TOWARDS A BETTER UNDERSTANDING OF AMERICAN DISABILITY ACT AND ITS IMPLICATIONS

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Abstract— The Americans with Disabilities Act (ADA) was enacted in 1990 with the intent to forbid discrimination against individuals with disabilities. In 2008 the ADA was amended to expand its scope. Even today organizations in the US are struggling to comply with it and to understand what they are required to do under the law for employees with disabilities. The article is intended to enhance the understanding of ADA from the HR professional's standpoint. In addition recommendations and conclusions are also provided for HR managers.

Keywords— American Disability Act, Human Resource Management, HR implications.

I. INTRODUCTION

Today, an increasing number of American companies are hiring employees with disabilities (Kalargyrou, 2012). This is in part due to the benefits associated with this action. Employees with disabilities tend to be more loyal, stay longer with a job, overcome difficulties and obstacles more easily, and be more satisfied with their work than their non-disabled coworkers (Kalargyrou, 2012; Lengnick-Hall, Gaunt, & Kulkarni, 2008; Siperstein,Romano,Mohler & Parker, 2005). Also, over 90% of the American public said that they viewed companies who hired people with disabilities more favorably than companies that do not hire those with disabilities (Siperstein, et.al., 2005).

However, there are laws regarding the hiring and compensation of employees with disabilities and the protection of these employees from discrimination in the workplace. Although the Americans with Disabilities Act (ADA) was enacted nearly 25 years ago, there still exists a perplexity of how the law should be carried out, especially among those who are often assigned the task of making a workplace ADA compliant: HR professionals (Meinert, 2012; Rush, 2012). This paper covers what the ADA is, highlights what should be done to comply with ADA measures, and discusses the implications of the ADA for key HR functions. In addition, conclusion is also presented.

II. SIGNIFICANCE OF THE PAPER

According to the U.S. Department of Labor, as of January, 2014 there were 28.5 million working-age Americans with disabilities. This is a significant percent of the workface, representing over 11% of the American working-age population (U.S. Bureau of Labor Statistics, 2014). Over 15%, or 4 million, of this population is employed in businesses across the country. Thus, employers and employees in nearly all industries and at all levels of the organization may deal with or be "disabled" workers (Herhold, 2010). This is increasing the need for HR professionals to understand and apply ADA mandates in their companies' business practices.

With the increased number of Americans with disabilities in the workforce, HR personnel must increasingly deal with the legal rights of workers with disabilities, and the attitudes, both positive and negative, of the other employees who deal with these workers. Ninety percent of the American public may say that they "favorably view" companies that hire employees with disabilities, but in 2013 the Equal Employment Opportunity Commission (EEOC) received almost 26,000 complaints from employees who felt they were being discriminated against because of their disabilities in their private sector workplaces (U.S. Equal Employment Opportunity Commission, 2013). With statistics such as these, HR personnel must be increasingly aware of these workers' rights in the workplace, and actions that can/should be taken to reduce the threat of legal intervention from employees with disabilities complaining that they are being discriminated against.

HR personnel have the responsibility to understand and promote diversity in the workplace, and to comply with the laws that regulate diversity and equal employment opportunities for all. Furthermore, Ivancevich (2010) highlights the fact that disability laws impact every HR activity; therefore, it is imperative that human resource professionals understand how the law relates in each area of human resource management and at all levels of an organization.

III.BACKGROUND: WHAT IS CONSIDERED A DISABILITY?

The ADA defines a "disability" as "an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment" (Autry, 2004, p. 670; Scott, 2010, p. 98; U.S. Equal Employment Opportunity Commission, 2009). In

