

# The ADA turns 30: Compliance in the evolving workplace

July 2020 marked the 30th anniversary of the Americans with Disabilities Act. The ADA was enacted to ensure equal opportunity for Americans with disabilities in many facets of life. Title I of the ADA addresses disability accommodations and protections from discrimination specifically in the employment context.



## COMPLIANCE CORNER

Nicole Elgin

## COMMENTARY

### The ADA defines “disability” broadly

Under the ADA, a “disability” is defined as a physical or mental impairment that substantially limits one or more major life activities. The law’s definition of “disability” also includes a person with a record of such impairment or a person who is regarded as having such impairment. Courts consistently interpret “disability” broadly to include alcohol use disorder, obesity or chronic migraines. Given the broad definition of “disability,” when employees ask for changes to their jobs due to a health condition, employers are wise to consider whether the request may be based on a “disability” and protected by the ADA.

### What is a reasonable accommodation and when are employers required to provide one?

Generally speaking, employers are required to provide a reasonable accommodation to an employee or job applicant with a disability unless doing so creates an “undue hardship” or a “direct threat.” A reasonable accommodation is an adjust-

ment that an employer makes to a job in order to allow an applicant or employee with a disability to have equal opportunity for employment. The law defines undue hardship as “an action requiring significant difficulty or expense” in light of the cost of the accommodation, and the size and overall financial resources of the employer. A direct threat is defined as a “significant risk to the health or safety” of the individual requesting the accommodation or others in workplace. Both the “undue hardship” and “direct threat” exceptions to providing a reasonable accommodation are interpreted narrowly and often misapplied by employers. We advise employers to consult with their legal counsel before denying an accommodation on these grounds.

### Be careful with medical inquiries and exams

According to the Equal Employment Opportunity Commission, employers may not ask job applicants about “the existence, nature or severity of a disability,” but they may ask applicants if they can perform a

specific job function. Employers cannot ask disability-related questions or require medical examinations until after a conditional job offer. Even then, there are significant restrictions on an employer’s ability to submit an applicant to a medical exam. The medical examination must be job-related and consistent with business necessity. Keep in mind, asking an employee questions specifically about his or her disability (rather than how it impacts job performance and the accommodations needed) can lead to liability for employers.

Employers performing workplace screening during the pandemic may also be submitting employees to “medical exams” and should check the latest guidance from the EEOC and state and local authorities to ensure these practices are permissible and consistent with current information available to health authorities.

### Leave as a reasonable accommodation

Many employers are unaware that time off or “leave” may be required as a reasonable accommodation for employees with a disability. As the EEOC explains, providing leave as a reasonable accommodation can include making modifications to existing leave policies and providing leave when needed for a disability, even when an employer does not offer leave to other employees. Some of the most common mistakes the EEOC cites employers for relating to leave as an accommodation are employers that maintain 100 percent healed policies

or that terminate employees who cannot immediately return to work following a medical leave absence. Often, an employee’s serious health condition that qualifies for Family Medical Leave (FMLA) or Oregon Family Leave (OFLA), may also mean the employee has a disability under the ADA.

The EEOC also reminds employers that they may need to consider whether reassignment is an option for employees with disabilities who cannot return to their regular job following leave. As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.

In the 30 years since its inception, the Americans with Disabilities Act has created a plethora of litigation as courts determine what exactly constitutes a disability, a reasonable accommodation, an undue hardship or direct threat, or when an employer’s medical inquiries or examinations run afoul of the ADA.

*Nicole Elgin is an attorney with Barran Liebman LLP. She can answer questions about accommodation requests by job applicants or employees. Contact her at 503-276-2109 or nelgin@barran.com.*

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