

## **Americans with Disabilities Act (ADA)**

The Americans with Disabilities Act (ADA) is a comprehensive federal law designed to eliminate discrimination on the basis of disability. Title I prohibits employment discrimination against the disabled and only covers discrimination between employers and employees or potential employees. Title II provides that public facilities must not discriminate in their "essential eligibility requirements for the receipt of services or the participation in programs or activities and that disabled individuals cannot be subjected to discrimination by public facilities. Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodation of any place of public accommodation.

The question faced by every hospital and managed care organization is whether to modify its credentialing procedures to conform to the requirements of the ADA. Given court decisions interpreting similar remedial laws, it is likely that the provisions of the ADA will be held to protect all members of the medical staff—both employees and non-employees in the hospital setting and all providers in the managed care setting. Hospitals and managed care organizations must seriously assess the current health status questions being asked on the application and accompanying documents, what their policies and procedures and bylaws state about this issue, whether references can be questioned regarding health status of applicants, as well as what questions can be asked of department chiefs in regard to the health status of applicants and/or observed performance in the reappointment process.

### **Who Is Protected by the ADA?**

The ADA prohibits discrimination against "qualified individuals with disabilities". A qualified individual with a disability is defined as:

**"An individual 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."**

The ADA definition of an individual with a disability is very specific. It is a person who has a physical or mental impairment that substantially limits one or more of his or her major life activities; has a record of such impairment; or is regarded as having such an impairment. Alcoholism is a disability under the ADA. Alcohol use that affects job performance is not. Unsatisfactory behavior such as absenteeism, tardiness, poor job performance or accidents caused by alcohol or illegal drug use need not be accepted nor accommodated. Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA. Physician and alcohol abuse is the greatest concern to hospitals during the credentialing process, as

such abuse is believed to pose the greatest threat to the safety of the patients. The ADA specifically permits an employer to ensure that the work place is free from the illegal use of drugs and the use of alcohol. However, the ADA does provide protection from discrimination for those physicians recovering from drug and alcohol addiction.

### **Credentialing under the ADA**

A determination of a practitioner's fitness to practice medicine is the essence of the credentialing process and is required by many states, JCAHO, NCQA, and the Commission/URAC. Whether a practitioner has any physical or mental impairment that would affect his/her ability to practice is a concern during the credentialing process. In order to assess health status, hospitals and managed care organizations have typically asked a series of health status questions on initial appointment application and reappointment/recredentialing forms.

Under the ADA, the legality of health status inquiries depends upon the stage at which they are made. Rather, the law seeks to insure that all qualified applicants are treated equally. When a practitioner is rejected as a "direct threat" to health and safety, a hospital must be prepared to show a "significant current risk of substantial harm"; the specific risk must be identified; the risk must be documented by objective, medical or other factual evidence regarding the particular individual; and even if a genuine significant risk of substantial harm exists, a hospital must consider whether it can be eliminated or reduced below the level of a direct threat by reasonable accommodation.

Under the ADA, post offer, preappointment medical inquiries and medical exams are allowed. If a healthcare entity decides to make the inquiries or order the medical exams and based upon information received does not appoint the practitioner to the staff, the healthcare entity must be prepared to show that the practitioner could not exercise the requested privileges even with reasonable accommodations from the hospital.\*

### **Healthcare Integrity and Protection Data Bank (HIPDB)**

Created by the Health Insurance Portability and Accountability Act of 1996, HIPDB will be a national health care fraud and abuse data collection program for the reporting and disclosure of certain final adverse actions taken against health care providers, suppliers or practitioners. It

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\*Ellen L. Janos, J.D., et. al., *Credentialing Under the ADA: Legal Overview*. 1999