other words, if a person has an impairment that substantially limits major life activities such as walking, bending, reading, hearing, sitting, standing, breathing, learning, lifting, reaching, sleeping, or communicating they are, according to ADA, "disabled" (Scott, 2010). The person is also covered by the ADA if they are thought of by others as having the disability or if they have a record of disability in the past (Scott, 2010; Jacobs & Lauber, 2011). For example, if an employee has Multiple Sclerosis, but is not currently showing the symptoms of the disease, the employee is still covered by ADA because the employee has a record of disability (Scott, 2010). Furthermore, the law states that employees who have a disability, but whose disability is corrected in some way, can still be defined as "disabled" (Scott, 2010). The amendments to the ADA law have highlighted the fact that its jurisdiction is not limited to those with obvious disabilities, such as employees who are in a wheelchair or who have serious mental disabilities (Jacobs & Lauber, 2011). The ADA now also covers those with immune system, cell growth, digestive, respiratory, skin, circulatory, and/or reproductive disorders, as well as cosmetic disfigurements (Scott, 2010; Jacobs & Lauber, 2011). These disabilities may or may not be readily noticeable by employers or coworkers, but the employee must prove that the disability limits one or more major life functions, or prove that they are regarded has having a disability, for the condition to be considered a disability (Scott, 2010). Another disability recognized by the ADA is alcoholism: employees may not be terminated simply because they are an alcoholic (Ivancevich, 2010). Recent developments have more specifically defined what can and cannot be considered a disability. For example, a recent amendment to the ADA ruled that visual impairments that are fully correctable via glasses or contacts are not covered by the ADA (Scott, 2010).

IV.AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) has five titles that cover employment, public services, public accommodations, telecommunications, and previous laws in regards to disabilities. An outline of the ADA can be seen in Figure 1.

Title I of the ADA protects those with disabilities from employment discrimination. This includes recruitment, pay, hiring, termination, promotion, job assignments, training, leave, benefits, and all other employment related activities (U.S. Equal Employment Opportunity Commission, 2008). Also under Title I, employers are required to make their facilities accessible to those with disabilities, including accommodations that will allow people with disabilities to participate in the application process, perform essential job functions, and enjoy benefits and privileges that are available to other non-disabled employees. For example, a company that has a corporate gym must make it accessible for all employees, regardless of disability status (U.S. Equal Employment Opportunity Commission, 2008).

Title II covers public entities; i.e., state or local governments and any of their departments, agencies, or other instrumentalities (U.S. Department of Justice, 2002). It describes the rights of employees with disabilities who work for public entities, including legislatures and courts, town meetings, police and fire departments, motor vehicle licensing, and those who have contact with these industries.

If the business is a place of public accommodation such as a bank, retail store, restaurant, or a commercial facility such as an office building/warehouse, or a privately owned transportation system, the company is covered by Title III of the ADA. Under this title, all new construction must be ADA compliant, and meet the terms set forth by the Architectural and Transportation Barriers Compliance Board (ATBCB). In existing structures, barriers must be removed if this is readily and reasonably achievable.

Furthermore, under the 2010 amendments to Titles II and III, wheelchairs and scooters must be permitted in all areas that are open to pedestrian use(ADA National Network, 2010). "Service animals", which are required to be allowed with their owners into areas where other pets are prohibited, have also been redefined as "a dog that has been individually trained to do work or perform tasks for benefit of an individual with a disability" (ADA National Network, 2010). Title IV discusses telecommunication services for the hearing/speech impaired, detailing telecommunication company obligations and TTD's (Telecommunications Devices for the Deaf), a device which transmits coded signals in graphic communication (Federal Communications Commission, 2005). Title V covers miscellaneous provisions including state immunity, retaliation, attorney's fees, coverage of congress, and other federal and state laws (Ryan, Fort, & Caldwell, 2007). We will discuss Titles I and III in the most detail, as these titles have the greatest impact on HR departments.

A. Americans with Disabilities Act Amendments Act of 2008

In 2008, The Americans with Disabilities Act Amendments Act (ADAAA) was signed into law, becoming effective in January 2009 (Scott, 2010). The ADAAA modified the language of the ADA to extend the law to cover more disabilities (for example, diabetes), specifically stated that impairments must be examined in their unmitigated state (for example, without medication or prosthetics; regular contact lenses/eyeglasses do not qualify), clarified that a sporadic disability is still a disability if it substantially limits a major life activity when active, lowered the standard of a disability "severely restricting" major life activities, and allowed

individuals to claim disability discrimination if they are "regarded as" having this disability, whether or not the disability actually exists (Jacobs & Lauber, 2011;Scott, 2010).

