

Americans with Disabilities Act

Anti-Discrimination Law Webinar Series
November 14th, 2018



*No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of **a public entity**, or be subjected to discrimination by any such entity.*



No covered entity shall discriminate against a qualified individual 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.



Overview

- ▷ **What it does:** prohibits disability discrimination and ensures equal access to programs
- ▷ **To whom does it apply:** public entities, covered entities
- ▷ **Whom does it protect:** students and employees with a qualifying disability, those who want to participate in activities or programs (applicants, parents, guardians)
- ▷ **Enforcement:**
 - Title II: OCR – Students
 - Title I: EEOC - Employment



Law and Regulations

Key Definitions and Requirements



Disability Definition

- ▷ Intended to be interpreted to allow for broad coverage
- ▷ Disability
 - **A physical or mental impairment that substantially limits a major life activity;**
 - **A record of such an impairment; or**
 - **Being regarded as having such an impairment.**



Major life activities

- ▷ Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working



Major bodily functions

- ▷ These are included under the “major life activities”
- ▷ Functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions



Disability

- ▷ An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting.

- ▷ Shall be interpreted without regard to the ameliorative effects of mitigating circumstances, other than ordinary eyeglasses or contact lenses
 - **Mitigating measures include: medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment**
 - **These measures cannot be considered when determining whether a person has a substantially limiting impairment.**



Auxiliary Aids

- ▶ A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

Reasonable Accommodation



- ▷ Refers to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment



Reasonable Modification

- ▷ Public entities are required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity



Related Services

- ▶ A term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation



Students



Administrative Requirements

**Notice, Coordinator, Grievance Procedure
Students**



Notice

- ▷ A **public entity** shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provision of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such a manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured to them by the Act.
- ▷ Name, office address, and telephone number of **responsible employee** should be made available to all interested individuals.

A notice posted in visible areas, on websites, and in a combined notice of discrimination is acceptable.

Sample Notice of Non-Discrimination Policy



•The (Name of School) does not discriminate on the basis of disability, age, race, creed, color, sex, sexual orientation (including gender identity), national origin, religion, ancestry, marital status, need for special education services or any other class protected by state or federal law. The following person(s) has been designated to handle inquiries regarding the non-discrimination policies:

Title IX Coordinator

- Name and/or Title
- Address
- Telephone No.
- Email

Age Discrimination Act Coordinator

- Name
- Address
- Telephone No.
- Email

Section 504/ADA Coordinator

- Name
- Address
- Telephone No.
- Email

McKinney-Vento Liaison

- Name and/or Title
- Address
- Telephone No.
- Email

SPED Coordinator

- Name and/or Title
- Address
- Telephone No.
- Email

Any other concerns may be brought to [Name and contact information].



Designation of Responsible Employee

A public entity shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part.

Your Section 504 coordinator should have knowledge of the ADA and its requirements.



Grievance Procedure

- ▷ *Complaint procedure.* A public entity shall adopt and publish grievance procedures providing for **prompt and equitable** resolution of complaints alleging any action that would be prohibited by this part.
- ▷ ***Your grievance procedure should never require a person to confront the person that they are accusing of discriminating against them.



Student Specific Areas



ADA and 504

- ▶ Standards of the ADA are generally the same as those required under Section 504.
- ▶ ADA and its regulations do not establish a lesser standard of protection than 504 does.
- ▶ To the extent that ADA provides greater protection, covered entities must also comply with ADA's substantive requirements

Disability – Any major life activity



- ▷ Not just learning
- ▷ ANY impairment that substantially limits his or her major life activity

- ▷ Examples:
 - **Student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing**
 - **A student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking**
 - **A student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system.**



“Being Regarded”

- ▷ Disability includes a person who has or is being regarded as having an impairment
- ▷ If an individual can establish that he or she has been subject to an act prohibited by the ADA (refused admission or expelled or denied equal access to educational programs) because of an actual or perceived physical or mental impairment, then he or she is entitled to protection under the ADA.
- ▷ **Example:** A nondisabled student has a mother who is well-known AIDS activist in the community. After the student transfers schools mid-year, he is harassed by other students based on their mistaken assumption that he has AIDS. This student, who is regarded as having an impairment, would be protected by the ADA.



“Being Regarded”

- ▷ A student will not be “regarded as” a person with a disability if the impairment is both transitory (meaning that it has an actual or expected duration of six months or less) and minor.
- ▷ An entity need not provide a reasonable modification of policies, practices, or procedures to individuals who meet the definition of disability solely because they are “regarded as” having a physical or mental impairment. **Such individuals would be entitled to protection from discrimination, including but not limited to protection from retaliation and harassment on the basis of disability.**



Auxiliary Aids

- ▶ It is the school's responsibility to provide auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine eligibility, the recipient must provide auxiliary aids in the interim.

- ▶ Examples
 - Taped texts, interpreters, readers, videotext displays, electronic readers, braille calculators, printers, or typewriters, closed caption decoders, open and closed captioning, specialized gym equipment, assistive learning or listening systems.

