



disability & absence solutions

## Managing the new ADA

*Employers face new, enormous government mandates to accommodate employees with disabilities. Today they confront compliance, productivity and reputational risks that may transform the enterprise risk profile of large and small employers. And it's a challenge that can't be ignored.*

*To resolve disability compliance risk, employers would do well to focus on two critical resources: developing a central information management platform that covers multiple mandates, and acquiring a higher level of job accommodation know-how. Both resources address the emerging mandates and offer employers the opportunity to leverage their investment to benefit the bottom line.*

*But first, some background.*

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# Compliance challenge

Today, Americans with Disabilities Act compliance has again become a significant business risk.

## Changes to the Americans with Disabilities Act

The watchword in discussions throughout corporate human resource departments once again is the Americans with Disabilities Act (ADA). The ADA has long dominated HR conversations, dating back to its passage almost 25 years ago in 1990 and, along with the ADA Amendments Act (ADAAA) enacted by Congress in 2008 broadening protected groups, it's once again top-of-mind.

The Equal Employment Opportunity Commission and other federal agencies have brought numerous successful discrimination and enforcement actions against a “who’s who” of American corporations. Multi-million dollar settlements have characterized these actions. In the wake of the amendments to the ADA, there is an opportunity for enforcement initiatives to accelerate as the new law becomes fully implemented. The Obama administration increased enforcement budgets in FY 2014.

Simultaneously, the Family Medical Leave Act (FMLA) of 1993 has penetrated ever deeper into employer practices, further complicating and exacerbating the size of the compliance risk. FMLA provides an employee relatively easy access to job protection due to absences. Now a trend is growing among states and municipalities to add paid sick leave and other mandates.

The federal government has put new performance standards for hiring of individuals with disabilities into its regulations of federal contractors (so-called “Section 503”). These include data reporting rules which will challenge the ability of any employer without a centralized information system to manage its job applications and human resource processes.

There are no safe harbors for employers and their vendors from compliance risk. Converging forces from state and federal governments complicate the compliance landscape. Regional permutations and state add-ons to federal protections, together with the sometimes conflicting court decisions emanating from the federal

courts in different districts, makes successful compliance an ever-moving target for employers.

A holistic examination of contemporary risks would place the increasing compliance, operational and business risks resulting from ADA, FMLA and related absence management and benefit issues near the top of an enterprise risk analysis.

## Formulating an effective ADA compliance policy and process

Employers struggle with the question of “How do you begin to wrap your arms around this thing called ADA?”

It has become increasingly evident that employers can greatly contain their exposures to complaints, grievances, lawsuits and enforcement actions by adopting several essential management practices. These practices could solely address ADA issues. But best practices also address FMLA and other employee mandates related to leave and accommodation – including workers’ compensation. Employer organizations such as the Disability Management Employers Coalition (DMEC) and the Integrated Benefits Institute (IBI) note the practical wisdom of shared solutions for multiple obligations.

Often, employers face two common compliance gaps. The first gap is the lack of a well-defined accommodation process and/or neglect in following the process consistently. Developing the process is often the biggest hurdle that Sedgwick encounters when working with employers. And, inconsistent implementation is a frequent bump in the road.

The second common gap deals with the ability of the employer’s information management platform to support the previously discussed accommodation process. Here there is a wide range of practices, often inconsistent even within the same organization. Some departments may collect and track needed data using an Excel spreadsheet, some may inconsistently report employee requests to human resources and some managers may just act on the spot, without any documentation. Any of these options can

leave the organization unable to completely implement its formal processes, and open it to costly legal action from employees and regulatory enforcement agencies.

The heart of a successful ADA/ADAAA compliance program is a dynamic central information platform matched with a job accommodation program that addresses the increasingly complex government accommodation regulations faced by all organizations.

## A central information management platform

The need for an effective, centralized information platform begins when an employee requests a job accommodation because of a disability that impedes their ability to perform all required job functions. This request sometimes arises as part of a claim for short term disability, long term disability benefits, FMLA or workers' compensation, or it can stem from a condition which never qualifies for any of these other benefits. The issue may seemingly arise in isolation, but may yet have important ADA repercussions and may also affect other employee benefits such as paid sick leave or vacation benefits.