B. Reasonable Accommodation and Undue Hardship

Employers are required by Titles I and III of the ADA to provide "reasonable accommodation" for employees and customers with disabilities as long as it does not pose an "undue hardship" to the employer (Autry, 2004; U.S. Equal Employment Opportunity Commission, 2002). In general, "an accommodation is 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" (U.S. Equal Employment Opportunity Commission, 2002). There are three basic kinds of accommodation, 1) modifications to the application process, 2) modifications to the work environment/manor or circumstances in which a job is performed, and 3) modifications that allow employees with disabilities to enjoy the same benefits and privileges as non-disabled employees (U.S. Equal Employment Opportunity Commission, 2002). Some of these modifications, such as installing ramps/removing barriers and restructuring the application process, can and/or should be implemented whether or not the company currently employs individuals with disabilities, while other accommodations, such as interpreters for the blind, job responsibility modification, or modification of equipment, can only be made if an employee with a disability requests the accommodation. Restructuring the application process also includes job designs that do not discriminate against people with disabilities. For example, stating that a cashier must stand for hours at a time is discriminatory if the cashier could sit on a stool to do the same function (Autry, 2004; Meinert, 2012).

However, all modifications and accommodations must be reasonable and not cause undue hardship for the employer (Autry, 2004; Meinert, 2012; U.S. Equal Employment Opportunity Commission, 2002). An action is "reasonable" if it is feasible, plausible, meets the needs of the individual, and allows an individual to perform the essential functions of the position. "Unreasonable" actions are those that force employers to eliminate essential job functions (for example, counting change for a cashier), lower production standards, and/or provide an accommodation that will be used as a personal item both on and off of the job. For example, a company is not required to provide an employee with a hearing aid because this is a personal item that will be used off of the job as well as in job functions, but the employer is required to provide a desk at the right height for an employee in a wheelchair to be able to work (Autry, 2004; U.S. Equal Employment Opportunity Commission, 2002).

However, a company can choose to provide an unreasonable accommodation if it wishes (U.S. Equal Employment Opportunity Commission, 2002). The purpose of the ADA is to help relieve the statistically lower standard of living among those with disabilities by giving equal opportunity to those with and without disabilities, not to demand special rights for employees with disabilities (Rush, 2012). Thus, the employer is not required to offer additional health benefits, install expensive equipment especially for the employee with disabilities, or hire a disabled applicant if they are not qualified for the position (U.S. Equal Employment Opportunity Commission, 2002; U.S. Equal Employment Opportunity Commission, 2008).

"Undue hardship" is defined as "an action requiring significant difficulty or expense" (Autry, 2004, p. 673). If an accommodation is unduly extensive, substantial, disruptive, or expensive, it may cause undue hardship for the employer, and the accommodation can be denied (U.S. Equal Employment Opportunity Commission, 2002). Undue hardship does not have any hard-and-fast rules, as each case is related to the size, scope, and financial ability of the company. However, employers should work with applicants with disabilities and employees to see if they can find a solution that will not cause undue hardship (Autry, 2004; Meinert, 2012). For example, a school may be able to buy a computer program to read students' assignments to a blind teacher rather than granting the teacher's initial request for a human interpreter to read the assignments.

V. IMPLICATIONS FOR HR DEPARTMENTS

In most organizations in the United States today, the human resource department is given the responsibility of ensuring that the organization complies with the ADA law (Meinert, 2012; Rush, 2012). One of the reasons for this may be that the ADA covers hiring and job description procedures, and thus organizations see the entire law as being under the jurisdiction of the HR department. However, HR personnel should stress to management that, although HR is held responsible for ensuring that the company is ADA compliant, the managers must also play a role in non-discriminatory hiring, reasonable accommodation, and promoting a non-discriminatory environment for workers (Canas & Sondak, 2011; Meinert, 2012).

Because of HR's role in a disability-friendly work environment, it is imperative that HR personnel understand the laws that cover applicants with disabilities, put them into practice, and inform company personnel of these laws. This is a first line of defense against disability-related lawsuits and disability discrimination claims(Meinert, 2012). We will next discuss the impact of the ADA on seven key HR functions: recruiting/hiring, termination,

pay/promotion, training/development programs, workplace diversity, employee benefits, and employee discipline (Ivancevich, 2010).

