



The Americans with Disabilities Act of 1990 and Injured Workers

What is the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) is civil rights legislation that extends to persons with disabilities the same protection against discrimination that has been in place for other persons on the basis of race, color, sex, religion, national origin, and age. The ADA covers all aspects of participation in society – employment, public accommodations, transportation, and telecommunications. The employment provisions of the ADA (Title I) prohibit discrimination against persons with disabilities in all facets of employment, including recruitment, pre-employment screening, hiring, training, promotions, employee benefits, layoffs and terminations. The ADA also requires employers to provide necessary reasonable accommodations as a form of nondiscrimination. Employers, human resource professionals, and labor union representatives need to be knowledgeable about the ADA in order to respond appropriately to accommodation requests by workers with disabilities and otherwise ensure compliance with the ADA’s requirements. Title I of the ADA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

When will the ADA Impact Injured Workers?

Anytime a worker sustains a significant injury, the ADA may come into play. Title I of the ADA covers private employers, and state and local governments, with 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding year. The definition of “employer” includes persons who are “agents” of the employer such as managers, supervisors, foremen, or others who act for the employer, such as agencies used to conduct background checks on candidates. Employment agencies, labor organizations, and joint labor management committees must also comply with Title I of the ADA.

When dealing with injured workers, including previously injured applicants, employers must take into account both state workers' compensation laws and federal ADA requirements. Employers should be particularly alert to possible ADA issues in the areas of hiring and pre-employment medical exams, workplace injuries and employee medical exams, confidentiality of medical information and the provision of reasonable accommodations.

Is an Injured Worker Automatically Covered under the ADA?

No. Whether an injured worker is protected by the ADA will depend on whether the person meets the ADA's jurisdictional definition of "disability." Under the ADA, the term "disability" is defined as: (a) a physical or mental impairment that substantially limits a major life activity; (b) a record of such an impairment; or (c) being regarded as having such an impairment. In order to be considered "substantially limiting," the impairment must significantly limit the ability of that person to perform the major life activity in question, as compared to most people in the general population. Those impairments resulting from occupational injury that are not severe enough to substantially limit a major life activity or are only temporary would therefore not constitute a disability covered by the ADA.

Likewise, just because an individual has a record of filing a workers' compensation claim does not necessarily mean s/he is covered under the "record" portion of the definition. The record or history of an impairment must be a record of an impairment that substantially limited one or more major life activities.

When is an Injured Worker Regarded as Disabled under the ADA?

An injured worker has a disability under the "regarded as" portion of the definition if s/he (1) has an impairment that does not substantially limit a major life activity but the employer treats him/her as though the impairment is substantially limiting; (2) has an impairment that substantially limits a major life activity because of the attitudes of others towards the impairment; (3) has no impairment, but is treated as though s/he has a substantially limiting impairment.

Example 1: During an office move, an employee sustains an occupational injury resulting in a temporary back condition that precludes him from heavy lifting. The employer views this person as not being able to lift even a few pounds and refuses to return him to his position even though he is fully capable of doing his job, which only requires the lifting of ordinary light weight items such as a book or small package of paper. This person would qualify as having an ADA disability.

Example 2: An employee sustains serious burns to her face during an on-the-job laboratory accident. The person is fully able to return to her duties as a scientist, however, the employer refuses to return her to her position because it fears the negative reaction of co-workers or clients. The employer regards her as having an impairment that substantially limits the major life activity of interacting with others and working. This employee would have a disability as defined by the ADA.

Example 3: An individual has fully recovered from a back injury. He applies for a new job and the employer refuses to hire him because it assumes that the person will severely injure his back again if he returns to heavy labor. The

employer is regarding this applicant as being disqualified from the class of jobs involving heavy labor, and thus substantially limited in the major life activity of working.

Even if an employee is awarded workers' compensation benefits, or is assigned a high workers' compensation disability rating, it is necessary to make a case-by-case determination of whether the person is an individual with a disability as defined by the ADA.

The other important prerequisite for ADA coverage is that the person must be qualified for the job. An injured employee or job applicant is considered qualified if s/he meets the education, experience and other qualification standards of the job, and is able to perform the essential functions of the job, with or without reasonable accommodation. The concept of reasonable accommodation is covered in greater detail in a later section of this brochure.

Does the ADA Limit an Employer's Ability to Find Out About a Person's Prior Workers' Compensation History?

Yes. The ADA limits when an employer may ask about prior workers' compensation claims. At the pre-offer stage, an employer may not ask about an applicant's disabilities or ask questions that are likely to elicit information about disability, including questions about workers' compensation history. An employer also may not obtain workers' compensation information at the pre-offer stage from third parties, such as former employers, state workers' compensation offices or services that provide workers' compensation information. Once the employer has extended an offer of employment to an applicant, however, the rules change. Then, the employer may require medical exams and make disability-related inquiries, including questions about prior

workers' compensation history, as long as such exams or inquiries are required of all candidates in the same job category.

