Dynamic Chiropractic

What Does the Americans with Disabilities Act Have to Do with the Practice of Chiropractic?

CURRENT SUPREME COURT DECISIONS AND THEIR RELATIONSHIP TO YOUR PRACTICE

Many doctors of chiropractic may not know much about the Americans with Disabilities Act (ADA), but many of the daily decisions they make in their offices fall under the coverage of the act.

To review briefly, the ADA was signed into law by President Bush in 1990. Initially, the act affected doctors of chiropractic who worked with industries providing pre-employment examinations. The ADA specifically made pre-employment medical examinations illegal. The act provides for post-offer/preplacement examinations, but the process of pre-employment examinations, which had become very popular for large business, was now not an option. Those doctors who continued to perform them created a liability for their practices and the companies that employed their services.

Doctors are excited to work with industries. We receive calls each week from doctors and companies to assist with setting up pre-employment examinations. You may be asked to create a program for an industry or use an instrument to screen potential employees for possible pre-existing injuries: either way, it is illegal. Being educated about the difference between pre-employment and post-offer/preplacement will save you many headaches and prevent liabilities you may not want to face.

If you do provide post-offer/preplacement examinations, there are specific procedures you need to follow. The examination must be job related, meaning that the usual orthoneurological tests or x-rays will not suffice. The EEOC states in their regulations that "general medical examinations are inherently suspect."

The exam has to relate to the specific job for which the person is applying. The basic facts have to revolve around whether the individual can perform the essential functions of the job with or without reasonable accommodations. A positive Kemp's or compression test will not give you this specific information.

If you don't do post-offer/preplacement examinations, does the ADA affect you? The ADA covers all aspects of employment, which means it goes way beyond the initial hiring of an employee. If you make a decision on the extent of a patient's disability, the act may affect you. If you take a person off work or return a person with restrictions, some aspects of your case may fall under the purview of the act. These factors involve some sort of disability and determination of reasonable accommodations for the person to work. Not every patient that you take off work or return to work with restrictions will fall under the act, but you need to be aware or knowledgeable in case it does.

Three recent Supreme Court rulings (*Sutton v. United Airlines, Murphy v. UPS* and *Albertson's v. Kirkingburg*), and the EEOC guidelines on reasonable accommodations will assist your understanding of how the ADA applies to your office.

The EEOC published new guidelines relevant to reasonable accommodations and undue hardship, which you can find on the Internet at www.eeoc.gov . These new guidelines provide definitions and

examples of how to do a proper analysis for reasonable accommodations. The Supreme Court rulings provided clearer definitions of what exactly is a disability under the ADA. Since its inception in 1990, multiple claims have poured in with people claiming to be disabled. Many claims were valid, but the volume of claims by people with purported disabilities of hair color, left-handedness, etc., prompted the need for a clearer definition of true disability under the act.

Under ADA, there are basically three primary steps or factors that must be satisfied. The employee must: 1) have a disability as defined under the ADA; 2) be able to perform the essential functions of the job with or without reasonable accommodations; and 3) the accommodations must not cause undue hardship on the company.

As a doctor of chiropractic, you may be called to determine if a patient has a disability. If the patient doesn't have a disability, the case cannot go forward. On its face, this may not seem too difficult. However, the definition of a disability under the ADA is different from a disability under workers' compensation, personal injury or social security. In fact, a recent Supreme Court case dealt with a person who claimed total disability under Social Security and then filed an ADA claim claiming she could work with reasonable accommodations. It can get very interesting.

The ADA law defines disability as: 1) physical or mental impairment that substantially limits one or more major life activities; 2) a record of such impairment; or 3) being regarded as having such an impairment. The EEOC had been taking the definition of disability very broadly, which is what potentially prompted the vast array of disabilities that employers were forced to deal with.

The Supreme Court, in its triad of rulings on disabilities, brought the definition of disability to a new level in which the employee with the potential disability had to first see if there were mitigating factors that would control the disability. For example, prior to the rulings, a person with diabetes could be considered disabled under the ADA. Now, if the person takes insulin or medication that controls the effects of diabetes, they would not be considered disabled. While the EEOC saw it as a dramatic step backward, it did assist employers with a clearer definition of who would fall under the act.

In *Sutton v. United Airlines,* the court looked at the case of twin sisters who applied to be pilots for United Airlines. The twins have extremely poor vision. In fact, without their glasses, they could not drive a car or shop in a store. With their glasses, the twins had perfect vision.

United rescinded its offer of employment, and the twins sued under the ADA for discrimination. The Supreme Court found that since the twins had perfect vision with their glasses, they were not disabled under the ADA. They looked at the person with mitigating factors to make this determination. The other Supreme Court rulings were similar. Thus, multiple ADA claims have now been nullified due to this damage. If there is no disability, the case is done.

The second and third prongs of disability determination happen when individuals or doctors create a disability where there isn't one. A person with a long history of workers' compensation injuries is not hired upon the recommendation of a doctor based solely on the person's record. They didn't look to see if the person could actually do the job or not. They have actually created a disability.

