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Office of Civil Rights Enforcement Presents

TITLE VII 50TH ANNIVERSARY OCRE EDUCATIONAL OUTREACH

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Emphasizing Practical, Best Practices for Complying
With Oklahoma's Anti-Discrimination Act

[DISABILITY AND ACCOMMODATION]

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Oklahoma Attorney General
Office of Civil Rights Enforcement
Title VII 50th Anniversary Educational Outreach Event

Laws Prohibiting Employment Discrimination against Qualified Individuals with a Disability

A Primer for Oklahoma Employers

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TABLE OF CONTENTS

I. Historical Perspective	1
II. Oklahoma Anti-Discrimination Act.....	3
III. The Americans with Disabilities Act	7

I. HISTORICAL PERSPECTIVE

The United States Congress passed the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, which was signed into law by President George H. W. Bush on July 26, 1990. The ADA's purpose was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities". Public Law 101-336, Sec. 2(b)(1, 3)(July 26, 1990). The law was comprehensive, addressing public transportation, public accommodations, and telecommunications. For our purposes, the ADA addressed employment.

While Washington, D.C., was debating the ADA, the Oklahoma Legislature was considering an amendment to Oklahoma's anti-discrimination laws as well. At that point, the Oklahoma Anti-Discrimination Act, OKLA. STAT. tit. 25, § 1101, *et seq.* (OADA), prohibited discrimination in employment on the basis of race, color, religion, sex, national origin, and age. If an Oklahoma resident believed he or she was a victim of employment-related discrimination based upon those factors, he or she could file a charge of discrimination with the Oklahoma Human Rights Commission and pursue administrative relief. Unlike the federal anti-discrimination laws, the OADA did not provide a private right of action to victims of employment related discrimination. In other words, you could not sue based upon the state statute like you could on the federal statute.

In May 1990, Oklahoma enacted OKLA. STAT. tit. 25, § 1901, titled Discrimination on Grounds of Handicap, which would go into effect September 1, 1990 – just months after the

effective date of the ADA. Unlike other classifications protected by Oklahoma law, handicap received additional protection. A person who was the victim of handicap discrimination in Oklahoma as of September 1, 1990, could bring a private right of action under state law. He could sue. OKLA. STAT. tit. 25, § 1901 (repealed effective November 1, 2011).

Thus, as of the passage of the ADA and Oklahoma's Discrimination on Grounds of Handicap, an individual who was the victim of disability/handicap discrimination could file a charge of discrimination and could sue under both federal and state statutory law.¹ (This was not so for any other protected classification in Oklahoma at the time.)

The next major change to the laws protecting the employment rights of individuals with disabilities occurred when Congress passed the Americans with Disabilities Act Amendments Act of 2008, Public Law 110-325, cleverly dubbed the ADAAA. The ADAAA was signed by President George W. Bush and went into effect on January 1, 2009. The ADAAA overturned several United States Supreme Court decisions and called into question many EEOC regulations. In short, Congress used the ADAAA to express its displeasure with the manner in which the ADA had been interpreted by the courts and by the EEOC. Perhaps the overriding theme of the ADAAA was found in its rules of construction regarding the definition of disability: "The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). Since the passage of the ADAAA, employers have been, *and should be,*

¹ Under the ADA, a person's right to bring an administrative charge or to sue is borrowed from Title VII of the Civil Rights Act. 42 U.S.C. § 12117.

more focused on their response to the needs of individuals with disabilities (including requests for accommodation) rather than on the existence of a disability.

Back in Oklahoma, attorneys and the Courts continued to grapple with the inconsistencies between its protected classifications and the rights of persons to sue based upon the specific protected classification. (We need not go through all of that here.) However, in 2011, the Oklahoma Legislature began passing laws which dramatically changed the landscape. The previous administrative agency which handled the charges of discrimination, the Oklahoma Human Rights Commission, was abolished. Further, the Oklahoma Legislature repealed the Discrimination on Grounds of Handicap law in favor of amending the OADA to provide all victims of discrimination with a private right of action.

