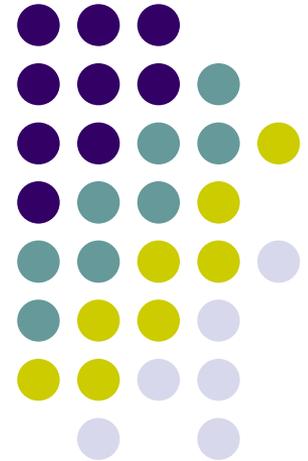
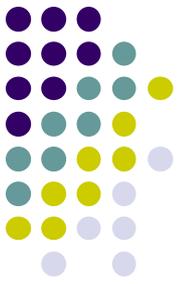


The ADA Amendments Act of 2008 and the Genetic Information Nondiscrimination Act of 2008: Recap and Implications

Equal Employment Opportunity Commission
Office of Legal Counsel
2012

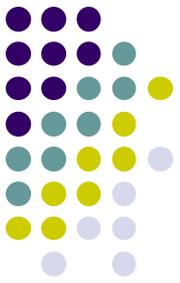


The ADAAA's Major Changes to the Definition of "Disability"



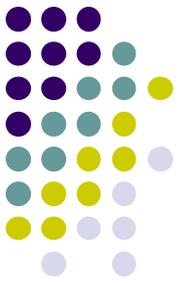
- “Substantially Limited in a Major Life Activity”:
 - Need not be “severely” or “significantly restricted”
 - Major life activities include “major bodily functions”
 - Ameliorative effects of mitigating measures not considered
 - Impairments that are “episodic” or “in remission” are substantially limiting if they would be when active

The ADA's Major Changes to the Definition of "Disability" (cont.)



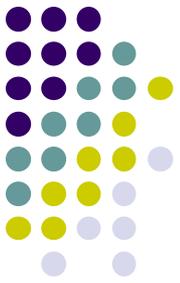
- “Regarded As”:
 - Concepts of substantial limitation and major life activity removed
 - Covers anyone subjected to an action “prohibited by this Act” because of an actual or perceived physical or mental impairment

Types of Impairments That Will Virtually Always Be Found To Be Substantially Limiting [§ 1630.2(j)(3)(ii)]



- Regulations emphasize that individualized assessment still required
- But, for certain impairments, this individualized assessment will virtually always result in a finding of substantial limitation due to the inherent nature of these conditions AND the extensive changes Congress made to the definition of disability

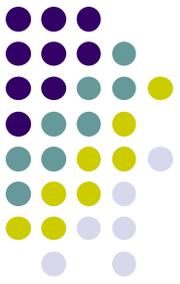
Types of Impairments That Should Easily Be Found To Be Substantially Limiting [§ 1630.2(j)(3)(iii)]



- Deafness, blindness, mobility impairments requiring use of a wheelchair, intellectual disability (mental retardation), partially or completely missing limbs
- Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy
- Mental impairments such as major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia

Condition, Manner, or Duration

[§ 1630.2(j)(4)]



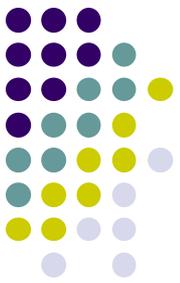
- Regulations retain these factors as concepts to consider, if relevant, in determining whether a substantial limitation exists
- May consider difficulty, effort, or length of time required to perform major life activity; pain; amount of time major life activity may be performed; the way an impairment affects the operation of a major bodily function

“Regarded As” Having a Disability

[§ 1630.2(A)]

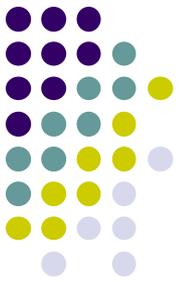


- This definition of disability completely new
- Covers anyone subjected to an action “prohibited by this Act” because of an actual or perceived physical or mental impairment
- For example, applies to actions such as hiring, demotion, promotion, termination, discipline, annual evaluation, compensation decisions, placement on involuntary leave



“Regarded as” (cont.)

- Regarded as coverage NO LONGER requires a showing that an employer believed the impairment substantially limited a major life activity
- Only two elements:
 - **Employer took employment action**
 - **Because of an individual’s actual or perceived impairment**



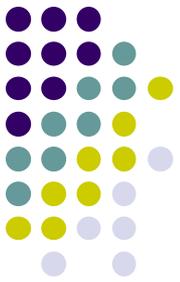
“Regarded as” (cont.)

- Employer can defeat “regarded as” coverage by showing that the impairment at issue is BOTH transitory and minor
- Transitory: Lasting or expected to last 6 months or less
- Whether impairment is transitory and minor determined objectively



“Regarded as” (cont.)

- **“Regarded as” coverage does not mean employer violated the ADA**
 - Employer may defend its employment action and, if the action taken for lawful reasons, then no discrimination
- **Individuals covered only under “regarded as” definition NOT entitled to reasonable accommodation**



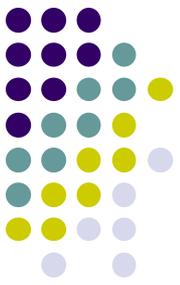
Implications

- First two prongs of the definition of “disability” will primarily be relevant where someone needs reasonable accommodation or claims an accommodation was unlawfully denied
- “Regarded as” prong will probably be most likely basis for coverage in non-accommodation cases



Implications (cont.)

- Where accommodation is requested, focus should be on NEED for accommodation rather than coverage
- Where accommodation is requested, employers may still ask for documentation to substantiate existence of non-obvious disability, but it will be different from, and likely less extensive than, documentation pre-ADAAA



Implications (cont.)