A. Recruitment and Hiring

Unfortunately, many companies unintentionally discriminate against employees with disabilities, not the least of which is seen in recruitment and hiring practices (Lengnick-Hall, et al., 2008; Meinert, 2012). Job descriptions used for recruitment can unintentionally discriminate if they list an action that may not be able to be performed by employees with disabilities as a major function of the job, but that is actually not completely essential to performing the job (Ivancevich, 2010). For example, if telephone skills are desirable, but the calls can be handled by someone else in the department, this should not be listed as a major or essential function of the job. Thus, before the job description is written, the essential functions of the job should be identified and only those that meet the criteria of an "essential function" (the reason the position exists is to perform that function, the function cannot be distributed to other coworkers, and/or the skill or expertise is required to perform the job) should be stipulated in recruitment efforts (U.S. Equal Employment Opportunity Commission, 2008). However, job descriptions must be thorough, accurate, and cover what the job entails because of increased federal regulations of employment practices (Ivancevich, 2010). This is where reasonable accommodation comes into play: jobs can be redesigned to assign non-essential functions to coworkers who are not disabled or to allow the worker with the disability to perform functions in a different manner (Autry, 2004).

Those interviewing applicants also need to be aware of the ADA's effect on this effort. Employers are not allowed to hire based on a disability; each new employee must be chosen based on skills and being qualified for the position (Arizona Center for Disability Law, 2001). Thus, it is unlawful for employers to ask applicants if they have a disability or questions about that disability until after a tentative job offer has been made (Arizona Center for Disability Law, 2001; Butler, Schatz, & Hathaway, 2014). Lawful questions include those about whether the applicant can perform the job function (e.g., "Are you good at communicating over the phone?"), if the applicant can meet the attendance requirements for the job ("Will you be able to be in your office and ready to help customers during our office hours which are Monday through Friday, 9am to 5pm?"), how many sick days the applicant has taken during the last year, if the applicant drinks alcohol, and whether the applicant has the licenses/credentials required to perform the job ("Are you licensed to help customers as a CPA?"). Unlawful questions include those that ask if the applicant has specific conditions or disabilities ("Do you have seizures?"), how often the applicant is ill ("How often do your seizures occur?"), how much alcohol the applicant drinks, and if the applicant has a disability (Arizona Center for Disability Law, 2001). However, these questions may be asked by the employer after a tentative offer of employment has been made, as long as the disability is obvious (U.S. Equal Employment Opportunity Commission, 2005). For example, it would be lawful for an organization to ask an applicant with an employment offer if they needed a larger-than-average office because they use a wheelchair. However, it is not lawful for the organization to ask if the applicant has AIDS, even after a tentative job offer has been made. An applicant can voluntarily give information about a disability if they wish if an employer has an affirmative action program for those with disabilities. Also, companies with such a program can lawfully ask applicants if they have disabilities, but they must inform the applicant that 1) the information will only be used for the affirmative action program, 2) the applicant will not be rejected simply because they did not fill out optional affirmative action paperwork, 3) the applicant's identification as "disabled" is voluntary, and 4) the information will be kept strictly confidential (Arizona Center for Disability Law, 2001). Employees also have no obligation to inform their employers of their disability before or after the hiring process, unless they are seeking accommodation for that disability (Studdert, 2002).

Employers must provide reasonable accommodation for applicants who are applying for a job, who are interviewing with the company, or who are being given standard tests that relate to the job functions (Arizona Center for Disability Law, 2001, U.S. Equal Employment Opportunity Commission, 2005). For example, a company can provide a large-print application or have personnel available to assist vision-impaired applicants (Meinert, 2012). In the same way, an applicant with a learning disability may need extra time to take standard tests that are given to job applicants, and the company can provide a wheelchair-accessible interview area for wheelchair-bound applicants. Employers should only use tests that measure the ability of the applicant to perform the job (Arizona Center for Disability Law, 2001).

