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The ADAAA and its affect on Section 503 of the 73 Rehabilitation Act

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The ADAAA and its affect on Section 503 of the 73 Rehabilitation Act

Presented by:

Mid-Atlantic ADA Center

Today's presenter:

Rob Hodapp
The Basics: ADA Amendments Act
(Signed in 2008)

“The courts have consistently chipped away at Congress’ very clear intent...virtually excluding entire classes of people even though (Congress) had specifically mentioned their impairments as objects of the laws’ protection.”

The ADA Amendments Act

Signed into law September 25, 2008
Effective date: January 1, 2009
EEOC final regulations published in the Federal Register on March 25, 2011
EEOC final regulations became effective on May 24, 2011


Consider these cases...

A fully qualified individual was denied employment in a warehouse on the basis of a cognitive disability

A teacher whose breast cancer was in remission was denied re-employment after a leave of absence

A sales associate was denied an accommodation (two very brief breaks) to take insulin shots for his diabetes

The Catch 22 ...

Not “impaired” enough to meet the ADA definition of disability but impaired enough to be considered “not qualified”

The merit of the discrimination event itself was rarely considered as the courts paid more attention to determining whether the individual had a “disability”
ADA Amendments Act ...

Realigning with the original intent of Congress

Definition of disability still reads:

*A physical or mental impairment that substantially limits one or more major life activity:

- Someone who has an impairment
- Someone who has a record of an impairment
- Someone who is regarded as having an impairment

But the terms of the definition have been expanded and illustrated

---

**Substantially limited**

Do not consider effects of mitigating measures (e.g., medication, wheelchair)

Episodic and remitting conditions which when active are substantially limiting, are covered.

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**Major life activity**

Illustrative (non-exhaustive) lists:

- Major life activities
- Bodily functions

Individual need only be limited in ONE activity (not multiple)
**Non-exhaustive Illustrative list**

**Major life activity:**

<table>
<thead>
<tr>
<th>Caring for oneself</th>
<th>Lifting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Performing manual tasks</td>
<td>Bending</td>
</tr>
<tr>
<td>Seeing</td>
<td>Speaking</td>
</tr>
<tr>
<td>Hearing</td>
<td>Breathing</td>
</tr>
<tr>
<td>Eating</td>
<td>Learning</td>
</tr>
<tr>
<td>Sleeping</td>
<td>Reading</td>
</tr>
<tr>
<td>Walking</td>
<td>Concentrating</td>
</tr>
<tr>
<td>Standing</td>
<td>Thinking</td>
</tr>
<tr>
<td>Sitting</td>
<td>Communicating</td>
</tr>
<tr>
<td>Reaching</td>
<td>Interacting with others</td>
</tr>
<tr>
<td></td>
<td>Working</td>
</tr>
</tbody>
</table>


**Major Bodily Functions**

- **Immune system**
- **Normal cell growth**
- **Digestive**
- **Bowel/bladder**
- **Special sense organs and skin**
- **Respiratory**
- **Circulatory**
  - Includes the operation of an individual organ body (e.g., kidney, liver, or pancreas)

EEOC (2011)

**ADA AA non-exhaustive list of impairments that should easily be found to be substantially limiting**

(Should not require further or extensive analysis)*

<table>
<thead>
<tr>
<th>Deafness</th>
<th>Diabetes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blindness</td>
<td>Epilepsy</td>
</tr>
<tr>
<td>Intellectual disability (formerly known as mental retardation)</td>
<td>HIV infection</td>
</tr>
<tr>
<td>Partially or completely missing limbs</td>
<td>Multiple sclerosis</td>
</tr>
<tr>
<td>Mobility impairments requiring use of a wheelchair</td>
<td>Muscular dystrophy</td>
</tr>
<tr>
<td>Autism</td>
<td>Major depressive disorder</td>
</tr>
<tr>
<td>Cancer</td>
<td>Bipolar disorder</td>
</tr>
<tr>
<td>Cerebral palsy</td>
<td>Post-traumatic stress disorder</td>
</tr>
<tr>
<td></td>
<td>Obsessive-compulsive disorder</td>
</tr>
<tr>
<td></td>
<td>Schizophrenia</td>
</tr>
</tbody>
</table>

ADA Amendments Act ...

