

ADA Amendments: Taking a Workforce Management Approach

Although the Americans with Disabilities Act (ADA) Amendments have been in force since January 2009, the impact on the workplace has not been fully understood by many employers. The intention of the Amendments was to restore eligibility under the ADA by reinstating the definition of disability as the law was originally written in 1990—before the impact of court decisions which considerably narrowed its scope. Now, with a broader range of people considered under the law to have disabilities, and therefore entitled to reasonable accommodations, employers are presented with an opportune time to evaluate their response to ADA. One of the first responses is to address their workforce management policies and procedures.

Implication for Employers

The purpose of this white paper is to give an overview of the ADA Amendments and the broadening of the definition of disability under the law. The white paper will discuss the implication for employers, particularly those who in the past took a legal stance in an attempt to disqualify employees from ADA protection. Now, the ADA Amendments underscore the importance of a comprehensive response by employers to offer reasonable accommodations to people with disabilities. Establishing workplace policies may also pay off for companies in the long run in terms of improving morale, productivity, and employee retention.

Further, the paper will look at the role of Certified Disability Management Specialists in helping employers comply with the ADA Amendments. Given their expertise in assessment, accommodation, return-to-work (RTW), and health, wellness, and productivity initiatives, Certified Disability Managers who work with and for employers will become even more valuable members of the workforce management team. Disability managers will be called upon to help employers provide employment opportunities for individuals based on their abilities, regardless of the existence of physical, mental, or cognitive disabilities or other limitations.

Understanding the ADA Amendments

The Americans with Disabilities Act Amendments of 2008 was signed by President George W. Bush on September 25, 2008, to go into effect January 1, 2009. Since that time, Amendment language has been evolving. In September 2009,

the U.S. Equal Employment Opportunity Commission (EEOC) voted to conform its ADA regulations to the Amendments. (See http://www.eeoc.gov/ada/amendments_notice.html)

Under the Amendments, the definition of disability was broadened to include individuals to the “maximum extent permitted by the terms of the ADA.” The Amendments made several important changes to the definition of “disability,” which has the effect of making it easier for an individual to seek protection under the ADA by establishing that he/she has a disability as defined by the law.

The Act retains the ADA’s basic definition of disability as: “an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.” The Amendments also expands the definition of “major life activities” by including two non-exhaustive lists. As the EEOC noted:

- The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
- The second list includes normal bodily functions (e.g., functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions).

Furthermore, the Amendments states that mitigating measures other than ordinary eyeglasses or contact lenses shall *not* be

“The ADA Amendments apply to a broader spectrum of people with disabilities, focusing more on accommodation than on whether the individual qualifies under ADA.”

– Andrienne Malka
Manager of Employee
Disability Management
Services, University
of California at
Los Angeles¹



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considered in assessing whether an individual has a disability. Thus if a person has a life-altering illness or condition that could be controlled by medication, diet, or other means, that factor is not taken into consideration in order to exclude that individual from eligibility under the ADA. With or without the mitigating factor, the person is considered to be disabled and, therefore, subject to protection under the ADA Amendments.

“Many employers have always approached ADA compliance and the obligation to provide reasonable accommodations with the mindset of, ‘Let’s just focus on whether we can make the employment relationship work.’ Their focus has been on sitting down with the employee and talking—cutting to the chase and figuring out whether employees can perform essential job functions safely and successfully, rather than whether they have a ‘disability’ as that term is defined by the law and interpreted by Courts. These employers don’t want to spend money and time defending their legal judgment as to whether someone’s condition is a disability. They would rather evaluate the precise job-related limitations of employees and see if there is a way to overcome them—to make the employment relationship work. The ADA Amendments Act will not have much impact on these employers because they are already comfortable engaging in an individualized assessment and interactive dialogue about ways to make the employee relationship work.”

– Frank Alvarez
 National Coordinator of the Disability, Leave, and Health Management Practice, Jackson Lewis

The Amendments also provide clarification on several important points. For one, an impairment that is episodic or in remission is still considered to be a disability if it would substantially limit a major life activity when active. Further, the Amendments change the definition of being “regarded as” when it comes to eligibility under the law. According to EEOC, a person is “regarded as” being disabled if he/she is impacted by an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor.

Addressing Employer Issues

The most significant impact of the Amendments is that they reinstate eligibility to the intent of the original ADA law. After it was enacted, the ADA was reinterpreted by several court

decisions—most notably a series of U.S. Supreme Court decisions in 1999 which significantly narrowed the scope of who was eligible. As a result of these court rulings, many employers took a defensive stance when employees claimed to have a disability covered by the ADA. Most of the

legal challenges to eligibility under ADA were won by employers. Therefore, rather than pursue reasonable accommodation, the path taken by some employers was to seek to make the person ineligible. These challenges, however, required employers to invest considerable resources (i.e., legal fees) to exclude employees from eligibility under the law as it was previously interpreted.

Yet, even before the ADA Amendments were enacted, there were employers that took an interactive approach to disability, choosing to work with employees rather than trying to fight eligibility. The experience of these employers who chose to respond with an interactive process with the employee provides a model for how employers will need to approach the ADA Amendments.

