


**Council on Licensing,
Enforcement and Regulation**



DENVER
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Test Accommodations
Under the 2008
Amendments to the ADA

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Agenda

- What frameworks inform your approach to requests for test accommodations?
- How has the legal framework changed since the 2008 Amendments to the ADA?
- How have the Amendments affected your approach?
- What practical considerations come into play?
- What questions remain?

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Audience Survey


By show of hands, do you:

- Handle or review requests for test accommodations?
- Administer a licensing or certification exam?
- Administer periodically? Continuously?
- Have you noticed a change in the volume of requests? Types of requests?
- Are you hearing new arguments from advocates?
- Have you made any operational changes?

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Frameworks - Measurement

- Standardized exams permit examinees to demonstrate knowledge, skills and abilities in a highly controlled context.
- Accommodation – a change made to an aspect of the context (e.g., content, format, environment, administrative procedures).
- Exam purpose, format, delivery method, frequency and length play a part when evaluating requests for test accommodations.

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Frameworks - Measurement

- What knowledge and/or skills are being measured?
- Will the absence of an accommodation:
 - Preclude or interfere with the candidate's demonstration of the knowledge or skills being tested?
 - Result in an inability to adequately assess the candidate's knowledge and/or skills?
- Will the provision of an accommodation:
 - Pose concerns for test security, raise doubts about the validity of the assessment of the candidate, give the candidate an advantage not available to others?

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Frameworks - Legal

- Shift in the legal framework
- Affected in part by societal concerns, primarily in the employment context.

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New Law

- The Americans with Disabilities Act (ADA) has been amended by the ADA Amendments Act (ADAAA).
- The ADAAA received broad support in the House and the Senate.
- The provisions of the ADAAA became effective as of January 1, 2009.

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Why?

- Congress expressed its view that regulatory and judicial interpretations of the ADA had narrowed the broad scope of protection it had intended to be afforded by the ADA.
- The regulatory and judicial interpretations referenced (with displeasure) in the ADAAA were all in the employment context.

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What's the Same? Definition of Disability

- The ADAAA retains the definition of "disability" contained in the ADA: "A physical or mental impairment that substantially limits one or more major life activities of such individual."
- But, the ADAAA specifically states that this definition "shall be construed in favor of broad coverage of individuals under this Act...."


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What's Different? Interpretation of "Impairment"

- The ADA did not address impairments that are "episodic or in remission."
- The ADAAA specifically states that: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- The fact that an individual has a disability, within the meaning of the law, does not answer the question of what, if any, accommodations are reasonable and appropriate.


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Hypothetical Case Discussion

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What's Different? Interpretation of "Substantially Limits"

- While the ADAAA retains the "substantially limits" standard, it affirmatively rejects past interpretations of that standard by the Supreme Court and by the EEOC.

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Interpretations Rejected by the ADA

- Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), holding that:
 - a) the definition of disability under the ADA needs to be "interpreted strictly to create a demanding standard for qualifying as disabled."
 - b) "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

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Interpretations Rejected by the ADA


- EEOC regulations under the ADA, defining the term "substantially limits" as "significantly restricted."

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But, Does This Change Anything for You?

- Yes, if you have, historically, required documentation that establishes that an individual has an impairment that "prevents", "severely restricts", or "significantly restricts" the individual.
- No, if you have interpreted "substantially limits" more liberally.
- The legislative history of the ADA notes that: "By retaining the essential elements of the definition of disability, including the key term 'substantially limits', we reaffirm that not every individual with a physical or mental impairment is covered"


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What's Different? Mitigating Measures

- The ADAAA specifically rejects the Supreme Court's holding in Sutton v. United Air Lines, Inc, 527 U.S. 471 (1999) that the ameliorative effects of mitigating measures are to be taken into account in determining whether an impairment substantially limits a major life activity.
- The ADAAA states that: "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."


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Examples of Mitigating Measures

- The ADAAA provides examples of mitigating measures:
 - Medication
 - Medical supplies, equipment, or appliances
 - Low-vision devices (but not ordinary eye-glasses or contact lenses)
 - Prosthetics
 - Hearing aids, cochlear implants, or other implantable hearing devices
 - Mobility devices
 - Oxygen therapy, equipment, or supplies


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Other Examples of Mitigating Measures

- Use of assistive technology
- Reasonable accommodations or auxiliary aids or services
- Learned behavioral or adaptive neurological modifications

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What's Different? Major Life Activities

- The ADA did not list major life activities. Regulations issued under the ADA identified some examples of major life activities.
- The ADAAA includes a non-exhaustive list of major life activities: 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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What's Different? Major Life Activities


- The ADAAA also adds “the operation of a major bodily function” as an example of a major life activity.
- Such functions include, but are 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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What's the Same? Fundamental Alteration

- The ADAAA reaffirms the provisions of the ADA that specify that reasonable modifications in policies , practices or procedures are required, unless an entity can demonstrate that such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.
- The ADAAA specifically notes that such "policies, practices, or procedures include "academic requirements in postsecondary education".

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What's the Same? Average Person

- The ADAAA does not address the "average person" or "most people in the general population" standard historically applied under the ADA.
- It is presumed that this remains the applicable comparator for assessing whether an individual is substantially limited.

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What's Next? Rulemaking

- The ADAAA grants authority to the EEOC and the Department of Justice to issue regulations to further delineate the definitions of "disability", as well as the "rules of construction" set forth in the law.

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Practical Considerations

- Know your test
 - What constructs are being measured?
 - What constitutes a fundamental alteration?
 - What constitutes a construct irrelevant variance (where an accommodation is not likely to affect the measure)?

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Practical Considerations


- Know the current legal landscape
 - ADA/AA
 - Implementing regulations: DOJ, EEOC
 - Current case law
 - Beware of mis/overstatements of current law and legislative history
- Litigation

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Practical Considerations

- Know/do the research
 - Content and psychometric experts
 - Validity: content, construct, predictive, etc.
 - Reliability
 - What's the harm?
 - Will the accommodation impact the measure? (e.g. over-predict ability, competence, alter the construct, etc.)

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Questions

- What questions remain a year after the Amendments have been enacted?
- Audience questions

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Resources

- Standards for Educational and Psychological Testing (1999)
 - American Educational Research Association (AERA)
 - American Psychological Association (APA)
 - National Council on Measurement in Education (NCME)
- The Americans with Disabilities Act: Information for Credentialing Examinations, Revised Edition February, 2004
 - <http://www.clearhq.org/publications.htm>

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Resources

- ADAAA
 - <http://www.ada.gov/pubs/ada.htm>
- Implementing regulations – Title III
 - <http://www.ada.gov/reg3a.html>

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