

Each day your Missouri Municipal League staff answers dozens of questions on municipal issues. This column reviews some of the most common questions the League staff receives. This issue's column is the first in a two-part series focusing on the Americans with Disabilities Act, commonly referred to as ADA. Most information stems directly from information available on the Great Plains ADA center website (gpadacenter.org). As with all legal matters, municipal officials are urged to consult their city attorney for guidance in the specific problems faced by their municipality. Answers provided in this column should serve only as a general reference.

Q. WHAT EMPLOYERS ARE COVERED BY TITLE I OF THE ADA?

The title I employment provisions apply to private employers, state and local governments, employment agencies and labor unions. Employers with 15 or more employees are covered by the ADA.

Q. WHAT PRACTICES AND ACTIVITIES ARE COVERED BY THE EMPLOYMENT NONDISCRIMINATION REQUIREMENTS?

The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training and other terms, conditions and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits and all other employment-related activities.

Q. WHO IS PROTECTED FROM EMPLOYMENT DISCRIMINATION?

Employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if she/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.

The first part of the definition makes clear that the ADA applies to persons who have impairments and

that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered. An individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb or the flu generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

Q. WHO IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY"?

A qualified individual with a disability is a person who meets legitimate skill, experience, education or other requirements of an employment position that she/he holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Q. DOES AN EMPLOYER HAVE TO GIVE PREFERENCE TO A QUALIFIED APPLICANT WITH A DISABILITY OVER OTHER APPLICANTS?

No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. WHAT LIMITATIONS DOES THE ADA IMPOSE ON MEDICAL EXAMINATIONS AND INQUIRIES ABOUT DISABILITY?

An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how she/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can

demonstrate that the individual would pose a “direct threat” in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the direct threat level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other federal laws, examinations to determine current fitness to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

Q. DOES THE ADA REQUIRE EMPLOYERS TO DEVELOP WRITTEN JOB DESCRIPTIONS?

No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. WHAT IS “REASONABLE ACCOMMODATION”?

Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. WHAT ARE SOME OF THE ACCOMMODATIONS APPLICANTS AND EMPLOYEES MAY NEED?

The decision as to the appropriate accommodation must be based on the particular facts of each case. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training or other programs. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

Q. WHEN IS AN EMPLOYER REQUIRED TO MAKE A REASONABLE ACCOMMODATION?

An employer is only required to accommodate a “known” disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual’s known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. WHAT ARE THE LIMITATIONS ON THE OBLIGATION TO MAKE A REASONABLE ACCOMMODATION?

The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employer’s business. “Undue hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources. If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship for providing the accommodation.

Q. MUST AN EMPLOYER MODIFY EXISTING FACILITIES TO MAKE THEM ACCESSIBLE?

The employer’s obligation under Title I is to provide access for an individual applicant to participate in the job application process, and for an individual employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break

with co-workers. The employer must provide such access unless it would cause an undue hardship.

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

Q. CAN AN EMPLOYER BE REQUIRED TO REALLOCATE AN ESSENTIAL FUNCTION OF A JOB TO ANOTHER EMPLOYEE AS A REASONABLE ACCOMMODATION?

No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. CAN AN EMPLOYER BE REQUIRED TO MODIFY, ADJUST OR MAKE OTHER REASONABLE ACCOMMODATIONS IN THE WAY A TEST IS GIVEN TO A QUALIFIED APPLICANT OR EMPLOYEE WITH A DISABILITY?

Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Q. CAN AN EMPLOYER MAINTAIN EXISTING PRODUCTION/PERFORMANCE STANDARDS FOR AN EMPLOYEE WITH A DISABILITY?

An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless

the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a job's essential functions.

Q. ARE APPLICANTS OR EMPLOYEES WHO ARE CURRENTLY ILLEGALLY USING DRUGS COVERED BY THE ADA?

No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Q. IS TESTING FOR THE ILLEGAL USE OF DRUGS PERMISSIBLE UNDER THE ADA?

Yes, but a test for illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information,

such information must be treated as a confidential medical record.

Q. ARE ALCOHOLICS COVERED BY THE ADA?

Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if she/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Q. DOES THE ADA OVERRIDE FEDERAL AND STATE HEALTH AND SAFETY LAWS?

The ADA does not override health and safety requirements established under other federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another federal law, an employer must comply with it and does not have to show that the standard is job related

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and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another federal law, then the employer must do so.

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a state or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

Q. WHAT IS DISCRIMINATION BASED ON "RELATIONSHIP OR ASSOCIATION" UNDER THE ADA?

The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. HOW ARE THE EMPLOYMENT PROVISIONS ENFORCED?

The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin and religious discrimination under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated state human

rights agencies. Available remedies will include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

Q. WHAT ARE AN EMPLOYER'S RECORDKEEPING REQUIREMENTS UNDER THE EMPLOYMENT PROVISIONS OF THE ADA?

An employer must maintain records such as application forms submitted by applicants and other records related to hiring, requests for reasonable accommodation, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the charge.

Q. DOES THE ADA REQUIRE THAT AN EMPLOYER POST A NOTICE EXPLAINING ITS REQUIREMENTS?

A. The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from EEOC summarizing the requirements of the ADA and other federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

Q. HOW ARE THE ADA'S REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS ENFORCED?

Private individuals may bring lawsuits to enforce their rights under Title II and may receive the same remedies as those provided under Section 504 of the Rehabilitation Act of 1973, including reasonable attorney's fees. Individuals also may file complaints with eight designated Federal agencies, including the Department of Justice and the Department of Transportation. □