

Revised ADA Requirements: What they Mean to You and the Work You Do



Workforce Programs Roundtable Program

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ADA Amendments Act of 2008



- Statute went into effect on January 1, 2009
- Statute is not retroactive
- All provisions of the Amendments Act apply to the Rehabilitation Act of 1973
 - The definition of disability in the ADA was taken from the Rehabilitation Act

EEOC Regulations



- Published in the Federal Register on March 25, 2011
- Effective Date: May 24, 2011
- Regulations closely track the statute
- In addition, published revisions to the interpretive Appendix that was issued with original regulations (1991)
- Only revised those portions of regulations and Appendix that were affected by the ADAAA

Definition of “Disability”



- First 2 definitions remains the same:
 - A physical or mental impairment that substantially limits a major life activity;
 - A record of such an impairment;
- Congress changed the meanings of key terms used in these two definitions
- 3rd Prong – “Regarded as having a disability” has been completely rewritten; new approach

Major Bodily Functions



- A new category of major life activities
- **Purpose:** To make it easier to establish disability for certain impairments
- Individual can show substantial limitation (or record of) in just one major life activity from either category
- Regulations include all of the examples of major bodily functions found in the statute and include some **additional** examples

Major Bodily Functions (cont.)

- **Functions of the:**

- Immune system
- Special sense organs and skin
- Normal cell growth
- Digestive
- Genitourinary
- Bowel & bladder
- Neurological
- Brain

- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive

Major Bodily Functions (cont.)



- Also includes operation of an individual organ within a body system
 - i.e. operation of a kidney, liver, or pancreas

Substantially Limits



- Finding of disability under the first prong requires a showing that a person is substantially limited in performing a major life activity as compared to **most people** in the general population
- Regulations establish “rules of construction” on how to analyze whether an individual’s impairment substantially limits a major life activity

Substantially Limits: Rules of Construction



- Impairment need not prevent or severely or significantly limit a major life activity to be considered “substantially limiting”
- Substantial limitation shall be construed broadly in favor of expansive coverage
 - i.e., if it’s a close call you should consider it to be a disability
- Determination of substantial limitation still requires an individualized assessment
- Regulations make it clear that not all impairments will be disabilities

Substantially Limits: Rules of Construction (cont.)



- Determination of disability should not require extensive analysis
- EEOC Advises:
 - Employer primary focus should be on: A person's qualifications for a job or a request for reasonable accommodation
 - Court's primary focus should be on: Whether any discrimination has occurred

Substantially Limits: Rules of Construction (cont.)



- No minimum duration requirement: impairment lasting fewer than six months may be substantially limiting
- Scientific, medical, or statistical evidence may be used to establish substantial limitation if appropriate, but often will be unnecessary
- Individual need only be substantially limited in one major life activity (either list) to have a disability

Substantial Limitation: Condition, Manner, or Duration



- Considerations in determining if a substantial limitation exists
- These include:
 - difficulty, effort or length of time required to perform major life activity
 - pain;
 - total amount of time major life activity may be performed;
 - the way an impairment affects the operation of a major bodily function

Impairments That Will Virtually Always Be Found To Be Substantially Limiting



- Regulations emphasize that an individualized assessment is still required
- Recognizes that for certain impairments, this individualized assessment will virtually always result in a finding of disability due to the inherent nature of these conditions AND the extensive changes Congress made to the definition of disability

Impairments That Easily Should Be Found To Be Substantially Limiting



- Deafness
- Blindness
- Mobility impairments requiring use of a wheelchair
- Intellectual disability (mental retardation)
- Partially or completely missing limbs
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia

Rules of Construction: Impairments that are Episodic or In Remission



- Will be disabilities if substantially limit a major life activity **WHEN ACTIVE**
- Episodic: impairments that may not affect a person 24/7 but which periodically flare up: epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia
- In Remission: Cancers, Leukemia, etc.

“Regarded As” Having a Disability



- This definition of disability completely new
- Covers anyone subjected to an action “prohibited by this Act” because of an actual or perceived physical or mental impairment
- Actions include: hiring, demotion, promotion, termination, discipline, annual evaluation, compensation

“Regarded as” (cont.)



- Regarded as coverage **NO LONGER** requires a showing that an employer believed the impairment substantially limited a major life activity
- Two elements to consider:
 - Employer took a negative employment action
 - The action was based on an individual’s actual or perceived impairment

“Regarded as” (cont.)



- Employer's can challenge a claim that they regarded a person as having a disability by:
 - showing that the impairment at issue is BOTH transitory and minor
- **New Term: Transitory**
 - Definition: Condition lasting 6 months or less
- “Regarded as” coverage cannot be based on a transitory and minor impairment
 - Whether an impairment is transitory and minor must be based on objective evidence

Documentation of Disability



- Employers may still ask for documentation to substantiate existence of a non-obvious disability, but the content of documentation will be different from, and often less extensive than, pre-ADAAA documentation
 - In many instances, documentation may no longer be necessary at all
- The primary focus should be on understanding the **NEED** for an accommodation
 - How does the limitation impact the ability to perform the job task(s)

Impact on Qualification Standards



- Employers should be prepared to defend qualification standards that exclude individuals based on impairments, since most individuals affected by such standards will meet the “regarded as” definition of disability
 - i.e., impairments at issue are unlikely to be both transitory and minor

Revised Title II and III Regulations



MAJORITY OF PROVISIONS WENT INTO EFFECT ON MARCH 15,
2011

ALTERATIONS AND NEW CONSTRUCTION PROVISIONS GO INTO
EFFECT ON MARCH 15, 2012

New Definition – Service Animal



- “Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”



Do Work or Perform Tasks



- Requires that the dog be individually trained to do work or perform tasks
- The work or tasks performed by a service animal must be directly related to the handler's disability.
- Animals solely for companionship or emotional support are not covered by the ADA.



