Overview

- JATC’s and AJATC’s are
  - Trusts governed by ERISA
  - Apprenticeship Programs governed by US DOL regulations and state laws
  - Joint Labor-Management Committees
  - Often non-profits under federal and state laws
  - Sometimes post-secondary “schools” or programs under state law or through joint ventures
  - Involved in employment issues

Application of “Employment Laws”

- JATC’s and AJATC’s are not and should not be considered “joint employers” of apprentices doing on the job (“OTJ”) training; for most wage/hour and other laws the contractor or utility is the employer
- However—many federal and state “employment” laws directly or indirectly reach apprentice issues, both in class and on the job
- These laws also apply to contractors and to the JATC and AJATC as an employer of its staff
Potential Liability of the JATC/AJATC

- Can be held directly liable for decisions made by the Committee, or for harassment or discrimination by Training Directors or other Committee members or staff
- Can be held liable for harassment or discrimination by fellow apprentices, if the Program knew about it and failed to correct it
- Has potential liability for discrimination by a contractor or the union if the Program learns of it and fails to take appropriate action

What is a “Disability”

The Definition of “Disability”

- An individual with a disability was defined by the ADA of 1990 as a person who has:
  - a physical or mental impairment that substantially limits one or more of the major life activities (MLA’s) of such individual;
  - a record of such an impairment; or
  - is regarded as having such an impairment
Effect of the ADA Amendments Act

- ADAAA took effect January 1, 2009 and applies to all decisions after that date; it is not retroactive
- A significantly larger number of apprentices and employees will be covered under the ADA than under prior law
- The emphasis shifts from whether the individual is "disabled" to the questions of qualification, essential functions and undue hardship

“Prohibited Action” Cases

- "Regarded as" having a disability now "means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”
- It is no longer required that employer or JATC perceive the applicant or employee as substantially limited in a major life activity to be protected
- It does not matter whether the employee or apprentice is impaired

What are Prohibited Actions?

- Any act of discrimination, other than denial of an accommodation, that would violate the ADA in the absence of a defense
- Includes refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.
- Disqualification or a lower ranking based upon an actual or perceived physical or mental impairment or medical condition would be enough
Definition of Physical Impairment

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.

Definition of Mental Impairment

- Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major Life Activities

- The ADAAA’s non-exhaustive list identifies: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. EEOC adds “interacting with others”
- The House Report also lists: writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination
Major Bodily Functions as MLAs

- ADAAA non-exhaustive list includes: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- EEOC adds special sense organs and skin; and cardiovascular, hemic, lymphatic, musculoskeletal, functions.
- EEOC’s position is that operation of a major bodily function includes the operation of an individual organ within a body system.

Rules to Follow in Determining a “Disability”

- EEOC has given nine rules—here are the most important.
- Substantially limits is not a demanding concept, and “shall be construed broadly in favor of expansive coverage.”
- This threshold question “should not demand extensive analysis.” The primary focus is on the employer’s or JATC’s obligations.

- You cannot consider the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses).
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
Temporary Impairments Under the ADAAA

- The first federal Circuit Court to apply the ADAAA expanded definition of disability
- Held that a temporary impairment can be a disability if it is "sufficiently severe"

“Virtually Always” Disabilities

- Deafness (hearing)
- Blindness (seeing)
- Intellectual disability (brain function)
- Missing limbs and mobility/wheelchair use (musculoskeletal)
- Autism (brain function)
- Cancer (normal cell growth)

“Virtually Always” Disabilities

- Cerebral palsy (brain function)
- Diabetes (endocrine function)
- Epilepsy (neurological function)
- HIV infection (immune function)
- Multiple sclerosis (neurological)
- Muscular dystrophy (neurological)
“Virtually Always” Disabilities

• Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (brain function)
• Many of these impairments may substantially limit other MLAs, but only one is needed

