The Americans with Disabilities Act of 1990 and Injured Workers

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, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. It was updated in September, 2001 by Sheila D. Duston, an attorney-mediator practicing in the Washington, DC metropolitan area from the original, which was written in 1997 by Bruce Growick.

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The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/surveyresults.html.

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org.

What is the Americans with Disabilities Act?

The Americans with Disabilities Act of 1990 (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 physical or mental

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impairment that substantially limits a major life activity, or a record of such an impairment, or being regarded as having such an impairment. Some impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may only be temporary, and have little or no long-term impact.

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 must be 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 under 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.

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. At the post-offer, pre-employment stage, an employer may make disability-related inquiries, including questions about workers' compensation, and may require medical exams as long as certain individuals are not being singled out.

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

It is illegal for an employer to make disability-related inquiries or require a medical examination of applicants prior to extending a job offer. As noted above, this includes questions about a person's workers' compensation history.

However, after making a conditional offer of employment, but before employment has begun, an employer may ask about a person's medical and workers' compensation history or require a medical examination to obtain information about the existence or nature of an applicant's prior occupational injuries, 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.

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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 that there is no reasonable accommodation that will permit the individual with a disability to perform the essential functions of the job.

EEOC takes the position that safety requirements must meet the "direct threat" standard in order to be job-related and consistent with business necessity.

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 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 workers with disabilities because of their disability or a previous on-the-job injury is disability discrimination, unless the employer can establish a direct threat.

An employer may refuse to hire a person for a particular job only if that person would pose a direct threat in that position. "Direct threat" means 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 employee is afflicted with post-traumatic stress disorder, which caused him to lose his concentration and memory. He applies for a job driving a truck loaded with highly flammable gasoline. The employer determines that he presents a direct threat to workplace and public health and safety and that he is not qualified for an "extremely dangerous" position of driving this truck, with or without accommodation. This would not violate the ADA.

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 that 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,"* and shall be collected and maintained on separate forms and in separate medical files. This includes information about an applicant's or employee's occupational injury or workers' compensation claim. Access to the file and the information contained in it must be strictly limited and disclosed only under the following circumstances:

- 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;

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- 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;

- 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 injury[1] must be allowed to return to work as long as s/he can perform the essential functions of the position and 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 this person currently would pose a direct threat in the position in order to justify the decision not to allow the person 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 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.

[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).

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 a qualified 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 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 for the remaining months of necessary leave.

If the employee requests leave as a reasonable accommodation, but the employer can instead provide an accommodation that keeps the employee working, the

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employer is not required under the ADA to provide the leave. But, if the employee simply requests leave that is routinely granted to other employees, the employer may not require this employee to remain on the job unless it also requires employees without disabilities to remain on the job with some type of adjustment. 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 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 a part-time schedule. If there is no equivalent position available, reassignment to a lower position should be considered. The employer and employee may agree to a reassignment at any point, however, if both parties think this is best. If there is no open position for the employee with the disability-related occupational injury, the employer is not required to create a 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 it.

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.

[2] 29 C.F.R. Section 825.702(d)(1) (2001). 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/dol/esa/flma.htm

Light Duty

The term "light duty" has a number of different meanings in the employment setting. 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 way 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 the creation of 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.

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 existing light duty positions that are reserved for employees that are 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 a 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.

[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.

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At least one court has disagreed with the EEOC position, stating that an employer could reserve light duty positions for employees recuperating from recent injuries who had temporary disabilities. [4]

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

Filing a workers compensation claim does not 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 is issued a "right to sue" letter by the EEOC.

Where Can I Go to Get More Information on These Issues?

The organizations listed below can provide you with further information on the employment provisions of the Americans with Disabilities Act of 1990:1

ADA Regional Disability and Business Technical Assistance Center Hotline, (800) 949-4232 (voice/TTY).

Job Accommodation Network,
918 Chestnut Ridge Road, Suite 1, Morgantown, WV 26506-6080,
(800) ADA-WORK (voice/TTY).

U.S. Equal Employment Opportunity Commission,
1801 L Street, NW
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) 800-3302 (TTY). For on-line information, including the EEOC Enforcement Guidance: Workers' Compensation and the ADA, go to: http://www.eeoc.gov

Disclaimer

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Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, 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

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[4] Dalton v. Subaru-Isuzu, 141 F.3d 667 (7th Cir. 1998).