What happens once an employer is notified of a request for accommodation critically impacts how they are viewed in regard to good faith compliance with required government mandates including ADA. A centralized information platform which supports the accommodation process gives an employer a significant advantage in the current regulatory environment. Ideally, all conversations and communications are recorded with date and time stamps within the platform. Compliance is both easier to achieve and, perhaps more importantly, clearly able to be demonstrated when an employer has this kind of system.

A centralized information management system tracks and documents each step in the accommodation process. This begins with an employee's request for accommodation and continues until a decision is made regarding the ability to accommodate the employee. Extensive documentation is required as a part of the process:

- Conversations with the employee
- What and how accommodations were analyzed and considered in the response to the employee's request
- Medical documentation substantiating the accommodation
- Acceptance of the accommodation including length of time and specifics of the accommodation
- In the case of a denial, strong rationale supporting the reasons for denial including why the request was not reasonable

Much of this information is highly sensitive and needs to be tightly managed from an accessibility standpoint in order to comply with privacy laws, especially those under the Health Insurance Portability and Accountability Act (HIPAA).

Often during the accommodation process, FMLA or other leave benefits may come into play. Ideally, having all of that information available within the same platform ensures better concurrent monitoring for the employer and employee. Any system should be easily and appropriately accessible to managers, human resources, and to the employee.

The manager tasked with the case needs to be able to look back historically to see what has happened. The best platform is not just a way to document the case, but can become an action tool. The system should coordinate multiple mandates and identify specific milestones in the process where the employer should take action. This use ensures not only compliance, but also an opportunity to plan.

The case for an effective central information platform touches upon a variety of issues:

- ADA regulations have continued to evolve based on new legislation and court decisions. The employer needs to use a platform that can easily and reliably adjust to support process changes in light of these developments.
- Employee benefit policies are intertwined and probably affect ADA compliance issues. A central platform can create "hooks" into the processes of multiple benefits and mandates to identify important events that could spur action.
- Employer policies and federal and state regulations continue to become more intertwined and dynamic. Relying on manual tracking methods may be a formula for compliance violations and increased risk. A robust, multi-faceted centralized information platform that supports multiple operational processes and enables comprehensive documentation can greatly reduce that risk.
- The potential for internet-based interactivity between employees and employers will improve the platform and make it more accessible. Many employers are insufficiently aware that FMLA and ADA regulations expect the employee to participate in good faith and take some initiatives on their own. Sedgwick's viaOne® suite of tools including mobile technology is an example of an interactive, internet-based tool that is easy to use for both employees and employers.

## Job accommodations

The employer community has been frank in expressing its concern that managing job accommodations is an exceptionally difficult part of ADA compliance. An employer survey published in September 2013 by Reed

Group and Spring Consulting Group reported that 47% of respondents said decisions about potential reasonable and effective accommodations were “difficult” or “extremely difficult.” Half of employers said assessing if a job accommodation imposed an undue hardship is “difficult” or “extremely difficult.”

The basic work steps for creating a job accommodation have been known for years. They are (as summarized by the Department of Labor’s Job Accommodation Network – chart at <http://askjan.org/media/JAChart.doc>): define the situation; perform a needs assessment; explore alternative placement options; redefine the situation; and monitor accommodations.

Making job accommodations is a challenge for employers and the ADAAA made it even more difficult. Employers are now required to undertake an “interactive process,” meaning that both the employer and employee need to engage at every major step in the process. It also means that the employer should refrain from applying inflexible rules, for example about the maximum duration of a job accommodation.

The regulations require that the employer must show convincingly that a job accommodation requested by the employee prevents the employee from performing an essential function. As an indication of how demanding the requirement can be, employers need to be able to demonstrate that just showing up for work is an essential function. In *Daniel Mecca v. Florida Health Services Center, Inc.*, a federal court in Florida held in February 2014 that, where regular attendance is an “essential function” of a position and a leave will not allow regular attendance now or in the immediate future, then employee leave is not a “reasonable accommodation.”

ADA permits employers to deny a job accommodation if it imposes an undue hardship on the employer. However, the regulations fail to define the conditions for undue hardship. Based on communication from the Equal Employment Opportunity Commission (EEOC), an employer must prove that implementing an accommodation would put them in financial hardship. For a very large employer, there are not many modifications that would be officially seen as impactful enough to incur financial risk. For a smaller employer, major modifications may be more likely to be viewed as a hardship.