A person in a wheelchair applies for a job, and the person hiring doesn't feel they can do the job. The person applying is regarded as disabled by the employer and as such creates a disability where there might not be one. The person may be able to do the job without any accommodations at all. Further examples and questions that expand on the "regard as" concept of disability are as follows.

Example: An employee has an occupational injury that has resulted in a temporary back

impairment that does not substantially limit a major life activity. However, the employer views the employee as not being able to lift more than a few points and refuses to return the worker to the position. The employer regards the employee as having an impairment that substantially limits the major life activity of lifting. The employee has a disability as defined by the ADA.

Example: An employee is fully recovered from an occupational injury that resulted in a temporary back impairment. The employer fires the employee believing that if the employee returns to a heavy labor job, the employee will severely injure their back and be totally incapacitated. The employer regards the employee as having an impairment that disqualifies them from a class of jobs and therefore as substantially limited in the major life activity of working. The employee has a disability as defined by the ADA.

Example: An employer requires that an employee with a disability-related occupational injury be able to return to "full duty" before allowing the patient to return to work. Full duty may include marginal and essential job functions, or it may mean performing job functions without any accommodations. An employer may not require that an employee with a disability-related occupational injury who can perform essential functions be able to return to full duty if, because of the disability, the employee is unable to perform marginal functions of the position or requires a reasonable accommodation that would not impose an undue hardship.

Example: An employer refuses to return to work an employee with a disability-related occupational injury simply by assuming, correctly or not, that the employee poses some increased risk of reinjury and increased workers' compensation cost. Unless the employer can show that employment of the person in the position poses a direct threat, the fact that an employee has had a disability-related occupational injury does not by itself indicate that the employee is unable to perform the essential functions of the job or that returning to work poses a direct threat.

Example: An employer refuses to return to work an employee with a disability-related occupational injury simple because of a worker's compensation determination that s/he has a permanent disability or is totally disabled. Since worker's compensation laws are different in purpose from the ADA and may not utilize different standards for evaluating whether an individual has a disability or is capable of working, a person could have a permanent total disability such as loss of both legs and still be able to work under ADA with reasonable accommodations.

Some companies will ask a nontreating doctor of chiropractic to make the determination whether an employee with a disability-related occupational injury is ready to return to work. While the employer may seek information from a consultant and provide the consultant with the following to assist in the process, the employer alone bears the total responsibility for deciding whether an employee with a disability-related occupational injury is ready to return to work:

- the essential functions of the job and nature of the work performed;
- the work environment and any safety hazards;
- potential reasonable accommodations.

If a disability is determined to exist under the ADA, you then need to see if the individual can perform the job with or without reasonable accommodations. Reasonable accommodations are defined as any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

There are three categories of reasonable accommodations:

1. modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires.

2. modifications to the work environment or to the manner or circumstances under which the position held or desired is customarily performed.

3. modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. (29 CFR 1630.2(o)(1)I-iii)(1997)

Some potential accommodations employers need to create include: 1) making the existing facilities accessible; 2) job restructuring; 3) part-time or modified work schedules; 4) acquiring or modifying equipment; 5) changing test, training materials or policies; 6) providing qualified readers or interpreters; and 7) reassignment to a vacant position. (42 USC 12111(9)/29 CFR 1630.2(o)(I-ii)(1997)

There are time frames in which an employee may request reasonable accommodation. An individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier preventing him/her due to a disability from effectively competing for a position, performing a job or gaining equal access to a benefit of employment. It doesn't have to be at the time of employment (*Masterson v. Yellow Freight Sys. 10th Cir.*, Dec. 11, 1998; EEOC guidelines, 3/1/99).

After the employee requests an accommodation, the employer and employee should be clear what the individual needs and identify the appropriate reasonable accommodation. If the disability is not obvious, the employer may ask the person for reasonable documentation about the disability its functional limitations.

The employer is entitled only to documentation that is needed to establish that the person has an ADA disability, and that the disability necessitates a reasonable accommodation. The employer cannot request a person's entire medical record, as it may contain information unrelated to the request. ((1)29 CFR 1630.2(o)(3), (2)29 CFR 1630) You may be requested to provide information on your patient for determination if the patient has a disability under the ADA.

The employer must get the treating doctor's records. They cannot hire an outside doctor to determine if the patient has a disability unless the treating doctor's records do not provide adequate documentation.

Remember that the definition of disability is different for ADA than for workers' compensation or other systems that you might be accustomed to. Have your facts straight before you declare someone disabled or not. To assist with the determination of reasonable accommodations, use your knowledge of body mechanics and other ergonomic factors to provide expert opinions on what could be modified to allow this person to work at the job they are applying for.

The ADA affects post-offer/preplacement and can touch your return- to-work and disability decisions. While this brief article cannot provide all of the necessary information on the ADA, it's a good idea to send away for the EEOC guidelines and familiarize yourself with them. There are hidden traps that are best left unsprung.