

# 6

## ADA and PDCRA

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## I. Overview

§6.1 Title I of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12101 et seq., as amended by the ADA Amendments Act of 2008, Pub L No 110-325, 122 Stat 3553 (2008) (eff. Jan 1, 2009), is a federal law that prohibits discrimination by employers, employment agencies, labor organizations, and joint labor-management committees "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 USC 12112(a). The law also makes it unlawful for a covered entity to fail or refuse to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. 42 USC 12112(b)(5)(A).

The Persons with Disabilities Civil Rights Act (PDCRA), MCL 37.1101 et seq., is Michigan’s counterpart to the ADA. The PDCRA also prohibits discrimination by Michigan employers, employment agencies and labor organizations because of a disability (or genetic information) that is unrelated to an individual’s ability to perform the duties of a particular job or position. MCL 37.1202–.1204. With certain exceptions, the PDCRA applies to employers with fewer than 15 employees who are not covered by the ADA; however, employers, labor organizations, and employment agencies that are subject to both statutes must comply with whichever is the most stringent. 42 USC 12201(b).

## II. Coverage Under the ADA

### A. Private-Sector Employers

§6.2 A private-sector employer is covered by the ADA if (1) it is “engaged in an industry affecting commerce” and (2) it has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 USC 12111(5)(A), 12112(a). In *Arbaugh v Y&H Corp*, 546 US 500 (2006), the Supreme Court held that the 15-employee coverage threshold in Title VII and the ADA is not jurisdictional and may be waived if not raised by the employer until after trial.

In *Walters v Metropolitan Educ Enters*, 519 US 202 (1997), the United States Supreme Court adopted the “payroll” method in a Title VII case and concluded that the 15-or-more-employees requirement is satisfied if an employer has 15 or more employees “on the payroll” for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, regardless of whether the employee was actually performing work on each such working day. *Id.* at 206–208.

In *Clackamas Gastroenterology Assocs, PC v Wells*, 538 US 440 (2003), the Supreme Court resolved a conflict in the circuits with respect to whether the shareholders and directors of a professional corporation may be considered “employees” for purposes of satisfying the ADA’s 15-or-more-employees requirement. Rejecting the approach taken by the lower courts in this case, the Supreme Court looked for guidance to the common-law definition of *master-servant relationship* with emphasis on the master’s control over the servant. Declaring that this “common law element of control” should be the “principal guidepost” in determining whether the individual acts independently and participates in managing the organization or whether the individual is subject to the organization’s control, the majority also commended to the lower court’s attention on remand the following six factors, drawn from the EEOC Compliance Manual:

- [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work
- [2] Whether and, if so, to what extent the organization supervises the individual’s work
- [3] Whether the individual reports to someone higher in the organization
- [4] Whether and, if so, to what extent the individual is able to influence the organization

[5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

[6] Whether the individual shares in the profits, losses, and liabilities of the organization.

*Id.* at 449–450; *see also De Jesus v LTT Card Serv*, 474 F3d 16, 21–24 (1st Cir 2007) (applying *Clackamas* approach to close corporation). In *Fichman v Media Ctr*, 512 F3d 1157 (9th Cir 2008), the court ruled that directors of a nonprofit corporation were not employees based on the *Clackamas* factors.

An entity that does not have 15 employees may still be covered by the ADA if it is affiliated with one or more other entities and the group of entities as a whole employs 15 individuals. Entities are aggregated under this “single employer” test when they have a significant degree of common ownership, common management, and common control of labor relations policies and integration of operations. *See, e.g., Swallows v Barnes & Noble Book Stores*, 128 F3d 990 (6th Cir 1997). The single employer doctrine is not unique to the ADA. It has long been applied by state and federal courts to aggregate employers for legal enforcement purposes under a variety of state and federal statutes, including Title VII and the National Labor Relations Act (NLRA). A foreign entity controlled by a U.S. employer that is covered by the ADA must also comply with the ADA. The ADA provides that the four single-employer factors are to be used to determine whether a foreign entity is controlled by a U.S. employer. 42 USC 12112(c).

When one business purchases the assets of another, there is no continuity of the legal entity, but the purchaser may nonetheless be held liable for some types of labor law violations committed by the predecessor based on legal successor liability principles. As with the single employer doctrine, the “successor liability” doctrine is judicially created and applied under a variety of federal and state employment laws. In general, a successor may be found liable for its predecessor’s violation of the ADA if it continues the predecessor’s business in substantially the same form.