**Record of & Regarded as**

"Record of" disability

Essentially the same definitions as “Prong 1”—having the disability

Changes in "Regarded as"

Covers individuals who have experienced discrimination because of an impairment unless the impairment is both transitory and minor (lasting 6 months or less).

Employer's not required to provide accommodation to those who meet definition of disability under "regarded as"

---

**What are non-obvious disabilities?**

- (Arguably) The most common category of disability in the US
- Are covered by the ADA and the ADAAA just like obvious disabilities
- Disabilities that may be misunderstood, leading to a unique dynamic in the workplace

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**The workplace dynamic: Non-obvious disabilities**

- Disclosure may be a choice
- Greater social stigma
- “But you look just fine!”—Credibility issues
- Others may be more likely to “blame” people for their disability
- Employers often confused about accommodation practices
What are some examples of major types of non-obvious disability?

- Arthritis
- Mental illness
- Diabetes
- Autism/Aspergers syndrome
- Learning disabilities
- ADD/ADHD
- AIDS/HIV
- Multiple Sclerosis
- Cancer
- Seizure disorder
- Multiple chemical sensitivity
- Other?

What do you think?

What is the leading cause of disability among people aged 15 – 44 in the US and Canada?*

A. Cancer  
B. Depression  
C. Multiple Sclerosis  
D. Seizure disorder


What do you think?

The most common type of disability among all age groups is:*  

A. Arthritis  
B. Cancer  
C. Seizure disorder  
D. Asperger syndrome/autism

What do you think?

Overall, what percent of adults in America are diagnosed with one or more chronic illness disabilities?*

A. 10%
B. 20%
C. 35%
D. 50%


What do you think?

Approximately what percent of veterans returning from Iraq or Afghanistan have PTSD, depression and/or traumatic brain injury?

A. 10%
B. 20%
C. 30%
D. 70%


Why are nonobvious disabilities becoming more prevalent among US workers?

- Our aging population
- Greater awareness/less shame
- Enhanced diagnostic/screening practices
- Increased survival of illnesses/injuries
- Environmental issues
- Other?
Nonobvious Disabilities and the Accommodation Process

Person only has a right to an accommodation if their disability, that is covered by the ADA, is interfering with their ability to perform essential functions of the job.

Employer may (but is not required to) collect medical information related to the accommodation decision.

Accommodation discussion should include: Who else will be told and why?

Choosing an accommodation—Creativity is your best resource.

ADA Amendments Act ...

What does this mean for the workplace?

- More employees will be protected by the ADA
- A need to know the definition of “qualified individual”
- A need for clearer job descriptions that identify essential vs. marginal job functions
- A need for managers and workers to understand their rights/responsibilities under the ADA

Questions?
Section 503 & ADA

The ADAAA & its Effect on the New Section 503 Rule

Section 503 OFCCP

- Section 503 prohibits employment discrimination on the basis of disability by Federal government contractors and subcontractors. Section 503 also requires that covered contractors take affirmative action to employ and advance in employment qualified individuals with disabilities.

VEVRAA OFCCP

- The Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA), prohibits employment discrimination against protected veterans by covered Federal contractors and subcontractors, and requires that they take affirmative action to employ and advance in employment these veterans.
Why Change?

- Framework unchanged since the 1970’s.
- Many veterans face substantial obstacles in finding employment in the civilian workforce.
- Unemployment rate of IWDs remains significantly higher.
- Revisions are intended to enhance contractor accountability for compliance and ultimately increase employment opportunities.

The New Regulations

- Update and strengthen the regulations to aid contractors in the recruitment and hiring of protected veterans and IWDs and facilitate compliance with the law.
- Increase contractor accountability for meeting their Affirmative Action (AA) obligations.

Phased In Compliance

- Effective date: March 24, 2014
- Contractors with existing Affirmative Action Programs (AAP) on the effective date may wait to come into compliance with the new affirmative action requirements as part of their standard AAP review and updating cycle.
- Must comply with other revised requirements by the effective date.
Section 503 Provisions

**Definitions**

- **41 CFR 60-741.2**
  - Revises definitions relating to "disability": including "major life activities," "major bodily functions," "regarded as" having a disability and "substantially limits" in accordance with changes made by the ADAAA.