Exclusion of Service Animals



- General rule: Covered entities must permit service animals.
- Two specific exceptions of when service animals can be excluded:
 1. The animal is out of control and the handler does not take effective action to control it; or
 2. The animal is not housebroken.
- The handler should be given opportunity to participate without the animal.



Inquiries About Service Animals



- Permissible:
 - If the animal is required because of a disability; and
 - What work or task the animal has been trained to perform.
- Impermissible:
 - Make inquiries when it is apparent the animal is a service animal;
 - Ask for any kind of documentation, including certification of training or licensing; or
 - Inquire about the nature or extent of the individual's disability

Miniature Horses



- Rules require reasonable modifications to permit a miniature horse that has been individually trained to do work or perform tasks.
- Rules provide assessment factors to assist entities in determining whether reasonable modifications can be made.



Assessment Factors



- The type, size, and weight of the horse and whether the facility can accommodate those features
- Handler has sufficient control of the horse
- Horse must be housebroken
- Whether the horse's presence in a specific facility compromises legitimate safety requirements

Other Power Driven Mobility Devices (OPDMD)



- “Any mobility device powered by batteries, fuel, or other engines– whether or not designed primarily for use by individuals with mobility disabilities– that is used by individuals with mobility disabilities for the purpose of locomotion.”



- Includes

- Golf cars
- Electronic personal assistance mobility devices (e.g. Segway® PT)
- Any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair.

Use of OPDMDs



- Covered entities must make reasonable modifications to permit individuals with mobility disabilities to use OPDMDs unless . . .
 -
 - The entity can demonstrate that the class of OPDMD cannot be operated in accordance with legitimate safety requirements adopted by the entity.



Assessment Factors



- The type, size, weight, dimensions, and speed of the device.
- The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year)
- The facility's design and operational characteristics (e.g., whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user.)

What Questions Can Be Asked ?



- **Permissible:**

- Entities may ask persons using an other power-driven mobility device to provide a “credible assurance” that the device is required because of the person’s mobility disability.

- **Impermissible:**

- Entities may not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual’s disability

Credible Assurances



- A valid, disability parking placard or card, or other State-issued proof of disability
- A verbal representation by the individual with a disability, that is not contradicted by observable fact, that the OPDMD is being used for a mobility disability

Effective Communication



- Definition of auxiliary aids revised to include additional examples such as:
 - Exchange of written notes.
 - Accessible electronic and information technology.
 - Real-time computer-aided transcription services.
 - Qualified interpreters (includes on-site or through video remote interpreting services (VRI))

Effective Communication (Con't)



- Type of auxiliary aid or service will vary in accordance with:
 - Method of communication used by individual;
 - Nature, length, and complexity of communication involved; and
 - The context in which communication is taking place.
- Provide auxiliary aids in accessible formats, in timely manner, and in manner that protects privacy and independence of individual.

Other Examples. . .



Other examples of auxiliary aids and services:

- Voice, text, and video-based telecommunications products and systems.
- Braille or tactile displays.
- Screen reader software.
- Video remote interpreting (VRI).

Companions – Effective Communication



- Covered entities must communicate effectively with companions with disabilities, as appropriate.
- Companion defined as “family member, friend, or associate of an individual seeking access to a service, program or activity of a public entity, who along with such individual is an appropriate person with whom the public entity should communicate.”

Sign Language Interpreter – Use of Adult



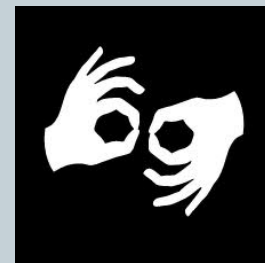
- Public entities shall not require individual to bring own interpreter.
- Public entities shall not require adults accompanying individual to interpret except:
 - In emergency involving imminent threat to safety or welfare of individual or public and no interpreter available, or
 - Where specific request by person with disability, accompanying adult agrees, and reliance on that person is appropriate under circumstances.



Sign Language Interpreter – Use of Children



- Use of a child as an interpreter is only permissible in emergency involving imminent threat to safety or welfare of an individual or the public where there is no interpreter available.



Video Remote Interpreting



- **Definition:** An interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images
- **DOJ standards require:**
 - Quality of video and audio that is high quality, clear, real-time, with clear uninterrupted images.
 - Dedicated high-speed connection.
 - Picture: Clear, sufficiently large, and sharply delineated, showing face, arms, hands and fingers
 - Voices: clear and easily understood transmission.
 - Quick set-up and training of users.



Other Communication Issues:



- **Use of Automated Attendant Systems**



- These include automated voice mail, interactive voice response systems.
 - ✦ If provided, must ensure effective communication in real time with individuals using auxiliary aids and services (TTY's, TRS).

- **Telecommunication Relay Services**

- Entity must answer telecommunications relay calls in same manner as it answers others



Employment and the ADA Resources



- **Equal Employment Opportunity Comm.**
 - 800-669-4000
 - <http://www.eeoc.gov>

- **Job Accommodation Network:**
 - 800-526-7234
 - <http://askjan.org>

- **ODEP (DOL Office Disability Policy)**
 - 202-376-6200
 - www.dol.gov/dol/odep/

Have Questions?



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