

# ADA - Americans With Disabilities Act

The ADA (Americans with Disabilities Act) protects qualified individuals from disability discrimination in all aspects of employment, from hiring and firing to promotion and demotion to compensation and scheduling. To be in compliance with the ADA, employers need in-depth understanding of who is covered by the law; the definitions surrounding disabilities discrimination, including what is meant by interactive process; and notification and record-keeping procedures that must be followed under the ADA.

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (ADAAA). The ADAAA, which took effect on Jan. 1, 2009, significantly expands the protections of the original ADA to include more individuals with less severe impairments.

The ADA protects **qualified individuals with a disability** from discrimination in regard to job application procedures, hiring, promotion, termination, compensation, job training, and other terms and conditions of employment. To ensure this, the ADA requires equal opportunity and **reasonable accommodation**.

An individual with a disability is a person who has a **physical** or **mental impairment** that substantially limits one or more **major life activities**; a record of having such impairment; or is regarded as having such an impairment.

## Coverage

Employers with 15 or more employees, including part-time employees, working for 20 or more calendar weeks in the current or preceding calendar year, must comply with the ADA. An employer includes any person, or agents of that person, who is engaged in an industry affecting interstate commerce. An employee means an individual employed by an employer. Employees who work in a foreign country includes citizens of the U.S.

The following entities are exempt from the requirements of the ADA:

1. Executive agencies of the U.S. government (but these agencies are covered by similar non-discrimination requirements and additional affirmative employment requirements under Section 501 of the Rehabilitation Act of 1973);
2. Corporations fully owned by the U.S. government;
3. Indian tribes; and
4. *Bona fide* private membership clubs that are not labor organizations and that are exempt from taxation under the Internal Revenue Service Code.

Religious organizations are covered by the ADA, but they may give employment preference to people of their own religion or religious organization.

## Key definitions

A **qualified individual** meets legitimate skill, experience, education, or other requirements of an employment position that he/she holds or seeks, and can perform the essential functions of the position, with or without reasonable accommodation. An individual with a disability should not be considered unqualified simply because

of the inability to perform marginal or incidental job functions. If an individual is qualified to perform essential job functions except for limitations caused by a disability, an employer must determine whether that person could perform the essential functions of the job with a reasonable accommodation.

A **physical impairment** is defined as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

A **mental impairment** is defined as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

**Major life activities** are activities that an average person can perform with little or no difficulty. Where the ADA was silent on what constitutes a major life activity, the ADAAA states that major life activities include, but are not limited to:

- caring for oneself,
- performing manual tasks,
- seeing,
- hearing,
- eating,
- sleeping,
- walking,
- standing,
- lifting,
- bending,
- speaking,
- breathing,
- learning,
- reading,
- concentrating,
- thinking,
- communicating, and
- working.

The ADAAA also adds a new major life activity category — major bodily functions, which includes, but is not limited to:

- functions of the immune system,
- cell growth,
- digestive, bladder, and bowel functions,
- neurological and brain functions,
- respiratory and circulatory functions,
- endocrine functions, and
- reproductive functions.

Impairments that are episodic or in remission qualify as covered disabilities if they would substantially limit a major life activity when active. Impairments also qualify as a disability if they substantially limit one major life activity; an impairment no longer needs to limit other major life activities to be considered a protected disability.

**Substantially limits** is defined by current EEOC guidance on the ADA to mean "significantly restricted." The ADAAA negates the standard that a covered impairment "prevent" or "severely restrict" a major life activity and expects the EEOC to issue interpretative guidance that lowers the definition of "substantially limits" to a level consistent with congressional intent.

**Regarded as** is not defined in the ADA. Courts subsequently ruled that to succeed with a "regarded as" claim, employees needed to prove that their employer regarded them as being disabled because they were viewed as substantially limited in a major life activity. Under the ADAAA, an employee only needs to demonstrate that they were subjected to prohibited action because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Which means employees only need to prove that they were viewed as being impaired, regardless of whether the impairment rises to the level of a protected disability.

