

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

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 written in June, 2002 by Susanne M. Bruyere, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, Cornell University

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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

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%).

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 qualified individuals with disabilities from employment discrimination on the basis of disability. Title I is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).² These protections apply to the entire employment relationship, including the application process, hiring, training, promotion, termination, compensation, and other benefits

¹A copy of the full report of this study is available from the Society for Human Resource Management (SHRM) at the SHRMStore at 800-444-5006 (item code 62.17023). The cost is \$39.95 for SHRM members and \$49.95 for nonmembers. An Executive Summary of this report is available from the Cornell University web site at <http://www.ilr.cornell.edu/ped/daa/>.

²For more information, please consult the U.S. Equal Employment Opportunity website at www.eeoc.gov.

and privileges of employment, such as health and retirement benefits, and employer-sponsored social functions. Providing necessary reasonable accommodations is considered to be part of the ADA's nondiscrimination requirements.

The ADA requires employers to provide necessary reasonable accommodations for qualified individuals with disabilities. Potential reasonable accommodations include making existing facilities accessible, job-restructuring, part-time or modified work schedules, assistive technology, providing aides or qualified interpreters, modifying tests or policies, and reassignment 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 sorts of accommodations would enable him/her to perform the essential functions of the position. When no accommodation is readily identified or alternative options are desired, technical assistance may be helpful in determining how to accommodate an employee in a specific situation. If the individual cannot perform an essential function of the job, even with accommodation, the individual is not considered "a qualified individual with a disability" under the law (and you may have to consider reassignment as a reasonable accommodation). In addition, the ADA does not require employers to provide accommodations that would pose an "undue hardship" on the operation of the business.

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, 1970³.

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 according to 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.⁴

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?

Some employers have used pre-employment physical fitness tests and other exams to screen out applicants prone to ergonomic hazard injuries. The ADA places limitations on employee testing. If an individual with a disability or a class of individuals with disabilities is screened out by a test or other qualification standard, the employer must show that the test or standard is job-related and consistent with business necessity and that the standard cannot be met with a reasonable accommodation.

In most instances, a risk of future injury won't satisfy this ADA standard. The ADA also prohibits an employer from making medical inquiries or requiring physicals before a job offer is made, and places certain restrictions on post-offer, pre-employment inquiries and exams. After the person is hired and becomes an employee, any medical inquiries and examinations must be job-related and consistent with business necessity. All of these restrictions on medical exams and inquiries are designed to prevent potential discrimination based on disability.

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 are required to be included within an

³ For more information, see the Occupational Safety and Health Administration website at www.osha.gov.

⁴ 29 U.S.C. Section 666(e).

audiometric testing program, which includes among other things, annual hearing tests⁵. 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 the 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 the charge of discrimination. The employer's defense may be rebutted by a showing of pretext, or by showing that the federal standard did not require the discriminatory action or could have been complied with in a non-exclusionary way⁶. A survey of the case law does not reveal any significant cases illustrating a conflict between the ADA's limits on medical inquiries and testing and OSHA's testing requirements, which leads this author to surmise that the differing goals and requirements of the ADA and the OSH Act are being harmoniously construed in a common sense way. Knowledgeable HR professionals can assist in resolving these conflicts early on, determining whether the requirements of both laws can be met 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 separate forms, in separate medical files and must be treated as a confidential medical record. Employers should take steps to guarantee the security of the employee's medical information, including keeping the information in a medical file in a separate locked cabinet, apart from the location of personal files, and should designate a specific person or persons to have access to the medical file. Employers may disclose the records, if necessary, to supervisors and managers in regard to work restrictions or necessary accommodations, to first aid and safety personnel, and to government officials investigating ADA and other disability discrimination laws. In addition, relevant information can be disclosed to state workers' compensation offices and to 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 causes⁷. About 1.3 million employers with 11 or more employees – 20 percent of the establishments 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.

OSHA has recently issued a new ruling on recordkeeping to improve the system that employers use to track and record workplace injuries and illnesses⁸. OSHA Forms 300 and 301 both note that they contain information about employee health and that this information must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

OSHA compliance personnel may also conduct an examination of employee medical records solely to verify employer compliance with the medical surveillance recordkeeping requirements of an occupational safety and health standard. However, the OSHA regulations note that an examination of this nature shall be conducted on-site and, that OSHA compliance personnel shall not record and take off-site any information from medical records other than documentation of the fact of compliance or non-compliance.

