

The Applicability of the ADA to Personal Assistance Services in the Workplace

Background and Statement of the Issue

Congress has stated that it is the policy of the United States to provide assistance to individuals with disabilities to lead productive work lives.¹ Congress has also found that Americans with significant disabilities often are unable to obtain health care insurance that provides coverage of the services and supports that enable them to live independently and enter or rejoin the workforce.²

Personal assistance services (such as attendant services, personal assistance with transportation to and from work, reader services, job coaches, and related assistance) may remove many of the barriers between significant disability and work. Coverage for such services is a powerful and proven tool for individuals with significant disabilities to obtain and retain employment.³

For individuals with disabilities, the fear of losing health care and related services is one of the greatest barriers keeping individuals from maximizing their employment, earnings potential, and independence. Recognizing these realities, on December 17, 1999 President Clinton signed into law the Ticket to Work and Work Incentives Improvement Act (TWWIIA).⁴ One purpose of TWWIIA is to encourage states to adopt the option of allowing individuals with disabilities to purchase Medicaid coverage that is necessary to enable such individuals to maintain employment (Medicaid Buy-In programs).⁵ A second purpose of TWWIIA is to establish the Ticket to Work and Self-Sufficiency Program that will allow individuals with disabilities to seek the services necessary to obtain and retain employment and reduce their dependency on cash benefit programs.⁶

Many states are currently analyzing whether and the extent to which personal assistance services (PAS) should be provided to individuals with disabilities in the workplace under the Medicaid program either as a benefit under the State plan or as a service provided under a waiver. Similar analyses are being undertaken by state agencies regarding the operation of the state vocational rehabilitation program under Title I of the Rehabilitation Act⁷ and by state and local workforce investment boards and One-Stop career centers under Title I of the Workforce Investment Act.⁸

Policy deliberations under these federal/state partnership programs require an understanding of the obligations of employers to provide PAS under the Americans with Disabilities Act. The purpose of this policy brief is to explore the responsibilities of employers to provide PAS in the workplace. More specifically, the policy brief addresses the following issue: whether, and if so, under what circumstances the provision of PAS in the workplace is a reasonable accommodation as defined in the ADA?

Summary

Some people with disabilities have functional limitations that may create barriers to employment. For example, a quadriplegic may have the requisite education, experience and expertise to perform the essential functions of a job, but may be unable to perform nonessential job functions (e.g., turning pages) without assistance.

Title I of the ADA is a federal civil rights statute that requires employers to assist qualified individuals with disabilities overcome particular impediments/barriers to employment resulting from their functional limitations. More specifically, when a disabled person's functional limitations become barriers to employment, the ADA requires employers to consider whether reasonable accommodation will remove the barrier, thereby providing genuine, effective, and meaningful employment opportunities for qualified individuals with disabilities.⁹

In general, personal assistance services (PAS) is a form of assistance used by persons with disabilities to perform tasks that the person would perform for himself or herself if he or she did not have a disability. Personal assistance services include assistance in performing tasks that range from assistance in reading, communication, and performing manual tasks (e.g., turning pages) to assistance in bathing, eating, toileting, personal hygiene, and dressing.

The issue analyzed in this paper is whether, and if so, under what circumstances the provision of PAS in the workplace is a reasonable accommodation as defined in the ADA? In a nutshell, the ADA requires employers to provide personal assistance services to an applicant or employee with a disability so long as the services are job-related and are not primarily for the personal benefit of the individual with a disability. Job-related assistance in the performance of such tasks as reading, communication, the performance of nonessential manual tasks, and business-related travel may be considered reasonable accommodations. Assistance in performing such tasks as eating, toileting, dressing and personal hygiene are primarily personal in nature and generally will not be considered reasonable accommodations.¹⁰

Set out in the following pages is a more detailed analysis of the issue, starting with a brief recitation of definitions of key terms.

Definitions of Personal Assistance Services

Under the Ticket to Work and Work Incentives Improvement Act¹¹ and the Rehabilitation Act,¹² the term “personal assistance services” generally means:

A range of services provided by one or more persons designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform if the individual did not have a disability. Such services shall be designed to increase the individual’s control in life and ability to perform everyday activities on or off the job.

The State Medicaid Manual¹³ defines the scope of personal care services (also known in States by other names such as personal assistance services, personal attendant services, etc) as:

A range of human assistance provided to persons with disabilities and chronic conditions of all ages, which enables them to accomplish tasks they would normally do for themselves if they did not have a disability. Assistance may be in the form of hands-on assistance (actually performing a task for an individual) or cueing so that the person performs the task by him/herself. Such assistance most often relates to performance of activities of daily living (ADLs) and instrumental activities of daily living (IADLs). [footnote 11 at page 47 in Primer] Medicaid Manual section 4480]

ADLs include eating, bathing, dressing, toileting, transferring, and maintaining continence.

