

# Navigating the ADA.

## The Americans with Disabilities Act (ADA) – What you need to know.

### ADA best practices.

The ADA is a significant civil rights law that prohibits discrimination against individuals with disabilities in many aspects, including employment. Specifically, the ADA prohibits **discrimination** against a **qualified individual** on the basis of a **disability**. Each of the bolded terms above are legal terms that have specific definitions under the ADA. This white paper will explain what those terms mean for employers and highlight what they need to know to comply with the ADA.

### Disability has a broad definition.

The ADA defines “disability” as:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment;
- Or being regarded as having such an impairment.

A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder. A major life activity includes, but is not limited to:

- |                           |                           |   |                   |
|---------------------------|---------------------------|---|-------------------|
| • Caring for oneself      | • Lifting                 | • Working                                   | – Respiratory     |
| • Performing manual tasks | • Bending                 | • The operation of a major bodily function: | – Circulatory     |
| • Seeing                  | • Speaking                | – The immune system                         | – Cardiovascular  |
| • Hearing                 | • Breathing               | – Digestive                                 | – Endocrine       |
| • Eating                  | • Learning                | – Genitourinary                             | – Hemic           |
| • Sleeping                | • Reading                 | – Bowel                                     | – Lymphatic       |
| • Walking                 | • Concentrating           | – Bladder                                   | – Musculoskeletal |
| • Standing                | • Thinking                | – Neurological                              | – Reproductive    |
| • Sitting                 | • Communicating           | – Brain                                     |                   |
| • Reaching                | • Interacting with others |   |                   |

### Assumed disability impairments:

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple sclerosis
- Muscular dystrophy
- Major depressive disorder
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia

That being said, the ADA definition of disability is not intended to create a demanding standard. The 2008 amendments to the ADA and the 2011 updates to the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) make clear that the primary focus is on ensuring that employers comply with their obligations under the ADA, and not whether an employee meets the definition of disability. The ADA, as amended, specifies that the definition of disability “shall be construed in favor of broad coverage of individuals.”<sup>1</sup> Similarly, the updated regulations state that an “impairment need not prevent, or significantly or severely restrict” a major life activity and that the term “substantially limits should be construed broadly in favor of expansive coverage.”<sup>2</sup> Given this lenient standard to establish the existence of a disability, employers should expect that the emphasis will be on the employer’s actions in the event of a regulatory or legal action related to the ADA, and not on the question of whether the employee is actually disabled.

## Disability discrimination protections.

Under the ADA, a “qualified individual” is someone who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>3</sup> A job function can be considered “essential” for several reasons, but typically “essential functions” are those that are fundamental to the job. Courts generally permit employers to define the essential functions but employers must be able present evidence to support a claim that a particular function is essential. Qualified individuals are protected from disability discrimination in employment. There are many forms of disability discrimination, including:

- Discrimination against individuals on the basis of a disability in any aspect of employment
- Use of standards, criteria, or methods that indirectly discriminate against disabled individuals
- Discrimination against an individual because of an association with a disabled person
- Certain medical examinations and inquiries
- Failure to grant a reasonable accommodation to a qualified individual with a disability
- Disability discrimination is prohibited in the full range of employment and personnel practices, including but not limited to:
  - job application procedures
  - compensation
  - leaves of absence
  - fringe benefits
  - selection and support for training

It is also illegal to harass individuals because of a real or perceived disability or association with a person who is disabled.

Most employers understand that they cannot treat an individual differently from others because of that person’s actual or perceived disability, or because that person is related to someone with a disability. However, the latter two bullets in the list above often cause confusion, as they are more complicated and may run counter to what may otherwise seem to be good business practices. They are therefore discussed in greater detail below.

## Unlawful interview questions:

- Will you need some kind of accommodation to perform the job?
- How many sick days have you taken in the last six months?
- Have you ever filed a claim for workers’ compensation?
- What prescription drugs are you currently taking?
- Do you have any medical problems that might make you miss work?

## Certain medical inquires and examinations are prohibited under the ADA.

Under the ADA, the extent to which an employer may make medical inquiries or require medical examinations depends on whether an individual is pre-offer, post-offer, or employed. During the pre-offer interview stage, medical inquiries are completely prohibited, even if they are related to the job. An employer may not ask an applicant to take a medical examination or ask questions regarding disability.

