

THE AMERICANS WITH DISABILITIES ACT'S IMPACT ON CORRECTIONS

The Americans with Disabilities Act (ADA) is the most sweeping civil rights legislation enacted in the past 30 years. Inspired by a desire to integrate more than 43 million individuals with disabilities into the mainstream, this law affects virtually every segment of society.

Every industry and profession is affected by the ADA, and corrections is no exception. Title I of the ADA covers employment issues; Title II dictates how correctional facilities deliver their programs, services and activities.

The ADA has significant consequences on how corrections hires personnel. The ADA prohibits administering medical exams or conducting any disability-related inquiries prior to extending a conditional offer of employment. In addition to ADA employment requirements, corrections administrators must ensure that the delivery of programs, services and activities does not exclude persons with disabilities. Administrators can meet this obligation by examining three areas: (1) policies and procedures, (2) physical access to programs and (3) communications systems. This examination should ensure that inmates, individuals with a legitimate right to interact with or visit inmates, and the public are not denied access to the facility's programs, services or activities because of a disability.

The ADA in Brief

The ADA identifies individuals with disabilities in three ways: (1) individuals having a mental or physical impairment that substantially limits a major life activity, (2) individuals with a record of such an impairment or (3) individuals who are perceived or regarded as having such an impairment.

Title I. Although a person may have a disability for purposes of the ADA, protection is not automatic. Under Title I, the person must also be otherwise qualified for the job, with or without reasonable accommodation. Being otherwise qualified means that the individual can perform the essential functions (those that are fundamental, not marginal) of the job.

If a person is not qualified for the job, the correctional agency needs to determine whether reasonable accommodation that will enable the person to perform the essential functions of the job can be made available. A reasonable accommodation is any modification or adjustment to a job, an employment practice, or work environment that makes it possible for the person with the disability to perform the essential functions of the job."

Reasonable accommodations must not be provided, however, where doing so poses a direct threat to the health and safety of the person or others, or causes an undue financial or administrative hardship. Direct threat means a significant risk of substantial harm. It must be based on objective evidence and not mere speculation. Undue hardship is significant difficulty or expense compared with the size and total resources of the employer.

Title II. Compare those requirements with those under Title II of the ADA. Title II protects individuals with disabilities who are otherwise eligible to participate in a program, service or activity with or

without a reasonable modification to its rules, policies or practices; the removal of architectural, communication or transportation barriers; or the provision of auxiliary aids or services.

Modification will not be required when it poses a direct threat to the health and safety of others (under Title II, a direct threat to one's self is not included), or causes an undue administrative or financial burden (similar to undue hardship for Title I). In addition, modifications that would fundamentally alter the nature of the program, service or activity are not required. A fundamental alteration changes the very nature of the program, service or activity so that the correctional facility is, in effect, offering a different program, service or activity.

Title I: New Developments that Affect Hiring Practices

A significant effect of the ADA on hiring corrections personnel is the prohibition against conducting medical exams or making disability-related inquiries before giving a conditional offer of employment. Most correctional agencies will need to conform their hiring process with this requirement.

In May 1994, the Equal Employment Opportunity Commission (EEOC) issued guidance addressing this critical issue. This guidance offers useful information on what constitutes a medical exam or a disability-related inquiry.

The guidance does something that the ADA, its regulations and the technical assistance manual do not do--it defines the term "medical exam." Medical exams are procedures or tests that seek information about the existence, nature or severity of a person's mental or physical impairment, or that seek information regarding an individual's physical or psychological health.

Which of the tests most commonly administered by correctional agencies are medical? Here is a brief summary:

Agility Tests. Agility tests are not considered medical in nature and may be administered at any time in the selection process. However, measuring an applicant's physical or psychological response to the agility test would be considered medical and, therefore, cannot be done before a conditional offer of employment is made. Additionally, because the ADA does not permit disability-related inquiries at the pre-offer stage, correctional agencies may not screen out applicants for medical conditions before administering the agility test.

One solution is to ask the applicant to release the agency from liability for injuries incurred while taking the test. The agency also may give the applicant a description of the test and require that the applicant get a doctor's certificate stating that he or she can safely perform the test.

