

# Americans with Disabilities Act

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Larry Richard's "Americans with Disabilities Act" was written for Human Resources Management (BAD64271) to investigate the legal protections afforded to disabled employees. His paper gives an overview of the act's purpose, examines some specific impacts, attempts to make sense of some undefined terms and aspects, and explores its possibilities.

### History and Overview

The Americans with Disabilities Act of 1990 (signed into law on July 26, 1990) emerged from a concern that many disabled Americans faced discrimination in the workplace. In congressional investigations, investigators found that about 43,000,000 Americans suffered from one or more mental or physical disabilities (EEOC, 1990). This number was expected to grow (and has grown) as the general population ages. Investigators had further discovered that not only have disabled people suffered from discrimination in housing, employment, and access to public services but they also had no legal recourse to address such discrimination.

The intent of the Americans with Disabilities Act (A.D.A.) was to bring parity to a group of underrepresented people. The A.D.A. became an adjunct to previous civil rights and anti-discrimination laws that go back as far as the mid 1880's. The A.D.A. provides a national mandate to eliminate discrimination based on disabilities and provides legal recourse for its enforcement.

The A.D.A. uses the term "disabilities" rather than "handicaps" (as used in the Rehabilitation Act of 1973) but only because disabilities is a more popular term. While both terms are interchangeable, additional protections are provided in the A.D.A. than those provided in the Rehabilitation Act. The Rehabilitation Act covers the federal government (as an employer) and private companies doing business with the United States government (under contract). The A.D.A. broadens the protections to virtually all companies and individuals.

The term "Americans" refers to not just United States citizens but to any qualified individual regardless of citizenship or nationality. The A.D.A. does not supplement any other law or the U.S. Constitution but provides additional protections not granted elsewhere. Consequently, any individual may pursue discrimination complaints on the state level or at the federal level. In reality, many of the definitions and terms used in the A.D.A. are identical to those used in Title VII of the Civil Rights Act of 1964. Because terms used in the A.D.A. are identical to the Civil Rights Act and The Rehabilitation Act, case law may be applicable to A.D.A. complaints.

The upshot of the A.D.A. is to make it unlawful to discriminate on the bases of disability in a wide range of employment activities including, job applications, hiring, compensation, promotions, discharge, and training.

### Definitions

As previously mentioned, the A.D.A. covers all Americans regardless of citizenship or nationality. Adherence to the law is a legal requirement for all employers of fifteen or more employees. It also includes United States citizens employed with U.S. companies operating outside of the U.S. borders as long as it does not violate the laws of the country in which the company operates. Some exceptions are religious organizations that may employ only those of that faith and also executive agencies of the U.S. government.

The A.D.A. prohibits discrimination against qualified individuals with disabilities. Qualified individuals with disabilities is loosely defined as any individual with a disability who meets the skill, experience, education and other job related requirements of a position held or desired, and who, with or without reasonable accommodations, can perform the essential functions of a job (EEOC, 1992).

Since the A.D.A. does not contain many definitions and specifics for guidance in compliance with the law, much interpretation is left to the courts. The A.D.A. broadly defines the individual with a disability as one who has a physical or mental impairment that substantially limits one or more of his or her major life activities, has a record of such impairment, or is regarded as having such impairment (EEOC, 1992)

Before moving into a more detailed analysis of these requirements, it is important to note that there are individuals who are not protected by the A.D.A. Those who illegally use drugs (i.e., those who use illegal drugs or those who use legal drugs illegally) are denied protection. However, someone, who has completed rehabilitation and is not currently using drugs or one who is in rehabilitation, would be covered.

The act does not recognize homosexuality or bisexuality as an impairment. Also included in the list of non-impairments is transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, sexual behavior disorders, compulsive gambling, kleptomania, or pyromania.

The first requirement of an individual with a disability (physical or mental impairment that substantially limits one or more major life activities) is difficult to define in that it is unreasonable to expect that one could list all impairments that might apply. However, the terms used in the A.D.A. are the ones that also appear in the Rehabilitation Act (EEOC, 1992).

Simply stated, a physical impairment is any physiological disorder affecting one of the body systems. A mental impairment is any psychological disorder affecting the brain, including learning disabilities. The term impairments does not include environmental, cultural, or economic conditions such as eye color, left-handedness, pregnancy, quick temper, muscle tone or a predisposition to disease. The term major life activities refers to the ability of one to care for his or her self in such ways as walking, seeing, hearing, speaking, breathing, and learning (EEOC, 1992).

When the act refers to substantial limits, it refers to the ability to perform a major life activity in relation to the general population. Furthermore, while an impairment may effect an ability (a need for glasses), that is not to imply that it would constitute a substantial limit to an individual's major life activities (Cava, 2002). The important point

is that the A.D.A. is not an all encompassing list of all possible conditions representing an impairment but rather a broad based approach in generalizing possible impairments.