ADA and Apprentice Selection

How the ADA Affects Apprentice Selection

• Requests for Accommodations (Application, Interview, Tests)
• What can be asked during the process
• When and how to conduct physical exams
• When can an applicant be excluded, or ranked lower, based on a physical or mental impairment
Requests for Accommodations in the Application Process or Class

Mom’s Call

- You receive a telephone call from Mrs. Jones about her son AJ, who is graduating high school and has just filled out an application. Mrs. Jones asks about the test and interview process. Mrs. Jones tells you AJ has some learning disabilities, and he’ll need extra time on the test, a quiet environment for all testing, and a reader for all instructions. She also says that AJ might need extra time for any on-line testing.

Questions:
- What ADA issues are raised by this request?
- How should the AJATC respond?

The New Journeyman

- Jason recently completed his apprenticeship. He received some accommodations for a learning disability in class (extended time on tests) and on some jobs (verbal instructions supplemented with written lists)

Questions
- Does the JATC have any further responsibility for job accommodations? Or if he comes to the JATC for classes offered to Journeymen?
Definition of Reasonable Accommodation:

One that will enable an otherwise qualified individual with a disability to perform the essential functions of a job or essential requirements of a program.

Apprentice’s Duty to Ask for an Accommodation

• It is an individual’s obligation to inform the employer/program of the need for an accommodation.
• No “magic words” are required.

Evaluation of Documentation for Learning Disabilities

• New guidance and best practices have reduced the amount of documentation that is appropriate.
• Does the documentation show that the applicant has a specific learning disability?
• Does the documentation show that the individual has received the particular accommodation in the past, e.g., on school tests?
Testing or Classroom Accommodations that May Be Appropriate with Documentation

- Longer test time or untimed tests
- Split testing
- Use of a calculator
- Sign language interpreters or readers

Lawful Pre-Indenture Medical Exams and Inquiries

The New Medical Exam

- Your JATC has decided that too many new apprentices are leaving for physical reasons, and it is time to supplement the DOT physical with a post-offer, pre-indenture physical exam. The doctor polls five to discuss with you based upon their medical history:
  - Apprentice A—color blindness;
  - Apprentice B—past history of alcoholism;
  - Apprentice C—epilepsy, but has been seizure-free for two years;
  - Apprentice D—highly allergic to bee stings; and
  - Apprentice E—three months pregnant.
The New Medical Exam

• Questions for each:
• Which of these applicants could potentially be denied admission? Why?
• What additional information do you need, if any, to make that decision?
• If you admit some or all of these applicants to the program, what obligation do you have to inform contractors that the apprentices have these conditions?

Pre-Offer Inquiries - How to Determine Whether an Applicant is “Qualified”

• Employers/JATC’s cannot inquire at the pre-offer stage whether an individual has a disability
• Employers/JATC’s can ask questions that relate to the applicant’s ability to perform job-related functions

ADA Pre-offer “Don’ts”

Do Not Ask About . . .
• Current or past disabilities or medical history
• Physical or mental conditions
• The prognosis or diagnosis of a condition
• Past medical problems
**ADA Pre-Offer Mays**

*If* the applicant has an obvious or disclosed a disability *and* the Committee believes it may interfere with essential requirements of the program, the Committee *may* question the applicant. If you do so:

--Stick to the questions regarding knowledge, skills and abilities

--Avoid any discussion of undue hardship

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**Post-Offer Medical Exams—When to Do**

- Employers/JATC’s can do medical exams or inquiries *only* after an “offer of employment” has been made to the applicant and before the applicant starts work
- *Some* interpret this to be when an applicant is selected from the list before indenture
- Can argue that it can be done after ranking is complete, and after all other pre-indenture conditions (such as background checks or drug tests)

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**Post-Offer Medical Exams—How to Do**

- JATC’s can condition admission on the results of a medical examination if:
  - the examination is given or the inquiry is made to *all* entering apprentices;
  - medical information is segregated and kept confidential; and
  - the results of the examination “are used only in accordance with” the ADA
Issues in Designing Medical Exams