Drug Tests. For purposes of the ADA, tests for the illegal use of drugs are not medical exams. However, take care not to elicit information about prior or current lawful drug use if doing so could lead the applicant to reveal the existence, nature or severity of a disability.

Alcohol Tests. Invasive tests designed to determine whether and/or how much alcohol a person has consumed are medical in nature and not permitted at the pre-offer stage. Invasive tests include testing blood or urine or administering a breathalyzer.

Psychological Exams. There are many types of tests on the market today, including IQ tests, aptitude tests, honesty tests and personality tests. When a test measures the applicant's ability to perform the

job, it may be allowed. To the extent that the test measures things such as tastes, habits or honesty, it would probably not be considered medical. On the other hand, if a psychological exam provides evidence that the applicant has a mental disorder, it may be medical in nature and should not be administered at the pre-offer stage. The EEOC has indicated that determinations as to whether a psychological exam is medical in nature should be made on a case-by-case basis.

Polygraph Tests. Polygraph tests are not specifically addressed by the ADA. Although a polygraph exam, in and of itself, is not a medical exam, often preliminary questions attendant with the administration of the exam are medical. For example, questions such as, "Are you currently on any medication?", "Do you have any mental disorders that would hamper your performance?" and "Have you ever been treated for drug or alcohol addiction?", would be impermissible before extending a conditional offer of employment.

Background Checks. To the extent background checks involve disability-related inquiries, they must be delayed until the offer is made. On the other hand, high school and college transcripts, credit checks and FBI checks may be conducted at any time.

Vision Tests. Tests that determine an individual's ability to see would be medical in nature. However, it is permissible to determine whether an applicant can read labels or distinguish objects, as long as it is job-related and consistent with business necessity.

Disability-related inquiries are likely to elicit information about a disability and may not be made at the pre-offer stage. Questions like "Do you have AIDS?" or "Have you ever been addicted to drugs?" should not be asked. The ADA permits questions about how applicants would perform the essential functions of the job. Likewise, applicants may be asked to demonstrate how they would perform these essential functions.

Here are common areas in which disability-related inquiries may arise:

Attendance. Questions about an applicant's attendance record can be asked. However, the interviewer should not ask why an applicant was absent, because this might elicit information about a disability or impairment.

Worker's Compensation History. The ADA prohibits questions about an applicant's worker's compensation history as well as job-related injuries.

Drug Use. Questions about current illegal use of drugs are allowed. However, questions regarding prior or current lawful use of drugs are not permitted. Drug or alcohol addiction is considered a disability under the ADA as long as the individual has successfully completed, or is currently in, a rehabilitation program. However, recreational use of drugs does not necessarily constitute drug addiction. Therefore, correctional agencies may ask about prior illegal use of drugs but, at the pre-offer stage, may not ask about the extent of such prior use. Although it may be permissible to ask, "Have you ever used marijuana?" at the pre-offer stage, it would probably not be permissible to ask, "How often did you use marijuana in the past?"

Certificates/Licenses. Inquiries regarding certificates or licenses are allowed at the pre-offer stage if they are related to essential or marginal functions of the job. This includes questions about why an applicant does not have a particular certificate or license.

Lifestyle. Inquiries about eating habits, weight and exercise habits are allowed at the pre-offer stage, with certain precautions. For example, agencies may ask whether an applicant regularly eats three meals a day but should not ask whether an applicant eats a number of small snacks at regular intervals throughout the day because this might require an applicant to reveal a disability, such as diabetes. Questions about whether an applicant drinks alcohol would be permitted. However, because alcohol addiction is considered a disability under the ADA, questions about how much the applicant drinks should not be asked.

Conditional offers must be bona fide and made in good faith. That means that all nonmedical information has been evaluated before making the conditional offer. Large numbers of offers should not be made for small numbers of positions.

Applicant Pools. The ADA allows for establishing qualified pools of candidates. However, pools should not be used to avoid hiring individuals with disabilities. Continuously placing individuals with disabilities at the bottom of the pool is not permitted. The EEOC's guidance provides that employers "must hire from the pool based on pre-established, objective standards such as date of application."

