

# Compliance Realities: ADA and Beyond

**I**n a recent address, former Supreme Court Justice Thurgood Marshall said that “the legal system can tear down walls and widen halls, but it can not build bridges.” Justice Marshall’s comment is interpreted to mean that no matter how much legislation and legal mandate, changing minds and overcoming fears and resistance to the dynamics that bring differently abled workers into the workplace are going to require some focused change. Organizations are currently fretting over the Americans with Disabilities Act (ADA) as they attempt to understand the extent the ADA will impact their operations and financial resources.

The compliance dates by which public and private organizations employing more than 25 must comply with the ADA have come and gone. Many organizations still are unsure about what the compliance requirements mean to them. Many of their questions remain unanswered. Some organizations hope these questions will not be answered until they understand their rights and responsibilities under the ADA. These organizations have chosen the route of “neutral noncompliance” or a stance of “what I do not know can not hurt me.” This article will pose some of the questions that need to be answered. With our question and answer format, we think we can spare you anxiety while you can begin to understand what needs to be done to better serve your clients, your citizens, and your current and prospective employees while complying with the Americans with Disabilities Act.

**The Time**

**For Serious**

**Action**

**Has Come**

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We do not offer these questions and answers as an exhaustive explanation of all the issues required for ADA compliance. These questions can, however, provide a basis for addressing important considerations to support compliance. Most employers are interested in what their responsibilities are for compliance with provisions of Title I of ADA, which governs employment provisions.

Title II of the Act governs public services and transportation; this section prohibits exclusion of disabled individuals from participating in, or being subjected to, discrimination by a public entity. Title III governs public accommodations and services operated by private employers or individuals; this section requires accommodation of disabled persons so that they receive equal enjoyment of goods, services, facilities, and accommodations. Title IV requires telecommunication carriers to provide services that permit speech or hearing impaired telephone users to communicate on an equivalent basis with non-impaired users. Lastly, Title V provides proscriptions against retaliation against individuals who bring claims under the ADA. In this article, we focus on the specific provisions of Title I because they are the most frequent source of such questions as "What should we do?" "Where and how should we begin?" and "What happens if we mess up and overlook an area critical to our compliance?"

### **The Meaning of the Legislation**

In simplest terms, the purpose of the ADA is to provide equal opportunity and access to employment to qualified individuals with disabilities. For state and local governments, the effective date for ADA compliance was January 26, 1992; for employers with 25 or more employees, the compliance date was July 26, 1992. Employers with 15 to 24 employees must

comply by July 26, 1994. For purposes of the Act, employers include all private and public employers who have 15 or more employees each working day in each of 20 or more calendar weeks in the current year. Also covered by ADA are labor unions, employment agencies, and joint labor-management groups. This expanded definition of *employer* (thus potential liability) should be kept in mind by organizations that contract for personnel-related services.

Before addressing the questions most often asked regarding compliance, the following three points should be made.

1. The operative word in the purpose statement is "qualified." As is true of other civil rights and affirmative action requirements, there is no requirement, implicit nor explicit, to hire persons that are otherwise unqualified for the job held or for which they are being considered. "Qualified individuals" means those individuals who can perform the essential requirements of the job with or without reasonable accommodation.

The law says "an individual must satisfy the position's requirements in the areas of educational background, employment experience, and skills and/or requisite licenses." The individual also must be able to perform the essential functions of the position with or without reasonable accommodation.

2. Specific criteria established for the position must apply to all individuals employed in the position; requirements may not be arbitrarily constructed to exclude otherwise qualified individuals.

3. The purpose of the ADA is not to require employers to hire a less qualified candidate who is disabled over a more qualified candidate who is not. However, if there are two equally qualified candidates, it is unlawful to reject the

disabled candidate solely on the basis that reasonable accommodation would be required.