Truly, the buzzword is “significant” – very major, negative impact must be proven to the finances of your organization

for a proposed accommodation to be recognized as a hardship. Especially for larger employers, this is considered very difficult to prove under most circumstances; each situation must be evaluated for specific determination.

## The talent challenge

How plentiful in the employer community is job accommodation talent? Unfortunately, trained and experienced job accommodation talent is hard to find.

Employers who manage work injury risk effectively are often well-versed in the job accommodation process based on decades-long experience with return-to-work programs in workers’ compensation. The majority of workers with injuries resulting in lost time tend to return to work through temporary modified duty.

This experience, while valuable, has important shortcomings in many ADA cases. With workers’ compensation, the injuries are generally short-term, often accidents that involve musculoskeletal impairments. These injuries often resolve themselves entirely within a few days, a few weeks or a few months. Even if permanent functional impairment remains, the impairment typically still allows, with relative low-cost redesign of the job, the ability of the employee to resume essential job functions and to regain their pre-wage income.

That’s not the typical case with a non-occupational condition. Non-occupational conditions that lead to ADA accommodations are primarily illnesses, many of them chronic in nature, perhaps causing the worker’s functional capacities to fluctuate. Cancer and multiple sclerosis are two examples. Job accommodations can even include temporary leave so that productivity declines to zero. Non-occupational conditions often put employees under significant stress. The non-occupational health condition and required accommodation, including leave, may not be covered by any wage replacement options – or wage replacement may be relatively short-term.

Sedgwick’s many conversations with its clients and its experts in job accommodation indicate that the challenge to employers is not just the ADA requirements themselves. The challenge also includes finding people who are qualified to perform job accommodation analyses, document when an essential function might be unmet, and document undue hardship. Lack of the requisite talent has become an operational business risk.

## Beyond compliance

It is no wonder that a DMEC task force in 2013 concluded that centralized administration of mandated employee protections and benefits is the single most important best practice recommendation for administration of ADA. (DMEC's 2013 Leadership Series, "How Accommodating Is Your RTW Program? Employer Best Practices in ADA Accommodations.")

Employee absences and job accommodations are now a standard cost of business, including added workloads, disruption to other workers, higher workplace stress, morale problems, and risks to output quality. As employers have trimmed their workforces to boost productivity in a less favorable economy, these issues have become more common. Existing jobs have become more essential to the functioning of the organization and employee absence increases business risk.

This can pose a significant risk to profits and revenue. IBI noted in 2006 that, "on average, employers leave an equivalent of 85% of net income on the table in excess benefits costs compared to companies with best-in-group performance in industry comparison groups."

More than compliance is therefore at stake. Compliance risks can be extremely costly, painful, and visible within and outside the organization. Business risks can be just as costly but far less visible. They can be difficult to measure and harder to document. They include the cost of lower production and loss of talent. They could also include reputational risk caused by successful government enforcement actions that could affect sales and revenue. They include losing experienced employees due to the lack of a clear, trustworthy policy that responds to personal and family crises. More and more employers confront these issues because of the combined impact of the aging workforce coupled with the commonality of two-income households.

Thus, the challenge for employers is to build effective resources for compliance risk, but apply the processes and policies and resources to both business and compliance risks.

## Take action

ADA/ADAAA compliance issues can seem daunting, but by lining up the right leaders, the right processes and the right tools and preparing themselves and their employees with education and resources, employers can remove confusion, outline a clear plan and build strong compliance and risk management programs. Accommodating employees under the ADA/ADAAA is not only the right thing to do under the law, but being prepared with accommodation plans can also make a positive impact on productivity and employee morale. Without a clear process and capable platform in place, the potential fines and productivity issues could add up to a risk disaster.

As the leader in claims and productivity management solutions, Sedgwick continues to introduce new and expanded services in response to client needs. With forward-thinking commitment, we work with our clients to develop the tools they need to address current and emerging compliance challenges and to provide the support and expertise needed to empower their human resources and risk management teams. Connect with us to find out if we can develop an ADA/ADAAA compliance solution for you.

Additionally, we invite you to engage with us on our Connection blog at [blog.sedgwick.com](http://blog.sedgwick.com) where we continue to address ADA issues and other compliance concerns for employers and the industry. We welcome your thoughts and look forward to hearing how you are managing the evolving challenges of ADA.

Contact Sedgwick today for more information on our ADA/ADAAA compliance solutions.



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