



Occupational Safety and Health and Disability Nondiscrimination in the Workplace: Complying with Dual Requirements

Why should HR professionals be informed about the intersection of disability nondiscrimination laws and health and safety requirements in the workplace?

Human resource professionals often have responsibilities for implementing the requirements of state and federal legislation, including disability nondiscrimination and health and safety laws. Sometimes the interaction of different legal requirements can be confusing. In a random sample survey of the membership of the Society for Human Resource Management (SHRM) conducted in 1998 by Cornell University,¹ respondents indicated that they were frequently or occasionally uncertain of selected areas where the Americans with Disabilities Act of 1990 (ADA) and the Occupational Safety and Health Act of 1970 (OSH Act) intersect. For example, approximately one-half of the respondents expressed uncertainty about whether OSHA regulations supersede the confidentiality requirements of the ADA. Other areas of uncertainty included whether worksite modifications or ergonomic changes constitute reasonable accommodation (46% of respondents), and whether it is permissible to discipline an employee who is a risk to self or others (40%).

¹ An Executive Summary of this report is available from the Cornell University web site /www.ilr.cornell.edu/edi

The following discussion will provide an overview of the employment sections of the ADA, the requirements of the OSH Act, a discussion of key areas where these laws intersect, and resources for future reference. Staying current on agency guidance and emerging case law in these areas will further assist the HR professional in helping businesses resolve questions involving workplace safety and the rights of employees with disabilities.

What does Title I of the ADA require?

Title I of the ADA protects individuals with disabilities from employment discrimination on the basis of disability. The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I protections, which apply to the entire employment relationship, including the application process, hiring, training, promotion, termination, compensation, and other benefits and privileges of employment, such as health and retirement benefits and employer-sponsored social functions.

The ADA requires employers to provide necessary reasonable accommodations for qualified individuals with disabilities. Potential reasonable accommodations include making existing facilities accessible, restructuring jobs, allowing part-time or modified work schedules, providing assistive technology, providing aides or qualified interpreters, modifying tests or policies, and reassigning the qualified individual to a vacant position. Generally, the individual with a disability must inform the employer that an accommodation is needed.

The employer should confer with the employee about what accommodations would enable him/her to perform the essential functions of the position. When no accommodation is readily identified or when alternative options are desired, technical assistance may be helpful in determining how to accommodate an employee in a specific situation. If the indi-

vidual cannot perform an essential function of the job, even with accommodation, then that individual is not considered "a qualified individual with a disability" under the law and is not protected by the ADA. Furthermore, even if the employee is qualified, he or she will not be protected by the ADA if accommodating him or her would impose an "undue hardship" on the employer's business. This would also assume that the employer has considered the accommodation of job reassignment but that this approach does not remedy the situation.

What does the Occupational Safety and Health Act require?

The Occupational Safety and Health Administration's (OSHA) mission is to prevent work-related injuries, illnesses and deaths. Since the agency was created in 1971, occupational deaths have been cut in half and injuries have declined by 40 percent. Congress created OSHA under the Occupational Safety and Health Act (OSH Act), signed into law on December 29, 1970.

The OSH Act is based on the premise that every worker has a right to a workplace that is free from recognized hazards. When a potential hazard is identified, the Occupational Safety and Health Administration (OSHA), which is part of the U.S. Department of Labor, develops a standard against which workplace practices or conditions should be measured. Unlike some other employment regulations, OSHA requirements are applied universally to all employers, regardless of the volume of business they conduct or the number of people in their employ.

After the implementation of a standard, the Labor Department can determine which workplaces will be inspected, either by the request of an employee in the particular workplace or at OSHA's discretion. Inspections are conducted with the permission of the employer

and in accordance with OSHA guidelines. Violations of a standard are punishable by government-ordered abatement and monetary fines, set according to the size of the business, the seriousness of the violation, the good faith of the employer, and the record of prior violations. Violations that result in the death of an employee are punishable under criminal law.²

Some of the requirements of the OSH Act overlap with provisions of the ADA. The HR professional is likely to encounter questions about the intersection of these laws in the areas of employee testing and screening, confidentiality of medical records, and reasonable accommodation.

How do the ADA and OSH Act requirements intersect in the area of employment testing and screening?