We believe it is important to begin by establishing the intent of the law because, unfortunately, some employers may erroneously assume that the ADA gives unfair advantage to some, especially during these times of tight labor markets. To the contrary, the ADA provides fairness of consideration to all qualified persons regardless of their disability.

### **Q. What does "disability" mean for purposes of compliance with the law?**

A. A person is considered "disabled" under the Act if a "major life function" is limited because of an impairment. Disability is defined as:

- Any physical or mental impairment that substantially limits one or more of the major life activities of an individual; or
- A record of such impairment; or
- Being regarded as having such a substantial impairment.

Major life functions include caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working. According to the appendix of the regulations, major life functions also include sitting, standing, lifting, and reaching.

### **Q. Does that mean that any "illness," even a broken leg, can meet the definition of impairment?**

A. It appears that Congress intended a very liberal definition of impairment, and specifically listed the following: hearing, orthopedic, speech or visual impairments; AIDS; cancer; diabetes; epilepsy; heart disease; multiple sclerosis; and muscular dystrophy. The EEOC has not provided an exhaustive listing of qualifying impairments; the definition, however, specifically excludes sexual orienta-

tion and sexual behavior disorders; compulsive gambling; kleptomania; pyromania; and substance abuse disorders resulting from the current use of illegal drugs. Individuals who have successfully completed or are participating in a supervised drug rehabilitation program and who no longer use illegal drugs are protected. Temporary, short-term, nonchronic impairments such as broken limbs, sprains, or other minor illness are not considered disabilities for purposes of the ADA.

**Q. What is necessary to establish "qualifications" for a position?**

A. The key determination is what the essential requirements or functions of the job are. Employers should focus on what the job's requirements are *rather than on how the requirements are achieved*. For example, if a job requires data entry and retrieval via a personal computer, the essential function should not specify that the jobholder be able to use a keyboard or view a screen in order to meet the essential requirement. There are adaptive devices that can be used to perform the essential requirement: data entry and retrieval.

Similarly, if a job requires that objects weighing 25 pounds be moved to another location, the employer should not arbitrarily impose the requirement that the jobholder be able to "lift" 25 pounds; the requirement is that the objects be moved. This can be achieved through other physical or mechanical means, including use of a dolly or wheelbarrow.

To establish qualifications for a job, you must determine the essential functions of the job, in other words, the reason the job exists. Next, calculate the percentage of time spent on each essential function. List the physical and mental demands required for the job.

Examples of physical demands (includes physical actions and physical environment) include carrying,

standing, lifting (number of pounds), squatting, hearing, climbing, walking, and being exposed to fumes, dirt, chemicals, or noise.

Examples of mental demands (mental skills and mental discipline) include reading, reasoning, solving problems, writing communications, being interrupted constantly, and having contact with customers.

Employers also should list the knowledge, skills, and abilities in terms of the minimum required to meet the essential requirements of the job, including degree level and subject, certification, licenses and special training (specify). Skills may include programming, typing, data input, accounting, and operating equipment (specify).

Once these areas are identified, employers will have a much more defensible basis for establishing position qualifications.

**Q. What am I expected to do for "reasonable accommodation?"**

A. Reasonable accommodation is defined as modifying or adjusting the job application process or work environment to enable a qualified disabled individual to perform the essential requirements of the job. The ADA requires that employers provide reasonable accommodation to the known physical or mental limitations of a person otherwise qualified for the job, unless to do so would impose "undue hardship" on the employer.

Reasonable accommodation extends to the terms and conditions of employment including the job application process, the work environment, and the manner in which the job is performed. Employers also are required to make reasonable accommodation in the workplace by ensuring that equipment and facilities are readily accessible and usable by employees with disabilities. Such changes may include alleviating crowded or cluttered conditions in the work area

so that aisles are accessible for wheelchairs, installing ramps, and making equipment modifications.

In some cases employers may be asked to institute such changes as restructuring jobs to reassign non-essential duties, offering part-time or modified work schedules, reassigning employees, and providing readers or interpreters.