**Equal Opportunity Clause**

- **Providing Notices to Applicants & Employees- 41 CFR 60-741.5**
  - Contractor can satisfy its posting obligation of notices of rights and obligations electronically for employees with telework arrangements or for those who do not work at the contractor’s physical location.
  - If contractor uses electronic or internet-based application processes, an electronic notice of employee rights and contractor obligations must be “conspicuously stored with, or as part of, the electronic application.”
Equal Opportunity Clause

**Contractor Solicitations and Advertisements - 41 CFR 60-741.5**

- New paragraph requires contractors to state in job solicitations and advertisements that it is an equal opportunity employer of individuals with disabilities.

Equal Opportunity Clause

**Incorporating the EO Clauses by Reference 41 CFR 60-741.5 (d)**

- Requires citation to EO Clause and the inclusion of specific mandatory language:
- "This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities."

Prohibitions

**41 CFR 60-741.21**

- Adds that reasonable accommodation need not be provided to individuals who are only "regarded as" having a disability. (6)(v)

- Adds that use of qualification standards, employment tests, or other selection criteria that are "based on an individual's uncorrected vision" are prohibited unless consistent with business necessity. (7)(ii)
• **41 CFR 60-741.21**

  Adds that reasonable accommodation extends to contractors’ use of electronic or online job application systems. Contractors’ must ensure that IWDs who cannot use the system have equal opportunity to apply and be considered for all jobs.

• **Utilization Goal** - 7% for individuals with disabilities (IWD), applies to all job groups. If fewer than 100 employees, 7% company wide.

• **Data Collection** - Document & update annually quantitative comparisons for number of IWDs who apply and number of IWDs hired. Measures effectiveness of outreach efforts.

• **Invitation to Self-Identify** - Requires contractors to self-identify at both pre-offer and post-offer phases of application phases using language prescribed by OFCCP. Also requires contractors every five years to invite employees to self-identify as IWDs. The prescribed language is now posted on OFCCP website.

Overview of Changes

- **Incorporation of the EO Clause**—Requires specific language be used when incorporating the equal opportunity clause into a subcontract by reference. The mandated language though brief, will alert subcontractors to their responsibilities as federal contractors.

- **Records Access**—clarifies that contractors must allow OFCCP to review documents related to a compliance check or focused review, either on-site or off-site at OFCCP’s option. Also, upon request contractors need to inform OFCCP of all formats in which it maintains records and provide to OFCCP in whichever format requested by OFCCP.

- **ADAAA**—The Final Rule implements changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of “disability” and certain nondiscrimination provisions of the implementing regulations.
Invitation to Self-Identify

- **41 CFR 60-741.42**
  - Pre-offer: invitation to self-identify as an IWD.
  - Post-offer: invitation to self-identify as IWD.
  - Employees: invitation to all employees in first year; and every five years thereafter; at least one reminder in intervening years.
  - All invitations use form posted on OFCCP Web site.

Timing of Pre-Offer Inquiries

- Ask applicants to self-identify when applicants are asked for other demographic information under EO 11246.
- Harmonizes Section 503 with the EO Internet Applicant Rule.
- "Basic qualification" screens may not screen out on the basis of disability unless job-related and consistent with business necessity.

AAP Elements

- **Outreach and Recruitment**
  - **41 CFR 60-741.44(f)**
  - Requires outreach and recruitment; provides examples; and retains contractor flexibility.
  - Requires documentation of activities and annual written assessment of the effectiveness of each of its activities.
  - If totality of efforts not effective, must identify and implement alternative efforts.
    - **Retain** these records for 3 years.
• **Data Collection Analysis 41 CFR 60-741.44(k)**
  - Requires contractors to document and update annually:
    - Number of IWD applicants;
    - Total number of applicants for all jobs;
    - Total number of job openings and jobs filled;
    - Number of IWDs hired; and
    - Total number of applicants hired.
  - Maintain these records for **3 years**.