IADLs capture more complex life activities and include personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management.

Title I of the ADA

A reasonable accommodation under the ADA is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy equal employment opportunity. An equal opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average similarly-situated applicant or employee without a disability.¹⁴ Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation.¹⁵

Under the ADA, an employer with 15 or more employees must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.¹⁶ A qualified person with a disability is

a person with a disability who meets the skill, experience, education and other job-related requirements of a position held or desired and who, with or without reasonable accommodation, can perform the essential functions of a job.¹⁷

In general, an employer may not make pre-employment inquiries about whether a person has a disability. Thus, for example, an employer generally may not ask an applicant “will you need reasonable accommodation related to your disability to perform the job?” However, an employer may ask an applicant whether he or she needs reasonable accommodation and what type of accommodation is needed to perform the functions of the job if the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability or when the applicant voluntarily discloses the need for reasonable accommodation.¹⁸

The process of identifying whether, and to what extent a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability in an interactive process. The determination of whether a particular accommodation is reasonable and required under the ADA must be made on a case-by- case basis.¹⁹

The statute and EEOC regulations provide examples of common types of reasonable accommodation that an employer may be required to provide.²⁰ This list is illustrative, not exhaustive.²¹

Analysis of the Issue

The following “personal assistance services” may be considered “reasonable accommodation” under the ADA because they are job-related. This list is derived from a review of the statute, regulations and policy interpretations issued by EEOC and the Department of Labor.

- Qualified readers or interpreters²²
- A personal assistant that acts as a page turner for an employee with no hands²³ or an individual who aids a person that uses a wheelchair file to retrieve work materials that are out of reach,²⁴ or a person that assists an individual with physical limitations resulting from a stroke transport materials from one place to another²⁵
- A travel attendant that acts as a sighted guide to assist an employee who is blind on occasional business trips²⁶ or who assists an employee with a mobility impairment on business trips²⁷
- A security guide that opens the entry or exit doors for an individual who is a paraplegic²⁸
- A temporary job coach to assist in the training of a qualified individual with a cognitive disability²⁹

On the other hand, the obligation to provide a reasonable accommodation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. If an adjustment or modification

assists the individual throughout his or her daily activities, on and off the job, generally it will be considered a personal item that the employer is not required to provide.³⁰

Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, or refrigerator that is not provided to employees without disabilities (See Senate Report at 31; House Labor Report at page 62).³¹

It should be noted, however, that the provision of such items might be required as reasonable accommodations if they are specifically designed or required to meet job-related rather than personal needs. An employer, for example, may have to provide an individual with a disabling visual impairment with eyeglasses specially designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside the office.³²

The regulations issued by the Department of Justice implementing Title III of the ADA (public accommodations) are more explicit with regard to whether the obligation to make reasonable modifications and provide auxiliary aids and services, and communication accessibility extends to services of a personal nature. The regulations state:

This part does **not** require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or **services of a personal nature including assistance in eating, toileting, or dressing.**³³

The Department of Justice prepared a manual explaining the provisions of Title III of the ADA—The Americans with Disabilities Act: Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities (November 1993). The DOJ ADA Technical Assistance Manual explains that the phrase “services of a personal nature” is not to be interpreted as referring to minor assistance provided to individuals with disabilities. For example, measures taken as alternatives to barrier removal, such as retrieving items from shelves or actions required as modifications in policies, practices, and procedures such as a bank filling out a deposit slip, would not be considered “services of a personal nature.”

Also if a public accommodation customarily provides its clients with what might otherwise be considered services of a personal nature, it must provide the same services for individuals with disabilities.³⁴

In addition to specifying whether a particular personal assistance service is or is not a reasonable accommodation under the ADA, the regulations also specify that it would be a reasonable accommodation to permit an individual with a disability the opportunity to provide or use services that an employer is not

required to provide as a reasonable accommodation.³⁵ For example, an employer could not prohibit an individual from using a personal attendant providing assistance in toileting paid under the Medicaid program or a job coach paid by a public or private social service agency.³⁶

Further, there is nothing in the ADA that prohibits an employer from providing an accommodation beyond those required by the ADA.³⁷

Notes

¹ 42 USC 1320b-19 note.

² Id.