B. Termination

Employers are not allowed to terminate an employee or withdraw a job offer because of a disability (U.S. Equal Employment Opportunity Commission, 2005). This is considered discriminatory, as the employer is required to provide reasonable accommodation for employees who cannot perform duties (Meinert, 2012). However, several options are open to employers who feel that an employee with disabilities is unable to perform their tasks successfully. First, tasks that cannot be performed by an employee with disabilities may be able to be shifted to other workers (U.S. Equal Employment Opportunity Commission,

2008). For example, if a worker with missing fingers cannot hold a pen to write addresses on envelopes, this task can be shifted to another employee, provided that addressing envelopes is not an essential function of the job, or a computer program may be used to address the envelopes if the worker is able to type accurately. Secondly, the employee may be shifted to a different position where they have the skills and knowledge to perform the essential functions of the new job. If this action is taken, the employee must be moved to a vacant, lateral position; employers do not have to "create" a new job for the employee (U.S. Department of Justice, 1997). Thirdly, it is not illegal to terminate an employee with disabilities if the termination is not related to the disability (a clerk with lupus is caught stealing cash from the cash drawer), the employee cannot meet legitimate requirements for the job even with reasonable accommodation (even when given much extra time, an employee with a learning disability cannot produce reports in time for customers), or, because of the disability, the employee poses a direct threat to the health or safety of the workplace (an alcoholic throws objects at other employees) (U.S. Department of Labor, 2005). This last provision causes some concern for HR personnel, as companies cannot terminate an employee based on a slight threat or risk of harm to the employee or others. Instead, "the determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions" (U.S. Equal Employment Opportunity Commission, 2008). Thus, there often must be an actual occurrence of the harm before an employee with disabilities can be terminated based on this provision. However, there are also situations of "negligent hiring and retention" if an employer knows or should know about an employee's violent or threatening tendencies. Thus, companies walk a fine line between discrimination against threatening employees and negligent hiring and retention (Ivancevich, 2010).

C. Pay and Promotion

Another area where it is unlawful to discriminate against employees with disabilities is in employee pay (U.S. Equal Employment Opportunity Commission, 2008). Employees with disabilities must be paid the same as what a non-disabled person in the same position would be paid, without regard to the employee's disabled status. An employee with disabilities need not be paid more than similarly employed non-disabled employee, but it is unlawful for the company to intentionally pay the employee less than it would pay a non-disabled employee. It may be helpful to look at the salaries or wages of other employees in similar positions to determine what would be a comparable wage or salary to pay the employee with disabilities.

Employees with disabilities must also be given the same opportunities for promotion as non-disabled employees (U.S. Equal Employment Opportunity Commission, 2008). Many employees who are "disabled" are fully competent to handle the responsibilities required in performing the job at the new level. For example, an employee who is confined to a wheelchair may be fully capable of managing a department.

D. Training and Development

Bruyère and Herzog (2010) suggest that one way to promote a diversity- and disability-friendly work environment is to ensure that employees with disabilities are given the opportunity for training. As HR professionals are often involved with training measures, this is an aspect of ADA application where HR professionals may have direct control.

The ADA specifically states that businesses need to provide reasonable accommodation in training procedures (U.S. Equal Employment Opportunity Commission, 2008). Companies must also give equal opportunities for training to those with disabilities as the company gives non-disabled employees. This may include providing readers or interpreters, adjusting or modifying training procedures, exams, materials, and/or policies, and/or making training facilities accessible to employees with disabilities (U.S. Equal Employment Opportunity Commission, 2008). Reasonable accommodation must be given whenever possible to ensure that employees with disabilities have equal opportunity to be trained with non-disabled employees (Meinert, 2012). However, undue hardship provisions still apply, and some accommodations may be too expensive or disruptive to implement. In this case, it may be wise to develop an alterative solution that is reasonable and allows the employee equal access to training.