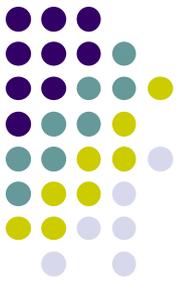
- Employers are more likely to have to defend qualification standards that exclude individuals from jobs based on *impairments*, since individuals affected by such standards will generally meet the “regarded as” definition of “disability” (i.e., unlikely that the impairments will be both transitory and minor)

GINA and ADA



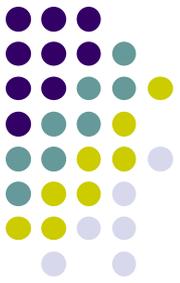
- **ADA prohibits discrimination on the basis of manifested conditions that meet the definition of disability.**
- **GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition.**

GINA's Basic Rules Related to Employment



- Prohibits use of genetic information to discriminate in employment
 - Includes prohibition on harassment and retaliation
- Restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information
- Requires that covered entities keep genetic information confidential, subject to limited exceptions

What is Genetic information?



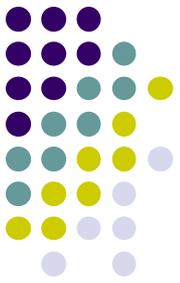
- Genetic Information includes information about:
 1. An individual's **genetic tests** (1635.3(f))
 2. Genetic tests of **family members** (1635.3(a))
 3. The manifestation of a disease or disorder in family members (**family medical history** – all conditions - not limited to conditions currently known to be inheritable - 1635.3(b))
 4. Request/receipt of **genetic services**
 5. Genetic info. of fetus or embryo carried/held by individual or family

Genetic Information Does NOT Include



- Information about an individual's or family member's race, sex, ethnicity, or age
- The fact that an individual currently has a disease or disorder (manifested condition) – this individual would be protected by the ADA if the disease rises to the level of a disability.

Acquisition of Genetic Information Prohibited



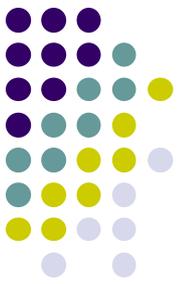
- **General Rule – 1635.8(a)**
 - Covered entities *shall not request, require, or purchase* genetic information of an applicant or employee
 - There are six narrow exceptions to this general prohibition

Six Narrow Exceptions to Prohibition on Acquisition



1. No liability for inadvertent acquisition
2. Permissible to acquire genetic information through employer-sponsored health or genetic services, including wellness program, that meet specific requirements
3. Permissible to acquire family medical history under the FMLA when request is for leave to care for family member.
4. Permissible to acquire genetic information through commercially and publicly available sources
5. Permissible to acquire genetic information through genetic monitoring that meets certain requirements
6. Permissible to acquire genetic information for DNA testing if you are an employer that engages in DNA testing for law enforcement purposes as a forensic laboratory or for purposes of human remains identification

1. No Liability for Inadvertent Acquisition – 1635.8(b)(1)



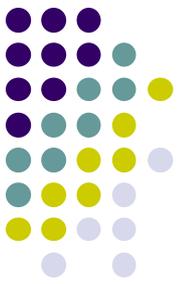
- Protects covered entity that unwittingly receives otherwise prohibited genetic information
- Examples of inadvertent acquisition – 1635.8(b)(1)(ii):
 - receipt of unsolicited email message that includes genetic information about an employee;
 - during a casual conversation or in response to a general inquiry about the individual's or family member's well-being, e.g., “How are you?” “How's your son feeling today?” or “Did they catch it early?” asked of an employee whose mother has just been diagnosed with cancer.

Prohibition on Requesting Genetic Information during Medical Exams Related to Employment – 1635.8(d)



- **ADA**: Employers may conduct post-offer medical examinations/inquiries or fitness-for-duty examinations consistent with ADA requirements
- **GINA**: Employers must direct THEIR doctors NOT to collect genetic information when conducting employment-related medical exams (e.g. post-offer or fitness-for-duty medical examinations)

Employers Requesting Health Information – 1635.8(b)(1)(i)

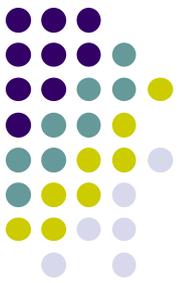


- If employer warns (verbally or in writing) individuals and their health care providers from whom employer sought information that genetic information must **NOT be provided to the employer**, but it receives genetic information anyway, that receipt will be considered inadvertent and not a violation of GINA.
- If employer does not give such a notice, it may still establish that its receipt of genetic information was inadvertent if its request was “not likely to result in the employer obtaining genetic information.”



Implications

- Must revise procedures for employment-related exams (post-offer and fitness for duty exams) – warn doctors not to collect GI (1635.8(d))
- Must revise procedures for requesting medical information from employees and employees' health care professionals – provide model warning (1635.8(b)(1))
- Must revise wellness programs that collect genetic info – must be voluntary and offer no incentives in return for genetic information (1635.8(b)(2))
- Must revise EEO information and harassment policies to include genetic information as a protected basis
- Must provide training on GINA requirements, especially as they relate to requesting medical information



Questions?

- www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (ADAAA Regulations Q&A)
- www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (ADAAA Regulations Fact Sheet)
- www.eeoc.gov/laws/types/genetic.cfm (GINA Regulation, Fact Sheet, and Q&A)
- Call Kerry Leibig, Senior Attorney Advisor, Office of Legal Counsel, EEOC at 202-663-4516