Five Things Every Nonprofit Should Know About the Americans with Disabilities Act

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The Americans with Disabilities Act (ADA) lays the foundation for the responsibilities of employers with 15 or more employees — including nonprofit employers — with respect to disabled applicants and employees. Failure to comply with the ADA can result in the loss of valuable employees and damaged morale, and may come with a hefty price tag. Nonprofit board members should ensure that their organization is in compliance.

The U.S. Equal Employment Opportunity Commission (EEOC) is the agency responsible for enforcing the ADA. In 2016 alone, the EEOC awarded more than $131 million to more than 7,700 employees whose employers were deemed in violation of ADA requirements. It is well worth the time and effort to comply with the law. Here are some key points to help your nonprofit stay in compliance:

1) The legal definition of "disability" is broad.

"Disability" is defined by the ADA as one of the following:

- A physical or mental impairment that substantially limits one or more major life activities.
- A past history of such an impairment.
- Being regarded as having a disability.

If employees meet any of these definitions, they are protected from discrimination and harassment based upon their disability. A covered employer has an affirmative duty to reasonably accommodate an individual with a disability who is qualified for the job that they hold or desire. An individual is qualified if he or she meets the skill, experience, education, and other job-related requirements of the position and can perform the essential, or fundamental, functions of the job, with or without reasonable accommodation.

So how does an employer determine if an employee has a disability? Congress and the EEOC clearly state that this is an expansive concept and the determination should not require extensive analysis. Or, to put it another way, it is generally high-risk to challenge an employee's disability if he or she provides documentation from their health-care provider that certifies the employee has an impairment that substantially limits one or more major life activities. Given this risk, the question for many employers is often no longer "Is the individual disabled?" but, rather, "Can I, as an employer, provide a reasonable accommodation to the employee?" Employers should also note that the definition of disability, accommodation obligations, and prohibitions against discrimination varies by state and local law.

Bottom line: If a health-care provider confirms that your employee has a disability, employers —including nonprofit employers — should begin an interactive and collaborative process with the employee to try to find reasonable and effective accommodations for the employee to do his or her job.

2) Obligations under the ADA begin before the employee is even hired.

An employer's ADA obligations begin as soon as it posts the job advertisement and continue throughout the entire hiring process and subsequent employment. These obligations may include, among others, providing reasonable accommodations to enable applicants with disabilities to apply for the job, such as web-based job ads and applications that are compatible with screen-reading software, or a physically accessible interview location for someone with mobility restrictions.

While employers can (and should) ask all applicants about their ability to perform key job functions, they should not try to elicit information about impairments or disabilities. The U.S. Department of Labor's JAN Employer Guide is a great resource for businesses to remain ADA compliant from hiring through the entire employment relationship.

3) The burden of recognizing the need for accommodations falls to the employer.

One of the biggest ADA compliance mistakes occurs when employers require employees to explicitly say that they want an accommodation for a disability. Employees do not have to use the words "ADA," "accommodation," or "disability," and they don't have to make a specific request for an accommodation. Once employees indicate that they have a medical condition that prohibits the performance of any part of their job functions, you, as an employer, have a responsibility to begin the interactive process of determining reasonable accommodations for them. If an employer waits until an employee uses specific words or phrasing, it may find itself facing a claim of discrimination for failure to accommodate.

4) Disabilities covered by disability insurance are not the same as disabilities under the ADA.

Generally speaking, disability insurance covers employees who cannot work because of an illness or injury that is not related to work, or because of a pregnancy-related condition. The ADA, in comparison, applies to applicants and employees who are qualified to perform the essential duties of a job but have a substantial impairment that

significantly limits or restricts a major life activity (or a record of such an impairment or are regarded by the employer as having such an impairment). While there can be overlap between what is covered by disability insurance and what is recognized as a disability under the ADA, one does not necessitate the other.

Compare the following three scenarios:

- Disability insurance: Vicky, a college professor, is having a difficult pregnancy. Her doctor has decided that she needs to be on bedrest for the last month before she gives birth. After her baby is born and her maternity leave is over, Vicky's health is expected to be as it was before she got pregnant and she plans to continue her work in the classroom exactly as she had before. In this scenario, Vicky may be considered disabled under her disability insurance but likely does not have a disability under the ADA.
- ADA: Tom was born unable to hear in his right ear, which doesn't affect his ability to do his job as an engineer. However, it does mean that he needs accommodations when listening, such as being seated in a position so his left ear is directed toward other meeting attendees.
- ADA/insurance overlap: Sue is an administrative employee whose essential duties involve working on a computer at her desk. While on vacation, she is in a terrible car accident that leaves her paralyzed from the waist down. She is unable to work for three months while she receives treatment. After her rehabilitation is completed, she returns to work with no restrictions on her ability to perform her job except permanently needing a desk that is compatible with her wheelchair. For the first three months after the accident, while Sue is unable to work, she is likely disabled for purposes of her disability insurance. She is likely also disabled for purposes of the ADA from the time of her injury through the duration of her employment because she has a permanent injury that places her in a wheelchair, thus restricting her ability to walk (a major life activity).

If an employee is unable to work because of an injury, illness, or pregnancy-related condition, you should consider whether the ADA, or a similar state law, applies to the situation. Keep in mind, however, that there are many times when an employee is not disabled for purposes of disability insurance but is disabled under the ADA.

5) Compliance standards may differ by state.

While, on a federal level, the ADA applies to employers with 15 or more employees, smaller employers should not assume they are not held to similar responsibilities. Many states and localities have ADA-like laws for employers with fewer than 15 employees, including some that extend disability protection obligations to employers with only one employee. Additionally, some states define disability more broadly than the ADA.

When it comes to the ADA, it's better to be on the side of caution. Contact your HR services provider for more information if you have an employee whom you think may be disabled.
