



By John S. Purtillo, CPA

The Americans with Disabilities Act Turns 20

Recent law changes provide new direction, employer challenges

Just 20 years ago, on July 26, 1990, President George H.W. Bush signed the Americans with Disabilities Act (ADA), a broad set of laws providing improved access to jobs, buildings, government services and transportation. You've seen some of its effects: blue-striped parking spaces, curb cuts, tactile signs, wheelchair ramps and lever-handles replacing round door knobs. These all were required by the ADA's extensive facilities access regulations and technical resources. It's safe to say you can't travel more than a few yards in an American city or town without encountering something that's been changed by the ADA.

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Besides providing access, the ADA prohibits discrimination in employment. Simply put, the ADA prohibits employers from discriminating against qualified people with disabilities. This includes job application procedures, hiring, promotion, termination, job training, and most other aspects of employment.

In addition, the law requires employers to make reasonable accommodations for workers to enable them to receive training and perform job tasks. In short, if a qualified worker can perform the essential physical functions of the job, the employer must accommodate the worker in performing the marginal, or nonessential, functions.

From the start, this proved challenging, because the ADA didn't contain fine-tuned definitions for disability, essential functions and reasonable accommodation. So, the ADA became shaped by several court cases and a small number of Equal Employment Opportunity Commission regulations. Increasingly, the EEOC regulations and the Supreme Court narrowed the ADA's impact, creating inconsistencies and making the ADA difficult for employers to implement.

Many employers vulnerable

The best illustration of this difficulty is found in position descriptions. Even today, few employers have expanded their position descriptions to include essential functions. Yet, if a position description doesn't list an essential function (hearing, for example), an applicant is entitled to assume that there are none. And, an applicant who is denied a job because of an undefined essential function can bring a lawsuit, claiming illegal discrimination.

Fast forward to 2010. Believing that Supreme Court decisions had limited the rights of persons with disabilities, Congress passes the ADA Amendments Act, effective in 2009 and in 2010, states and the EEOC are issuing enabling regulations. Let's review the ADAAA.

The ADAAA starts by deleting two statements in the ADA that the Supreme Court used to limit its application. The first was that some 43 million Americans have one or more physical or mental disabilities and the second was that individuals with disabilities are a discrete and insular minority. The Court had taken these statements to mean the ADA should be applied narrowly, when Congress had intended the opposite. The fact is that 20 percent of Americans have disabilities and their unemployment rate is more than double that of the rest of the population.

Defining disability and reasonable accommodation

The ADAAA next defines a disability more completely. The original ADA says that a person's major life activities must be substantially limited in order for an impairment to be a disability, but it left the term open to interpretation. The ADAAA now lists examples of major life activities including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

It also lists major bodily functions, including functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The ADAAA makes it clear these lists are not all inclusive; others can be added by the EEOC. So, if the employer needs an employee to perform one of the listed functions, hearing for example, the function has to be listed in the position description.

The ADAAA struck down a Supreme Court finding that mitigating measures (medication, assistive technology, accommodations) could cancel a person's disability. It also provides that a disability that is temporary or in remission must be considered in its active state.

To our disappointment, the ADAAA fails to define reasonable accommodation any better. That may be because the term is already included in an earlier law, the Rehabilitation Act of 1973. Accommodation is clear and there are two types: physical and work rules. For a physical accommodation, the employer provides a tool, appliance, equipment or modification. A work rules accommodation is one where the employer restructures the job, modifies work schedules or revamps applications or examinations.

The problem is the term "reasonable." It's defined in terms of itself, whether an accommodation would impose undue hardship. Factors to be considered include: number of employees, number and type of facilities, size of budget and the type of operation, including the composition and structure of [the] workforce, and nature and cost of the accommodation.

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Do you have an action plan for this changed ADA?

For one thing, expect more lawsuits. With fewer escape hatches, the courts can be expected to be more friendly to people with disabilities. Employees will still go to the EEOC - because it's free - if they can bring a claim within the EEOC's 180-day time limit. **Here are some other suggestions:**

- Include essential functions in all position descriptions. Now that we know what they are, there's no excuse not to.
- Use the position description in all job interview situations. You can't quiz an applicant about his or her disabilities, but you can provide a copy of the position description and ask, Can you perform this job?
- Treat all applicants alike. If an applicant has an apparent disability, can't ask specific questions about the disability, except to determine if the applicant needs an accommodation for the interview and for any required skills testing.
- Assume the number of people with disabilities will grow rapidly. Age is the biggest driver and the oldest baby boomer is now age 64.
- Assume your existing workforce will develop disabilities. When that happens, they become protected, you can't discriminate against them and you must provide accommodations for the nonessential functions of their jobs.

JOHN PURTILL
WILL PRESENT TWO
COURSES IN OCTOBER
FOR THE WICPA:

What CPAs Need to Know About Wage and Hour Overtime Laws (FLSA)

TUESDAY, OCT. 19
8 a.m. registration
8:30 a.m. - 4 p.m. program
Brookfield Suites, Brookfield

Controller or HR Director: Personnel and Regulatory Issues (PRI)

WEDNESDAY, OCT. 20
8 a.m. registration
8:30 a.m. - 4 p.m. program
WICPA, Brookfield