As an employer, may I ask for medical documentation for a condition that is not obvious?

Yes, employers can ask for documentation when an employee requests an accommodation and the disability and or need for an accommodation is not obvious. The documentation required should not be excessive. Instead, the employer's focus should be on the accommodation, determining if it is reasonable and whether there are other accommodations that could be considered.

Q15. I keep reading that the focus should be on the accommodation and not the condition. Does this mean we should just assume all requests are legitimate without checking to see if their impairment falls under the definition of an ADA disability?

No. You should still be sure that the condition or impairment qualifies under the present law. Each situation must be determined on a case by case basis because conditions affect individuals differently. However, the law is clear in that the employer should not have to do extensive research to see if a condition qualifies.



Q16. My employee has an impairment that substantially limits his immune system however, this major life activity is not one that is required to perform his job. Do we still have to accommodate him?

Yes. Don't confuse the definition of disability with an accommodation. Even though he doesn't need his "immune system" working normally to perform work, the employee still has a covered disability and is entitled to an accommodation for any limitations associated with the disability whether significant or not. Perhaps in this case a reasonable accommodation is a plastic panel that helps protect him from germs and infections.

Q17. Am I required to allow a pregnant employee to work from home?

Many courts have held that telecommuting is a reasonable accommodation under ADA. If a pregnancy qualifies under ADA and telecommuting is not an undue burden on the employer then you may be required to allow it as a reasonable accommodation. If your organization allows other disabled employees to telecommute or allows similar positions the option of telecommuting it is likely that you would need to approve such a request.

Q18. When can an employer ask an applicant to "self-identify" as having a disability?

Federal contractors and subcontractors who are covered by the affirmative action requirements of section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the section 503 affirmative action requirements. Employers who request such information must observe section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

A pre-employment inquiry about a disability is allowed if required by another federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services. (Source: www.ada.gov)

Q19. Can we offer pregnant employees more leave than we offer employees with other temporary disabilities?

Although employers may not treat pregnant employees worse than other temporarily disabled employees, some preferential treatment of pregnant employees may be lawful. In California Federal Savings and Loan v. Guerra, 479 U.S. 272 (1987), the Supreme Court held that a state can require employers to provide a benefit to pregnant employees, such as additional leave, which is not granted to other temporarily disabled employees. This decision appears to allow employers to give pregnant employees more leave than is given to other employees.

One caveat should be noted. This preferential treatment may apply only during the period when the employee is actually disabled as a result of the pregnancy. Employers generally must give the same leave benefits to both male and female employees who take parental leave to care for a newborn. Therefore, if you offer female employees leave for childcare when no disability exists, you also should offer male employees equivalent leave. (Source: www.ppspublishers.com)

Q20. Can we discipline a pregnant employee for performance and attendance problems?

Generally, yes. Although a pregnant employee is protected from discrimination, you do not have to tolerate poor performance or attendance simply because she is pregnant. You may hold her to the same work standards as other employees, as long as you apply them consistently.



If her performance or attendance problems are related to her pregnancy (for example, she is late to work because of morning sickness or cannot lift boxes as required to perform her job), the PDA requires only that you treat her the same as you would any other employee with a temporary medical condition. Thus, if you allow employees with temporary medical conditions to be late because of their conditions or accommodate their lifting restrictions, you should apply the same standards to a pregnant employee.

Note, however, if she is covered under the FMLA, you should take her pregnancy into consideration if her attendance problems are caused by pregnancy-related medical conditions. Absences that qualify as FMLA leave should not be counted when determining whether an employee's attendance problems warrant discipline or discharge. (Source: ppublishers.com/articles/pregnancy)

Q21. Is drug testing permitted under the ADA?

Yes. Public entities may utilize reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs. (Source: www.ada.gov)

Q22. May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?

No. An employer may not withdraw a reasonable accommodation as punishment for the unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation

is not working. The employer can proceed with the unsatisfactory rating, but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation.

If the reasonable accommodation is not assisting the employee in improving his performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted. (Source: www.eeoc.gov)

Q23. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination toward supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.

Employers also may:

- *prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);*



- prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (e.g., pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work; and
- require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and prohibit drinking or illegal use of drugs in the workplace. [See FAQs.]

Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable. The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example A: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics

sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.

Example B: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics that do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example C: Assume that Steve has all the severe tics mentioned in Example A, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers.