Although some employers may wish to use pre-employment physical fitness tests and other exams in order to screen out applicants prone to ergonomic hazard injuries, the ADA limits such testing in order to further its goal of preventing discrimination on the basis of disability. Thus, the ADA requires that whenever an employer screens out an individual with a disability based upon a test or other qualification standard, the employer must show that: (1) the test or standard is job-related and consistent with business necessity, and (2) the individual with a disability cannot meet such standard by means of reasonable accommodation. In most instances, a risk of future injury won't satisfy this ADA standard. The ADA also prohibits employers from making medical inquiries or requiring physicals before a job offer is made, and places restrictions on post-offer, pre-employment inquiries and exams.³ After the applicant becomes an

² 29 U.S.C. Section 666(e).

³ More information on ADA rules and regulations governing employment testing, screening and medical exams can be found in other brochures in this series entitled "Pre-Employment Testing and the ADA," "Pre-Employment Screening Considerations and the ADA,"

employee, any medical inquiries and examinations must be job-related and consistent with business necessity.

The OSH Act, in contrast, affirmatively requires employers to monitor and test employees in a variety of situations to assure safety. For example, employees exposed to high noise levels must be included within an audiometric testing program, which includes among other things, annual hearing tests.⁴ The ADA's limits on employee and applicant testing might initially appear to conflict with OSHA's need for testing in furtherance of workplace safety goals. However, the ADA regulations recognize that if an employer's alleged discriminatory action was taken in order to comply with another federal law or regulation, the employer may assert this as a defense to a charge of discrimination. An applicant or employee can thereafter rebut such defense by showing that compliance with other federal law is simply a pretext for discrimination or that the employer could have complied with the federal standard in a non-discriminatory way.⁵ HR professionals should assist in resolving any potential conflicts between the requirements of the ADA and the OSH Act by determining whether the employer can meet the requirements of both laws or whether the ADA's conflicting federal law defense is applicable.

What are the considerations in complying with the ADA's confidentiality requirements regarding medical records and the OSH Act's recordkeeping requirements relating to occupational illness and injury?

The ADA requires strict confidentiality of medical records. All information obtained from post-offer medical exams and inquiries must be collected and maintained on sepa-

and "Employee Medical Exams and Disability-Related Inquiries under the ADA: Guidance for Employers Regarding Current Employees."

⁴ See 29 C.F.R. Section 1910.95.

⁵ 29 C.F.R. Section 1630.15(e).

rate forms, in separate medical files and must be treated as a confidential medical record. Employers must take steps to guarantee the security of employee medical information, including keeping the information in a medical file in a locked cabinet apart from the location of regular personal files. Employers should also designate a specific person or persons who will have access to the medical files. The ADA provides, however, that employers may disclose the records when necessary to: (1) supervisors and managers in regard to work restrictions or necessary accommodations, (2) first aid and safety personnel, (3) government officials investigating the ADA and other disability discrimination laws, (4) state workers' compensation offices, and (5) insurance companies that require a medical exam to provide employees with health or life insurance.

The OSH Act requires employers to keep records of workplace injuries and illnesses and grants OSHA personnel access to such records in the interest of exposing potential hazards and their causes.⁶ About 1.3 million employers with 11 or more employees – 20 percent of the establishments that OSHA covers – must keep records of work-related injuries and illnesses. Workplaces in low-hazard industries such as retail, service, finance, insurance and real estate are exempt from record-keeping requirements.

The OSH Act requires that employers subject to recordkeeping requirements and OSHA compliance personnel who enforce record-keeping requirements maintain the confidentiality of medical records. OSHA Forms 300 and 301, which employers must use to report recordable illnesses and injuries, note that employers who use the employee health information contained in those forms for occupational safety and health purposes must protect employee confidentiality to the fullest extent possible. Likewise, OSHA compliance person-

⁶ 29 C.F.R. Section 1904.

nel, who have the authority to examine medical records to verify employer recordkeeping compliance, must perform such examinations on-site and are prohibited from recording and/or taking off-site any information contained within those records. In addition, OSHA personnel will exercise their authority to gain access to personally identifiable employee medical information only after the agency has made a careful determination of its need for this information, and only with appropriate safeguards to protect individual privacy.⁷

Overall, the OSHA regulations appear to be concerned about the confidentiality of employee medical information in a manner that is generally consistent with the ADA's confidentiality requirements. HR personnel should guide employers to construe OSHA requirements in a manner that also complies with the ADA's confidentiality provisions whenever possible. Clearly, however, OSHA personnel and other individuals designated in the OSHA regulations, including representatives from the National Institute for Occupational Safety and Health (NIOSH), will insist upon access to those medical records they deem vital to their mission.⁸ While these parties are not listed in the ADA as having access to confidential medical records, the ADA's conflicting federal law and regulation defense would protect an employer who grants access to OSHA representatives acting pursuant to federal law.