What are the ADA Requirements Regarding Pre-Employment Medical Examinations and Disability-Related Inquiries, Including Questions about Workers' Compensation?

As noted above, the ADA prohibits an employer from making disability-related inquiries or requiring a medical examination of applicants prior to extending a job offer, but allows employers to engage in the same following a job offer as long as the inquiry or exam is required of all entering employees in the same job category. After an employer has obtained basic medical information from all entering employees in a job category, it may ask specific individuals to take follow-up examinations and/or answer more questions if examinations and inquiries are medically related to the previously obtained medical information.

If the employer withdraws a job offer because the medical examination reveals that the person does not satisfy certain qualification standards, including safety, vision, or hearing requirements, or did not pass certain job tests, the employer must be able to show that:

- the exclusionary criteria do not screen out on the basis of disability; or
- the exclusionary criteria are job-related and consistent with business necessity, and there is no reasonable accommodation that will permit the individual with a disability to perform the essential functions of the job.

Where a disability gives rise to safety issues, the employer must still engage in a "direct threat" analysis, and should not make an ad-

verse employment decision based upon safety concerns regarding the disability in question if the disability does not pose a direct threat. Under the ADA, a “direct threat” is a significant threat of substantial harm to workplace health or safety that cannot be eliminated or reduced with reasonable accommodation. This is a very high standard to meet and must be based on a factual, individualized inquiry that takes into account the specific circumstances of the individual with a disability and the job at issue.

Example: An applicant has post traumatic stress disorder, which causes him to lose his concentration and memory at times. He applies for a job driving a truck loaded with highly flammable materials. The employer determines that the applicant presents a direct threat to workplace and public health and safety due to his disability and decides that the applicant is not qualified for the position, with or without accommodation, because his loss of concentration and/or memory while driving could cause an extremely dangerous condition. The employer’s decision is justified by the “direct threat” doctrine and therefore would not violate the ADA.

What if the Employer Thinks the Person’s Disability or Prior Occupational Injury will Pose an Increased Risk of Workers’ Compensation Costs?

An employer may not refuse to hire a qualified person with a disability simply because it assumes the disability will pose an increased risk of occupational injury and increased workers’ compensation costs. Similarly, an employer may not refuse to hire an individual with a disability who has had a previous occupational injury based on generalized assumptions or stereotypes. Excluding qualified workers with disabilities because of their disability or a previous on-the-job injury

constitutes disability discrimination under the ADA, unless the employer can establish that the worker poses a “direct threat” to his or her coworkers or to himself/herself.

What About Medical Exams or Disability-Related Inquiries at the Time of Injury or When the Person Wants to Return to Work?

The ADA allows an employee to ask disability-related questions or require a medical examination at the time an employee experiences an occupational injury or seeks to return to work after such an injury as long as the inquiries or medical exams are job-related and consistent with business necessity. This requirement is met where an employer reasonably believes that the occupational injury will impair the employee’s ability to perform essential functions or raises legitimate concerns about direct threat. The questions or exams must not exceed the scope of the specific injury and its effect on the employee’s ability, with or without reasonable accommodation, to perform essential functions or to work without posing a direct threat.

Does the ADA Impact How an Employer Determines its Workers’ Compensation Liability?

The ADA does not prohibit an employer from asking disability-related questions or requiring medical exams of employees seeking workers’ compensation provided that the exams and inquiries are necessary to ascertain the extent of its workers’ compensation liability. The questions and exams must be consistent with the state law’s purpose of determining eligibility for workers’ compensation benefits. Examinations and questions must be limited in scope to the specific occupational injury and may not

be required more often than is necessary to determine an individual's initial or continued eligibility for workers' compensation benefits.

With Whom Can Medical Records be Shared?

Information obtained from permitted medical examinations and disability-related inquiries is a "confidential medical record" that employers must collect and maintain on separate forms and in medical files separate and apart from personnel files. This includes information about an applicant's or employee's occupational injury or workers' compensation claim. Employers must strictly limit access to such files and comply with the following limitations on disclosure:

- supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first-aid safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
- government officials investigating compliance with the ADA shall be provided relevant information on request;
- employers may give information to state workers' compensation offices, state second injury funds, and workers' compensation insurance carriers in accordance with state workers' compensation laws; and
- employers may use the information for insurance purposes.

May the Employer Require that a Person with a Disability-Related Occupational Injury Return to Full Duty?

No. The term full duty may include both marginal and essential functions. The employee with a disability-related occupational injury¹ must be allowed to return to work as long as s/he can perform the essential functions of the position, with or without reasonable accommodation, and s/he does not pose a direct threat.