Other factors to be considered in evaluating an A.D.A. claim are the duration of the illness (a broken leg is short term and does not constitute a valid claim), the nature and severity of the impairment (subjective), and long term impact of the disability.

For an individual to be considered a qualified individual with a disability, one must be able to perform the essential functions of the job with or without accommodations (Mishra, 1995). Furthermore, it is imperative that the employer have a clear and concise job description which outlines the requirements of the job. An employer that changes a job description in such a manner that a qualified individual is no longer able to perform the "essential duties", risks a law suit as this would cause one to infer intentional discrimination. Employers must be not only fair in their treatment of their employees but they must also be careful to document company rules, policies, and job requirements.

### **Reasonable Accommodations**

Once it is determined that an individual is one who is qualified with a disability, reasonable accommodation must be made by the employer. Again, reasonable accommodation is rather subjective. However, the law does lay down some broad guidelines. An accommodation will change the environment such that one with disabilities will enjoy

equal opportunities. Those equal opportunities apply to job applicants and existing employees so that they may enjoy equal benefits of those without disabilities.

Some of the types of accommodations that most of us have seen include special parking places for easy access to facilities, wheelchair ramps, and disability friendly rest-rooms (Mishra, 1995). Restructuring of a job would be required unless the restructuring greatly alters the essential functions of the job. Therefore, an employer may only shift nonessential functions away from the disabled individual (Pine, 1999). Since there is a near infinite number of jobs with possible job descriptions coupled with a large list of possible disabilities, accommodations are subjective. Thus an employer has a lot of latitude in restructuring a job as long as it does not overtly (or negatively) impact an individual with disabilities.

Reassignment to a vacant position is a viable alternative for an employer with a disabled employee. However, the option of reassignment is an option only if job modification would not cause an undue hardship on the employer. Furthermore, reassignment can not be used in a discriminatory manner or in a way which secludes or reduces the disabled to an undesirable position.

Reassignment should not involve a reduction in pay or benefits unless it represents the pay and benefits of non-disabled individuals performing the same tasks. Additionally, the reassigned individual must be given ample time to master the new position. As with all other facets of the act, specifics are not established, but courts will determine the legality of such actions on a case by case basis based on what a reasonable person would expect. It is also important to note that an employer is not permitted to reassign a person if that reassignment violates a seniority provision of a union contract or a company policy which is fair and uniform (Crampton, 2003).

Furthermore, no employer is required to meet the needs of a qualified individual with a disability if that action would put undue hardship on the employer. Although specifics are once again absent, undue hardship is one which would force the employer to incur a large expense or could only be achieved with great difficulty. These factors might vary with the size and income of the employer. Congress did provide some tax relief in allowing a limited tax credit for structural improvements that would benefit the disabled (IRS form 8826).

In determining the extent of reasonable accommodations, an employer should use a standard problem solving approach. The employer should analyze the essential requirements of the job (ideally, the matter should already have been covered in a previously defined job description). The employer needs to consult with the individual alleging a claim so that they may ascertain any limitations in the performance of the job and what accommodations that may be helpful. They also need to assess the effectiveness of such accommodations. In the event of several possible solutions, an employer might be wise to consider the preference of the individual. This multi-step approach provides a brainstorming approach to determining the best way to achieve a mutual goal (Mishra, 1995).

### **Enforcement and Defenses**

Individuals who assert a claim under the A.D.A. must do so through the Equal Employment Opportunity Commission (E.E.O.C.). The E.E.O.C. will then either pursue the case on the individual's behalf or more likely they will issue a "right to sue" letter which allows the individual to pursue the matter in federal court. Additionally, many states have similar nondiscriminatory laws and a lawsuit may be initialized in state court. Relief sought by the individual may include back pay, reinstatement, promotion, attorney's fees, compensation, and/or punitive damages (Cava, 2002).

A disturbing trend, however, is that the E.E.O.C. has been deluged with complaints at a time when the agency is understaffed. This has resulted in insufficient investigations into complaints and may be causing many important issues to go unresolved (EEOC, 1992). Additionally, failure of the E.E.O.C. to pursue complaints then shifts the

burden of legal representation onto the disabled individual. These people are the least likely to be able to afford competent representation as the disabled are often unemployed and not in a strong financial position.

It should be obvious to any employer that actions taken by it in the form of retaliation against an individual because of asserting a claim would be illegal. Furthermore, it is unlawful to coerce, interfere, or intimidate an individual for claiming rights under the A.D.A. (Percy, 2001).

