

**THE NEW LANDSCAPE
OF THE ADA:
EMPLOYEE DISABILITIES
& ACCOMMODATION**

Michelle R. Klegon
Klegon Law Office, Ltd.
(763) 546-1109
MKlegon@klegonlaw.com

BACKGROUND

ADA HISTORY

- Congress passed the Americans with Disabilities Act (ADA) in 1990
 - Intent: eliminate discrimination against individuals with disabilities
 - Congress also intended the ADA to provide "broad coverage"

ADA HISTORY

- A series of U.S. Supreme Court decisions narrowed the scope of the ADA's applicability, undermining Congress' intent and the effectiveness of the ADA
 - Example: The Supreme Court interpreted the term "substantially limits" in the ADA's definition of "disability" to require a greater degree of limitation than Congress intended
 - Result: Lower courts, following the Supreme Court's lead, held that many individuals with various substantially limiting impairments were not people with disabilities and thus not covered by the ADA

CONGRESSIONAL RESPONSE

- In 2008, Congress took the rare step of re-drafting the ADA by passing the ADA Amendments Act (ADAAA)
 - The ADAAA overturned the Supreme Court's interpretation of the ADA and returned the law to the broad scope of coverage Congress originally intended in the ADA
 - President Bush signed the ADAAA into law on September 25, 2008; effective January 1, 2009
 - The Equal Employment and Opportunity Commission (EEOC) issued its proposed ADAAA regulations on September 23, 2009.
 - The EEOC did not issue its final ADAAA regulations until March 25, 2011

DEFINITION OF DISABILITY

- The ADAAA itself largely retains the ADA's definition of "disability."
 - Disability, "with respect to an individual," means:
 - (A) a physical or mental impairment that **substantially limits** one or more **major life activities** of such individual;
 - (B) [having] **a record of such an impairment**; or
 - (C) **being regarded as having** such an impairment."

42, U.S.C. §12102, as amended by the ADAAA, Public Law 110-325

WHAT THE ADA CHANGED

GENERALLY

- Requires a **broad interpretation** of the term "disability"
- Different focus of interpretation: Courts must focus on whether employers complied with the law and should not dwell on whether the individual's impairment "substantially limits" a major life activity.
- Broad interpretation accomplished through established rules of construction for interpreting "substantially limits" and by changing the definition and interpretation of "major life activities."
- Result: More individuals (i.e., employees) will be considered disabled

MAJOR LIFE ACTIVITIES

- Changed definition/interpretation of "**major life activities**" under the statute and the regulations.
 - The regulations define major life activities as "those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty." 29 CFR §1630.2.
 - Under the original ADA, "major bodily functions" were not included in the definition of "major life activities"

MAJOR LIFE ACTIVITIES

- “Major Life Activities” include:
 - **“basic activities”** such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking
 - **“major bodily functions”**—This part of the definition is new and includes functions such as those of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, etc. This also includes the operation of an individual organ within a body system

29 C.F.R. §1630.2(i)

MAJOR LIFE ACTIVITIES

- When determining if other activities are “major life activities,” the term “major” shall not be interpreted strictly to create a demanding standard for disability
- Additionally, whether an activity is a “major life activity” isn't determined by reference to whether it is of “central importance to most people’s daily lives”
 - Instead, it is determined by the impact on the life of the specific individual

29 C.F.R. §1630.2(i)(2)

SUBSTANTIALLY LIMITS

- Regarding “substantially limits,” the ADAAA clarifies that “substantially limits” does not need to “significantly” or “severely” restrict a major life activity for the standard to apply
- ADAAA and the regulations create a lower standard than used prior to the ADAAA’s enactment in order to help those individuals bringing challenges under the ADAAA

SUBSTANTIALLY LIMITS

- The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. [29 C.F.R. §1630.2(j)(1)(vi)]
 - The purpose of this regulation is to emphasize that an employer should not take into account anything that mitigates the impact of an impairment
 - Exception for glasses and contact lenses