An employer whose personnel department is on a floor only accessible by stairway might consider relocating the area to a more accessible location. If relocation is not possible, the employer may make whatever structural changes are necessary to assure access. At the very least, all employees involved in the employment application process, including receptionists, clerks, and guards, should be thoroughly knowledgeable about procedures to assist job applicants with disabilities in the application process.

**Q. What constitutes "undue hardship" to an employer?**

A. Neither Congress nor the Equal Employment Opportunity Commission (EEOC) have specified an exact dollar amount that would serve as a threshold for determining undue hardship. The statute commands that several areas be considered in determining whether an accommodation would cause the employer to incur significant difficulty or expense, including:

- The nature and cost of the accommodation,
- The overall financial resources of the facility where the accommodation is needed, including the effect of operations,
- The financial resources and size of the covered entity overall,
- The type of operations, and
- The impact on the operation of the facility, including the impact on other employees' ability to perform their jobs and the impact on the facility's ability to conduct business.

Employee morale is not considered sufficient basis for undue hardship as a rationale for not making reasonable accommodation. Obviously, the degree to which cost has a substantial impact on a business is a function of the size of the business and the extent of the accommodation. Substantial expenditures may be required in some cases, while in other cases a business might incur only nominal expense, such as equipping telephones for the hearing impaired.

**Q. What are the implications for assessing "undue hardship" regarding modifications to provide reasonable accommodations in large organizations that operate in multiple locations?**

A. The determination may be taken up to the parent organization level with careful examination of the funding and legal structures of the organization. Responsibility must be based on whether the unit operates as an independent entity under a general organizational heading responsible for generating its own revenues. Impact of the modification must be considered in light of that unit's total financial picture. If the unit is controlled and receives funding from a parent organization, impact of the modification must be considered in light of the financial relationship between the unit and the parent organization.

**Q. Am I prohibited from testing and preemployment medical screening?**

A. Employee testing is covered under two aspects of the Act. The first prohibits any qualification, standard test, or other selection criteria or process that would screen out persons with disabilities covered by the Act, unless the test is job related and consistent with business necessity. The second area requires that tests be administered in such a way as to accurately measure the ability of an individual

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suffering impaired hearing, manual, or sensory skills to perform the job-related requirements, not simply to identify or determine the extent of the disability.

Medical inquiries and examinations are permitted under certain conditions. Post-offer inquiries into medical history can only address the individual's ability to do job-related functions, not to detect the presence of a disability or the degree to which an individual is disabled. Inquiries regarding past workers' compensation claims are not permitted. Medical examinations can be required at the time of hire only if:

- The applicant is first offered employment contingent on completing the physical;
- All new employees in the job category are subject to the examination; and
- The examination is job related and consistent with business necessity.

Results of medical examinations and inquiries must be maintained in confidence. Supervision may receive only the information relating to necessary work restrictions. First-aid personnel may be informed only of conditions that may require emergency treatment.

**Q. Our employment application form has a separate section for medi-**

**cal history; is it still permissible to ask such questions?**

A. Questions regarding whether an applicant has or has had a disability that may interfere with his or her ability to perform the job are not permitted. Neither should applicants be required to indicate any potentially disabling impairments, as from a checklist of possible disorders.

Employers may test for illegal drugs before making an offer of employment as long as the test, which is not considered a medical examination, is administered after an offer of employment.

**Q. What can be asked during an employment interview?**

A. First of all, make sure the interview site is accessible to individuals with disabilities. Interviewers should be well informed of ADA requirements and of the employer's process and procedure for compliance. A well-written job description that clearly describes the essential job functions provides the best guidance for conducting the job interview. The interview should focus on the job, and the applicant's ability to do the job, not on disability.