That brings us to Oklahoma in 2014.

II. OKLAHOMA ANTI-DISCRIMINATION ACT

The OADA was amended in 2011 and then again in 2013. Prior to the 2011 amendments, its stated purpose was to “provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 to make uniform the law of those states which enact this act . . .”. OKLA. STAT. tit. 25, § 1101, superseded eff. Nov. 1, 2011.

Currently, Section 1101 declares the OADA’s purpose is to provide the “exclusive remedies within the state of the policies for individuals alleging discrimination in employment

on the basis of race, color, national origin, sex, religion, creed, age, disability or genetic information. OKLA. STAT. tit. 25, § 1101.

The OADA provides that

A. It is a discriminatory practice for an employer:

1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, sex, national origin, age, genetic information **or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer;** or

2. To limit, segregate, or classify an employee or applicant for employment in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, color, religion, sex, national origin, age, genetic information **or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer.**

B. This section does not apply to the employment of an individual by his or her parents, spouse, or child or to employment in the domestic service of the employer.

OKLA. STAT. tit. 25, § 1302. A similar prohibition applies to employment agencies, labor organizations, and training programs. OKLA. STAT. tit 25, §§ 1303-1305. There is an exemption for religious entities provided it involves the “employment of individuals of a particular religion to perform work connected with the carrying on by the corporation, association, or society of its religious activities.” OKLA. STAT. tit. 25, § 1307. Additionally, it is not unlawful to consider employment decisions based upon such protected classifications if “related to a bona fide

occupational qualification reasonably necessary to the normal operation of the business or enterprise.” OKLA. STAT. tit. 25, § 1308(1).

Oklahoma defines an “Individual with a disability” as “a person who has a physical or mental impairment which substantially limits one or more of such person’s major life activities, has a record of such an impairment or is regarded as having such an impairment”. OKLA. STAT. tit. 25, § 1301. This definition was passed in 2011 (the previous definition still referring to “Handicapped person” though otherwise reflecting much of the ADA’s definition).

Employees who believe they have been the victims of employment discrimination in Oklahoma now follow this procedure to pursue their state law rights:

- They have up to 180 days to file a charge of discrimination with the Attorney General’s Office of Civil Rights Enforcement. (They still have up to 300 days to file with the EEOC under federal law.)
- The OCRE processes the charge and can investigate the charge, including holding administrative hearings.
- At the conclusion of the process, including at the request of the charging party, the OCRE shall issue a Notice of a Right to Sue.
- All lawsuits brought as a result of the OCRE’s Notice of a Right to Sue shall be brought in the district court for the county in which the unlawful employment practice is alleged to have occurred. The charging party has 90 days from receipt of the OCRE’s Notice of a Right to Sue in which to file the law suit.
- The parties are entitled to a jury trial.

- The employer is entitled to any defense that is available to it under the comparable federal anti-discrimination law; *e.g.*, the ADA.
- If the individual prevails, the court may enjoin the employer from engaging in the unlawful employment practice and may order affirmative relief such as reinstatement or hiring. Additionally, the individual shall be entitled to back pay and an additional amount as liquidated damages. Interim earnings or amounts earnable with reasonable diligence shall operate to reduce the back pay otherwise allowable.
- The court may award the prevailing party – be it the individual *or* the employer – a reasonable attorney’s fee.

OKLA. STAT. tit. 25, § 1350.²

While it is important to understand that Oklahoma law protects the rights of individuals with disabilities and permits private state-law litigation, there are very few cases working through the court system at this point. Employers would be wise to look to the ADA for guidance on how to deal, day-to-day, with hiring, employment, and discharge situations.