As part of regulatory changes to improve job opportunities for individuals with disabilities, federal contractors must invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability. This invitation must be provided to each applicant when the applicant applies or is considered for employment. The invitation may be included with the application materials for a position but must be separate from the application. 41 CFR 60-741.42(a)(1). At any time after the offer of employment, but before the applicant begins his or her job duties, the contractor must ask the applicant to inform the contractor whether the applicant believes that he or she is an individual with a disability. 41 CFR 60-741.42(b)(1). The contractor may not compel or coerce an individual to self-identify as an individual with a disability. 41 CFR 60-741.42(d). The contractor must keep all information on self-identification confidential and must maintain it in a data analysis file (rather than in the medical file of the individual employee). 41 CFR 60-741.42(e).

## B. Public Sector Employers

§6.3 The employment provisions of the ADA do not apply to the United States or a corporation wholly owned by the United States or an Indian tribe. 42 USC 12111(5)(B)(i). Instead, the federal government is subject to the provisions of the Rehabilitation Act of 1973, 29 USC 791, 794.

In *Board of Trs v Garrett*, 531 US 356, 360 (2001), the Supreme Court held that suits by employees of a state to recover money damages for violations of Title I of the ADA are barred by the Eleventh Amendment. As it had in earlier cases involving other federal discrimination statutes, the majority concluded that Congress may subject nonconsenting states to suit in federal court only pursuant to a valid exercise of its authority under §5 of the Fourteenth Amendment and that the ADA was not a valid exercise of that authority. *Id.* at 364, 374. In reaching this conclusion, the majority relied on (1) its view of equal protection jurisprudence that states are not required by the Fourteenth Amendment to make special accommodations for the disabled so long as their actions are rational, *id.* at 366–368; (2) the absence of Congressional findings of a history and pattern of unconstitutional employment discrimination by the states against the disabled, *id.* at 368–372; and (3) its view that the provisions of the ADA do not meet the tests of congruence and proportionality inasmuch as they go well beyond the protections afforded the disabled under the Equal Protection Clause. *Id.* at 372–374.

As a result of *Garrett*, state employees are left without the right to bring an action for monetary relief under the ADA. However, the Sixth Circuit has ruled that state employees can seek prospective injunctive relief for Title I violations pursuant to *Ex parte Young*, 209 US 123 (1908). See *Whitfield v Tennessee*, 639 F3d 253, 257 (6th Cir 2011); see also *Gentry v Summit Behavioral Healthcare*, No 05-3751, 2006 US App LEXIS 22779 (6th Cir 2006) (state-owned mental health facility enjoys Eleventh Amendment immunity from claims under Title I of ADA but does not have immunity from claims under Rehabilitation Act, 29 USC 794). Individual states are free to waive their immunity from suit for monetary damages under the ADA, either in individual cases by failing to raise it as an affirmative defense or across-the-board by legislative enactment, as Minnesota did on May 21, 2001. See Minn Stat 1.05 (2005); see also *Lee-Thomas v Prince George's County Pub Sch*, 666 F3d 244, 248–255 (4th Cir 2012). Note also that the Supreme Court's decision applies only to state government employers and not to employees of local units of government. See *Lowe v Hamilton County Dep't of Job & Family Servs*, 610 F3d 321, 324–332 (6th Cir 2010).

## C. Individual Liability or Coemployees Acting as Agents

§6.4 The ADA definition of *employer* includes “any agent” of the employer. 42 USC 12111(5)(A). These provisions raise the question of whether the individual employee, manager, or supervisor whose actions or inactions gave rise to the plaintiff's claim are personally liable for violations of the ADA. Although the United States Supreme Court has not ruled on the question, the federal circuit courts that have ruled on this issue are in universal agreement that individual employees, managers, or supervisors are not personally liable under the

