

What is the Americans with Disabilities Act (ADA)?

The ADA is a Federal law prohibiting discrimination against “qualified individuals with disabilities” in all employment practices. Employers with 15 or more employees are required to comply with the Act. States may pass discrimination laws that are more protective of employees than federal law and several states have done this. If the ADA does not protect you because your employer does not have enough employees, call or check the website of your state Human Rights Commission to see if you are protected by state employment discrimination laws.

Does the ADA protect persons with Hepatitis-C?

This is an interesting question because the ADA protects persons with disabilities. It does not protect all persons who are sick.

An individual is considered to have a “disability” if he or she 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 associated or in a relationship with a person with a disability also are protected. This definition is different than the definition of disability used by the Social Security Administration.

Persons with AIDS are protected by the ADA. HIV and HCV are similar disabilities caused by similar blood borne viral pathogens. Fear and modes of transmission result in stigmatization and high rates of discrimination. HIV and HCV tend to be chronic and persist for life. Common symptoms such as depression, brain fog and fatigue “limit one or more major life activities.” HCV is like HIV and is more like a disability than an illness. However, this writer knows of no reported cases stating that HCV is a disability protected by the ADA.

The ADA protects “qualified individuals with disabilities.” A qualified individual is a person who can perform the “essential functions” of a job with or without a reasonable accommodation. “Essentials functions” does not mean all functions. A person unable to perform “marginal or incidental functions” is still considered qualified.

What is a reasonable accommodation?

A “reasonable accommodation” is any modification or adjustment to a job or the work environment that enables a “qualified individual with a disability” to perform

essential functions of the job. Examples of reasonable accommodations persons with HCV may be entitled to include special equipment (a couch or recliner in the office); modification of work schedule (flexible hours, short or long term medical leave, working at home, allowing an afternoon nap); reassignment to a less demanding position with more flexible hours if the person is unable to do the existing job even with an accommodation; allowing time off for treatment or medical appointments; education of co-workers to eliminate fear, shunning or “direct threats” to health or safety; and education and training of all employees in standard precautions for safe handling of blood borne pathogens.

Employers may not discriminate because of fear or “negative reactions” to the employee. Education about the disability to dispel unfounded fear of transmission or other “negative reactions” is a reasonable accommodation in HIV cases that in HCV cases also should be granted.

Are there limits on an employer’s obligation to make accommodations?

Yes. Employers are not required to lower quality, quantity or performance standards or assign “essential functions” of a job to other employees. If the employee cannot perform essential functions of the job in spite of reasonable accommodation, the employee is not a “qualified individual with a disability” and is not protected by the ADA. Employers are not required to make accommodations that impose “undue hardship” on operation of the business. “Undue hardship” is defined “an action requiring significant difficulty or expense.”

Employers are not required to hire individuals who pose a “direct threat to the health or safety of the employee or others” if the risk cannot be eliminated or reduced below the level of a “direct threat” by reasonable accommodation. This is the most common reason for discrimination against employees with HCV and HIV. Direct threats to health or safety are difficult to prove. Employers may not fear, speculate or assume a threat to health or safety and are required to make individualized assessments of risks based on reliable medical or other objective evidence. Established legal precedents protecting persons with AIDS from fear-based discrimination suffice in most situations to protect persons with HCV from the same kind of discrimination.

Can food service workers be restricted from working with food because of having HCV?

No, but this is a common form of discrimination against HCV positive persons. Health department regulations forbid workers with hepatitis-A from working with food until the period of acute infection passes. Employers in food service industries hear “hepatitis,” think “hepatitis-A,” panic and discriminate against the employee. In most cases, this kind of discrimination can be resolved by asking your doctor or someone from the department of health to contact the employer and explain the difference between hepatitis-A and hepatitis-C. If the employer continues to discriminate after the difference is explained, a formal complaint alleging violation of the ADA should be filed.

Can a doctor or dentist refuse to treat me because I have HCV?

No. This is a form of fear based discrimination. Doctors and dentists are “public accommodations.” A public accommodation cannot refuse services to a person with a disability, cannot offer unequal or separate services, and must offer services in the most integrated setting possible. Standard precautions for all medical professionals are sufficient to protect doctors, dentists and the uninfected public from infection in these situations.

When should I disclose to a current employer or at a job interview that I have HCV?

Employers are not allowed to ask questions about disabilities or the nature or severity of disabilities, or ask or require an applicant to take a medical examination before an offer of employment is made. Do not disclose a disability to an employer until after an offer of employment is made.

