

What constitutes a Disability?

**NOT EVERY
DISABILITY IS
VISIBLE.**

- ▶ An actual disability is “a physical or mental impairment that substantially limits one or more major life activities” of an individual.
- ▶ The term, “disability,” is regarded a legal term versus a medical term under ADA guidelines.



What is a disability? What constitutes a disability? As mentioned, not every disability is visible. A disability is a physical or mental impairment that substantially limits one or more major life activities. For example, an individual that suffers with depression may not present visible signs of depression at the workplace. Under the ADAAA, depression is a non-visible disability. It is a mental impairment that substantially limits a major life activity. If an individual is suspected of a disability, it is your responsibility to inform the HR dept. They are qualified to best determine what is occurring with an employee.

What does this all mean?

Terms commonly used in ADA/ADAAA

- ▶ **Disability:** A physical or mental impairment that substantially limits one or more major life activities of the individual, a record of such an impairment, or being regarded as having such an impairment.
- ▶ **Qualified individual:** An individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
- ▶ **Reasonable accommodation:** Includes any changes to the work environment and may include making existing facilities readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, telecommuting, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.



For reference, the definitions for a disability or a qualified individual have been provided in previous slides.

What is a reasonable accommodation? A reasonable accommodation includes any changes to the work environment that may include making existing facilities readily accessible to and usable by individuals with disabilities, job restructuring, telecommuting, modified work schedules, training materials or policies, acquisition or modification of equipment or devices, the provision of qualified readers or interpreters, and any other similar accommodations for individuals with disabilities. For example, a reasonable accommodation could be for an individual to have his/her work schedule adjusted because they have a trouble to physically get ready for work to make it on time. Reasonable accommodations can be met as long as it does not create an undue hardship for the business. This may be difficult sometimes because of the finances of a small business versus a large corporation with a considerable amount of cashflow that could require a reasonable accommodation(i.e., an expensive ramp being built at another location for the employee to utilize). Small businesses must adhere to the regulations of ADA and ADAAA. HR's job is to determine what type of reasonable accommodation should be provided.

Commonly used terms ADA/ADAAA (continued)

- ▶ **Impairment:** The condition of being unable to perform as a consequence of physical or mental unfitness (Vocabulary.com, n.d.).
- ▶ **Major Bodily Functions:** Physical or mental impairment such as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine.
 - ▶ Also included are any mental or psychological disorders, such as intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness and specific learning disabilities.
- ▶ **Major Life Activities:** Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.



An impairment prevents an individual from performing a certain task.
A major bodily function involves disorders or conditions that may affect the major functions of an individual's body such as thinking, breathing, sweating, feeling, etc.
A major life activity that impairs/can impair caring for oneself, seeing, hearing, eating, breathing, etc. A major life activity is the ability to perform an everyday task.

What is Substantially Limited?

- ▶ In accordance with the ADAAA final regulations, the determination of whether an impairment substantially limits a major life activity requires an individualized assessment, and an impairment that is episodic or in remission may also meet the definition of disability if it would substantially limit a major life activity when active.
- ▶ Examples of these types of impairments may include: epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder and schizophrenia.
- ▶ An impairment, such as cancer that is in remission but that may possibly return in a substantially limiting form, is also considered a disability under EEOC final ADAAA regulations.



An individual may perhaps take a little longer to perform a certain task because of a mental illness or physical limitations. A good way to determine if an individual has an impairment that substantially limits a major life activity would be for the individual to be assessed. The employer cannot demand/require for the employee to be evaluated. The EEOC is able to begin an assessment with the employee should the employee become terminated and makes a discrimination claim. If it is suspected that the individual is disabled in any way, report this to HR. It is always a good practice to be overly specific in the job description and duties to be performed. This will help to better protect against the claim of job discrimination because of an individual's lack of ability to perform the assigned duties. It is important to remember that if an individual does not display signs at the time, it does not mean that they are not protected(i.e. an individual whose cancer is now in remission).

More commonly used terms...

