



The Americans with Disabilities Act (ADA): Employment Issues and the 2009 Influenza Pandemic

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Summary

On June 11, 2009, in response to the global spread of a new strain of influenza, the World Health Organization (WHO) raised the level of influenza pandemic alert to phase 6, which indicates the start of an actual pandemic. This change reflects the spread of the new influenza A(H1N1) virus, not its severity. Although currently the pandemic is of moderate severity with the majority of patients experiencing mild symptoms and making a rapid and full recovery, this experience could change.

The Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities and protects applicants and employees from discrimination based on disability. The application of the ADA's nondiscrimination mandates during an influenza pandemic is uncharted territory since the most recent previous influenza pandemic was in 1969, before the 1990 enactment of the ADA. Currently, an individual infected with the H1N1 virus would most likely not be considered an individual with a disability; however, if the H1N1 virus were to mutate to cause more severe illness, such an infection may be considered a disability. The ADA prohibits employers from making certain disability-related inquiries and, currently, this prohibition might be interpreted to apply to inquiries about whether an employee would be in a high-risk group for pandemic influenza. The ADA also requires that employers provide reasonable accommodation for individuals with disabilities, and during a pandemic these accommodations would continue to be applicable unless they constitute an undue hardship.

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Introduction

On June 11, 2009, in response to the global spread of a new strain of influenza, the World Health Organization (WHO) raised the level of influenza pandemic alert to phase 6, which indicates the start of an actual pandemic. This change reflects the spread of the new influenza A(H1N1) virus, not its severity. Although currently the pandemic is of moderate severity with the majority of patients experiencing mild symptoms and making a rapid and full recovery, this experience could change.¹

The Americans with Disabilities Act (ADA)² has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities. As stated in the act, the ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."³ The application of the ADA to an influenza pandemic is uncharted territory since the most recent previous influenza pandemic was in 1969, before the 1990 enactment of the ADA, and before the 1973 enactment of Section 504 of the Rehabilitation Act of 1973,⁴ which was the model for the ADA.

Definition of Disability

Statutory Provisions

The starting point for an analysis of rights provided by the ADA is whether an individual is an individual with a disability. The term "disability," with respect to an individual, is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph(3))."⁵ The ADA was amended by the ADA Amendments Act of 2008, P.L. 110-325, to expand the interpretation of the definition of disability from that of several Supreme Court decisions.⁶ Although the statutory language is essentially the same as it

¹ For information on the latest number of cases, medical information, and U.S. government actions, see <http://www.flu.gov>. See also CRS Report R40554, *The 2009 Influenza Pandemic: An Overview*, by Sarah A. Lister and C. Stephen Redhead. For an overview of the legal issues relating to the 2009 Influenza A(H1N1), see CRS Report R40560, *The 2009 Influenza Pandemic: Selected Legal Issues*, coordinated by Kathleen S. Swendiman and Nancy Lee Jones.

² 42 U.S.C. §§12101 *et seq.* For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

³ 42 U.S.C. §12101(b)(1).

⁴ 29 U.S.C. §794.

⁵ 42 U.S.C. §12102(2) as amended by P.L. 110-325, §4(a).

⁶ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Kirkingburg v. Albertson's Inc.*, 527 U.S. 555 (1999); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). For a more detailed discussion of P.L. 110-325 see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

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was in the original ADA, P.L. 110-325 contains new rules of construction regarding the definition of disability, which provide that

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;
- the term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act;
- an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;
- an impairment that is episodic or in remission is a disability if it would have substantially limited a major life activity when active;
- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.⁷

The findings of the ADA Amendments Act include statements indicating that the Supreme Court decisions in *Sutton v. United Airlines* and *Toyota Motor Manufacturing v. Williams*, as well as lower court cases, have narrowed and limited the ADA from what was intended by Congress. P.L. 110-325 specifically states that the current Equal Employment Opportunity Commission (EEOC) regulations defining the term “substantially limits” as “significantly restricted” are “inconsistent with congressional intent, by expressing too high a standard.” The codified findings in the original ADA are also amended to delete the finding that “43,000,000 Americans have one or more physical or mental disabilities.” This finding was used in *Sutton* to support limiting the reach of the definition of disability.

The ADA Amendments Act states that the purposes of the legislation are to carry out the ADA’s objectives of the elimination of discrimination and the provision of “‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection available under the ADA.” P.L. 110-325 rejected the Supreme Court’s holdings that mitigating measures are to be used in making a determination of whether an impairment substantially limits a major life activity as well as holdings defining the “substantially limits” requirements. The substantially limits requirements of *Toyota* as well as the EEOC regulations defining substantially limits as “significantly restricted” are specifically rejected in the new law.

Application to Pandemic Influenza

The statutory definition of disability does not discuss pandemic influenza. How, then, would this definition apply in the context of an influenza pandemic? Specifically, are individuals infected with a pandemic influenza virus considered to be individuals with disabilities? There is not a clear-cut answer to these questions, but the EEOC has indicated that currently individuals infected with the H1N1 virus would not be individuals with disabilities. However, if the disease were to become more severe, an infected individual might be considered to be an individual with a disability under the ADA.