In addition, if the agency reranks applicants in a pool, based on the results of post-offer exams, then the correctional agency must advise the applicant of his or her rank before the exam, as well as after the exam.

Delivering Inmates Services under Title II

Because integration into mainstream society--even a prison or jail "society"--is a cornerstone of the ADA, programs, services or activities that discriminate on the basis of a disability should be avoided. However, correctional facilities may offer separate or special programs when needed to provide individuals with disabilities an equal opportunity to benefit from the programs.

Corrections administrators should evaluate three areas to ensure accessibility to their programs, services and activities: (1) policies and procedures, (2) architectural barriers and (3) communications.

Policies and Procedures. Administrators should determine whether there are policies or procedures that screen out inmates with disabilities from participating in programs. If they do, then reasonable modification to those policies and procedures may be necessary.

Architectural Barriers and "Program Access." Correctional facilities may not deny the benefit of their programs simply because the facilities are physically inaccessible. This does not mean that correctional agencies must retrofit their existing facilities. What the ADA does require is that the facility operate each program, service or activity it offers so that, when viewed in its entirety, the service, program or activity is readily accessible to or usable by individuals with disabilities. This standard is called "program access" and applies to all new construction and alteration to existing structures. Achieving access can include relocating the program to an accessible part of the facility, redesigning equipment, providing auxiliary aids or altering existing facilities.

Communications. Corrections administrators must make sure that inmates with hearing, vision or speech impairments have effective communications. This may be accomplished through auxiliary aids

and services, such as telecommunication devices for the deaf (TDDs), qualified readers or audio-taped texts.

Making Programs and Services Accessible

Corrections administrators will need to survey the programs, services and activities offered to ensure accessibility. These programs, services and activities might include:

Educational Programs. Agencies are free to establish whatever eligibility requirements are necessary to offer educational programs. However, care should be taken to modify policies that adversely affect inmates with learning disabilities. For example, it would be permissible to require inmates taking college credit courses to have a general equivalency diploma (GED). However, inmates who could not get a GED because of a learning disability might need some accommodation as long as doing so does not fundamentally alter the nature of the program. Likewise, requirements that inmates be able to attend classes in places that are physically inaccessible may violate the ADA. In such cases, where possible, classes should be relocated to an accessible area.

Drug and Alcohol Treatment. Programs like Alcoholics Anonymous or Narcotics Anonymous should be accessible to inmates with disabilities. In cases where deaf or hard of hearing inmates want to attend, it may be necessary to provide a sign language interpreter.

Library Services. Inmates who are blind or have vision impairments are entitled to access to a facility's library. This does not mean, however, that the agency must replicate the entire library in Braille. Rather, this may be accomplished by providing books on tape, qualified readers, or books or parts of books in Braille.

Inmate Work Programs. Many correctional facilities offer programs that allow inmates to earn early release in exchange for strenuous physical labor. Clearly, inmates with certain physical disabilities will not be eligible for such programs. Because early release from prison or jail is such a fundamental benefit, it may not be proper to exclude inmates with disabilities from this opportunity. This is an area that may require corrections administrators to create programs where none exist in order to give inmates with disabilities the same opportunity for early release that is available to inmates without disabilities.

Finally, compliance with the ADA is not limited to inmates and employees. Those having a legitimate fight to be on the premises also are included. Family members, clergy, attorneys, counselors, probation and parole officers and volunteers may need to be accommodated. For example, even if a facility does not have an inmate who is deaf or hard of hearing, a TDD machine may be necessary to provide access to family members, attorneys or others who need this auxiliary aid to be able to communicate with an inmate.

This article is supported under award number 92-IJ-CX-0009 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this article are those of the author and do not necessarily represent the official position of the U.S. Department of Justice.

PHOTO (BLACK & WHITE): Invasive tests, such as urine screening, are medical in nature and not permitted at the pre-offer stage of employment.

~~~~~

By Paula N. Rubin

Paula N. Rubin, a lawyer, is a visiting fellow at the National Institute of Justice (NIJ), coordinating NIJ's initiative to research, develop and deliver publications and training for the criminal justice system on the Americans with Disabilities Act, as well as other human resource management issues.

Copyright of Corrections Today is the property of American Correctional Association and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.