What About Return-to-Work Concerns Regarding Future Injury or Increased Workers' Compensation Costs?

The employer may not refuse to return to work an employee with a disability-related occupational injury because of assumptions about future injury or increased workers' compensation costs. The employer would have to establish that the returning worker would pose an immediate and direct threat if returned to his/her former position in order to justify a decision not to allow that worker to return.

May an Employer Refuse to Return to Work an Employee With a Workers' Compensation Rating of "Totally Disabled?"

No. Workers' compensation laws are different in purpose from the ADA and use different standards. A workers' compensation determination of total or permanent disability is never

¹ An individual with a disability may have an occupational injury that has nothing to do with his disability. EEOC uses the term "disability-related occupational injury" to refer to a situation where the ADA and workers' compensation laws simultaneously apply (i.e., where there is a connection between an occupational injury and a disability as defined under the ADA).

dispositive of the question of whether a person can return to work under the ADA. It may, however, provide relevant evidence about whether the person can perform the essential functions of the job, with or without reasonable accommodation, and without posing a direct threat.

Who Makes the Return-to-Work Decision?

The employer is ultimately responsible for deciding whether an employee with a disability-related occupational injury is able to return to work. The employer may find it helpful to obtain information from a rehabilitation counselor, physician, or other specialist regarding the employee's specific functional limitations, abilities, and possible reasonable accommodations. The employer may also obtain useful information from others who are not experts but who have knowledge about the employee's current abilities, limitations and use of reasonable accommodations.

What are the ADA's Reasonable Accommodation Requirements in the Context of an Occupational Injury?

The ADA requires that an employer make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. Reasonable accommodation is a modification or adjustment to a job, the work environment or the way things are usually done that enables an individual with a disability to enjoy an equal employment opportunity. Other brochures in this series discuss the reasonable accommodation obligation at length. Our discussion here

focuses on common questions about reasonable accommodation following a disability-related occupational injury.

The ADA does not require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have an ADA disability. The employer does have the duty of reasonable accommodation, however, if the employee has a disability-related occupational injury.

Leave

If the employee has a disability-related occupational injury that leaves him/her temporarily unable to work, the employer may not discharge him/her and must provide leave, as long as this does not impose an undue hardship. The employee would be entitled to return to his/her same position unless the employer can show that keeping the position available for the worker's return would be an undue hardship. If the employer makes this showing, the employer must then consider whether there is a vacant equivalent position to which the individual could be reassigned.

If the employee requests leave as a reasonable accommodation, but the employer can instead provide an accommodation that keeps the employee working, the employer is not required under the ADA to provide the leave. In other words, the ADA gives the employer the right to choose which accommodation to implement in the event that more than one effective accommodation exists. If the employee requests leave that the employer routinely grants in similar circumstances to other employees, however, the employer may not force the employee requesting leave to remain on the job if so doing would cause the employer to apply differing standards to employees with and without disabilities. Furthermore, if the

employee qualifies for leave under the Family and Medical Leave Act (FMLA), the employer may not require him/her to remain on the job with an adjustment/accommodation instead of taking a leave of absence.²

On-the-Job Accommodations

If the employee with a disability-related occupational injury is still able to perform the essential functions of the job, but cannot perform certain marginal functions, the employer must restructure the job by reallocating or redistributing the marginal functions that the person cannot do because of the disability. Reassignment to an equivalent, vacant position, on either a permanent or temporary basis, is a last resort when the person cannot be accommodated in the current position through job restructuring, modification of equipment or implementation of a part-time schedule. If there is no equivalent position available, the parties may consider reassignment to a lower position. The employer and employee may agree to a reassignment at any point if both parties think this is best. If there is no open position for the employee with the disability-related occupational injury, the ADA does not require the employer to create a new position or “bump” another employee from his/her position.

An employer will not satisfy its ADA reasonable accommodation obligation by placing an employee with a disability-related occupational injury in a workers' compensation vocational rehabilitation program. However, if both the employer and employee agree that this is the best course of action, they are free to choose that option.

² 29 C.F.R. Section 825.702(d)(1). In general, when any sort of leave issue arises in an ADA case, employers need to be aware that they may also have FMLA obligations. For on-line information about the FMLA, go to: <http://www.dol.gov/whd/fmla/>.

An employer is also free to make a workplace modification that is not required under the ADA in order to offset workers' compensation costs. For example, an employer might choose to temporarily lower production standards, which is not required by the ADA, in order to return an occupationally-injured employee to work sooner.

Light Duty

The term “light duty” has a number of different meanings in the employment setting. The EEOC uses the term to mean particular positions created specifically for the purpose of providing work for employees who are unable to perform all of their normal duties.