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• **Utilization Goal 41 CFR 60-741.45**
  - Establishes a nationwide **7% utilization goal**.
    - Apply goal to each job group annually, except if 100 or fewer employees may use entire workforce
    - If goal not met, determine if impediments to EEO exist; take steps to correct any identified problems.
    - Failure to meet goal is NOT a violation & will NOT carry penalties.

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• **Compliance Evaluations 41 CFR 60-741.60**
  - Adds a pre-award compliance review procedure.
  - Clarifies that OFCCP may need to examine information after the date of the scheduling letter.
  - States that OFCCP may request that documents be provided either on-site or off-site during compliance checks and that focused reviews may be conducted both on-site and off-site.
Recordkeeping

- Three year recordkeeping requirement
- 41 CFR 60-741.80
  - External outreach and recruitment efforts (60-741.44(f)(4))
  - Data collection analysis (60-741.44(k))

Access To Records

- 41 CFR 60-741.81
  - Requires that contactors must provide records and other information "in any of the formats in which they are maintained, as selected by OFCCP."
  - Confirms OFCCP’s commitment to treat records provided by contractors as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act.

Appendix A

- Guidelines on Contractors Duty to Provide Reasonable Accommodation
  - Minor changes to update the guidelines and conform them to changes made in the Final Rules.
Appendix B

- Provides "best practice" guidance for contractors who voluntarily choose to adopt and implement written reasonable accommodation procedures.

Accommodations

- The final rule notes that using written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations.
- Appendix B that provides guidance for contractors on establishing written reasonable accommodation procedures.

Questions?
VEVRAA Provisions

- Rescission of 41 CFR Part 60-250
  - Rescinds Part 60-250 in its entirety.
  - Provision added to permit any "pre-JVA veteran" who would have been covered by Part 250 (but not by Part 300) to file discrimination and retaliation complaints.

**OFCCP covering rare instances that there are any Pre-JVA (before 12/1/03) contracts still in existence.

VEVRAA EO Clause

Notice to Applicants & Employees

- Contractor can satisfy its posting obligations of notices of rights and obligations electronically for employees with telework arrangements or for those who do not work at the contractor's physical location.
- If contractor uses electronic or internet-based application processes, an electronic notice of employee rights and contractor obligations must be "conspicuously stored with, or as part of, the electronic application."
• Equal Opportunity Clause
• New paragraph requires contractors to state in job solicitations and advertisements that it is an equal opportunity employer of protected veterans and individuals with disabilities.

“This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.”

This contractor and subcontractor shall abide by the requirements of 41 CFR §§ 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status or disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.
Combining EO Clauses

This contractor and subcontractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

VEVRAA Definitions

• "Protected Veteran" -
  - Those discharged in last 3 years
  - Disabled Veteran

• "Other Protected Veteran" -
  - Active Duty Wartime
  - Campaign Badge Veteran

VEVRAA DCCP

• Mandatory Job Listing
  - Requires that contractors provide job listings "in a manner or format permitted by the appropriate employment service delivery system [ESDS]."

• Information Provided to State Employment Services
  - Contractors must provide additional information including status as a federal contractor, contact information, its request for priority referrals, and update information annually.
Final Rule eliminates the separate inquiry regarding disabled vet status.

- **Pre-offer**: invitation to self-identify as a protected vet.
- **Post-offer**: invitation to self-identify specific veteran category(ies) that the contractor is required to report to VETS on. Model invitations contractors may use in Appendix B.

**Timing of Pre-Offer Inquiries**

- Ask applicants to self-identify when applicants are asked for other demographic information under EO 11246.
- Harmonizes VEVRAA with the EO 11246 Internet Applicant Rule.
- “Basic qualification” screens may not screen out on the basis of disability unless job-related and consistent with business necessity.

**Outreach and Recruitment**

- Requires outreach and recruitment; provides examples; and retains contractor flexibility.
- Requires documentation of activities and annual written assessment of the effectiveness of each of its activities.
- If totality of efforts not effective, must identify and implement alternative efforts.
  - **Retain** these records for 3 years.
Data Collection Analysis
- Requires contractors to document and update annually:
  - Number of protected veteran applicants;
  - Total number of applicants for all jobs;
  - Total number of job openings and jobs filled;
  - Number of protected veterans hired; and
  - Total number of applicants hired.
- Maintain these records for 3 years.