While this definition opens up the courtroom door for more claims by employees, two stipulations prevent that door from being opened as wide as you might fear.

1. Impairments that are "transitory and minor" cannot form the basis of a "regarded as" claim. A transitory impairment is one with an actual or expected duration of six months or less.
2. Employers do not have to provide reasonable accommodations to employees who are "regarded as" disabled, unless those persons satisfy another part of the definition of a disability, i.e., have a physical or mental impairment that substantially limits one or more major life activities or a record of such an impairment.

**Reasonable accommodation** is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has the same employment rights and privileges as those of employees without disabilities.

Employers may question qualified applicants to determine whether they can perform specific job functions.

*Example:* If a one-armed person applied for a job as an inspector, a manager could ask the following question:

"The inspector is responsible for checking all incoming parts using a dial indicator to make sure they are within tolerance. He/she must do a visual check, place rejected parts on a dolly, and place all acceptable work on a conveyor belt. Can you perform these tasks?" It would also be acceptable to ask, "Are you able to perform the job with or without reasonable accommodation?"

If applicants reply that they can perform the job without an accommodation, the employer can ask for a demonstration. If they indicate that they can perform the job with an accommodation, a manager can request the applicants to specify the extent of the accommodation. Then, a determination can be made as to whether it is "reasonable" or not. Managers are not required to make an accommodation if it would impose an undue hardship on the operation of the business. Also, management is under no obligation to find a position for an applicant who is not qualified for the position sought.

In an attempt to apply a "common sense" approach to its guidelines on hiring questions asked of employees with disabilities, the Equal Employment Opportunity Commission (EEOC) outlined three situations that alter previous restrictions on asking applicants any questions regarding reasonable accommodation before a job offer had been tendered.

According to the EEOC, you can ask an applicant about which reasonable accommodations he/she would need under these circumstances:

- if you reasonably believe the applicant would need an accommodation because of an obvious disability;
- if the applicant reveals a hidden disability which leads you to believe an accommodation will be necessary;
- if the applicant voluntarily discloses to you the need for a specific accommodation.

In these situations, you can then attempt to obtain relevant information by giving the applicant the opportunity to answer practical questions about how they would perform the job.

When an employer receives a request for a reasonable accommodation from a current employee, the employer and the individual with a disability should engage in an informal process, known as the interactive process, to clarify what the employee needs and identify an appropriate reasonable accommodation. The employer may ask the employee questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

While employers may have to *consider* accommodation options, they are not required to *implement* unreasonable options that would impose an undue hardship on the operation of the employers' business.

Examples of reasonable accommodation include:

- making existing facilities used by employees readily accessible to and usable by persons with a disability;
- restructuring a job;
- modifying work schedules;
- acquiring or modifying equipment;
- providing qualified readers or interpreters;
- appropriately modifying examinations, training, or other programs.

Reasonable accommodation may also include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to perform the original job because of a disability, even with an accommodation. Employers do not need to create a position or bump another employee in order to transfer the employee. Also, an employer is not required to lower quality standards as an accommodation or to provide personal use items such as glasses or hearing aids.

## Medical examinations

Employers have the right to condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry. An applicant can be disqualified if a post-offer medical examination demonstrates that the individual would pose a "direct threat" to other employees in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the "direct threat" level through reasonable accommodation.

A test for the illegal use of drugs is not considered a medical examination under the ADA. Therefore, employers may test applicants or employees under certain circumstances and make employment decisions based on the results. If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

## Mitigating measures

In *Sutton v. United Air Lines* (527 U.S. 471, 1999), the Supreme Court interpreted the ADA to require the consideration of mitigating measures when determining whether an individual has a protected disability. The ADAAA nullifies this, stating that the determination of whether an impairment substantially limits a major life activity shall be made *without* regard to the ameliorative effects of mitigating measures such as:

- medication, medical supplies, equipment, or appliances; low-vision devices; prosthetics, including limbs and devices; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; or oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxiliary aids or services; or
- learned behavioral or adaptive neurological modifications.