Now, with the ADA Amendments reinstating the original intent and scope of the federal law, employers will find it far more beneficial to engage in dialogue with employees, rather than to press a legal case against eligibility. In order to do this most effectively, employers will need to take a workforce management approach to disability, which requires consistent policies and process whenever employees request accommodation for a disability.

A Culture of Accommodation: A Best Practice Approach

A best practice approach to the ADA Amendments focuses on procedure, starting with what needs to be done immediately, as soon as an employee provides notification that he/she has a disability. Employers need to spell out in detail the protocol for how all parties, from front-line supervisors to human resources personnel, respond when an occupational or non-occupational disability is reported. Established policies and procedures enable employers to promote consistency in their approach to disability, demonstrating that they treat everyone the same way because they have specific steps in place when people report a disability and request accommodation.

Following is a suggested list of some best practices that employers should consider when assessing their own policies and procedures.

- 1. Assess processes and documentation, starting with job descriptions.** Too often job descriptions are outdated,

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confusing, or lack current essential functions. Job descriptions should include vital essential function information, physical and cognitive demands, and take into account any special skills/expertise, licenses, and certifications that are required. When job descriptions are outdated, it becomes difficult to evaluate whether someone can perform the essential duties of the job, with or without accommodations as stipulated by the law.

2. Use an interactive process, involving the employee. Having the employee involved in the discussion is not only a good business practice, it is also a legal requirement under ADA. Involving the employee in the discussion from the beginning may uncover accommodations and/or worksite changes that cost little or nothing to implement.

3. Explore accommodations using a team approach. Rely on experts such as Certified Disability Management Specialists, nurse case managers, ergonomists, or others. Not only does this tap into valuable disability management expertise, it also demonstrates that the employer is willing and is making a good faith effort to accommodate. When reasonable accommodations can be identified and are implemented, follow-up should occur to make certain that the accommodation is provided and to see if the employee has any problems or concerns.

4. Offering accommodations to employees promotes loyalty and productivity. The June 2008 report, "Workplace Supports and Job Retention: Promoting an Employer Driven Approach to Employment of People with Disabilities," from Virginia Commonwealth University, found that "the concept of 'reasonable accommodation' is something that many employers have learned is 'good business'—the more one can make accommodations within cost limitations, the less turnover of employees, higher worker morale, and greater productivity." Accommodations that may be put in place, often at little or no cost, include flexible work schedules, specific types of software, ergonomic chairs, wrist supports, and telecommuting.

Based on the cost information for accommodations provided by employers, 167 out of 366 (46%) said the accommodations needed by employees and job applicants cost nothing. Another 165 (45%) experienced a one-time cost. Of those accommodations that did have a cost, a typical one-time expenditure by employers was \$500, according to the Job Accommodation Network (JAN). Moreover, when asked how much they paid for an accommodation beyond what they would have paid for an employee without a disability who was in the same position, employers typically answered around \$300.

5. Seek alternative placement in the company when reasonable accommodations cannot be found.

If reasonable accommodations cannot be found that would allow an employee to return to his/her job, the next step is to seek alternative job placement within the company. The employer has an affirmative duty to make known to the employee other suitable job opportunities with the employer, and to determine whether the employee is interested in and qualified for those positions—if the employer can do so without undue hardship.

6. Engage in management training.

Front-line supervisors and managers should be trained in the importance of accommodation in order to hire a qualified person with a disability or to allow an employee with a disability to resume working. Management training should cover not only ADA requirements, but also the company's policies and procedures (such as whom to contact when an employee reports that he/she has a disability).

ADA and State Laws

Employers need to be aware not only of the ADA Amendments, but also state disability laws. Laws can differ from state-to-state and from federal statutes as well. The rule of thumb, however, is that employers must comply with the law that is most generous to employees, especially with regard to how disability is defined. If a company has operations in more than one state, state-specific laws in each location must be understood.

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For example, California disability law, which is under the umbrella of that state's Fair Employment and Housing Act, has a different definition of disability than the federal ADA. The California state law considers an individual to be disabled if he/she has a condition that "limits" a major life activity. By contrast, the federal ADA law states that the condition must "substantially limit" a life activity. Therefore, the California law would include many limitations that might not be encompassed in the federal standards.

In addition to California, other states with notable disability standards include New York, New Jersey, and Connecticut—with each defining disability differently. In addition, New York City has a local municipal law that defines disability differently than New York State. These examples, while hardly exhaustive, highlight the importance of employers knowing all applicable laws that cover their workforce. The definition of disability under the ADA Amendments will suffice in many states for determining people who are protected and eligible for reasonable accommodations. However, in states such as New York, New Jersey, and California, state laws governing reasonable accommodations are more liberal compared with the federal requirement.

One consideration for employers, however, is that inconsistency among state laws can be problematic since companies do not want to give the impression of any kind of favoritism. However, differences in state disability laws may result in employees being treated differently, depending upon where they work. One way that employers can promote consistency in their approach to disability is with established policies and procedures.