NOTE: ***The OADA includes small employers.*** The OADA defines an “employer” as an entity “that pays one or more individuals a salary or wages for work performance, or ... which contracts or subcontracts with the state, a governmental entity or a state agency to furnish material or perform work.” OKLA. STAT. tit. 25, § 1301. It does not include a “Native American

² The damages provisions have already been, and survived, the subject of one constitutional attack. *MacDonald v. Corporate Integris Health*, 2014 OK 10.

tribe or a bona fide membership club, other than a labor organization, that is exempt from taxation under Title 26, Section 501(c) of the United States Code.” Id.

III. THE AMERICANS WITH DISABILITIES ACT³

The ADA is the law passed by Congress. That law provides the framework. It is complemented by both the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and by the decisions of the Courts.

The ADA’s primary prohibition is against discrimination. The statute titled “General rule” reads:

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added). Such a seemingly straightforward statement however has so many subparts. One must break that down to begin to understand the ADA.

What is a “covered entity”? “The term ‘covered entity’ means an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2).⁴ What constitutes an “employer”? The ADA applies to employers of at least fifteen (15) employees “for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”. 42 U.S.C. § 12111(5)(A). Specifically excluded from the definition of

³ For the remainder, the paper will simply refer to the ADA as incorporating the ADAAA.

⁴ Covered entities must post appropriate notices in accessible formats. 42 U.S.C. § 12115.

employer are the following: “the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or ... a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.” § 12111(5)(B).

What makes someone a “qualified individual”?

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of [the ADA], consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8).

So, you know if you are a covered employer, you probably know if the person is a qualified individual. **Now, how to you determine if there is a “disability” in play?** Recall this is where Congress expressed its extreme dissatisfaction with the Courts’ and the EEOC’s stance when it enacted the ADAAA. It was with the definition of disability that it specifically included rules of construction advising that “[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ...”. 42 U.S.C. § 12101(4). The current definition of “disability” is

(1) Disability

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), 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.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity 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.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. § 12102(1-3). If you have come away from this definition with a very expansive understanding of the definition of disability, you have read the definition correctly.

Subsection 1 is perhaps the most important because it clarifies that there are three types of individuals who will receive protection under the ADA: (1) a person who *actually has* a physical or mental impairment ..., (2) a person who has a record of (who used to have, but no longer has, or who is in remission, for example), and (3) a person who absolutely does not have, but who is regarded or who is believed to have such an impairment. Each of these three types of individuals receives the protection from discrimination in employment.⁵

So what type of protection does the ADA afford these individuals? The statute sets forth the general description (much expanded upon by the EEOC and the Courts of course). The law defines discrimination “against a qualified individual on the basis of disability” to include the following (this list is thus not exhaustive):

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such

⁵ The ADA specifically addresses the illegal use of drugs. If a person is currently engaging in the illegal use of drugs, he is not included in the definition of a qualified individual with a disability. 42 U.S.C. § 12114(a). However, a person shall not be excluded from the definition of a qualified individual with a disability if he “has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; ... is participating in a supervised rehabilitation program and is no longer engaging in such use; or... is erroneously regarded as engaging in such use, but is not engaging in such use”. 42 U.S.C. § 12114(b). The ADA does not prohibit or pass upon the use of drug testing programs, but other state and federal laws may apply. NOTE: While the law specifically states that “a test to determine the illegal use of drugs shall not be considered a medical examination,” § 12114(d)(1), it makes no such statement about tests used to determine the presence of alcohol. The law does, however, provide that an employer “may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.” 42 U.S.C. § 12114(c)(4).

applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making **reasonable accommodations** to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an **undue hardship** on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an

individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12112(b) (emphasis added).

The concepts of “**reasonable accommodation**” and “**undue hardship**” set the ADA apart from the traditional anti-discrimination laws such as the Age Discrimination in Employment Act or Title VII. The ADA adds an affirmative requirement on employers (*and applicants / employees*) to engage in an interactive process to determine whether there is a reasonable accommodation to allow the applicant / employee to do the job. These concepts of reasonable accommodation and undue hardship form the basis of many lawsuits and, before that, many (*many*) hours of head-scratching by employers. Congress defined these terms within the ADA.