- ▶ **Direct threat:** A significant risk to the health, safety or well-being of individuals with disabilities or others when this risk cannot be eliminated by reasonable accommodation.
- ▶ **Qualified individual:** An individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
- ▶ **Undue hardship:** An action requiring significant difficulty or expense by the employer.
- ▶ **Essential functions of the job:** Job activities that are determined by the employer to be essential or core to performing the job; these functions cannot be modified.
- ▶ **Per se Disability:** According to the ADA (2019), a Per se disability is a condition that always substantially limits at least one major life activity.
 - Deafness and Blindness
 - Mobility impairment (e.g. wheelchair)
 - Autism
 - Cancer
 - Epilepsy
 - Bipolar Disorder
 - Intellectual Disability
 - Schizophrenia
 - Obsessive Compulsive Disorder



If an individual has a disability or requests an accommodation that provides a direct threat to safety, this is not a reasonable accommodation that can be allowed. Anything that creates a hardship to the employer and/or others, cannot be used as a reasonable accommodation. It must be safe to the workplace environment. A per se disability substantially limits at least one major life activity such as walking, talking, seeing, intellectual disability, etc. HR is the best resource to seek in order to identify a reasonable accommodation. It may be an instance that a reasonable accommodation cannot be met. HR will make the final decision to avoid liability.

What is Regarded as a Disability?

Remember, the ADA protects if an employer “believes” that there is a disability (even if it is not diagnosed at the present time)

This means a disability can be regarded as:

- ▶ An impairment that does not substantially limit a major life activity;
- ▶ An impairment that substantially limits a major life activity only as a result of the attitudes of others toward them; or
- ▶ Does not have any impairments but is treated by an entity as having an impairment.

The EEOC states:

“The determination of disability should not require extensive analysis.”



A disability is an impairment of a major life activity even if it's not visible. The disability does not need to be a “diagnosed” disability. If an employer believes that there is a disability, there may be a disability present. This is something that needs to be reported to HR right away for a determination. According to the EEOC, “the determination of a disability should not require extensive analysis.”

What is a Record of a Disability?

A record of a disability means that “the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities, even though the person does not currently have a disability.” (Adata.org, 2019).



If an individual is not currently disabled, but there is a record of a disability the individual remains protected under ADA and ADAAA. Documentation is always vital and necessary to keep for HR records. It's important to remember that a misdiagnosis of an individual's condition also protects under these laws.

Disability or Not?

An employee has been out on an approved leave of absence and has returned to work. The employee returned to work after undergoing chemotherapy for his/her cancer and returned to work a lot earlier than planned. It was shared that he/she is now in remission. Would this be considered a disability? Impairment? Why or why not?

Answer: (Click to reveal answer)

A. Yes, this is considered a disability even though she is now in remission. Ann has a “record of disability” that protects her under ADA guidelines.



Disability or Not?

The employee, Ann, is considered disabled. She has a history of cancer even though she is now in remission. There is a record of disability for Ann that provides protection under ADA guidelines.

Disability or Not?

Helen was diagnosed 5 years ago with MS (multiple sclerosis) that causes chronic, intermittent weakness. Every few months, Helen has a flare up and is unable to stand or walk, lasting from several days to weeks, during which time she must use a walker or wheelchair. Is Helen “disabled” even during the time she is not affected? Why or why not?

Answer: (Click to reveal answer)

A. Yes, this is considered an episodic condition and is substantially limited in the major life activity of walking or standing when her condition is active.



Disability or Not?

Helen is considered disabled, even though, her condition is episodic in nature. It flares up from time to time, but it is still present.

Disability or Not?

Marie reveals she has bipolar disorder and experiences mood swings between being manic and depressed. She tells you she's been to a therapist who prescribed medications for her condition. Although the medications work when she takes them, she chooses not to take the medications because they make her sleepy and cause her to feel "spaced out." Is she disabled? Why or why not? Also, what should you do?

Answer: (Click to reveal answer)

- A. Yes! Marie is disabled because the employer must look at the underlying condition without regard to available mitigating measures.
- B. You should inform HR. However, keep note that employers cannot require an individual to use the mitigating measure.



Disability or not?