A different standard applies to individuals who have been given a conditional job offer but who have not yet become employees and started work. Those individuals may be subject to medical inquiries and examinations that are consistent for all applicants entering the same job category, regardless of disability. Such "employment entrance medical examinations" do not have to be related to the job, but if the employer withdraws an offer of employment because the applicant failed to pass a certain aspect of the medical examination, the employer must show either that the exclusionary criteria does not have a disparate impact on individuals with disabilities or that the exclusionary criteria is job-related and consistent with business necessity and that no reasonable accommodation will enable the applicant to perform the essential functions of the job.

After employment begins, employers may only make medical inquiries and require medical examinations, such as fitness-for-duty examinations, that are job-related and consistent with business necessity. Generally, an employer must have a reasonable belief, based on objective evidence, that either the employee's ability to perform essential job functions is impaired by a medical condition, or that the employee poses a direct threat to his own safety or that of others due to a medical condition.

It is important to note that this limitation on medical inquiries and examinations impacts the reasonable accommodation interactive process. The EEOC position is that an employer may request medical information from an employee who requests an accommodation only if the disability and need for accommodation is not known or obvious. If the employer is already aware of the employee's disability and need for accommodation, either through its own observations or because the employee has already provided the employer with sufficient information to substantiate the request, it is not job-related and consistent with business necessity to ask for additional medical documentation.

## Employers must provide reasonable accommodations to individuals with disabilities absent undue hardship.

The ADA requires that employers provide reasonable accommodations that enable qualified individuals with disabilities to perform the essential functions of that position or enjoy benefits and privileges of employment equal to those enjoyed by non-disabled individuals, unless providing the accommodation would cause the employer undue hardship. A reasonable accommodation can be any change in the work environment, the job position, or the methods and processes by which job duties are performed.

In general, it is an individual's responsibility to request a reasonable accommodation from the employer. However, if an individual with a known disability is having difficulty performing their job, an employer should inquire whether the employee is in need of a reasonable accommodation.

### Sample scenario:

John was in a car accident and subsequently uses a wheelchair due to paraplegia. He requests that his workspace be changed to the ground floor and closer to a handicapped-accessible bathroom. John's disability is known and obvious. A request for medical information in this scenario is not job-related and consistent with business necessity.

### Sample scenario:

Jane has developed kidney disease and as a result took a reduced schedule leave under the Family and Medical Leave Act (FMLA) so that she could undergo twice-weekly dialysis treatments. She previously provided medical documentation that indicates she will continue to require such treatments for the rest of her life unless she receives a kidney transplant. Her FMLA time is now exhausted. Jane requests that her position be made permanently part-time so that she can continue to work on the same reduced schedule and receive treatments. Jane's disability is known and obvious. A request for medical information in this scenario is not job-related and consistent with business necessity.

An employee may disclose a disability and request accommodation at any time during the employment process. Additionally, another person, such as a spouse or medical provider, may request an accommodation on the employee's behalf.

A request for accommodation does not have to include specific mention of the ADA or even use the term "reasonable accommodation." Essentially, any request relating to a medical condition should be treated as a potential request for reasonable accommodation.

An employer may need to engage an employee in need of accommodation in an informal, interactive process to determine the appropriate accommodation. The goal of the interactive process should be to determine what barriers the employees faces in the workplace and to identify a reasonable accommodation that can help the employee overcome that barrier.

## **The interactive process will differ on a case-by-case basis. However, there are generally four steps to the interactive process:**

1. Analyze the employee's job and determine its purpose and essential functions
2. Consult with the employee regarding their job-related limitations, how they relate to their disability, and how those limitations could be overcome with a reasonable accommodation
3. In consultation with the employee, identify potential accommodations and assess their effectiveness in enabling the employee to perform their essential functions
4. Select and implement the accommodation appropriate for both the employee and the employer

Importantly, employers do not need to create new jobs for disabled employees – a reasonable accommodation is to enable the employee to perform their essential job functions. Additionally, the employer may offer any accommodation that enables the employee to perform their essential job functions or access equal benefits and privileges of employment; the accommodation does not have to be the specific accommodation the individual requested. However, the individual's preference should be considered.

In some cases, providing accommodation to an individual with a disability may impose an undue hardship on the operation of that employer's business. "Undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. Thus, an accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business, would create an undue hardship. In such instances, the employer is not required to provide that accommodation.