- What is the program looking for?
- Is the test narrowly tailored to program requirements?
- Is a DOT physical the right test?
- Selecting and training physicians/MRO's
- Model forms in the NJATC ADA Manual

Exclusion from the Program Based on Significant Impairments or Disabilities

The Deaf Apprentice

- A recently-organized contractor has an employee, Kevin, who has been working for two years. Kevin has substantial hearing loss in one ear, and partial hearing loss in the other; he is considered legally deaf. He lost his hearing at an early age, so his speech is sometimes slow and difficult to understand. Kevin's father is a lineman who has been with this contractor for 10 years and is a friend of the owner. The Business Agent who tells you about Kevin says he has already spoken to the IBEW Committee members, and they agree Kevin should not work for any other contractors because of the concern over potential safety issues and the extra work involved in having to supervise a deaf apprentice.
The Deaf Apprentice

Questions:
• What issues will this pose for the JATC?
• How do you respond to the Business Agent?
• What accommodations would be needed for the Aptitude test or interview?
• What accommodations on the job?
• How would you handle small contractors refuse him as unqualified?

Legal Reasons to Refuse Indenture (or Terminate) Based on Medical Conditions

• The applicant or apprentice cannot to perform the essential functions of the job or the program even with reasonable accommodations
• The requirement is job-related and consistent with business necessity
• The individual poses a direct threat to the health or safety of himself/herself, or others that cannot be reduced through reasonable accommodations

Setting Physical Qualification Standards

ETA Standards and the KSAs are not an automatic defense, unless another federal law requires exclusion (e.g., DOT requirements for a CDL)
• Applicants must be considered individually - case-by-case
• Medical evidence is often necessary
Physical Qualification Standards

• If the concern is safety—risk of future injury to the applicant or others—the program may have to meet the direct threat standard

• Must also consider accommodations—can the applicant safely perform fundamental tasks with reasonable accommodations?

Direct Threat Issues

The term “direct threat” means:

• a significant risk of substantial harm to health or safety of the individual or others
• that cannot be eliminated or reduced by reasonable accommodation

Direct Threat Issues

This determination:

• must be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job
• must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence
Direct Threat Issues

The factors to be considered include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

Difficult Cases

- Reading
- Vision
  - inability to see warnings
  - color blindness
- Back Injuries
- Hearing
- Missing Limbs
- HIV
- Hepatitis C
- Epilepsy
- No CDL

Requests for Accommodations on the Job
The Deaf Apprentice Pt. 2

- Kevin, who was admitted through organizing, requires a sign language interpreter. For a 3 hour class this means two interpreters, with special skills. On the job he may need accommodations for certain meetings and training.

- Question
  - When does this become an undue hardship?

Basic Principles

- The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability
- A reasonable accommodation need not be the best accommodation available or the one requested, as long as it is an effective accommodation

Documentation

- Programs can
  - require medical documentation
  - require apprentices to sign releases of information
  - require second opinions or independent medical exams, where appropriate
- Most common concerns
  - what happens pending this process
  - who pays
Defenses

• Undue Hardship—a particular accommodation would impose an undue financial or administrative hardship, considering the cost, financial resources of employer, and the impact on the operation or co-workers
• Direct Threat—to the health or safety of the individual or others
• Fundamental Alteration of the Program or Services. There is specific new language in the ADA Amendments, reiterating this defense

Examples of Common Requests on the Job

• Adjustment in referral procedures when individual contractors refuse to make accommodations
• Adjustment in procedures where apprentices cannot work particular sites
• Request to only be sent to certain types of job sites
• Specialized equipment
• Changes in job duties
• Schedules and breaks

Who Pays For Accommodations?