³ Id.

⁴ Public Law 106-170.

⁵ Section 201(a)(1) of Public Law 106-170 adds a new section 1902(a)(10)(A)(ii)(XV) to the Social Security Act.

⁶ 42 USC 1320b-19 note, Section 2(b)(3). See also 42 USC 1329b-19.

⁷ 29 USC 720-751.

⁸ 29 USC 2801-2945.

⁹ See Interpretative Guidance on Title I of the ADA issued by the Equal Employment Opportunity Commission (EEOC) at 56 FR 35739 (July 26, 1991).

¹⁰ This conclusion is based on a thorough review of the ADA statute, regulations, and policy interpretations and guidance issued by The Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), and the Department of Labor (DOL). A review of the case law provided no additional guidance.

¹¹ 42 USC 1320b-22(b)(2)(B)(ii); 34 CFR 361.5 (39).

¹² 34 CFR 361.5(39).

¹³ Section 4480 of the State Medicaid Manual, Personal Care Services.

¹⁴ A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act (January 1992) at 3.3 (page III-2).

¹⁵ EEOC Interpretative Guidance at 56 FR 35747 (July 26, 1991). See also EEOC Technical Assistance Manual 3.4 (page III-4).

¹⁶ 29 CFR 1630.9(a).

¹⁷ 29 CFR 1630.2(m).

¹⁸ ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations at page 6-7 (October 10, 1995).

¹⁹ EEOC Interpretative Guidance at 56 FR 35739 and 35748 (July 26, 1991).

²⁰ See 42 USC 12111(9) and 29 CFR 1630.2 (o) (2). See also EEOC Technical Assistance Manual , 3.5 at page III-6.

²¹ 56 FR 35744 (July 26, 1991).

²² 29 CFR 1630.2(o)(2)(ii).

²³ EEOC Interpretative Guidance 56 FR 35744 (July 26, 1991). See also EEOC Technical Assistance Manual 10 (page III-33).

²⁴ Personal Assistance Services in the Workplace (Department of Labor, ODEP Education Kit 1997).

²⁵ Id.

²⁶ EEOC Interpretative Guidance 56 FR 35744 (July 26, 1991). See also

EEOC Technical Assistance Manual, 10 (page III-33).

²⁷ DOL/ODEP PAS In the Workplace Education Kit.

²⁸ DOL/ODEP PAS in the Workplace Education Kit.

²⁹ EEOC Interpretative Guidance, 56 FR 35747 (July 26, 1991).

The EEOC Interpretative Guidance also explains that an employer would not, however, be required to restructure the essential functions of a position to fit the skills of an individual with a disability who is not otherwise qualified to perform the position, as is done in certain supported employment programs.

³⁰ EEOC Interpretative Guidance 56 FR 35747 (July 26, 1991). See also EEOC Technical Assistance Manual 3.4 (page III-5).

³¹ EEOC Interpretative Guidance 56 FR 35747 July 26, 1991). See also EEOC ADA Technical Assistance Manual, 3.4 (at page III-5)

³² Id.

³³ 28 CFR 36.306. See also regulations implementing Section 188 (nondiscrimination) of the Workforce Investment Act [29 CFR 37.7(n)] which specify that: "This part does not require a recipient to provide any of the following to individuals with disabilities: (1) Personal devices, such as wheelchairs; (2) individually prescribed eyeglasses or hearing aids; (3) readers for personal use or study; or (4) services of a personal nature, including assistance in eating, toileting, or dressing."

³⁴ DOJ Technical Assistance Manual at page 26.

³⁵ EEOC Interpretative Guidance 56 FR 35744 (July 26, 1991). See also page 56 FR 35745.

³⁶ EEOC Interpretative Guidance 56 FR 35744 (July 26, 1991).

³⁷ EEOC Interpretative Guidance 56 FR 35744 (July 26, 1991). See also EEOC Technical Assistance Manual 3.4 (at page III-5).



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This policy brief was written by Robert Silverstein of The Center for the Study and Advancement of Disability Policy (CSADP). The CSADP is a partner of the Rehabilitation Research and Training Center on State Systems and Employment at the Institute for Community Inclusion (#H133B30067), and the Rehabilitation Research and Training Center on Workforce Investment and Employment Policy at the Law, Health Policy and Disability Center, University of Iowa (#H133B980042). The Centers are funded, in part, by the National Institute on Disability and Rehabilitation Research (NIDRR) of the US Department of Education. The opinions contained in this publication are those of the grantees and do not necessarily reflect those of the US Department of Education.

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