Marie is considered to be disabled, even though, Marie is not managing her condition well. The manager/supervisor should inform HR regarding the information that was shared so that it can be properly documented.

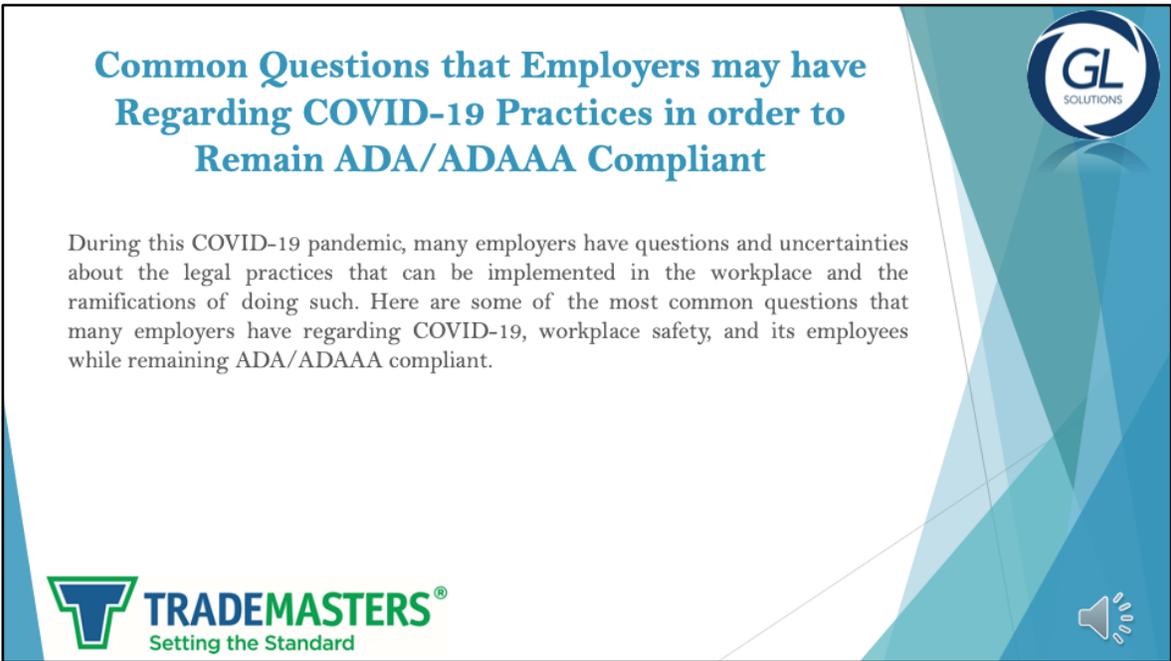
The Coronavirus 2019(COVID-19) and the ADA/ADAAA

The Coronavirus 2019(also known as COVID-19) is a family of viruses that can cause respiratory illnesses such as the common cold, severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (MERS). The Coronavirus of 2019 has become a world-wide pandemic, and has caused many illnesses and deaths to occur around the world.

As COVID-19 continues to threaten the lives of others, there are guidelines and suggestions that the Centers for Disease Control (CDC) has implemented to help minimize the spread of this contagious virus. These guidelines should also be implemented by employers regarding COVID-19. As a reminder, the EEOC laws still apply during the time of pandemics, such as the most recent Coronavirus 2019(also known as COVID-19) pandemic. Employers should be aware that the guidance and suggestions from public health authorities can change as the COVID-19 pandemic evolves. Employers should be certain to follow the most up-to-date information regarding safety in the workplace for its employees.



The Coronavirus 2019 is also known as “COVID-19” has become a world-wide pandemic. This virus has caused a staggering number of illnesses and deaths in humans of all ages around the globe. The Centers for Disease Control (CDC) has provided guidelines to be implemented to help minimize the spread of this life-threatening virus. The EEOC laws in a workplace still apply during the time of a pandemic. Suggestions and advice can change as the COVID-19 pandemic evolves, so it is wise for employers to follow the most recent information released by the CDC to implement for the safety of its employees in the workplace.