• Contractor, if covered by the ADA
  • 15 or more employees; and
  • is not an undue hardship
• JATC
  • has joint responsibility with the employer
Medical Leaves

- Time off for medical conditions
- Deadlines to get through the program
- Absences as affecting classroom training

Step 1—Assume the Individual Might Be Covered by the ADA

- If an applicant or apprentice says that they want or need something because of a physical or mental condition, assume that the ADA might apply, because under the ADA Amendments it might
- Never ignore or reject out of hand such requests, even if they are made orally, informally—there are no magic words

Step 2—Consider Essential Functions and Precedent

- Is the request something you have done for others? For how long?
- Does it relate to essential functions?
- Is it something that does not impose much of a burden—at least temporarily?
- If the burden is not great, accommodate, but document for how long
Step 3—ADA Analysis

• If the burden is more than you would normally agree to do, then you do a more formal ADA analysis:
  • Is the individual covered under the Amendments?
  • Are they qualified to perform essential functions with the accommodation?
  • Is there another defense (undue hardship or fundamental alteration)?

Bad Back Jack

• Jack, a third year apprentice, has developed chronic back pain that flares up periodically and leaves him incapacitated for 1-3 days. His doctor recommends that Jack not do repetitive lifting over 35 lbs. Jack ignored this advice at his last job, and his back went out again. He’s been released to return to work, and calls to request that he only be referred to positions that can accommodate his restrictions. When you contact the first contractor on the list, he responds that they do not have any light duty jobs, and to send another apprentice.

• Questions:
  • What are the JATC’s rights and responsibilities here?
  • How would you respond to Jack’s request?

Sam and Harry

• You get two calls from apprentices about accommodation requests.
  • Sam has a bad knee and wants permission to park close to the building—where the supervisors park
  • Harry is a second year apprentice who suffered from heat stroke, and wants to either be exempt from outside jobs during the summer, or from working on the hottest days of the year

• Question: are these reasonable accommodations?
Mary’s Recovery

Mary is a fourth year apprentice. Approximately five months ago she was diagnosed with breast cancer. She was out of work for several weeks for surgery, then released to return to work. She worked for four weeks before that job finished. Mary was then sent to a new contractor. After being on the job for two weeks, you receive a call from the contractor stating that Mary has “light duty” restrictions, and the other apprentices and journeymen have been covering for her. You call one of the journeymen for the prior contractor and learn that the same thing has been going on since her operation.

Questions

• Questions
• Is Mary protected by the ADA?
• What obligations does the contractor have to accommodate Mary’s restrictions? Does the JATC?
• If Mary says her restrictions are long term, what would be your next step?

HARASSMENT ISSUES
Types Of “Harassment”

• Conduct that is discriminatory, because is based on protected characteristics or conduct
• Conduct that is just bullying

Harassment as One Type of Discrimination

Harassment based on any of these categories when it rises to a “hostile work environment”:
• Gender
• Race
• National origin
• Citizenship
• Sexual orientation, marital status and other protected classes under some state or local laws
• Religion
• Age (usually over 40)
• Disability
• Military status

When is it a Hostile Environment?

• Repeated unwanted behavior or conduct based upon a person’s protected characteristics or conduct
• That has the effect of unreasonably interfering with an individual’s work performance or creating an offensive work environment.
• Does not need to involve – loss of economic benefits.
Liability of A JATC for Acts of Its Employees

- If an apprentice suffers an adverse “tangible employment action” by an instructor or JATC employee, then the JATC is liable
- In other situations, the JATC is liable for the acts of supervisors unless it
  - Had a written harassment policy and
  - The apprentice did not use it or
  - The apprentice complained and the JATC took prompt remedial action.

Liability for the Acts of Co-Workers, Classmates or Third Parties

- A JATC is liable for unlawful harassment of apprentices by others if it knew or should have known the alleged harassment, and the JATC failed to take immediate and appropriate corrective action
  - This includes conduct by co-workers, fellow apprentices, customers, or employees of other companies

Questions?
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