If an employee's condition would qualify as a disability without such aids, consider the person to have a protected disability. There is one exception, however, for ordinary eyeglasses or contact lenses.

Consistent with its special treatment of corrective lenses, the ADAAA prohibits employers from using qualification standards, employment tests, and other selection criteria based on an individual's uncorrected vision, unless the standard, test, or other selection criteria, as used by the employer, is shown to be job-related for the position in question and consistent with business necessity. In most situations, individuals required to take a vision test must be permitted to use their corrective lenses.

## **Reverse discrimination**

The ADAAA explicitly states that a reverse discrimination claim is not actionable under the ADA. Therefore, an individual without a disability cannot succeed based on a claim that they were discriminated against because of their lack of a disability.

## **Record-keeping requirements**

Personnel records, including résumés and employment applications; records on promotions, demotions, transfers, and layoffs; and compensation information, must be kept for at least one year after the record is made or the action is taken, whichever is later.

Accommodation requests are also considered an employment record, and must be kept for one year after the record is made. It should include: your accommodation suggestions, the employee's suggestions, advice from the employee's health care provider, the costs of different accommodations, and the reason, if any, for rejecting an accommodation.

Any information related to discrimination charges brought by the Attorney General must be kept until final disposition of the charge or action.

Employers with 100 or more employees must always keep a copy of their most recent Form EEO-1 at each unit or headquarters.

## **Posting requirements**

Covered employers must post the EEOC's "Equal Employment Opportunity Is The Law" poster.

## **FAQs about ADA**

### *1. How can you tell if an impairment is sufficiently severe to substantially limit a major life activity?*

An impairment is sufficiently severe to substantially limit a major life activity if it prevents an individual from performing a major life activity or significantly restricts the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population. An impairment does not significantly restrict major life activities if it results in only mild limitations.

NOTE: The ADA Amendments Act of 2008, which became law effective Jan. 1, 2009, orders the EEOC to issue

interpretative guidance that lowers the definition of "substantially limits" from the current EEOC definition that defines the term to mean "significantly restricted".

## *2. What is a "reasonable accommodation"?*

Reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of non-disabled applicants.

Examples of reasonable accommodation include:

- making existing facilities used by employees readily accessible to and usable by persons with disabilities;
- restructuring a job;
- modifying work schedules;
- acquiring or modifying equipment;
- providing qualified readers or interpreters;
- appropriately modifying examinations, training, or other programs.

Reasonable accommodation may also include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to perform the original job because of a disability, even with an accommodation. Employers do not need to create a position or bump another employee in order to transfer the employee.

## *3. Can an employer ask job applicants about their need for accommodation during the pre-employment stage without running afoul of the ADA?*

In order to ensure that qualified candidates aren't screened out because of a disability before their ability to perform a job is determined, the ADA prohibits any inquiries about an applicant's disability during the pre-employment process (applications, medical information forms, interviews, etc.). This is especially important for candidates with hidden disabilities (AIDS, diabetes, etc.) who may be excluded purely on the basis of what they're asked to disclose on applications or in interviews, without getting the opportunity to present their qualifications.

There are, however, three circumstances under which an employer may ask about accommodation of a disability. They are:

- If the employer reasonably believes that the applicant would need an accommodation because of an obvious disability;
- If the applicant reveals a hidden disability that leads the employer to believe that accommodation will be necessary; and
- If the applicant voluntarily discloses the need for a specific accommodation.

## *4. Does an employer always have to grant an employee's accommodation request?*

No. An employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined by the Equal Employment Opportunity Commission as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.

Employers are also not required to make an accommodation if it poses a health or safety threat, or if it doesn't

help the employee to successfully perform their essential job functions at the same level as employees without disabilities.

*5. If an employee with a disability cannot perform his/her current position with accommodation is the employer required under the ADA to transfer him/her to a different position?*

Under the ADA, reasonable accommodation may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to perform the original job because of a disability, even with an accommodation. However, employers are not obligated to transfer a person who is not qualified for the position, nor are they required to create a position to which it could transfer the employee. Finally, employers are not required to make an accommodation if it would impose an undue hardship on the operation of the employer's business.