⁷ Low-vision devices are not included in the ordinary eyeglasses and contact lens exception.

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On September 23, 2009, the EEOC issued proposed regulations under the ADA Amendments Act.⁸ The proposed regulations do not specifically discuss whether influenza is a disability; however, the comments to the proposed regulations state that certain types of impairments are usually not disabilities. These include "broken limbs that heal normally, sprained joints, appendicitis, and seasonal or common influenza."⁹ Pandemic influenza is not discussed. The appendix to the existing regulations contains similar language, but simply refers to "influenza," not "seasonal or common influenza."¹⁰ Thus, both current and proposed ADA regulations leave unanswered the application of the definition of disability to pandemic influenza.

However, on October 5, 2009, EEOC issued a technical assistance document regarding workplace pandemic preparedness and the ADA that contains a fact-based analysis. The document indicates that EEOC believes that an individual infected with the H1N1 virus would not be an individual with a disability if the illness is similar to seasonal influenza, or the 2009 spring/summer H1N1 virus. However, if the illnesses were more serious, they might be considered disabilities under the ADA.¹¹ Despite the fact that currently an individual infected with the H1N1 virus would not be considered an individual with a disability, the EEOC states that "employers should allow employees who experience flu-like symptoms to stay at home."¹²

Although the EEOC guidance indicates that the current situation with the H1N1 virus would not make an infected individual an individual with a disability under the ADA, the possibility of such coverage for a more serious illness is raised. However, the EEOC guidance does not delineate when the illness would be serious enough to be encompassed by the ADA. Generally, individuals with long-term contagious diseases would be considered individuals with disabilities.¹³ In *Bragdon v. Abbott*,¹⁴ the Supreme Court held that HIV infection was a physical impairment that was a substantial limitation on the major life activity of reproduction. It might be argued that an individual who is infected with a pandemic influenza virus and who manifests long-term symptoms would have a substantial limitation on a major life activity. Whether an individual infected with serious pandemic influenza is an individual with a disability is dependent on an individualized determination. This may turn on the severity of the particular infection and whether an individual had any long-lasting residual effects from the infection. In addition, the enactment of P.L. 110-325, with its requirement that the definition of disability be construed broadly,¹⁵ makes it more likely that a disability will fall within the purview of the ADA.

It should also be noted that the third prong of the definition of disability protects individuals who are "regarded as" having a disability and would appear to be the most applicable in situations such as quarantines, since individuals who are quarantined may not be infected. P.L. 110-325 amended the ADA definition of "regarded as" providing that an individual meets the requirement of being "regarded as" having a disability "if the individual establishes that he or she has been

⁸ 74 FED. REG. 48431 (September 23, 2009). Comments on the proposed regulations must be submitted on or before November 23, 2009.

⁹ 74 FED. REG. 48448 (September 23, 2009).

¹⁰ 29 C.F.R. Part 1630, App. § 1630.2(j).

¹¹ http://www.eeoc.gov/facts/pandemic_flu.html.

¹² *Id.*

¹³ For a discussion of the ADA's coverage of contagious disease generally, see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by Nancy Lee Jones.

¹⁴ 524 U.S. 624 (1998).

¹⁵ 42 U.S.C. § 12101(3), as amended by P.L. 110-325, § 4.

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subjected to an action prohibited under this act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹⁶ The “regarded as” prong does not apply to transitory and minor impairment. A transitory impairment is defined as an impairment with an actual or expected duration of six months or less.¹⁷ Therefore, it would appear to be difficult to find that an individual who has been quarantined is an individual with a disability under the “regarded as” prong.

Employment Discrimination

General Statutory Provisions

Title I of the ADA prohibits employment discrimination, and specifically provides that no covered entity shall discriminate against a qualified individual with a disability on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.¹⁸ The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.¹⁹

Disability-Related Inquiries

The ADA limits an employer’s ability to make disability-related inquiries or to require medical examinations.²⁰ Prior to an offer of employment, all disability-related inquiries and medical examinations are prohibited. After a conditional job offer, but prior to the commencement of employment, an employer may make disability-related inquiries and conduct medical examinations as long as this is done for all entering employees in the same job category. After an employee begins work, an employer may make disability-related inquiries and conduct medical examinations only if they are job-related and consistent with business necessity. Any medical information an employer obtains as a result of these actions must be treated as a confidential medical record.

If an inquiry is not about a disability or likely to elicit information about a disability, the ADA’s prohibition on disability-related inquiries does not apply. The EEOC technical assistance document regarding workplace pandemic preparedness and the ADA discusses disability-related inquiries in the context of a pandemic, noting that “asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.”²¹ An inquiry that

¹⁶ 42 U.S.C. §12101(3), amended by P.L. 110-325, Section 4.