Contractors must set an annual hiring benchmark.
- Is the benchmark a goal?
- Two methodologies for setting the benchmark:
  - National percentage of veterans in the civilian labor force, currently 8%, or
  - Establish an individual benchmark using five factors identified in the Final Rule.
- 3 year recordkeeping requirement

Adds a pre-award compliance review procedure.
- Clarifies that OFCCP may need to examine information after the date of the scheduling letter.
- States that OFCCP may request that documents be provided either on-site or off-site during compliance checks and that focused reviews may be conducted both on-site and off-site.
Three year recordkeeping requirement
• 41 CFR 60-300.80
• External outreach and recruitment efforts (60-300.44(f)(4))
• Data collection analysis (60-300.44(k))
• Criteria and conclusions regarding contractor established hiring benchmarks (60-300.45)

Access to Records
• Requires that contactors must provide records and other information “in any of the formats in which they are maintained, as selected by OFCCP.”
• Confirms OFCCP’s commitment to treat records provided by contractors as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act.

Guidelines on Contractors Duty to Provide Reasonable Accommodation
• Minor changes to update the guidelines and conform them to changes made in the Final Rules.

Appendix A
• Sample Invitation to Self-Identify
  • Made consistent with changes to 41 CFR 60-300.42.

Appendix B

Accommodation Facts

• Many people with disabilities do not require accommodations.
• If they do, most accommodations are of a minimal cost ($600) or cost nothing.
• Many people with disabilities already have their own accommodations.
• Accommodations are an ongoing process as more improved ones are developed.

Better Communications

• Accommodations can have a positive impact on overall workplace productivity.
• The best accommodations come from open and ongoing dialogue.
• This open dialogue can help solve the problem of:
Better Communications

- Employees being reluctant to bring up their accommodation needs. Companies need to foster a workplace culture that affirms the uniqueness of each employee and that welcomes suggestions that will sustain or enhance their productivity. - Rob McInnis

Many companies already have employees with disabilities and don’t even know it! The younger “Baby Boomers” are in their 50s. If companies can’t create an environment that accepts differences then employees will continue to hide their disabilities. - leading to lower productivity.
- Walgreen’s and Lowe’s have great models.

Employers should review accommodation procedures, past and present; also review requests that were denied in the past. - Since 2008 ADA Amendments, past denials may be valid now.
- ALWAYS: Include the employee or applicant in the accommodation process. They may come up with the best ideas.
National VR Resource

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Director of Business Relations, The NET: The National Employment Team, Council of State Administrators of Vocational Rehabilitation (CSAVR)
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206.999.9455 (Office/Cell)
Website: www.rehabnetwork.org

PA OVR BUSINESS RESOURCES

- Ralph Roach - Business Services Division Chief rroach@pa.gov 717-787-3940
- Vondol Hammond - OVR Eastern PA Business Outreach Specialist vhammond@pa.gov 717-787-5098
- Rob Hodapp - OVR Western PA Business Outreach Specialist rhodapp@pa.gov 814-451-5421
- Dave Baum - OVR OJT Specialist dbaum@pa.gov 717-771-4407 Ext. 201

RESOURCES

- Office of Federal Contract Compliance Programs
  - Section 503 Landing Page Link
    http://www.dol.gov/ofccp/regs/compliance/section503.htm
  - VEVRAA Landing Page Link
    http://www.dol.gov/ofccp/regs/compliance/vevraa.htm
RESOURCES

• Rob McInnes, Diversity World, December, 2009 www.diversityworld.com

• Job Accommodation Network (JAN) www.askjan.org (800)526-7234

• Mid-Atlantic ADA Center- www.adainfo.org
  800-949-4232-Technical Assistance

Questions?

Contact Us

• ADA questions
  – ADA National Network
    • 1-800-949-4232 V/TTY
    • wwwadata.org

• Questions about this presentation
  – Mid-Atlantic ADA Center
    • 1-800-949-4232 V/TTY (DC, DE, MD, PA, VA, WV)
    • 301-217-0124 local
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