

HRPA UPDATE

Strategy—commitment—foresight

IS IT TIME TO DEVELOP A NEW ADA COMPLIANCE STRATEGY?

The Americans with Disabilities Act Amendments Act (ADAA) brings millions more people within the ADA's protection due to its vast expansion of what "disability" means. This increase in the number of applicants and employees who are now eligible for reasonable accommodations means it is time for employers to refresh their ADA compliance strategy.

The ADA still covers only qualified individuals with disabilities and provides that to be disabled, an individual must have "a physical or mental impairment that substantially limits one or more major life activities," or must have a record of such an impairment, or must be **regarded as** having such an impairment.

Expands eligibility: With the ADAA, the only requirement for the "regarded as" prong is that the impairment must not be minor—a criterion the law does not define—or transitory, defined in the law as lasting less than six months. Mitigating measures such as medications and other interventions that manage a disease or disability must be ignored. As a result, more employees will be covered.

Broadens the definition of disability: The ADAA expands the term "major life activities," doing away with the "substantially limited" requirement for those regarded as having a disability, and overturning two U.S. Supreme Court decisions which narrowly interpreted the ADA's definition of disability.

What Employers Can Do

Separate ADA Training: The ADAA does not require ADA training, but provides a strong business case for it. As in the case with sexual harassment lawsuits, employers with effective ADA policies and training can reduce inappropriate workplace conduct and stronger defense should litigation arises.

Educate Managers: Managers need to be aware that harassment actions can be brought under the ADA. In FY 2007, disability harassment ranked 3rd after race and sexual harassment and also ranked more than the amount for age, national origin or religious harassment. These rankings are of total harassment charges made to the EEOC and state Fair Employment Practices Agencies. Employers must train all employees to prohibit harassment and to report complaints of impairment-related harassment to HR.

Re-Evaluate Hiring Processes: Applicants are covered under the ADAA. Thus, job descriptions must accurately reflect what are essential and non-essential functions of the job and an employer probably will have to provide a reasonable accommodation to help a candidate through the application process if they have a disability that is considered non-essential. For example, reading is now a major life activity. If reading isn't an essential function of the job, such as for a maintenance staff position, and if a candidate can't read, an employer probably will have to provide a reasonable accommodation to help the candidate complete the application process. However, if reading and/or writing are essential job functions, the employer doesn't need to provide such assistance. Employers also should remind those who screen applicants that employers are not allowed to ask whether individuals have disabilities. Interviewers can ask whether someone is able to perform essential job functions with or without accommodation.

Employers should:

- Establish procedures for responding to requests for reasonable accommodations
- Revise medical certification forms
- Make sure job descriptions spell out essential job functions
- Train supervisors and managers on the new law and how to handle requests for accommodation
- Provide diversity training for all employees which would include disability

The amendments will make ADA compliance more complicated and expansive. Now is the time to train the entire HR team and management on the ADA—to minimize mistakes and, should you have to go to trial, aid your defense.

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