Congress defined “reasonable accommodation” to include, *but not be limited to*:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

Congress defined “undue hardship” to mean “an action requiring significant difficulty or expense, when considered in light of the factors” below:

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B).

Congress did not see fit to pass laws as to every aspect of the hiring through termination phases of employment; however, it did pass very specific law as to the circumstances under which **medical examinations and inquiries** could be had.

(1) In general

The prohibition against discrimination ... shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with [the ADA's employment provisions].

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12112(d). [NOTE: Recall that there are other laws which also bear on medical inquiries such as the Family and Medical Leave Act.]

In addition to the text of the ADA, Congress empowered the **EEOC to promulgate regulations** to further define the ADA, providing guidance to employers and employees alike. As discussed previously, Congress was not pleased with results of the original regulations leading to its enactment of the ADAAA, after which the EEOC issued amended regulations on

March 25, 2011. Notably, under its first provision of the amended regulations titled “Purpose, applicability, and construction,” the EEOC states:

The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. **The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.** The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

29 C.F.R. § 1630.1(4) (emphasis added).

It is this second highlighted statement which underscores the employer’s obligation as it exists post the Americans with Disabilities Act Amendments Act – “The primary object of attention in cases brought under the ADA should be whether [employers] have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.” When you are working through your day-to-day issues, this should be the sentence that drives you to compliance.

Recall the parts of the query you must explore every time:

1. **Is there a covered entity?** That is, are you a covered employer?
 - a. The answer to this is generally simple, or at least ascertainable.

2. Does the situation present because of an individual with a disability (actual, record of, perceived)?

- a. The EEOC has basically made the question of whether the person has an actual impairment a simple hurdle for the individual – “should not demand extensive analysis”. Certain conditions will still not qualify, but they are extremely limited.
- b. This admonition applies to record of claims as well.
- c. The regarded as prong is broad. If a covered entity regards or perceives an individual as having one of these impairments (even if not true and even if it would not substantially limit a major life activity) and discriminates against him, that is a violation of the ADA.⁶

3. Is the person a qualified individual?

- a. Much of the litigation revolves around this question.
- b. The EEOC has further defined “qualified” to mean “that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential job functions of such position.” 29 C.F.R. § 1630.2(m).
- c. The EEOC defines essential job functions in general to mean “the fundamental job duties of the employment position the individual with a disability holds or

⁶ An employer is not required to provide a reasonable accommodation to a person under this prong however.

desires. [They do] not include the marginal functions of the position.” Thought not an exhaustive list, they suggest the following as considerations in determining whether a function is essential: “because the reason the position exists is to perform that function; ... because of the limited number of employees available among whom the performance of that job function can be distributed; ... [because the] function may be highly specialized so that the incumbent in the position is hired for his or expertise or ability to perform the particular function.” 29 C.F.R. § 1630.2(n)(2). The EEOC is clear to note that evidence of whether a function is essential includes

- i. The employer’s judgment
- ii. Written job descriptions prepared before the fact
- iii. Amount of time the function is performed
- iv. Consequences of not performing the function
- v. Any applicable terms of contracts, collective bargaining agreements
- vi. Work experiences of current or past incumbents

29 C.F.R. § 1630.2(n)(3).

- d. It may be well worth your time to review job postings, job descriptions, now – not later.

4. Was there discrimination?

And then, we come full circle. Was there “discriminat[ion] against a qualified individual **on the basis of disability** in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”? 42 U.S.C. § 12112(a)(emphasis added). First, in the employment arena and, unfortunately many times in court, the parties will work through a myriad of scenarios debating whether discrimination occurred in a vast array of settings “on the basis of disability.”

Did the employer ask an impermissible medical question?

Did the employer refuse to hire or to promote an applicant / employee because of an actual or perceived disability?

Did the employer refuse to accommodate an employee without being able to demonstrate an undue hardship?

There are as many scenarios and outcomes as there are individuals and businesses. At the Outreach Event, participants will work through some case studies based upon actual cases to help underscore some of the concepts described herein.