SUBSTANTIALLY LIMITS

- Mitigating measures include, but are not limited to:
 - Medication
 - Medical equipment
 - Low vision devices (but not ordinary eyeglasses or contact lenses)
 - Prosthetics
 - Hearing aids and cochlear implants
 - Mobility devices
 - Oxygen therapy equipment
 - Assistive Technology
 - Learned behavioral or adaptive neurological modifications
 - Psychotherapy, behavioral therapy, or physical therapy

SUBSTANTIALLY LIMITS

- “Substantially limits” includes assessing **episodic or In-remission impairments** in their active states.
 - In other words, if the episodic or in-remission impairment would “substantially limit” a major life activity when the impairment is active, the impairment would qualify as a “disability” under the ADAAA
 - The fact that an “active” period of the impairment is brief or occurs infrequently is no longer relevant to the determining whether the impairment substantially limits a major life activity

SUBSTANTIALLY LIMITS

Examples of episodic or in-remission impairments (non-exhaustive list):

- Epilepsy
- Multiple sclerosis
- Cancer
- Hypertension
- Diabetes
- Asthma
- Major depressive disorders
- Bipolar disorder
- Migraine headaches

RECORD OF DISABILITY

- Second Prong of Disability Definition
- An individual falls under this if he/she has a "history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities"
- Intent: broad construction not requiring extensive analysis
- Individual can get a reasonable accommodation if it is needed and if it is related to past disability under this prong

REGARDED AS

- Third prong of Disability Definition
- Applicant or employee will meet "regarded as" definition if he/she is "subjected to an action prohibited by the ADA because of an actual or perceived impairment"

29 CFR 1630.2(l)(1)

REGARDED AS

- The "regarded as" prong requires causation in order for the individual to be covered:
 - There must be an employment action prohibited under the ADA (failure to hire, denial of promotion, or termination) and
 - There must be a causal relationship between the physical or mental impairment (that is not transitory and minor) and the prohibited employment action and
 - There must be some reason to believe the employer took discriminatory action because of the individual's physical or mental impairment

REGARDED AS

- Exception to "regarded as" coverage:
 - An applicant or an employee will not fall under the "regarded as" prong if the impairment is both **"transitory and minor"**
 - "transitory" means six months or less, regardless of whether the impairment was minor
 - "minor" not defined

29 C.F.R. 1630.15(f)

REGARDED AS

- The "transitory and minor" exception gives employers a defense:
 - Employer must show that the *actual* impairment is objectively transitory and minor or
 - That the *perceived* impairment would objectively be transitory and minor if it were real

PROHIBITED ACTIONS

- Refusal to hire
- Demotion
- Placement on involuntary leave
- Termination
- Exclusion for failure to meet a qualification standard
- Harassment
- Denial of any other term, condition, privilege of employment

29 C.F.R. §1630.2(l)(1)

PROHIBITED ACTIONS

- An employer cannot discriminate in:
 - Recruitment, advertising, and job application procedures
 - Rates of pay or any other form of compensation and changes in compensation
 - Job assignments, job classifications, organizational structures, position descriptions, lines of progressions, and seniority lists
 - Leaves of absence, sick leaves, etc.
 - Fringe benefits
 - Selection and financial support for training and selection for leaves of absence to pursue training
 - Activities sponsored by an employer, such as social and recreational programs

29 C.F.R. §1630.10(a)

PROHIBITED ACTIONS

- It is also a prohibited action to deny an individual with a disability a **reasonable accommodation**
 - However, that protection **does not extend** to a person covered just under the "regarded as" prong
 - To receive a reasonable accommodation, the individual **must fall under either the "substantially limits" or "record of" prongs.**