The interviewer may ask questions regarding the applicant's ability to perform all job functions, not just essential functions. The applicant should not be disqualified because of the inability to perform marginal or nonessential job functions. It is permissible to ask an applicant to demonstrate how he or she will perform job functions *only if all applicants are required to demonstrate*. An applicant may bring up and discuss a particular disability, but the interviewer may not extend that discussion to cover other disabilities.

If an applicant has a known disability that would appear to interfere with or prevent him or her from performing a job-related function, he or she may be required to demonstrate

or describe how the function would be performed. If the applicant states that the job function could be performed with reasonable accommodation, the employer must provide the accommodation so that the applicant may demonstrate his or her abilities or let the applicant describe how he or she would perform the task.

**Q. What are the penalties for non-compliance?**

A. The ADA was intended to be a strong statute with serious penalty for noncompliance. The EEOC is the agency charged with investigating complaints. If a charge of discrimination is filed, a right-to-sue notice is always issued, and the EEOC will investigate the merits. After a right-to-sue notice is granted, a private suit may be brought against the employer. As with all civil rights statutes, the burden of proof of nondiscrimination rests on the plaintiff/employee. Successful claimants are entitled to back pay, benefits, attorneys' fees, and injunctive relief. A claim of disparate treatment entitles the plaintiff to seek compensatory and punitive damages. In addition, cases filed under the ADA will be tried by jury.

In view of the potential legal and financial exposure, it is prudent to take the necessary steps toward full compliance. For those employees who have opted to take a "wait and see" approach in hopes for clearer direction from the EEOC, we suggest a much more proactive stance. The areas we have addressed are key areas to start thinking about. Following is a checklist of four minimum steps necessary to bring an organization into compliance.

1. Review and redefine existing job descriptions to capture the essential functions of each job. Congress has stated that employers are to be given some deference if they have proper job descriptions for use under the ADA.

2. Review recruitment and hiring practices and update application forms.

- Eliminate questions relating to disabilities.
- It is permissible to invite applicants to voluntarily identify themselves as disabled. This applies only to employees who are covered under Section 503 of the 1973 Rehabilitation Act (i.e., employers who have federal government contracts in excess of \$2,500 or who receive federal financial aid).
- Inform applicants on the form and have employment personnel understand and emphasize that accommodations may be made in the application process.
- If selection tests are a job-related necessity, provide notice on the application form and post notices to allow the applicant to request accommodation in advance.
- Make sure employment agencies that your company uses comply with the ADA. If there is a contract with an employment agency, it is advisable to include a provision stating the agency will conduct its activities in compliance with the ADA and other civil rights laws and statutes.
- Review all medical and pre-employment test practices for compliance.

3. Provide training and communication to all employees to emphasize the organization's commitment to ADA compliance. This is the first step to "building bridges."

- Offer training to ensure that staff is knowledgeable of the ADA requirements and of their responsibilities for compliance.
- Make sure all employees have training opportunities and ensure accessibility to training sites.

4. Determine the need for and provide reasonable accommodation.

- Consult the EEOC, competent legal advisors, and employees with disabilities, as well as agencies that serve disabled persons for specific guidance on what is needed.

The ADA is law and it is here to stay. The grace period is over and the time for serious, committed action has come. Leadership in all affected organizations must communicate their plan of action for complying with the law and assure that the climate in the organization supports hiring and retaining the best talent available.

There are no "quick fixes" for compliance with the ADA. Common sense solutions are important first steps to answering and providing meaningful approaches to compliance. It is important to appreciate how the physical, social, and professional environment influences the success of incorporating persons with disabilities into the mainstream functioning of the organization.

Many of our organizations are focusing on the costs they think they may face while trying to comply with ADA. While there are an estimated 44 million Americans who have disabilities, ADA may represent the catalyst for a large number of the disabled, underemployed, and unemployed people to enter the economy as contributing taxpayers. As we seek to create a more competitive and productive labor force, we need to embrace those with disabilities and other differences and encourage them to make the best contribution they can to our labor force and to our specific work force environment. **PM**

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