Do I have to disclose to an employer that I have HCV to obtain an accommodation?

Yes. Accommodation is something that must be requested by the employee. An employer is only required to accommodate a known disability. If the employee does not disclose the disability and request an accommodation, the employer is not obligated to provide one.

Disclosure of disability to an employer to obtain accommodation is a calculated risk. HCV is stigmatized as “a junkie disease.” Cirrhosis of the liver is stigmatized as a disease of alcoholics. Discrimination based on fear of transmission or stigma may be

triggered by disclosure to obtain accommodation. If you can perform essential functions of the job without accommodation, in most situations, the better decision is not to disclose. If you must disclose to request accommodation, do not disclose or request accommodation until after a job is offered.

Are alcoholism and drug addiction are protected disabilities?

Yes. HCV positive employees may be former IV drug users or alcoholics or may be falsely assumed by employers or co-workers to be IV drug users or alcoholics. Current users of illegal drugs are not protected by the Act, but employees “with a record of [these] impairments or regarded as having [these] impairments” are protected. If you contracted HCV from IV drug use in the past, you are protected by the Act. If you contracted HCV from a blood transfusion and are discriminated against because you are presumed to be an alcoholic or former IV drug user, you are also protected by the Act.

Can an offer of employment be conditioned on passing a post-offer medical examination?

Yes. If employment is conditioned on passing a post-offer medical examination, the employee must submit to the examination. If a questionnaire or the examiner asks a specific question that requires the employee to disclose the disability or tell a lie, the employee must disclose the disability. If the questionnaire or examiner does not specifically inquire, the employee may not be required to disclose. The ADA makes it difficult for an employer to discharge “a qualified individual with a disability.” It does not make it difficult to discharge a liar.

If a person is not hired because a post-offer medical examination or inquiry reveals a disability, the burden is on the employer to prove its reasons for not hiring the person are “job related and consistent with business necessity.” The employer must prove that no reasonable accommodation was possible, or accommodation would impose “undue hardship” on the employer, or the individual poses a “direct threat” to health or safety in the workplace. A direct threat is “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 by reasonable accommodation.

How do I file a formal ADA complaint?

The employment discrimination provisions of the ADA are enforced by the federal Equal Employment Opportunity Commission (EEOC). These provisions are enforced by the same procedures applicable to discrimination on the basis of race, color, national origin and religion under Title VII of the Civil Rights Acts of 1964 and 1991. Complaints must be in writing and may be filed with the EEOC or designated state human rights administrative agencies. Generally, the better practice is to file with a state Human Rights Commission. Many states have human rights laws that are more protective of employee's rights than the ADA. Filing with the state allows employees to allege violations of state human rights laws and the ADA in one complaint

In most states, complaints must be filed within 180 days of the last incident of discrimination. The deadline in a few states is even shorter. Consult with an attorney and do not wait to file a complaint. The most common reason ADA claims are dismissed is filing a meritorious claim too late. One telephone call to an employer from an attorney or the state human rights commission before another applicant is hired and settles in often resolves the case.

What will the employer be ordered to do if I win my case?

Potential legal remedies include hiring, rehiring, promotion, back pay, front pay, restored benefits, reasonable accommodations, attorneys' fees, expert witness fees and court costs. If specific reasonable accommodations are requested, request them specifically.

If medical insurance benefits are lost because of unlawful discrimination, restoration of benefits is retroactive to the date of discrimination. However, most medical insurance providers require that medical insurance claims be filed within a short period of time after services are rendered. If you lose medical insurance and have an ADA claim pending, continue to submit insurance claims on time. If you do this, when you win your case and medical insurance benefits are reinstated, the insurance company will be stuck without a defense and will have to pay the claims.

Should I apply for Social Security disability benefits with an ADA claim pending?

No, refrain from applying for disability benefits with an ADA claim pending. Remember, the ADA protects you only if you are able to work. The ADA does not allow

you to “have it both ways.” If you are disabled enough to be entitled to disability benefits (or state on an application that you believe you are disabled enough to be entitled to disability benefits even if benefits are denied), you are not “a qualified individual with a disability” entitled to protection by the ADA.

Where can I obtain more information about my rights?

Search the internet for the website of your state Human Rights Commission or pick up the telephone and call them. Information, instructions and forms for filing a complaint are available at most state Human Rights Commission websites.

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