IMPACT ON EMPLOYERS	
--------------------------------	--

REQUIREMENTS FOR EMPLOYERS
<ul style="list-style-type: none">▪ Employers must provide a “reasonable accommodation” under the first and second prongs of the “disability” definition unless doing so would present an undue hardship (29 C.F.R. §1630.3)▪ Exception for regarded as claim

REQUIREMENTS FOR EMPLOYERS
<ul style="list-style-type: none">▪ Employers cannot discriminate on the basis of disability against a qualified individual in regards to recruitment, hiring/firing, rates of pay, job assignments, leaves of absences or sick leave, fringe benefits, etc. (29 C.F.R. §1630.4)▪ It is unlawful for an employer to use qualification standards, tests, and other selection criteria (29 C.F.R. §1630.10)

REASONABLE ACCOMMODATION

- Coverage only triggered if the employee asks for an accommodation
- Employers should expect to see an **increase** in accommodation requests around **scheduling and leave**

REASONABLE ACCOMMODATION

- It helps discover realistic accommodations
- It boosts morale
- Protects against an award of compensatory and punitive damages if an employer is sued for allegedly failing to provide a reasonable accommodation
- The failure to engage in the process is a violation of the ADA (as amended by the ADAAA)

REASONABLE ACCOMMODATION

- The process is an “informal, interactive process” conducted with the disabled employee in need of an accommodation
- The interactive process should “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”
29 C.F.R. §1630.2(o)(3)

REASONABLE ACCOMMODATION

- Interactive Process triggered when a qualified individual with a disability requests a provision of a reasonable accommodation
 - At this point, the employer must make a reasonable inquiry to discover the appropriate accommodation

REASONABLE ACCOMMODATION

- The employee's request does not have to be formal or include the words "ADA" or "accommodation."
- The employee or his/her representative only has to provide enough information that the employer can be "fairly said to know of the disability and the desire for the accommodation" under the circumstances
- A low bar for the employee to initiate the process

6 STEPS EMPLOYERS SHOULD TAKE IN THE INTERACTIVE PROCESS

1. Analyze the job in question to determine its purpose and essential functions
2. Consult with the individual to determine the job-related limitations which the conditions impose and how each could be overcome
3. In consultation with the affected individual, identify potential accommodations and assess the effectiveness of each in enabling the individual to perform the essential functions of the job

**6 STEPS EMPLOYERS SHOULD TAKE
IN THE INTERACTIVE PROCESS**

- 4. Consider the preference of the individual and select the accommodation that is most appropriate for both the employer and the individual
- 5. Document and implement the return to work plan
- 6. Follow up to ensure that the workplace modification(s) are effective.

29 C.F.R. §1630

INTERACTIVE PROCESS TIPS

- Analyze the particular job involved to determine its purpose and essential functions
 - Physical requirements for the job
 - Behavioral characteristics essential for job performance
 - Marginal functions not essential to job performance
 - The minimum qualification requirements essential for the position

INTERACTIVE PROCESS TIPS

- Gather and review information from medical providers or outside experts about the individual's abilities and limitations and a determination regarding work environment or job task factors that would pose difficulties

INTERACTIVE PROCESS TIPS

- After individual signs a medical release, the manager or supervisor should request validation of the disability from his/her physician or other acceptable medical professional.
 - Describe the impact of the disability on the individual's ability to perform the essential functions and described in the employee's job description
 - Suggest reasonable accommodations for the performance of the essential job functions affected or impacted by the individual's disability.

INTERACTIVE PROCESS TIPS

- An employer's request shouldn't be overbroad
- Employer may only request the documentation needed to establish an individual has an ADA disability which requires a reasonable accommodation.
 - Cannot seek documentation unrelated to determining the existence of a disability and the necessity for an accommodation.

WHAT'S REASONABLE?