A common complaint by those who allege discrimination is that of disparate treatment. Disparate treatment is treatment of a disabled individual that is different from that of a non-disabled individual. While technically, disparate treatment is a difference in treatment that can either be positive or negative, the A.D.A. concerns itself with negative disparate treatment. Equally important for an employer is the importance of realizing that there is a difference between acting illegally in disparaging an employee and that of maintaining an employment requirement that fairly represents the essential functions of a job.

Disparate treatment, under the A.D.A., is similar to that under Title VII and case law may be applicable and provide guidance for employers. For example, an employer shows disparate treatment towards an employee if that employer excludes that employee from staff meetings because the employer does not want to see a severe facial disfigurement that an employee may have sustained. The employee is being treated differently (and negatively). The law would even extend to the point that an employee who is shunned because of AIDS, would be considered disparaged. There is a fine line between disparate treatment and workplace harassment. Case law and legal protection for those harassed is plentiful.

The employer should strive for clear and uniformly applied standards. All uniform policies must not only meet any constraints imposed by the A.D.A. but they must also be consistent with all other state and federal laws.

If an employer chooses to assert a claim that a reasonable accommodation would cause undue hardship, substantiation and evidence must be provided as mere assertion is not sufficient to defend against an A.D.A. claim of discrimination (Petesch, 1999). Indeed, an undue hardship for one employer may not be an undue hardship for another employer. The undue hardship provision of the A.D.A. has its roots in the Rehabilitation Act and employer guidance towards proper accommodation may be found there.

Employers may have several defenses to an A.D.A. discrimination claim. Cost would be a factor to consider, especially for smaller firms. Additionally, if an accommodation causes a disruption to other employees or to the functions of the business, that would be a valid defense to the refusal of a reasonable accommodation (that is, it would, in essence, be an unreasonable accommodation) (Crampton, 2003). An employer, however, can not assert a valid claim if the employer legally refuses an action while illegally refusing an alternative (viable) action.

While the cost of compliance with the A.D.A. is a factor to be considered by an employer, the cost of defending as A.D.A. discrimination case can be costly. Still, employers prevail in over ninety percent of the cases resolved in federal courts.

Individuals fair slightly better in E.E.O.C. settled disputes, although not significantly (Crampton, 2003).

While many employers believe that they should have complete control in managing their businesses and workforce, accommodating those with a disability may reap benefits. If an employer has a group of employees who must lift heavy items during the course of a day, an A.D.A. complaint alleging disability with regards to the essential function of lifting, may lead to a resolution which eliminates or greatly reduces the lifting requirements for all employees. This action may reduce costs for the employer and increase productivity in addition to increasing the moral of the employees. Accommodating an individual with disabilities can be a winning combination for employers and employees. No employer should want to lose any of its greatest assets (its employees).

All of the aforementioned reinforces the belief that today's human resources department is a complex organization

that is more attuned to the complexities of legal (national and international) issues than at any other time in our history. Each action and reaction of an employer hinges on a myriad of often undefined laws and interrelated regulations. The A.D.A. does require the E.E.O.C. to coordinate their efforts between the A.D.A. and the Rehabilitation Act so that consistent standards apply between the two. However, this does not guarantee legal clarity for the employer.

### **A Summary and the Future of the A.D.A.**

The A.D.A. is an extension of previous laws that have been passed to bring parity and equality to all Americans. Like all laws, including the Constitution, the A.D.A. is a “living document”. It addresses matters that need attention today and it is also a document that can be modified to address the needs of those in the future. Technology and changing cultural beliefs will mandate revisions in this and other civil rights laws.

The human resource department will be required to constantly monitor legislation and modify existing corporate rules to remain in compliance with U.S. laws. Employers will do themselves a great favor if they act in good faith to accommodate those with disabilities and therefore take a proactive role in establishing fair and uniform treatment for all of their employees. The A.D.A., like other laws, is not a panacea that guarantees that fairness will always occur for all people. It does provide an avenue of approach for those who are aggrieved but does not assure utopia.

Legal restrictions are required to combat the tendency of humans to often act inhumanly to their fellow human beings. It would be nice to not need these laws, but until (or if) such time as people change their inherent ways, safeguards must be in place to rein in abusive practices.

Discharges account for nearly fifty percent of A.D.A. claims. As the workforce ages and downsizing remains the norm, employers will be faced with A.D.A. claims whether or not such discrimination does take place (Crampton 2003).

Ironically enough, since the inception of the A.D.A. there are fewer disabled Americans (as a percentage) who are employed. Furthermore, the disabled are employed working fewer hours than those not disabled (Crampton, 2003). Whether this trend continues or not remains to be seen. It may represent an employer’s ability to more discreetly avoid the disabled or it may be an anomaly, but only time will tell.

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