¹⁷ *Id.*

¹⁸ 42 U.S.C. §12112(a).

¹⁹ 42 U.S.C. §12111(5). This parallels the coverage provided in the Civil Rights Act of 1964. The Supreme Court in *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500 (2006), held that the 15-employee limitation in Title VII of the Civil Rights Act, 42 U.S.C. §2000e(b), was not jurisdictional, but rather was related to the substantive adequacy of a claim. Thus, if the defense that the employer employs fewer than 15 employees is not raised in a timely manner, a court is not obligated to dismiss the case. Since the ADA’s 15-employee limitation language parallels that of Title VII, it is likely that a court would interpret the ADA’s requirement in the same manner.

²⁰ 42 U.S.C. §12112(d).

²¹ http://www.eeoc.gov/facts/pandemic_flu.html.

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seeks to determine if an individual would be in a high-risk group for pandemic influenza due to a chronic health condition like asthma would not be permitted prior to a pandemic. Similarly, such an inquiry would not be permitted during a pandemic where the illness, as is currently the case, is generally moderate or mild.²² However, such inquiries may be made if public health officials find that the illness caused by the pandemic is generally severe.²³ Any disclosures of medical information by an employee must be kept confidential.²⁴

Qualified Individual with a Disability

For an ADA employment-related issue, if the threshold issues of meeting the definition of an individual with a disability and involving an employer employing over 15 individuals are met, the next step is to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Title I defines a "qualified individual with a disability." Such an individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires."²⁵ The EEOC states that a function may be essential because (1) the position exists to perform the duty, (2) there are a limited number of employees available who could perform the function, or (3) the function is highly specialized.²⁶

It is a defense to a charge of discrimination that an alleged application of a qualification standard has been shown to be job-related and consistent with business necessity.²⁷ A qualification standard may include a requirement that an individual not pose a direct threat to the health or safety of other individuals.²⁸ "Direct threat" is defined as meaning "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."²⁹ EEOC states that the severity of the illness is the determinate of whether pandemic influenza rises to the level of a direct threat, and that this determination is to be based on assessments by CDC or public health authorities. Currently, the H1N1 influenza virus is not seen as posing such a threat.³⁰

Reasonable Accommodation

The ADA requires the provision of reasonable accommodation unless the accommodation would pose an undue hardship on the operation of the business.³¹ "Reasonable accommodation" is defined in the ADA as including making existing facilities readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules,

²² *Id.* The EEOC provides a sample ADA compliant pre-pandemic survey which allows employers to identify which employees are more likely to be unavailable for work during a pandemic.

²³ *Id.*

²⁴ 42 U.S.C. § 12112(d).

²⁵ 42 U.S.C. § 12111(8).

²⁶ 29 C.F.R. § 1630.2(n)(2).

²⁷ 42 U.S.C. § 12113.

²⁸ 42 U.S.C. § 12113(b).

²⁹ 43 U.S.C. § 12111(3).

³⁰ http://www.eeoc.gov/facts/pandemic_flu.html.

³¹ 42 U.S.C. § 12112(b)(5)(A).

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reassignment to vacant positions, acquisition or modification of equipment or devices, adjustment of examinations or training materials or policies, provision of qualified readers or interpreters, and other similar accommodations.³² The EEOC interprets reasonable accommodation as including work at home³³ and the use of paid or unpaid leave.³⁴

During a pandemic, reasonable accommodations must continue to be provided unless these constitute an undue hardship. For example, if employees are asked to telework to reduce the spread of the virus, an employee with a disability who needs an accommodation at work, such as a screen-reader, must be provided that same accommodation during telework, barring undue hardship.³⁵

“Undue hardship” is defined as “an action requiring significant difficulty or expense.”³⁶ Factors to be considered in determining whether an action would create an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operation or operations of the covered entity.³⁷ The EEOC has provided detailed guidance on reasonable accommodation and undue hardship, which, in part, discusses the use of paid or unpaid leave as a form of reasonable accommodation.³⁸

It is important to note that the third prong of the ADA’s definition of disability, being “regarded as” having a disability, does not require the provision of reasonable accommodation.³⁹ As a practical matter, this would mean that the provision of telework for individuals who are quarantined or subject to a “snow day” would not be required under the ADA, even if an individual were to meet the requirements of the third prong of the definition.

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³² 42 U.S.C. § 12111(9).

³³ See <http://www.eeoc.gov/facts/telework.html>.

³⁴ EEOC, “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>. Since the ADA Amendments Act largely concerned the definition of disability, it is likely that the EEOC’s interpretations of parts of the ADA would not be significantly affected by P.L. 110-325.

³⁵ http://www.eeoc.gov/facts/pandemic_flu.html.

³⁶ 42 U.S.C. § 12111(10).

³⁷ *Id.*

³⁸ EEOC, “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>. This guidance also discusses the relationship between the ADA and the Family Medical Leave Act (FMLA).

³⁹ 42 U.S.C. § 12201(h), as amended by P.L. 110-325, Section 6.