- ▶ Cannot charge for auxiliary aid or service

- ▶ Note, not just students – schools are obligated to provide effective communication to all individuals who seek to participate in or benefit from a school's services, programs or activities
 - **Student registration, parent-teacher conferences, meetings, ceremonies, field trips**



Existing Facilities

- ▷ A public entity shall operate each service, program, or activity so that the service, program or activity when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.
- ▷ A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.
- ▷ See [Rocky Mountain ADA Center](#)

New Construction and Alterations



▷ Design and Construction

- Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

▷ Alterations

- Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.



Website Accessibility

- ▷ Website Accessibility Issues
 - Only accessible by people who can use a computer mouse
 - Dropdown functions
 - Images and links missing text labels
 - Videos did not have accurate captions
 - Document accessibility
 - Captcha Requirements

- ▷ Check enrollment procedures**

- ▷ Resource – Mary Lou Mobley, Office of Civil Rights - Mary.Lou.Mobley@ed.gov



Enrollment and Admissions

- ▷ Registration materials should not have a “chilling effect” on the enrollment of individuals who identify with a particular protected class or classes
- ▷ **Cannot** ask about disability status prior to admission **unless** it is used for purposes of a weighted lottery or if the school is chartered to serve the needs of students with a particular disability
- ▷ After student is **admitted**, can ask for prior IEPs and 504 Plans **but** failure to provide them is not a bar to enrollment.



Restraint and Seclusion

- ▷ FY 2016 – Increase in the number of complaints involving restraint and seclusion of students with disabilities

- ▷ HB17-1276 made revisions to certain legal requirements
 - **Notification and Documentation**
 - **Staff Training**
 - **Post-restraint review**
 - **Annual review of incidents**
 - **Complaint process for parents/guardians with the state**



Service Animals

- ▷ Per ADA Title II definition: A 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 mental disability.
- ▷ ADA permits a student with a disability who uses a service animal to have the animal at school. IDEA and Section 504 allow a student to use an animal that does not meet the ADA definition of a service animal if that student's IEP or Section 504 team decides the animal is necessary for the student to receive FAPE.



Employees



Administrative Requirements

Notice, Grievance Procedure



Notice

- ▷ Every employer shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter.
- ▷ EEOC notification, posting in physical places
- ▷ Notice of non-discrimination on all applications, employee handbooks.



Grievance Procedure

- ▷ “prompt and appropriate corrective action” > best practice is to have a grievance procedure in place
 - See attached Employer’s Council Guidance

- ▷ ***Your grievance procedure should never require a person to confront the person they are accusing of discrimination



No Coordinator Required

- ▶ For Title I, no coordinator required
- ▶ However, your responsible employee should be aware of employees rights and be able to direct them in the right direction.



Employee Specific Issues



Disability Definition

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 - **A physical or mental impairment that substantially limits a major life activity;**
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“Being Regarded”

- ▷ **Example:** An employee has controlled high blood pressure (an ADA disability). If the employer reassigns the individual to a less strenuous job solely because of fear that continued work in the present position will cause a heart attack, the employer has “regarded” this employee as disabled.
- ▷ **Example:** An employer discharged an employee based on a rumor that the employee was HIV-positive. In fact, the employee did not have any impairment, but was terminated based on the rumor. The employer has regarded the employee as a disabled individual.



“Being Regarded”

- ▷ An employer does not regard an employee as disabled when the actual or perceived impairment on which the adverse employment decision was based is both transitory and minor.
 - **Transitory: actual or expected duration of six months or less**
 - **Minor: “trivial”**

- ▷ Impairments that last only a short time may be ADA impairments if they are sufficiently severe

Qualified Individual With a Disability



- ▷ The individual satisfies the prerequisites for the position, necessary educational background, employment experience, skills, licenses etc.
- ▷ Whether the individual can perform the **essential functions** of the position held or desired, with or without **reasonable accommodation**



Essential Functions

▷ Core Functions

- Whether an employee is required to perform this function
- Whether removing the function would fundamentally change the job
- Whether the position exists to perform the function
- Whether there are a limited number of other employees available to perform the function
- Whether the function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.



Reasonable Accommodation

- ▷ Reasonable accommodation is required in three aspects of employment
 - To ensure equal opportunity in the application process
 - To enable a qualified individual with a disability to perform the essential functions of a job
 - To enable an employee with a disability to enjoy equal benefits and privileges of employment

- ▷ Reasonable accommodation is anything an employer can reasonably do to enable job performance.

- ▷ Accommodations may include making existing facilities readily accessible, part-time or modified work schedules, modifying furniture, permitting use of accrued paid leave or unpaid leave for necessary treatment.



Reasonable Accommodation

▷ Job Posting

- Require applicants to apply online or post on your website, must ensure that their website meets ADA accessibility standards

▷ During Employment

- An employer is only required to provide reasonable accommodations that will enable the employee to perform the essential job functions. It is the employee's responsibility to request an accommodation, unless the disability is obvious.
 - Interactive process

- ▷ If there is a reasonable accommodation that will enable the individual to perform essential job functions, the employer is obligated to provide it unless doing so would impose an undue hardship on the business or pose a direct threat to the health and safety of the individual or others.