In addition, OSHA takes the position that access to employee medical records will in certain circumstances be important to the agency's performance of its statutory functions. Due to the substantial personal privacy interests involved, OSHA authority to gain access to personally identifiable employee medical information will be exercised only after the agency has made a careful determination of its need for this information, and only with appropriate safeguards to protect individual privacy⁹.

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. H.R. 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

⁷ 29 C.F.R. Section 1904.

⁸ For further information, see <http://www.osha-slc.gov/recordkeeping/OSHArecordkeepingforms.xls>

⁹ 29 C.F.R. Section 1913.

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 mission¹⁰. 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 does not override federal health and safety requirements. If OSHA requires a standard, an employer must comply with it. However, an employer cannot just screen out a person with a disability as a result of health and safety testing. The ADA requires that the employer consider the possibility of reasonable accommodation to enable the employee to perform his or her current 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 employer might want to terminate the employee, seeing this as a potential risk, or perhaps transfer the person to another job. The ADA would require that the employer first consider an accommodation, such as sound abatement equipment, to enable the individual to continue in his/her current job, and as a last resort, reassignment to another position.

Sometimes the OSHA regulations will not permit a particular type of accommodation. For instance, OSHA's respirator requirements are clear and specific. The employer would not have to keep an employee in a position that requires a respirator if the worker is not able to wear a respirator. However, the ADA would still require that the employer consider transferring this employee to an equivalent, vacant position.

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.

¹⁰ 29 C.F.R. Section 1904.40.

In determining whether an individual with a disability poses a direct threat, including an individual with a contagious disease, 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.

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 16% of total claims to date)¹¹. H.R. professionals will often encounter accommodation and health and safety questions about persons with musculoskeletal injuries¹².

¹¹ See U.S. EEOC web site at URL <http://www.eeoc.gov/stats/ada-receipts.html>.

¹² See [Workplace Accommodations for Persons with Musculoskeletal Injuries](#), produced by Cornell University, available at

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 people¹³.

An ergonomist uses information about people, for example their size (height, etc.), ability to handle information and make decisions, ability to see and hear, and ability to work in extreme temperatures, to match people to jobs¹⁴. 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 living¹⁵.

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 context¹⁶.

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

http://www.ilr.cornell.edu/extension/files/download/Musculoskeletal_Disorders.pdf.

¹³ For further information, contact the Human Factors in Ergonomics Society, PO Box 1369, Santa Monica, CA. 90406-1369, Telephone 310/394-1811, Fax 310/394-2410, and Email HRES@compuserve.com.

¹⁴ 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.

¹⁵ The American Physical Therapy Association, 1111 N. Fairfax St., Alexandria, VA. 22314, Telephone 703/684-APTA, Fax 703/684-7343, Internet <http://www.apta.org>.

¹⁶ American Occupational Therapy Association, Inc., 4720 Montgomery Lane, Bethesda, MD. 20814-3425, Telephone 301/652-2682, Fax 301/652-7711, Internet <http://www.aota.org>.

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 and the credentials required for an industrial hygienist, as well as safety engineers, may be gained from the relevant professional associations.^{17, 18, 19}

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."²⁰ 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 disability²¹. A mental health professional or employee assistance program (EAP) professional may be of assistance in this situation.²²

¹⁷ American Industrial Hygiene Association, 2700 Prosperity Avenue, Suite 250, Fairfax, VA. 22031, Telephone 703/849-8888, Fax 703/207-3561.

¹⁸ American Society of Safety Engineers, 1800 East Oakton Ave., Des Plaines, IL 60018-2187, Telephone 703/692-4121.

¹⁹ National Safety Council, 444 North Michigan Ave., Chicago, IL 60611, Telephone 800/621-7619.

²⁰ Position Statement adopted by the Board of Directors of the National Mental Health Association on June 13, 1999 regarding "Constitutional Rights and Mental Illness."

²¹ See [Employing and Accommodating Workers with Psychiatric Disabilities](#), produced by Cornell University, available at http://www.ilr.cornell.edu/extension/files/download/Psychiatric_Disabilities.pdf.

²² Further information about employee assistance program professionals can be found at www.eap-association.com.

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

ADA Technical Assistance Program and Disability and IT Technical Assistance Centers
(800) 949-4232 (voice/TTY), www.adata.org

U.S. 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 (TDD)
www.ilr.cornell.edu/ped/hr_tips

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

Job Accommodation Network
(800) ADA-WORK (voice/TTY),
www.dol.gov/dol/odep/public/pubs/ek98/jan.htm

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>