ADA or similar federal, nondiscrimination statutes. *Roman-Olivares v Puerto Rico Elec Power Auth*, 655 F3d 43, 50–52 (1st Cir 2011), *later proceeding*, 797 F3d 83 (1st Cir 2015); *Spiegel v Schulmann*, 604 F3d 72, 79–80 (2d Cir 2010) (no individual liability for violation of ADA’s anti-retaliation provision); *Albra v Advan, Inc*, 490 F3d 826, 830 (11th Cir 2007); *Walsh v Nevada Dep’t of Human Res*, 471 F3d 1033, 1037–38 (9th Cir 2006); *Fasano v Federal Reserve Bank*, 457 F3d 274, 289 (3d Cir 2006); *Butler v City of Prairie Vill*, 172 F3d 736, 744 (10th Cir 1999); *United States EEOC v AIC Sec Investigations*, 55 F3d 1276, 1282 (7th Cir 1995); *see also Hiler v Brown*, 177 F3d 542, 545–547 (6th Cir 1999) (no individual liability under Rehabilitation Act). Such a conclusion is a logical extension of the courts’ holding that Title VII, an analogous statute, does not support personal capacity claims. *See, e.g., Fantini v Salem State Coll*, 557 F3d 22, 28–31 (1st Cir 2009); *Wathen v GE*, 115 F3d 400, 405–406 (6th Cir 1997).

#### D. Employment Agencies

**§6.5** An employment agency is a covered entity subject to the ADA. 42 USC 12111(2), 12112(a). In 42 USC 12111(7), the ADA incorporates the definition of *employment agency* that is used in Title VII: “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.” 42 USC 2000e(c).

#### E. Labor Organizations

**§6.6** A labor organization or joint labor management committee is a covered entity subject to the ADA. 42 USC 12111(2), 12112(a). As noted in 42 USC 12111(7), the ADA incorporates the detailed definition of *labor organization* used in Title VII, which includes “any agent of such an organization.” 42 USC 2000e(d).

#### F. Leased Employees

**§6.7** Many employers lease some or all of their employees from an employee leasing organization (ELO) or a professional employer organization (PEO). Some of these arrangements provide that the ELO or PEO is the sole employer of the leased employees. Others provide that the ELO or PEO is a coemployer, along with the host employer at whose facilities the employees actually work. In a coemployment arrangement, both the ELO/PEO and the host employer are responsible for ADA compliance. Even where the arrangement contemplates that the ELO/PEO is the sole employer, courts may hold the host employer jointly liable for ADA violations under federal and state coemployer or joint employer rules. These rules generally provide that where the host employer exercises significant control over the leased employees’ terms and conditions of employment and work performance, it will be considered to be an employer of the leased employees, along with the ELO/PEO. EEOC Notice 915.002, Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec 22, 2000).

### G. Exceptions to Coverage

§6.8 The ADA specifically provides that the term *employer* does not include (1) the United States or a corporation wholly owned by the government of the United States, (2) an Indian tribe, or (3) a bona fide private membership club (other than a labor organization) that is exempt from taxation under IRC 501(c). 42 USC 12111(5)(B).

The ADA specifically provides that it does not prevent a religious entity from giving preference in employment to individuals who adhere to that particular religion as to work connected with the carrying on of the entity's activities, and a religious entity may require that all applicants and employees conform to its religious tenets. 42 USC 12113(d). In *Hosanna-Tabor Evangelical Lutheran Church & Sch v EEOC*, \_\_\_ US \_\_\_, 132 S Ct 694 (2012), the Supreme Court held that there is a ministerial exception, grounded in the religion clauses of the First Amendment, precluding the application of employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers. The ministerial exception is not limited to the head of a religious congregation, but the *Hosanna-Tabor* Court declined to adopt a rigid formula for deciding when an employee qualifies as a minister. Although some courts had treated the ministerial exception as a jurisdictional bar, the U.S. Supreme Court clarified in *Hosanna-Tabor* that the exception is an affirmative defense. 132 S Ct at 667 n4.

The ADA also contains a special exemption for the food industry. An employer need not assign a disabled employee to a job involving food handling if the employee has an infectious or communicable disease that is transmitted to others through the handling of food and that is included on a list of such diseases published by the U.S. Secretary of Health and Human Services. 42 USC 12113(e)(2).

## III. Definition of *Disability* Under the ADA

### A. Statutory Definition

§6.9 The ADA defines *disability*, with respect to an individual, as

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 USC 12102(1).

The ADA Amendments Act of 2008 expressed Congressional frustration with judicial restrictions on disability discrimination claims that narrowed the scope of protection under the ADA. Pub L No 110-325, §2. Among the most significant changes are the following:

1. The definition of *disability* must be construed in favor of broad coverage of individuals under the act, 42 USC 12102(4), and *substantially limits* no