E. Workplace Diversity

A common topic in both HR and business circles today is diversity in the workplace (Gilbride, Stensrud, Vandergoot, & Golden, 2003). Cited benefits of a diverse workforce include a broader range of services, a variety of viewpoints, and more effective execution of organizational objectives (Canas & Sondak, 2011). These may translate into higher productivity, higher profits, greater return on investment, better customer service, and a larger pool of ideas and experiences (Canas & Sondak, 2011). Employees with disabilities are considered part of diversity and as such tend to bring the above benefits to a company, as well as others (Lengnick-Hall, et al., 2008; Stein, 2000). For example, they may be more innovative, dedicated, and persistent than their non-disabled coworkers, tend to take less sick-leave and have fewer accidents on-the-job, have lower turn-over rates and longer retention times, and be more satisfied overall with their work (Lengnick-Hall, et al., 2008).

One of the most frequently used procedures in

increasing diversity and ADA awareness in the workplace is diversity training (Canas & Sondak, 2011; Lengnick-Hall, et al., 2008; Meinert, 2012; Rush, 2012). This training may focus on non-discrimination, diversity awareness, diversity skills, flexibility in work schedules, and investigation of employee evaluation and reward structures (Bruyère & Herzog, 2010). However, training needs to be carefully planned in terms of development and delivery, especially if the training is mandatory for all employees. Workers may see the training as pushing affirmative action, or as punishment for failing to be diversity-friendly (Canas & Sondak, 2011). Others legitimately wonder what seminar or training can be powerful enough to alter deeply ingrained attitudes and behaviors towards workers with disabilities (Canas & Sondak, 2011). However, training workers with disabilities and other employees in their benefits under ADA may be an important step in making a diversity-friendly, disabled-employee-welcoming workplace (Rush, 2012).

Two important aspects of training is that it must touch individuals where they are in their workplaces, and that their former experience in the workplace must support their current learning (Canas & Sondak, 2011). Discriminatory attitudes, and actions HR professionals can take to change those attitudes, will be covered later in this article.

F. Employee Benefits

Another area where it is unlawful to discriminate against employees with disabilities is in the area of benefits such as health insurance. This includes discrimination against an employee who has an immediate family member who is disabled (U.S. Equal Employment Opportunity Commission, 2008). However, contrary to popular opinion, businesses are not required to provide additional insurance for employees with disabilities (U.S. Equal Employment Opportunity Commission, 2008). Companies are only required to provide equal access to whatever health insurance coverage it currently offers to its other employees. For example, if an insurance plan excludes or limits the coverage for pre-existing conditions, the company is not required to change the plan or make an exception for an employee with disabilities.

G. Employee Discipline

Just like other employees, workers with disabilities can and should be disciplined when they violate a workplace conduct standard. These standards include those relating to effectiveness, alcohol/illegal-substance abuse (those who use illegal drugs, however, are not covered by the ADA), illegal acts such as theft and fraud, and company rules and standards of etiquette (Ivancevich, 2010; U.S. Equal Employment Opportunity Commission, 2008). The employee can even be disciplined if the violation resulted from a disability, but only if the action violates a standard of conduct, is job-related, and all employees are held to the same standard (U.S. Equal Employment Opportunity Commission, 2011). For example, if an employee is taking a prescription drug for a disability and the drug causes her to act violently towards another employee, the offending employee can legally be disciplined under the ADA if a non-disabled employee would be disciplined in the same manner. In discipline cases where the disabled offender sues on the context of their disability, the court often investigates whether the employee warned their co-workers and supervisor about what might occur relating to the disability, and if any actions were taken by the employee or others to address the consequences of the disability; courts have often upheld the employers' right to discipline employees with disabilities if these conditions are satisfied (Lee, 2003). Thus, management and HR should take some documented action before or during the discipline process to improve the situation so as not to be charged with negligent hiring or retention. Other laws and corporate rules and discipline policies must also be followed as they would be with a non-disabled employee (U.S. Equal Employment Opportunity Commission, 2011).

CONCLUSION

The ADA is sometimes seen as a confusing and troublesome law because of the implications of lawsuits. However, when companies understand their obligations under the ADA, comply with the law, and deal with the negative attitudes of non-disabled employees, it can become a disability-friendly business, and one that is willing and able to tap into the large and diverse market of employees with disabilities, as well as the positive public relations hiring employees with disabilities can bring to a company. Human resource personnel can play a leading role in making this into a reality, and in ensuring a workplace where employees with disabilities have equal opportunities.

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