*6. What is meant by the phrase "interactive process," and what are an employer's responsibilities when it comes to the interactive process?*

It's a communication process whereby an employer and employee sit down and discuss the employee's limitations, what accommodations are desirable, and which of those are feasible. The goal of such dialogue is to identify accommodations that will allow the employee to perform his/her essential job functions.

EEOC regulations require, when necessary, an informal, interactive process to find an effective accommodation. Here are the steps recommended by the EEOC to identify a reasonable accommodation for an applicant or employee covered by the ADA.

1. Look at the particular job involved. Determine its purpose and its essential functions.
2. Consult with the individual with the disability to find out his/her specific physical or mental abilities and limitations as they relate to the essential job functions. Identify the barriers to job performance and assess how these barriers could be overcome with an accommodation.
3. In consultation with the individual, identify potential accommodations and assess how effective each would be in enabling the individual to perform essential job functions. If an appropriate accommodation is not identified, technical assistance is available from a number of sources, many without cost. There are also financial resources to help with accommodation costs.
4. If there are several effective accommodations that would provide an equal employment opportunity, consider the preference of the individual with a disability and select the accommodation that best serves the needs of the individual and the employer.

*7. Are the rules about when an employer may make disability-related inquiries and require medical examinations the same for employees and applicants?*

No. The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at three stages: pre-offer, post-offer, and during employment. The rules concerning disability-related inquiries and medical examination are different at each stage.

At the first stage (prior to an offer of employment), an employer may not ask any disability-related questions or require any medical examinations, even if they are related to the job.

At the second stage (after an applicant is given a conditional job offer, but before he/she starts work), an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

## 8. Is testing for illegal drugs permissible under the ADA?

Yes. A test for illegal drugs is not considered a medical examination under the ADA. Employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

## 9. What constitutes a protected psychiatric disability, and what must an employer do to accommodate employees with mental disabilities under the ADA?

In an effort to "combat the myths, fears, and stereotypes" that individuals with psychiatric disabilities face in the workplace, the EEOC has issued detailed policy guidance for accommodating these employees under the ADA.

The EEOC published the guidance to explain what constitutes a protected psychiatric disability, when an employer may ask applicants about psychiatric disabilities, and what accommodations meet ADA obligations, using a series of examples and court opinions. Here are some highlights.

- What constitutes a protected psychiatric disability? According to the EEOC, examples of "emotional or mental illnesses" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. Traits or behaviors, such as stress, irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.
- When may an employer ask applicants about psychiatric disabilities? The EEOC guidelines also explain that an employer may not ask questions on a job application that are likely to elicit information about a disability before making an offer of employment. However, an employer may lawfully ask an individual about a psychiatric disability in the following limited circumstances:
  1. If an applicant asks for reasonable accommodation for the hiring process and the need for this accommodation is not obvious, an employer may ask for reasonable documentation about the disability to verify its existence.
  2. After an employer makes an offer of employment, it may require a medical exam (including a psychiatric exam) or ask disability-related questions (including questions about psychiatric disabilities) if it subjects all employees in the same job category to the same inquiries or exams, regardless of disability.
  3. An employer may require a disability-related inquiry or medical examination of an employee when it has a reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition or that an employee will pose a direct threat due to a medical condition.
- What accommodations meet ADA obligations? Although accommodations must be made on a case-by-case basis, the EEOC makes several suggestions for accommodating individuals with psychiatric disabilities, including: giving an individual with a disability time off from work or a modified work schedule; making physical changes to the workplace or equipment, such as room dividers, partitions, or other soundproofing or visual barriers; modifying a workplace policy; adjusting supervisory methods, such as communicating assignments, instructions, or training; providing a job coach to assist in the training of a qualified individual with a disability; and reassigning an individual with a disability to an equivalent position when accommodation in the present job would cause undue hardship.