Disability

ABCs of the ADAAA: Are You Compliant?

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Tom Kerr (TK): I'm Tom Kerr. While most employers understand the legal requirements tied to the original Americans with Disabilities Act, they may not be as clear on their responsibilities under the ADA Amendments Act of 2008. Known as the ADAAA, the amendment significantly changed the definition of "disability" under the act. To gain a better understanding of the ADAAA, I'm joined today by Kevin Ufier, National Director of Disability & Absence Services at Genex.

Kevin, thanks for joining us.

Kevin Ufier (KU): Glad to be here.

TK: Kevin, can you start by giving us some background on the ADAAA?

KU: Yeah, the original Americans with Disability Act had a lot of involvement with physical access to the workplace. The whole idea of the ADA is to make sure employees have the benefits of employment, whether it be salary, interacting with people, etc. And because of a lot of litigation at the Supreme Court level — like how do people qualify to meet the ADA, which is basically employees who have physical limitations, or mental limitations — employees have the ability to request accommodation.

It became a big battle about what is an appropriate diagnosis in order to make an accommodation, and Congress came back in 2008 and decided to make the strategy a little clearer. And it became a little broader which, in the end, makes it more difficult for employers to say, "OK, I have to really spend some time looking about how I'm going to be compliant with the act."

It also ties into workers' comp, short-term disability, long-term disability, and FMLA. And so, in a general sense, compliance gets to be very difficult, because you have to weigh all these other employment issues.

TK: And why have some employers had trouble meeting the compliance requirements of the amendment?

KU: I think the problem has been some employers did not realize how the 2008 act — the ADAAA act — has put more pressure on them to have a program that meets the need. Smaller employers probably get very few requests. They might not be as aware of it. The set core, larger employers, say over 2,000 to 5,000 employees, are going to get a lot more requests. They probably developed a strategy. They have legal advice from the HR perspective telling them what they might need to do.

A lot of employers will come to us and say, “How can you help us with the ADAAA?” And we're not going to provide legal advice other than telling them what the act requires. But what we can do is help them with the aspect called the interactive, where an employee will request an accommodation because of a perceived need. It could be a non?exertional — a psychological need — that the employee requests some kind of accommodation on the job. But most accommodation requests are physical accommodation requests in nature.

And, we basically recommend employers recognize when a request is being made to have a process to develop that request, to confirm that there is, in fact, some kind of impairment. There are some limitations on requesting information from the attending physician. It has to be information specific to that request. It cannot be a broad request where you're kind of fishing for evidence. It needs to be specific to whatever the employee’s request is regarding that accommodation.

And there should be documentation of what has been undertaken to help the employee meet an accommodation including, as I mentioned, the interactive, which also involves talking to the employer/supervisor — the person who knows the job and what can be done to accommodate it — and even an HR person who's usually identified to be an ADA specialist who, in the end, would make the decision.

Genex would help with all the documentation. Usually, I have certified rehab counselors, staff with an ergonomic background who will be involved in the interactive process on behalf of the employee and make recommendations. But in the end, employers have to make the decision about will they accommodate.

TK: And you had mentioned that the broad interpretation of disability under the ADAAA has also been a major challenge.

KU: Yeah, it's become broader. And there's been recent cases in the last few years that even the Supreme Court is saying something such as pregnancy, which doesn't sound like a long?term disability except, I guess, if you're pregnant and it's been a long nine months [laughter]. That seems like an eternity, but it's not a long?term situation. But the courts are saying that's even something you have to consider.

And when time ties into a situation, what often comes into play is the question: how long should you accommodate? And there is some good evidence that maybe up to six months is a reasonable time to have an accommodation, if needed.

Beyond that, the decision has to be made by the employer, do you change the job? Do you just rewrite a job description? And you're not required to do that. You're required to make an effort to try to accommodate. And, a lot of times, it's not a mandatory situation. It’s only mandatory to make an effort to make accommodation and work with the employee.

In terms of the difficulty of the law, some people joke that [the ADAAA] sounds almost like an “attorney's full employment act,” as there are a lot of federal regulations. But overall, I think the ADAAA is an attempt to make employers fairer to the employees. To just give some consideration to keep these people who have worked for you, and you probably can accommodate the job if you're willing to bend.

There is a wonderful resource online with the EEOC, the federal agency that's tasked with the enforcement of the act: "Enforcement Guidance on Reasonable Accommodations and Undue Hardships Under the Americans with Disability Act." It's about a 50?page document online that actually gives examples and footnotes and case laws. It's very helpful. In fact, over the years, I continue to go back to it and reread it as a reminder of the fundamentals of the law.

TK: So, then what are the requirements for reasonable accommodation under the ADAAA?

KU: That's on a case-by-case basis. And when I said [employers] don't have to accommodate, I'm saying that an employee may say, "I want this accommodation," and suggest it, but employers aren't forced to do it. They have to evaluate if it is reasonable.

And reasonable is one of those difficult legal terms where you have to kind of take it on case-by-case basis. And reasonable accommodation is a modification or adjustment to a job, an employment practice, or a work environment that makes it possible for the employee to perform the essential functions of the job. And that, of course, is on a case-by-case basis.

One of the services Genex provides is job analysis, physical demand analysis. What I have found in over 30 years in the industry — and the ADA has been almost out there that long — is employers are often very weak in making pre?employment as well as job descriptions in general, and that is something I think that we see across board. And part of what we do in the interactive process is confirming what the requirements of the job are compared to the requests. An employee may make a request, but you're not forced to take that, you have to weigh it — are there alternatives? You have to consider making an accommodation, but you're not forced to take one solution.

The one key idea there is what is an undue hardship? That is something that employers can say, "we just can't do it because you're asking us to kind of change the whole process, and that would be an onerous financial and productive hardship to the business."

But it's difficult to prove what is an undue hardship a lot of times. And that is something where an employer, HR attorney would have to get involved and say, we're going to do it. Yes or no.

TK: Does that also factor in the size of the company, how many employees they have ...?

KU: That would be a factor. That is actually an issue that you can have penalties for systematically not accommodating the requests and looking into it, not having a program and just ignoring situations, or having poor documentation about what you did even though you might have done something as an employee.

The penalties could be from $50,000 to over $100,000 depending on the size of the employer. Now there have been large consent decrees where the EEOC has gone to settlement with large employers and they are penalized $10 million because they had a policy of ignoring [accommodation] requests.

So, there can be a quite onerous penalty to employers if they don't try to have some kind of program and try to at least make the effort to engage in the interactive and accommodate people's requests.



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