An employer may feel a special obligation arising out of the employment relationship to create a light duty position for an employee who is injured on the job. The EEOC has stated that nothing in the ADA prohibits an employer from creating a light duty job for an employee who is injured on the job, so long as the policy is applied in a non-discriminatory manner to all employees, including those with disabilities.³

The ADA does not require an employer to create “light duty” positions for a non-occupationally injured employee with a disability. The general principal that the ADA does not require employers to create positions applies equally to the creation of light duty jobs. Note, however, that if the “heavy duty” tasks an injured worker can no longer perform are marginal job functions, they would have to be reallocated to coworkers as part of the reasonable accommodation of job restructuring.

³ The EEOC leaves open the possibility that, should this policy have a disparate impact on a class of individuals with disabilities, the employer would have to show that the policy is job-related and consistent with business necessity.

If an employer chooses to create light duty positions for workers injured on the job, the employer also determines everything about the positions, including the length of time they are available. Thus, if an employer only provides temporary light duty positions, it need only provide a temporary light duty position to an employee with a disability-related occupational injury.

The EEOC makes a distinction between the creation of a light duty position, which is not required under the ADA, and the placement of a non-occupationally-injured employee with an ADA disability into an existing light duty position that is reserved for an employee who is injured on the job. The EEOC takes the position that if an employee with a disability, who is not occupationally injured, becomes unable to perform the essential functions of his/her job and there is no other effective reasonable accommodation, the employer must reassign him or her to the vacant reserved light duty position as a reasonable accommodation. The EEOC has also stated that an employer could not establish undue hardship by showing that it would not have any light duty positions remaining if another employee was subsequently injured on the job.

Some courts have limited application of the EEOC position to circumstances in which the transfer of a non-occupationally injured employee to a light duty position does not either convert the light duty position into a new position (by, for example, turning a temporary position into a permanent one) or conflict with employer light duty position policies that govern the rights of fellow employees.⁴ Employers should take great care to examine all

⁴ See, for example, *Middleton v. Ball-Foster Glass Container Co.*, 139 F. Supp. 2d 782 (N.D. Tex. 2001), affirmed 31 Fed. Appx. 835 (5th Cir. 2002); *Dalton v. Subaru-Isuzu*, 141 F.3d 667 (7th Cir. 1998); *Hendricks-Robinson v. Excel Corp.* 154 F.3d 685 (7th Cir. 1998).

relevant facts in such situations and may wish to obtain legal advice before making an accommodation decision.

Does Filing a Workers' Compensation Claim Prevent an Injured Worker from Filing a Charge Under the ADA?

“Exclusivity” clauses in state workers' compensation laws bar all other civil remedies related to an injury that has been compensated by a workers' compensation system. However, these clauses do not prohibit a qualified individual with a disability from filing a discrimination charge with the EEOC or filing a suit under the ADA, if s/he obtains a “right to sue” letter from the EEOC.

Where Can I Go to Get More Information?

The organizations listed below can provide you with further information on the employment provisions of the Americans with Disabilities Act of 1990:

ADA Regional Disability and Business
Technical Assistance Center Hotline
800.949.4232 (voice/TTY)

Job Accommodation Network,
PO Box 6080, Morgantown, WV 26506-6080,
800.526.7234 (V) or 877.781.9403 (TTY)

Equal Employment Opportunity Commission,
131 M Street, NE
Washington, DC 20507

To be connected to the nearest field office, call 800.669.4000 (voice), 800.669.6820 (TTY). To order publications, call 800.669.3362 (voice), 800.669.3302 (TTY). For online information, including the EEOC Enforcement Guidance:

Disclaimer

This material was produced by the Employment and Disability Institute in the Cornell University ILR School. Development of the original brochure series was funded by a grant from the National Institute on Disability and Rehabilitation Research (NIDRR) (grant #H133D10155). Content updates were funded by NIDRR grant number H133 A110020. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.

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>

Workers' Compensation and the ADA, go to:
<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.

This brochure was originally written in 1997 by Professor Bruce Growick, the Ohio State University, and reviewed and updated September, 2001 by Sheila D. Duston, an attorney-mediator practicing in the Washington, DC metropolitan area. It was reviewed and updated in 2011 by Elizabeth Reiter, an independent legal consultant in Ithaca, N.Y., with assistance from Sara Furguson, a Cornell University Employment and Disability Institute ILR student research assistant.

These updates, and the development of new brochures, were funded by Cornell, the National ADA Center Network, and other supporters.

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

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

Contact Information

Susanne M. Bruyère, Ph.D., CRC
Director, Employment and Disability Institute
Cornell University
ILR School
201 Dolgen Hall
Ithaca, New York 14853-3201

Voice: 607.255.7727

Fax: 607.255.2763

TTY: 607.255.2891

Email: smb23@cornell.edu

Web: www.edi.cornell.edu

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