Steve's condition would not necessarily make him unqualified for a job in this environment.

Example D: A telephone company employee's job requires her to spend 90 percent of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful toward coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example E: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does

not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself. (Source: www.eeoc.gov)

Q25. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?

If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct, or if the employee thinks there is an accommodation that could help her avoid future misconduct. If an accommodation is requested, the employer should begin an "interactive process" to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective. The employer may seek appropriate medical



documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting the employee's conduct, and what accommodations may address the problem.

Employers cannot refuse to discuss the request or fail to provide reasonable accommodation as a punishment for the conduct problem. If a reasonable accommodation is needed to assist an employee with a disability in controlling his behavior and thereby preventing another conduct violation, and the employer refuses to provide one that would not cause undue hardship, then the employer has violated the ADA.

Example A: Tom, a program director, has successfully controlled most symptoms of his bipolar disorder for a long period, but lately he has had a recurrence of certain symptoms. In the past couple of weeks, he has sometimes talked uncontrollably and his judgment has seemed erratic, leading him to propose projects and deadlines that are unrealistic. At a staff meeting, he becomes angry and disparaging toward a colleague who disagrees with him. Tom's supervisor tells him after the meeting that his behavior was inappropriate. Tom agrees and reveals for the first time that he has bipolar disorder. He explains that he believes he is experiencing a recurrence of symptoms and says that he will contact his doctor immediately to discuss medical options. The next day Tom provides documentation from his doctor explaining the need to put him on different medication, and stating that it should take no more than six to eight weeks for the medication to eliminate the symptoms. The doctor believes Tom can still continue working, but that it would be helpful for the next couple of months if Tom had more discussions with his supervisor about projects and deadlines so that he could receive feedback to ensure that his goals are realistic. Tom

also requests that his supervisor provide clear instructions in writing about work assignments as well as intermediate timetables to help him keep on track. The supervisor responds that Tom must treat his colleagues with respect and agrees to provide for up to two months — all of the reasonable accommodations Tom has requested — because they would assist him to continue performing his job without causing an undue hardship.

Practical Guidance: Ideally, employees will request reasonable accommodation before conduct problems arise, or at least before they become too serious. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including termination) warranted by misconduct. Employees should not assume that an employer knows that an accommodation is needed to address a conduct issue merely because the employer knows about the employee's disability. Nor does an employer's knowledge of an employee's disability require the employer to ask if the misbehavior is disability-related.

Example B: An employee informs her supervisor that she has been diagnosed with bipolar disorder. A few months later, the supervisor asks to meet with the employee concerning her work on a recent assignment. At the meeting, the supervisor explains that the employee's work has been generally good, but he provides some constructive criticism. The employee becomes angry, yells at the supervisor, and curses him when the supervisor tells her she cannot leave the meeting until he has finished discussing her work. The company terminates the employee, the same punishment given to any employee who is insubordinate. The employee protests her termination, telling the supervisor that her



outburst was a result of her bipolar disorder which makes it hard for her to control her temper when she is feeling extreme stress. She says she was trying to get away from the supervisor when she felt she was losing control, but he ordered her not to leave the room. The employee apologizes and requests that the termination be rescinded and that in the future she be allowed to leave the premises if she feels that the stress may cause her to engage in inappropriate behavior. The employer may leave the termination in place without violating the ADA because the employee's request for reasonable accommodation came after her insubordinate conduct. (Source: www.eeoc.gov)

Q26. May an employer ask a pregnant employee to sign a waiver to release the employer of liability when she works in positions that carry potential risks to the fetus?

No. According to the LSU Law Center, a woman may not absolve the employer of this liability by signing a waiver because the right to compensation belongs to the baby — not to the mother.

For additional information about ADA, contact:

DA Information Line
U.S. Department of Justice

For ADA publications and questions:

800-514-0301 (voice) 800-514-0383 (TTY)
www.ada.gov or ada.gov

**U.S. Equal Employment Opportunity Commission
For publications**

800-669-3362 (voice) 800-800-3302 (TTY)

For questions

800-669-4000 (voice) 800-669-6820 (TTY)
www.eeoc.gov

You may also contact
MTAS Human Resource Consultants
Richard Stokes and Bonnie Jones
for assistance.



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THE UNIVERSITY of TENNESSEE

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