If it is determined that an accommodation results in an undue hardship, the employer must try to identify another accommodation that would be reasonable. If no other accommodation exists, the EEOC expects the employer to reassign the employee to a vacant position for which the employee is qualified (meaning the employee could perform the essential functions with or without reasonable accommodation), if such a vacant position exists and such reassignment would

## **Potential reasonable accommodation examples:**

- Acquiring or modifying equipment or devices
- Aids such as special computer software, screen readers, reading devices, videophones, interpreters
- Part-time or modified work schedules
- Flexible work hours
- Reassignment of marginal job duties
- Altering how job duties may be performed
- Reassignment to a vacant position
- Leave

## **Reasonable accommodation request examples:**

- I've been diagnosed with diabetes and need frequent bathroom breaks or to be taken off the production line
- I'm having trouble getting to work at my scheduled start because of medical treatments I'm receiving
- The lighting in my office is very dim and is making my vision problems worse and making it difficult to read my reports
- I need six weeks off to get surgery for a back condition that is causing me a lot of pain
- I have a cognitive processing disorder and need a detailed calendar and checklist of daily tasks to help me get through job duties in the right order

not cause an undue hardship. If no such vacant position exists, the employer is not required to create a vacancy or a new position.

In the event of a regulatory investigation or litigation, the employer has the burden of demonstrating that an accommodation would create an undue hardship. Therefore, an employer should document thoroughly how the accommodation would impact the nature of its business or its ability to function, or otherwise adversely affect the business. Because the full resources of an employer will be considered in an undue hardship analysis, a larger employer with greater resources may be expected to make accommodations requiring more effort or expense.

## Interaction between the ADA and employee benefit plans.

The definition of disability under the ADA will likely differ from how disability is defined under an employer's short-term or long-term disability (STD/LTD) plan. That being said, because the ADA's definition of disability is so expansive, it is likely that an employee who is deemed disabled under an STD/LTD plan will meet the definition of disability under the ADA.

(One exception, however, is pregnancy, which is commonly covered by STD plans but is not considered a disability unless the pregnancy causes an impairment that would qualify as a disability under the ADA.) On the other hand, even if an employee does not qualify for disability benefits under an STD/LTD plan, they may still be considered disabled for the purposes of the ADA. Employers should, therefore, evaluate employee eligibility for benefits and protection under the ADA separately.

## Interaction between the ADA and the FMLA.

Likewise, an employer should determine an employee's rights under the ADA and the FMLA separately, as the FMLA definition of a "serious health condition" is not the same as the ADA definition of disability. The same applies for any state leave laws.

An employer's obligations under the FMLA and ADA may overlap but are inherently different. The FMLA entitles eligible employees to up to 12 weeks of leave taken on an intermittent or continuous basis for qualifying reasons, even if providing such leave would cause an undue hardship. The ADA does not entitle employees to a leave of absence for any specific period of time. However, an employer may be required to grant a leave of absence as a reasonable accommodation under the ADA if there are no other reasonable accommodations that would enable the employee to perform the essential functions of their job and doing so would not cause an undue hardship. If an employee requesting leave under the ADA has already taken 12 weeks of FMLA leave, the employer may consider the impact of such leave in its undue hardship analysis.

Finally, inflexible or "no fault" leave policies, which provide for automatic termination once an employee reaches an employer's maximum leave limit, have come under fire from the EEOC, even where the maximum limit was a generous 12 months. The EEOC's position, which has generally been followed by the courts, is that employers must have flexible leave policies that involve engaging employees in an interactive process on a case-by-case basis and working with employees who may require a reasonable accommodation to return to work.

**Document, document, document the interactive process.**

## Undue hardship analysis factors:

- The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding
- The overall financial resources of and the number of persons employed in the facility or facilities involved in providing the accommodation, and the effect on resources and expenses
- The employer's overall financial resources, size, number of employees, and number and types of facilities
- The employer's type of operations, including the composition, structure and functions of its workforce, and the relationship of the impacted facilities to same
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business

## Proactive steps to minimize risk.

Employers can take several steps to ensure compliance with the ADA.

- Review their employment policies to ensure that they conform with the ADA;
- Train human resources and managers on their obligations under the ADA;
- Ensure that written job descriptions are accurate and include essential functions;
- Engage in, and document, the interactive process when an individual requests an accommodation;
- If an accommodation is deemed an undue hardship, ensure documentary evidence exists to support that determination;
- Ensure practices around hiring, promoting, compensation, and other benefits and privileges of employment do not discriminate directly or indirectly on individuals with disabilities; and
- Ensure that any adverse employment action relating to a disabled individual is based on a factor that is not disability.



Employers can also visit the EEOC website at <https://www.eeoc.gov/laws/types/disability.cfm> for additional resources on the ADA.



The United States Department of Labor's Office of Disability Employment Policy also sponsors resources you may find helpful, which can be found at <https://www.dol.gov/odep/resources>.<sup>4</sup>

1. 42 U.S.C. §12102(4)(A).

2. 29 C.F.R. § 1630.2(j).

3. 42 U.S.C. §12111(8).

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