▪ Changes to job application	▪ Alcohol treatment
▪ Work at home arrangements	▪ Unpaid leave
▪ Work environment modifications	▪ Reassignment
▪ Modified work schedules	▪ Modify workplace policies
▪ Changes to benefits and privileges	▪ Job re-structuring
	▪ Transfer to light duty
	▪ Change in supervisor
	▪ Discipline

STUMBLING BLOCKS

- The employer knows of disability and does nothing and doesn't act on the employee's accommodation request
- Delay in meeting with the employee

STUMBLING BLOCKS

- Requesting Medical Information
 - Employer has the right to request further documentation from employee's treating physician if the employee's disability or need for accommodation is not obvious to the employer
 - However, employers **are not entitled** to review the employee's **entire file** [29 C.F.R. §1630.9]
 - Employers **can require** their employees to submit to medical examinations or inquiries that are **job-related and consistent with business necessity**

STUMBLING BLOCKS

- Requesting Medical Information (cont.):
 - An employer can require an employee to submit to a medical examination in the following circumstances*:
 - Employee has difficulty performing job effectively
 - When employee becomes disabled on or off the job
 - When the examination is necessary to determine a reasonable accommodation
 - When exams or medical screening and monitoring are required by other laws

* EEOC Technical Assistance Manual

STUMBLING BLOCKS

- **Failure to Consider Alternatives**
 - An employee is not entitled to a specific accommodation **BUT**
 - Accommodation process doesn't end if the accommodation sought can't be provided or if it's not effective.
 - The employer must consider other alternatives that could enable the employee to perform the essential functions of the job, even if the employee does not suggest them.

STUMBLING BLOCKS

- **Improperly Discussing Employee's Accommodation**
 - The employer is not allowed to disclose to others in the workplace that an individual employee is receiving a reasonable accommodation [42 U.S.C. §12112(d)(3)(B); 29 C.F.R. §1630.14]
 - Don't refer to an employee/applicant's "disability," "handicap," or their "reasonable accommodation" to others in the workplace

STUMBLING BLOCKS

- **Failure to document interactive process or the work plan**
 - **Failure to follow-up to ensure the workplace modifications are effective**
- Example:** An employer accommodated a check-out cashier's need for frequent restroom breaks. However, the employer later hired a new supervisor who did not know of the accommodation and denied the employee's request for a break, humiliating the employee. The court held that the employer was obligated to communicate the employee's need for an accommodation.

UNDUE HARDSHIP

- **The ADA limits reasonable accommodations to those which do not impose an “undue hardship” on the employer**
 - An “undue hardship” is an “action requiring significant difficulty or expense.” 42 U.S.C. §1211(10)(A); 29 C.F.R. 1630.2(p).
 - Senate Committee on Labor and Human Resources report: An action requiring “significant difficulty or expense” is an action that is costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program.

UNDUE HARDSHIP

- **ADA lists factors to consider in an “undue hardship” analysis:**
 - The nature and cost of the accommodation needed
 - The overall financial resources of the facility included in the provision of the accommodation
 - The number of persons employed at the facility
 - The effect of the accommodation on facility expenses, resources, and operation

UNDUE HARDSHIP

- The overall financial resources of the employer
- The overall size of the business of an employer with respect to the number of its employees
- The number, type, and location of its facilities
- The type of operation(s) of the employer, including:
 - The composition, structure, and functions of the workforce of such entity
 - The geographic separateness
 - The administrative, or fiscal relationship of the facility or facilities in question to the covered entity

42 U.S.C. §12111(10)(B); 29 C.F.R. §1630.2(p)

RESOURCES AND REFERENCES

- **ADA of 1990, as amended by the ADAAA**
<http://www.ada.gov/pubs/adastatute08mark.htm>
- **EEOC ADAAA Regulations:**
<http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>

QUESTIONS?

**THE NEW LANDSCAPE
OF THE ADA:
EMPLOYEE DISABILITIES
& ACCOMMODATION**

Michelle R. Klegon
Klegon Law Office, Ltd.
(763) 546-1109
MKlegon@klegonlaw.com