How does the ADA's reasonable accommodation requirement interact with the OSH Act?

The ADA requires that employers consider reasonably accommodating any employee with a disability so that he or she can perform the essential functions of the job, in accordance with OSH Act requirements. For example, if an audiometric test required by OSHA identifies that an employee has a hearing loss because of exposure to loud equipment, the

⁷ 29 C.F.R. Section 1913.

⁸ 29 C.F.R. Section 1904.40.

employer might be tempted to terminate the employee or transfer him or her to another job to prevent continued exposure. The ADA requires, however, that the employer first consider an accommodation (such as sound abatement equipment) that would enable the employee to remain in his or her current position. If no such accommodation would work, the employer may then consider reassigning the employee.

OSHA regulations may prohibit certain accommodations. For instance, OSHA's respirator requirements are clear and specific. Where OSHA regulations require employees to wear respirators on a particular job, an employer would not have to keep an employee who is unable to wear a respirator in a position that requires one as part of a reasonable accommodation. The ADA would require, however, that the employer consider transferring this employee to an equivalent, vacant position as an alternate accommodation.

What is "direct threat" under the ADA and how does it relate to the OSH Act?

Some employers are concerned that a worker with a disability could be a safety hazard, either to him or herself or to co-workers or customers. The ADA takes this concern into account, but only if it is founded upon clear, documented evidence that the individual is a "direct threat" to himself or others because of the nature of the job and the specific characteristics of that individual's disability.

In determining whether an individual with a disability, including a contagious disease, poses a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Even if the person is found to pose a significant risk of substantial harm, part of the

reasonable accommodation determination is an analysis of whether the individual can be accommodated in a way that eliminates the direct threat or reduces it to an acceptable level.

The direct threat standard is a tough standard for an employer to meet. Employers are not required to do a direct threat analysis, however, if an OSHA standard mandates the removal of an employee from a particular job for health and safety reasons. Again, the employer must always consider whether there is an effective accommodation that will allow the employee to come into compliance with OSHA rules, and if not, must consider reassigning the worker to an equivalent, vacant position.

What other experts can help the HR professional dealing with OSHA and ADA requirements?

Larger employers may employ their own specialists to assist with health and safety considerations and accommodation issues, including health and safety specialists, ergonomists, occupational health specialists, physical therapists, and occupational therapists. Smaller employers may hire these services as needed from outside agencies. Knowing which professionals to call is often the first important step for HR professionals, who will often be assisting supervisors in dealing with these issues. The HR professional will work closely with these service providers in applying and utilizing their advice within the framework of ADA and OSHA requirements.⁹

For example, orthopedic or musculoskeletal injury, specifically back injury, is the type of disability that has the highest number of claims before the EEOC for alleged disability discrimination under the ADA (approximately 17% of total claims as of FY 2008). HR professionals will often encounter accommodation

⁹ See "Workplace Accommodations for Persons with Musculoskeletal Injuries," in this brochure series, for more information.

and health and safety questions about persons with musculoskeletal injuries. Supervisors or HR professionals may want to seek the assistance of an ergonomist, physical or occupational therapist, industrial hygienist, or health and safety specialist. Ergonomists integrate knowledge derived from the human sciences to match jobs, systems, products, and environments to the physical and mental abilities and limitations of people.¹⁰

An ergonomist uses information about people, for example their size, ability to handle information and make decisions, ability to see and hear, and ability to work in extreme temperatures, to match people to jobs.¹¹ Physical therapists, or PTs, are health care professionals who evaluate and treat people with health problems resulting from injury or disease. PTs assess joint motion, muscle strength and endurance, function of heart and lungs, and performance of activities required in daily living.

Occupational therapists (OTs) evaluate and treat individuals with injuries, illnesses, cognitive impairments, psychosocial dysfunctions, mental illness, developmental learning disabilities, physical disabilities, or other disorders or conditions. Evaluation and intervention by an OT focuses on an individual's level of function and involves assessment of performance components, and performance context.

An industrial hygienist plays a role in insuring that the workplace is as free as possible from hazards and that the workers in the community at large are protected from potential health

threats. Some of the areas that industrial hygienists may get involved in include: testing for and possibly removing toxic materials in the work environment; helping to limit disabilities caused by repetitive and/prolonged movement, such as typing at a keyboard, or sitting at a desk all day; and setting limits on exposure levels and providing guidelines for control of chemicals, noise, and radiation in the workplace.

Further information about the services provided by and the credentials of these professionals may be gained from the relevant professional associations, listed in the "Resources" section of this brochure.