Opportunities for Certified Disability Managers

As employers examine their workforce management policies and programs in light of the ADA Amendments, Certified Disability Management Specialists will be called upon to exhibit leadership to help companies examine and redefine the ways that they are doing business in compliance with the ADA. The required components of these activities speak directly to the

skills and expertise of certified disability managers, including:

- Job analyses to determine the essential functions of a job
- Assessment of a person's experience, skills, and abilities to perform the essential functions
- Determination of whether a job modification or accommodation plan can be put in place to allow the employee to take on the job

There are opportunities for Certified Disability Management Specialists to help educate employers on how to provide accommodations and other workplace supports that increase productivity and promote safety in the workplace—while also providing job opportunities for people with disabilities. Disability managers can also provide training for human resources personnel, managers, and supervisors on requirements of ADA. This is analogous to sexual harassment training provided by companies whereby employers are able to demonstrate a policy of intolerance of sexual harassment and thus potentially avoid legal action taken by employees.

Certified Disability Management Specialists have the knowledge, skills, and expertise to help employers devise effective and cost-efficient strategies to accommodate workers with disabilities. Based on their experiences with other employers across multiple industries—including small, medium, and large firms—Certified Disability Management Specialists are able to provide examples of workplace strategies that can be adopted by other employers. Disability managers who work with a variety of companies across multiple industries will be in a position to offer employers case studies and examples of effective and often low-cost job modifications and accommodations.

Disability managers who are knowledgeable about the ADA Amendments could very well find new opportunities to work with employers in this area. Disability managers may already be involved in supervisor and manager training for return-to-work programs, in part to raise awareness of the importance of early RTW for employees who have been ill or injured. Now, training

"Employers want to comply with the ADA and the ADA Amendments, and they want to know how."

– Brian T. McMahon
Research Professor,
Department of Rehab
Medicine, Virginia
Commonwealth
University

“Disability managers who work with multiple organizations can help promote best practices. Nobody listens to businesses more than other businesses.”

– Brian T. McMahon
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and workplace awareness programs can be expanded to provide ADA training.

With an understanding of the language of the ADA Amendments, Certified Disability Management Specialists can guide employers to devote time and resources to interact with employees to determine eligibility under ADA and what could be done to keep a qualified individual on

the job. Moreover, Certified Disability Managers will likely find a willing audience of employers who need to understand the implications of the ADA Amendments; how to comply with the law and take the appropriate and reasonable steps to offer accommodation—while improving workforce productivity.

RESOURCES FOR DISABILITY MANAGERS AND EMPLOYERS

Americans with Disabilities Act of 1990 – Current text of the Americans with Disabilities Act of 1990, as amended. www.ada.gov/pubs/ada.htm

Job Accommodation Network (JAN) – A service provided by the U.S. Department of Labor’s Office of Disability Employment Policy. JAN’s mission is to facilitate the employment and retention of workers with disabilities by providing employers, employment providers, people with disabilities, their family members, and other interested parties with information on job accommodations, entrepreneurship, and related subjects. www.jan.wvu.edu/

JAN Resources:

ADA Amendments of 2008 www.jan.wvu.edu/LINKS/adaaa.htm

ADA and Rehabilitation Act Compliance and Other Disability Related Laws www.jan.wvu.edu/links/other.htm

Accommodation and Compliance Series: The ADA Amendments Act of 2008
www.jan.wvu.edu/bulletins/adaaa1.htm

Job Descriptions www.jan.wvu.edu/media/JobDescriptions.html

Five Practical Tips for Providing and Maintaining Effective Job Accommodations
www.jan.wvu.edu/media/FivePracticalTips.doc

Five Practical Tips Webcast www.jan.wvu.edu/training/library.htm

Employers’ Practical Guide to Reasonable Accommodation under the Americans with Disabilities Act (ADA) www.jan.wvu.edu/Erguide

The Disability and Business Technical Assistance Center (DBTAC) – Provides information, guidance, and training on the ADA vis its ADA National Network web site. www.adata.org/

The U.S. Equal Employment Opportunities Commission www.eeoc.gov/

EEOC Resources:

EEOC Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008 www.eeoc.gov/policy/docs/qanda_adaaa_nprm.pdf

The ADA: Your Responsibilities as an Employer www.eeoc.gov/facts/ada17.html

EEOC Disability Discrimination www.eeoc.gov/types/ada.html

Applying Performance and Conduct Standards to Employees with Disabilities
www.eeoc.gov/facts/performance-conduct.html

Georgetown Law Archive of ADA – A comprehensive, online archive of documents and history related to the Americans with Disabilities Act. www.law.georgetown.edu/archiveada/

Toll Free ADA Information Line – An information line to obtain answers to general and technical questions about the ADA and to order technical assistance material. 800-514-0301 (voice) 800-514-0383 (TTY)

The United States Department of Justice/Gov Delivery: Sign up to receive email updates, based on subscriber preference and selected delivery timeframe (immediately, daily, weekly, monthly)

REFERENCE

¹Gonzales, Donald, “After the ADA Amendments: Taking a Best Practice Approach to Accommodation,” *Risk & Insurance*, November 1, 2009, www.riskandinsurance.com/story.jsp?storyId=279876750

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