

a series of fact sheets written
by experts in the field of liver
disease

American with Disabilities Act: What It Does, and Doesn't Do

Jacques Chambers, CLU, Benefits Consultant

Although the federal American with Disabilities Act (ADA) recently celebrated its tenth anniversary, there is still a great deal of misunderstanding about what it does and doesn't do. The law itself has little impact on benefits, despite what many may think, but it is an important tool in the rights and protection of persons with disabilities.

As with any federal law, this law is made up of many parts and affects different groups in different sections. This article focuses on Title 1 of the ADA and the protection it provides to "qualified individuals with disabilities" of private employers. "Private employers" includes employers, employment agencies, and labor unions. The employees of private employers that have 15 or more employees are protected by this portion of the law.

Title 1 of the ADA protects a person with a disability in two primary areas: the interview and hiring portions of obtaining a job; and being able to continue to work at a job. It centers on the workplace and helping people stay in the workforce.

"Disability" clearly has a different meaning under this law than when used by Social Security or other programs that look only at total disability. When applied to the provisions of the ADA, a "qualified individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment,

or is regarded as having such an impairment. Also, persons who are discriminated against because they have a known association or relationship with an individual with a disability also are protected. HBV or HCV infection with accompanying symptoms is considered a "disability" for purposes of protection under the ADA.

It should be noted that questions have been raised in the courts about the legality of applying parts of the law to persons employed by government agencies and quasi-public agencies such as school districts. You may want to see what your own HR and Personnel Departments have in the way of information on the ADA and you.

Many people mistakenly believe that the ADA provides protections for persons who cannot work due to a disability. It does not. Its protection ends once a person ceases work due to a disability. What ADA does do is assist persons who can work, but may need some extra consideration in performing their duties so that they may continue to work.

Probably the most common misunderstanding about the ADA is that it protects your job if you have to stop due to a disability. There is nothing in the law that prohibits an employer from terminating your employment if you do not perform your job, even if it is a disability that prevents you from doing so. There is very little in the law that provides any assistance for persons who are totally disabled. Other laws, such as the Family and Medical Leave Act (FMLA) and COBRA/OBRA provide help for those persons. The ADA is designed to protect the working person who, due to a disability, has difficulty performing all job tasks.

Another common mistake is the belief that the ADA somehow provides access to insurance for people with disabilities. It does not. The ADA is very careful to spell out that insurance companies may continue to discriminate against persons with disabilities when performing medical underwriting for health, life, and disability insurance policies. This means that if you apply to an insurance company for an individual health policy, you can be refused coverage because of your history of HCV, and it is not a violation of the ADA to do so. Fortunately, other legislation requires insurance companies to accept all applicants under employer provided health insurance coverage, HCV or not.

A "qualified individual with a disability," under the law, is a

person who, by reason of skill, experience, education or other requirements is able to perform the “essential” functions of a job even though they have a medical condition (disability) that may prevent them from performing those duties in the same manner as they are typically performed.

The ADA also protects job applicants by limiting the information an employer can obtain in the interview and hiring decision processes. In the job interview, an employer can no longer ask about your health history or medical condition. The most they can ask is “Are you able to perform the essential duties of this position?” You are not obligated to answer more than that about your health.

As long as you are physically able to perform the job that you are applying for, you do not need to, and should not, go into details about your medical condition. If the interviewer asks about medical history, just politely reply, “I have no problem that would prevent me from doing this job.”

There is some question as to when you should notify a prospective employer of your need for accommodation in performing the job if you require it. To avoid not being hired because of your medical condition, it is probably a good idea to wait until a formal job offer is made before going into the need for any accommodation.

An employer may not require you to take a pre-employment medical examination until a job offer has been made. The employer may then condition the job offer on the satisfactory result of a post-offer examination, but only if this is required of all entering employees in the same job category. However, the job offer may only be withdrawn for medical reasons if the reason is job-related and no “reasonable accommodation” is available that would permit you to perform the essential job functions. (See below for more on “reasonable accommodation.”)

When taking a pre-employment physical or completing a pre-employment health questionnaire, it is important that your responses be truthful. You should not try to hide your medical condition. While you cannot be legally refused a job because of your disability, you can be refused employment for not answering a health questionnaire truthfully.

Conversely, the employer does not have to give any special preference to a person with a disability. If another person applies for the same position and is better qualified than you, there is nothing in the ADA that requires an employer to give

special preference to a person with a disability.

Title 1 of the ADA also protects persons who are working, but who find it difficult to do the job duties as they are usually performed and require some form of accommodation. The ADA requires an employer to provide “reasonable accommodation.” It should be emphasized again that the purpose of this portion of the law is to help a person with a disability continue to work, not provide protection when they can’t work at all.