Defenses to ADA Claims

- ▷ Individual is not qualified

- ▷ Undue hardship
 - **Employer bears the burden of providing this**
 - **Undue hardship is an accommodation that poses significant difficulty, expense, or disruption in the operations in relation to the size of the employer, the resources available, and the nature of the operation**
 - **Case by case basis**

- ▷ Direct Threat to health or safety

Job Applications and Descriptions



- ▷ ADA ensures that people with disabilities are not excluded from jobs that they can perform

- ▷ If a qualification standard, test, or other criteria screen to an individual with a disability, or a class of such individuals based on a disability, it must be a legitimate measure or qualification for the specific job it is being used for.
 - **Must relate to the essential functions of the job**

Medical Inquiries and Examinations



▷ Pre-offer stage

- **ADA prohibits all disability –related questions and medical examinations**
 - Disability related question is one that is likely to elicit information about a disability
 - Permitted to make pre-offer inquiries about the ability of an applicant to perform job-related functions
- **Drugs and Alcohol**
 - Generally may not ask about an applicant’s past or present lawful use of medication
 - May ask an applicant about current illegal drug use. However, past drug addiction is protected under the ADA if the employee is currently enrolled in rehab, or has successfully completed a rehab program. Generally, should refrain from asking about past illegal drug use.
 - Alcoholism is a covered disability. Employer may not asks questions about this.
- **Drug Testing**
 - An applicant can be required to take a drug test before a conditional offer of employment has been made
- **Questions about Attendance/Absences**
 - May ask how many days the applicant was absent from the applicant’s last job, but not how many sick leave days the applicant took

Medical Inquiries and Examinations



- ▷ Pre-employment, post-offer (conditional offer) stage
 - May ask any disability-related questions and may require medical examinations, as long as this is required of everyone
 - Ask about reasonable accommodations

- ▷ While these questions are allowed, be careful. Employers should only ask information that is truly necessary.

Medical Inquiries and Examinations



▷ Employment Stage

- Disability related questions and medical exams must be job related and consistent with business necessity.



Medical Files

- ▶ ADA requires that medical information be collected and maintained on separate forms and in separate medical files



Service Animals

- ▷ There is no automatic right to bring a service animal into the workplace.
- ▷ Whether the accommodation is reasonable and enables the employee to perform the essential functions of the job without an undue hardship or direct threat to themselves or others
- ▷ For employment purposes – **ADA Title I** does not define what constitutes a service animal.
- ▷ Right to request documentation or demonstration of the need for the service animal, that the service animal is trained, and that the service animal will not disrupt the workplace.

Service Animals – Colorado Law



- ▷ CRS 24-34-803(a) and (b)
- ▷ Employers cannot refuse employees with disabilities who are accompanied by assistance animal to keep the animal with them while at work absent a showing of undue hardship.
- ▷ Employers cannot refuse to hire, discharge, and otherwise discriminate against persons with disabilities because they are accompanied by the an assistance animal specially trained for them
- ▷ Per Colorado Law – service animal has the same definition as the ADA Title II
 - A 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 mental disability.



Investigation



Investigation

- **Purpose**
 - Neutral, objective, precise, and thorough
 - Fair and even-handed to protect alleged victims and those accused.
 - Allegations of bias come from both sides.
 - Restrict publication of report and supporting documentation to those with a legitimate need to know
 - Retaliation
 - The more serious the allegation at issue, the greater the employer's burden to investigate and the greater the burden to support its findings before publishing the information

- **See Age Discrimination Webinar and attached Employer's Council Resources**



Investigation

- **If you find yourself in an situation where you think this investigation is beyond you or your school's abilities, contact you attorney as soon as possible.**
- **Contact Employer's Council**
- **Contact insurance company**



Resources

- [Auxiliary Aids FAQ](#)
- [Service Animals](#)
- [ADA Title II Regulations](#)
- [ADA homepage](#)
- [Q & A on the ADA Amendments Act and Section 504](#)
- [ADA Checklist – Existing Facilities](#)
- [ADA Checklist – New Construction](#)
- [Rocky Mountain ADA Center](#)
- [EEOC notice of non-discrimination](#)



Trainings

- ADA: Managing Disabilities in the Workplace
 - Colorado Springs – 1/24/2019
 - Denver – 2/26/2019
 - Denver – 4/30/2019
 - Denver – 7/18/2019
 - Loveland – 8/1/2019
 - Denver – 9/26/2019
 - Denver – 11/19/2019

<https://www.employerscouncil.org/ada-managing-disabilities-in-workplace>



Employer's Council Training

- **Discrimination in the Workplace: The Law of EEO**
 - January 10, 2019 – Denver
 - April 18, 2019 – Denver
 - May 30, 2019 – Colorado Springs
 - June 21, 2019 – Denver
 - July 24, 2019 Loveland
 - October 2, 2019 – Denver

<https://www.employerscouncil.org/discrimination-in-the-workplace>



Upcoming Schedule

- Title VI
 - January 23, 2019 at 9am
- Stay Tuned for Title IX Presentation
 - New Regulations



Thanks!
Any questions?

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