Common Questions that Employers may have Regarding COVID-19 Practices in order to Remain ADA/ADAAA Compliant

During this COVID-19 pandemic, many employers have questions and uncertainties about the legal practices that can be implemented in the workplace and the ramifications of doing such. Here are some of the most common questions that many employers have regarding COVID-19, workplace safety, and its employees while remaining ADA/ADAAA compliant.

The COVID-19 pandemic has left many employers with questions regarding the Do's and Dont's of workplace practices in order to remain ADA and ADAAA compliant. You will be informed of the most common questions from employers concerning what is acceptable and lawful when dealing with COVID-19 and its employees in the workplace.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ How much information may an employer request from an employee who calls in sick to protect the rest of the employees during the COVID-19 pandemic?

Answer:

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.



Per the ADA guidelines, employers may ask employees if they are experiencing symptoms associated with COVID-19. Please keep in mind that this medical information received must be kept strictly confidential in order to remain compliant with the ADA guidelines.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ In regards to the screening process at the workplace, are employers allowed to ask its employees questions about COVID-19 symptoms as specified by the EEOC, or are they allowed to ask about any known symptoms that are identified by the CDC and other public health authorities?

Answer:

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC and other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. Employers are allowed to inquire with their employees regarding any known symptoms that may be present.



Employers are allowed to ask questions if its employees have experienced or are currently experiencing any COVID-19 related symptoms.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to take the body temperatures of employees during COVID-19?

Answer:

Generally speaking, when a body temperature is taken it is constituted as a medical examination. Due to the CDC, local, and state guidelines, it is permissible for employers to check the body temperature of an employee. As a reminder, implementing body temperature checks are not always indicative of being infected with COVID-19 because some do not experience signs of a fever.



Yes, body temperature checks are permissible in the workplace because of the CDC, local, and state guidelines. It should be remembered that many people experience a fever when infected; however a majority of others don't experience a fever or any symptoms at all. They are said to be asymptomatic because they don't present any symptoms indicative of being infected with the COVID-19 virus.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Per the ADA, can employers require employees to stay home if they are experiencing any COVID-19 symptoms?

Answer:

Per the CDC, employers do have the authority to require an employee to stay home if he/she is experiencing the symptoms of COVID-19. The ADA will not interfere with employers when following the guidelines and suggestions of the CDC.



Yes, employers can require an employee to stay home if that employee is displaying any COVID-19 symptoms. Because these are guidelines from the CDC, the ADA will not interfere with this decision. The point of having an employee to stay home is to safeguard others from this highly contagious virus.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to ask its employees entering the workplace if they've been tested or diagnosed with COVID-19?

Answer:

Yes, an employer has the authority to ask those employees who are reporting to the workplace if they are experiencing symptoms associated with COVID-19 or if they've tested positive for COVID-19. Those experiencing COVID-19 symptoms can displayed a fever, nausea, cough, shortness of breath, chills, headache, muscular pain, and gastrointestinal issues to name a few.



Employers are indeed permitted to ask employees if they have recently been tested for the COVID-19 virus or if they are infected with the COVID-19. This information is needed because an employer has the responsibility to all of its employees to have a safe working environment.

Common Employer Questions Asked about COVID-19 in order to Remain ADA/ADAAA Compliant

- ▶ Are employers allowed to ask its employees entering the workplace if they've been tested or diagnosed with COVID-19?

Answer continued:

In addition, if an employee is displaying symptoms of a potential COVID-19 infection or has been diagnosed with the virus, an employer may exclude the employee from the workplace as a safety and health precautionary measure for others. The EEOC has determined that having the employee remain in the workplace could pose a direct threat to the health and safety of others in the workplace. On the other hand, employers would not be generally permitted to ask those employees who are teleworking and not having physical interactions with other employees.



As a follow up to this question, an employer has the authority to ask the employee to leave the workplace if an employee is experiencing symptoms and/or a positive diagnosis has been confirmed. According to the EEOC, an employee experiencing symptoms or has received a positive diagnosis could pose a direct threat to the health and safety of other employees. On the other hand, employers would not need to ask those employees who do not report to the workplace about being tested or diagnosed with COVID-19 because they do not come in contact with others in the workplace.