What is “reasonable accommodation” under the ADA? The law left the term intentionally vague because what may be reasonable for an employer with 2,000 employees may not be reasonable for an employer with 17 employees.

The term “reasonable accommodation” is meant to include any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to perform the essential functions of the job. It 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.

Examples may include making existing facilities readily accessible; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified if the person is unable to do the original job because of a disability even with accommodation, although there is no obligation for the employer to search for such a position.

However, an employer is not required to make an accommodation if it would impose an undue hardship on the operation of the business. Undue hardship is determined on a case by case basis. The difficulty and the expense are considered along with the size, resources, nature, and structure of the employer’s operation.

It is important to understand that an employer is only required to provide reasonable accommodation for “known” disabilities. In other words, to receive protection under the ADA, you will need to advise your employer of your condition and the need for accommodation. It is not possible to withhold the nature of your medical condition from your employer and still demand reasonable accommodation.

Glossary of Terms

Family & Medical Leave Act

A federal law enacted in 1993 that protects an employee's job when they have to take time off because of a serious health condition of the employee, a child, a spouse or parents. The law requires employers to protect their job position and continue their employee benefits for up to twelve weeks in any twelve-month period. The law applies to the employees of an employer with 50 or more employees employed within a 75 mile radius. Continuing salary is not part of this law.

COBRA

A federal law that applies to the employees of employers with at least twenty employees. If an employee or spouse or child loses their health insurance due to termination of employment, death of the employee, divorce, or reaching age 18, the person(s) losing coverage may be allowed to continue coverage under the employer's plan by paying the full premium. Terminating employees may continue coverage for up to 18 months. Children and spouses losing coverage may continue COBRA continuation for up to 36 months.

Many states have enacted "mini" COBRA laws which extend the right to coverage to smaller employee groups and, in some states, expands the time that coverage may be continued.

OBRA

This is an extension of the original COBRA and permits persons who leave work disabled to continue their COBRA coverage for up to 29 months, which is how long it takes to receive Medicare once someone becomes disabled. To qualify for the Disability Extension under OBRA, one must apply for and be approved for Social Security Disability (SSD) benefits. The Onset Date, as approved by Social Security must be within sixty days of the start of COBRA, and a copy of the Notice of Award letter from Social Security must be mailed to the administrator within 60 days of its receipt.

Medical Underwriting

This is the insurance term for the process of reviewing a person's medical history and medical condition prior to offering them life, disability or health insurance. Most companies selling individual insurance requires that a person pass their medical underwriting review in order to obtain insurance. Often, it consists of only a health questionnaire. For larger policies, the company may require a person to submit to a physical application with laboratory tests of blood, urine, etc.

Persons with HCV who apply for individual insurance coverage will almost never be able to get the policy if they must go through medical underwriting.

Medical underwriting is prohibited for health plans that are offered to employees of an employer on a group basis.

It is recommended that you disclose information with a letter from your doctor. It is also recommended that you personally deliver the letter to the highest level person in Personnel or Human Resources with whom you are comfortable.

The letter should state your diagnosis and generally review your symptoms. The doctor should clearly state what limitations you have concerning the performance of your job duties. It will help if your doctor "suggests" specific accommodations that would accommodate your condition; however, it is up to the employer to determine what accommodations can be made for you.

While there are laws that provide some protections for the person that is unable to continue working, the Americans with Disabilities Act is focused on helping a person with a disability continue his or her employment.

For more information you can call the ADA at 800-949-4232 for information and assistance with questions.

[Jacques Chambers, CLU, and his company, Chambers Benefits Consulting, have over 35 years of experience in health, life and disability insurance and Social Security disability benefits. For the past twelve years, he has been assisting people with their rights, problems, and other issues concerning benefits and disability. He can be reached at jacques@helpwithbenefits.com or through his website at: <http://www.helpwithbenefits.com>.]

For more information about hepatitis C, hepatitis B and HCV coinfections, please visit www.hcvadvocate.org.

• hcspFACTsheet •

A publication of the Hepatitis C Support Project

Executive Director

Editor-in-Chief, HCSP Publications
Alan Franciscus

Design

Paula Fener

Production

C.D. Mazoff, PhD

Contact information:

Hepatitis C Support Project
PO Box 427037
San Francisco, CA 94142-7037

alanfranciscus@hcvadvocate.org

The information in this fact sheet is designed to help you understand and manage HCV and is not intended as medical advice. All persons with HCV should consult a medical practitioner for diagnosis and treatment of HCV.

This information is provided by the Hepatitis C Support Project • a nonprofit organization for HCV education, support and advocacy • © 2007 Hepatitis C Support Project • Reprint permission is granted and encouraged with credit to the Hepatitis C Support Project.

