

The ADA Amendments Act and the Genetic Information Nondiscrimination Act

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Definition of “Disability”

- A physical or mental impairment that substantially limits a major life activity
- A record of such an impairment
- Being regarded as having such an impairment

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Definition of “Disability” (cont.)

- Should be construed broadly and generally should not demand extensive analysis
- Mitigating measures (other than ordinary corrective lenses) will not be considered
- Impairment can be disability even if **episodic** or **in remission**

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Mitigating Measures

Mitigating measures include:

- Medication, medical supplies and equipment, low vision and hearing devices, prosthetics, mobility devices, etc.
- Use of assistive technology
- Reasonable accommodations
- Learned behavioral or adaptive neurological modifications

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Ordinary Eyeglasses or Contact Lenses

- Distinguished from “low vision devices,” defined as “devices that magnify, enhance, or otherwise augment a visual image”
- Definition: “lenses that are intended to fully correct visual acuity or eliminate refractive error”

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Major Life Activities

- Include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, standing, lifting, **bending**, speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working.

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Major Life Activities

- The term “major life activities” also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

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“Regarded As” Disabled

- Broader definition of “regarded as” disabled that would cover anyone subjected to an action “prohibited by this Act” because of a real or perceived physical or mental impairment
- “Regarded as” would, however, exclude impairments that are transitory (less than six months) and minor
- Individuals only “regarded as” disabled not entitled to reasonable accommodation

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Other Provisions

- Qualification standard based on uncorrected vision must be job-related and consistent with business necessity
- Term “qualified individual” replaces “qualified individual with a disability”
- In general prohibition of discrimination, the phrase “**discriminate on the basis of a disability**” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”
- No discrimination based on lack of disability
- Federal agencies, including EEOC, given authority to issue regulations interpreting the term “disability”

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Implications

- Most reasonable accommodation decisions will focus on need for accommodation rather than coverage.
- Documentation in support of accommodation request will often be different (e.g., will describe effects on major bodily functions, limitations without mitigating measures).

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Implications (cont'd)

- Courts to have considered the issue have said the ADAAA is not retroactive.
- Accommodation decisions made before January 1, 2009, if challenged, would likely be evaluated under standards in effect before that date.
- Evaluate accommodation requests made before January 1, 2009 but that are still pending on that date under new standards.
- Evaluate accommodation requests renewed after January 1, 2009 under new standards.

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Implications (cont'd)

- Many ADA disparate treatment claims will probably be brought under the “regarded as” prong, even if the individual may also be covered under first or second prong.
- Avoid qualification standards that screen individuals out based on impairments, or be prepared to defend them as applied to each individual who may challenge them.

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GINA Title II: Basic Prohibitions

- Prohibits use of **genetic information** to make employment decisions;
- Prohibits employers from requesting, requiring, or purchasing genetic information, with very limited exceptions; and
- Requires that genetic information be kept confidential, with very limited exceptions.

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GINA: Definition of Genetic Information

- Information about an individual's **genetic tests** or the genetic tests of **family members**
- A request for or receipt of **genetic services** by an **individual** or **family member**
- Manifestation of a disease or disorder in **family members** of an individual
- Genetic information of a fetus or embryo

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GINA: Definition of Family Member

- A dependent, including a spouse, child, or someone who becomes a dependent by adoption or placement for adoption
- A first-degree, second-degree, third-degree, or fourth-degree relative of an individual
 - Extends as far as great-great-grandparents, great-great-grandchildren, and first cousins once removed

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GINA: Definition of Genetic Test

- An analysis of human DNA, RNA, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes
- Generally, test is to determine whether someone has genetic markers that may indicate an increased risk of acquiring a condition **in the future**

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GINA: Definition of Genetic Tests

- Genetic tests include –
 - Tests for the presence of genetic variants evidencing predisposition for acquiring conditions such as breast cancer, nonpolyposis colorectal cancer, and Huntington's Disease

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GINA: Definition of Genetic Test

- Tests that are not genetic tests include –
 - Tests for the presence of a virus not composed of human DNA, RNA, proteins or metabolites
 - Tests for the presence of alcohol or illegal drugs
 - Cholesterol tests, liver function tests, and complete blood counts

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GINA: Prohibition of Acquisition

- Unlawful to request, require, or purchase genetic information except –
 - Where acquisition is **inadvertent**
 - As part of a **voluntary** wellness program
 - For **FMLA** purposes
 - Through sources that are **commercially and publicly available**
 - As part of **genetic monitoring**
 - In certain situations applicable to **forensic labs**

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Inadvertent Acquisition

- Overhearing discussions among coworkers
- In response to inquiry about employee's general well-being or the well-being of a family member
- Unsolicited communications about an employee or employee's family member from third party
- In response to lawful requests for health information (e.g., as part of reasonable accommodation request)

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Voluntary Wellness Program

- Prior, knowing, written consent
- Employer receives genetic information only in the aggregate that cannot identify specific employees
- Certain types of inducements may raise questions about whether program is voluntary

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FMLA Exception

- Typically is needed when employee requests leave to care for a family member with a serious health condition (because serious health condition of family member is considered family medical history of employee)

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Sources That Are Publicly and Commercially Available

- Newspapers books and magazines
- Also includes electronic sources (internet, television and movies)
- Does not apply to court records or medical databases
- May not apply where sources require permission to access
- May not apply where employer intentionally searches sources that are publicly and commercially available to find genetic information
- May not apply to sources that employer knows or reasonably should know are likely to contain genetic information

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Confidentiality

- Genetic Information must be kept confidential, but disclosure is permitted –
 - To the individual or family member if requested in writing
 - For research purposes pursuant to 45 CFR Part 46
 - Pursuant to court order specifying information to be disclosed
 - To government officials investigating compliance with GINA, where relevant
 - For FMLA purposes
 - To public health officials where family member has a contagious disease that presents an imminent hazard of death or life-threatening illness

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ADA and GINA

- GINA prohibits discrimination based on the possibility that someone will acquire a condition **in the future**.
- ADA protects individuals who **currently have** impairments or who **are perceived as having** impairments, if they meet the definition of “disability.”
- Expanded definition of “disability” under ADAAA makes it far less likely that individuals will be without protection under either statute.

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ADA and GINA (cont'd)

- As of November 21, 2009, GINA will prohibit employers from acquiring genetic information (e.g., family medical history) as part of a post-offer medical exam or as part of a medical exam during employment.
- Although the ADA and GINA have different exceptions to confidentiality, employers may keep genetic information in same confidential file as medical information subject to ADA.

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