The HR professional is also likely to get many questions about mental health disabilities. Employers often express concern that people with certain psychiatric disabilities or a history of treatment may pose a safety concern. According to the National Mental Health Association, "Violent acts committed by persons with mental illness represent a small fraction of the violence perpetrated in our country, yet these acts are frequently highly sensationalized by the media and lead to the continued stigmatization of persons with mental illness."¹² Getting more information about mental health or psychiatric disabilities in general, and consultation on the unique accommodation considerations for a particular individual, is imperative when there are questions surrounding a mental health disability.¹³ A mental health professional or employee assistance program (EAP) professional may be of assistance in this situation.

10 For further information, contact the Human Factors in Ergonomics Society (see Resources).

11 Congress and the President took action in 2000 to rescind the major ergonomics rule that DOL had published at the end of 1999. OSHA is currently developing voluntary guidelines to assist employers in recognizing and controlling hazards.

12 Position Statement adopted by the Board of Directors of the National Mental Health Association on June 13, 1999 regarding "Constitutional Rights and Mental Illness."

13 See the brochure "Employing and Accommodating Workers with Psychiatric Disabilities" for more information.

Moving Forward

HR professionals can play a pivotal role in helping employers to understand and effectively navigate the dual requirements of the ADA and OSH Act. By working closely with frontline supervisors and technical experts who deal with health, safety and accommodation issues, HR professionals can assist their organizations in fully complying with OSHA's health and safety requirements, without needlessly screening out or discriminating against applicants or employees with disabilities.

Resources

General Information on OSHA and ADA

ADA National Network (Technical Assistance on ADA)
800.949.4232 (voice/TTY), www.adata.org

Equal Employment Opportunity Commission
800.669.4000 (Voice), 800.669.6820 (TTY),
www.eeoc.gov

Cornell University Tips for HR Professionals –
Tools to help HR professionals build inclusive
workplaces.
607.255.7727 (voice); 607.255.2891 (TTY)
www.ilr.cornell.edu/ped/hr_tips

Occupational Safety and Health
Administration
For Workplace Safety and Health Questions:
(800) 321-OSHA (6742) or 877.889.5627 (TTY)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
www.osha.gov

Job Accommodation Network
(800) ADA-WORK (voice) or
877.781.9403 (TTY)
<http://askjan.org/>

Professional Organizations

American Industrial Hygiene Association
2700 Prosperity Avenue, Suite 250
Fairfax, VA. 22031
Phone: 703.849.8888
Fax: 703.207.3561
<http://www.aiha.org>

American Occupational Therapy Association
4720 Montgomery Lane
PO Box 31220, Bethesda, MD 20824-1220
Phone: 301.652.2682
TTY: 800.377.8555
Fax: 301.652.7711
<http://www.aota.org/>

American Physical Therapy Association
1111 N. Fairfax St., Alexandria, VA. 22314
Phone: 800.999.2782 or 703.684.2782
Fax: 703.684.7343
<http://www.apta.org>.

American Society of Safety Engineers
1800 East Oakton St.
Des Plaines, IL 60018-2187
Phone: 847.699.2929
Fax: 847.768.3434
<http://www.asse.org/>

Employee Assistance Professionals
Association, Inc.
4350 North Fairfax Drive, Suite 410
Arlington, Virginia 22203
Phone: 703.387.1000
Fax: 703.522.4585
<http://www.eapassn.org>

Human Factors in Ergonomics Society
PO Box 1369
Santa Monica, CA. 90406-1369
Phone: 310.394.1811
Fax: 310.394.2410
<http://hfes.org>

National Safety Council
1121 Spring Lake Drive
Itasca, IL 60143-3201
Phone: 630.285.1121
Fax: 630.285.1315
<http://www.nsc.org/Pages/Home.aspx>

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The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Commission or the publisher. EEOC interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance.

Cornell University is authorized by NIDRR to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). You should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at:
<http://www.eeoc.gov>

About this Brochure

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, Director, Employment and Disability Institute, Cornell University ILR School.

It was written in June, 2002 by Susanne M. Bruyere, and updated in December 2010 by Elizabeth Reiter, an independent legal consultant, Ithaca, N.Y., with assistance from Sara Furguson, a Cornell University Employment and Disability Institute ILR student research assistant.

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The full text of this brochure, and others in this series, can be found at www.hrTips.org.

More information on accessibility and accommodation is available from the ADA National Network at 800.949.4232 (voice/ TTY), www.adata.org.

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To view all the brochures in this series, please visit:
www.hrtips.org

