

DISABILITY & AGING RIGHTS



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DISCRIMINATION

Employment Rights Under the Americans with Disabilities Act

People with disabilities, including older Americans who have a physical, sensory, cognitive or mental impairment, are covered by the Americans with Disabilities Act – also known as the ADA. The ADA prohibits discrimination on the basis of physical or mental disability. The ADA provides protections against disability discrimination in a variety of areas, including employment.

To be covered by the employment provisions of the ADA, you must fit into one of the following three categories:

1. A person with a physical or mental impairment that substantially limits one or more major life activities. For example, a person who uses a wheelchair is substantially limited in the major life activity of walking.

2. A person with a *record* of a physical or mental impairment. For example, a person had cancer in the past, but after treatment is cancer free. If the employer refuses to hire the person because of the past impairment, the ADA protects the person based on the record of an impairment. This category would cover people who have been misclassified as disabled, such as people who have been incorrectly categorized as having learning disabilities and are discriminated against based on that incorrect record.

3. A person who is *regarded* as having an impairment. There are three ways this category will come into play:

- The worker's impairment may not be substantially limiting, but it may be regarded as substantially limiting. For example, an employee with controlled high blood pressure who is inappropriately reassigned to less strenuous work because the employer feels that the employee might have a heart attack.

- The person has an impairment that is substantially limiting only because other people regard it that way. For example, an employee has a condition that causes an occasional involuntary jerking of the head. This condition is not necessarily substantially limiting, but an employer violates the ADA if it treats the worker differently based on the fear that co-workers or members of the public will incorrectly perceive that it is substantially limiting.
- The person has no impairment at all, but is thought incorrectly by the employer to have one. For example, an employer violates the ADA if it fires an employee because it is falsely rumored that he is HIV-positive.

IMPORTANT: The definition of disability applies for ALL of the Titles of the ADA.

Which employers are covered by the ADA?

- Private employers
- State and local government
- Employment agencies
- Labor unions

Which employers are not covered by the ADA?

- Employers with fewer than 15 workers
- The U.S. government (covered by the Rehabilitation Act of 1973)
- Private clubs
- Indian tribal nations



The ADA covers all aspects of employment, including these areas:

- **Interviewing:** A potential applicant for a job who uses a wheelchair is unable to attend the interview because the office where the interview is scheduled is inaccessible.
- **Applying for a job:** An application for employment asks whether the applicant has ever been treated for mental illness.
- **Hiring:** An employer refuses to hire a qualified applicant after learning from her former employer that the applicant went on short-term disability in her last job.
- **Training:** A newly hired employee who is deaf is unable to complete mandatory training because the employer has provided no alternative methods of communication.
- **Promotion:** A person with a history of hospitalization for mental illness is not promoted to a management position because the employer fears the employee will be hospitalized in the future and the resources for management training would be “wasted.”
- **Salary:** A person with a learning disability is paid less than other workers in the same job. The employer claims the lower rate is justified because the worker with the learning disability lives at home and has lower expenses than other employees.

- **Termination:** An employee is fired for filing a discrimination charge alleging that the employer refused to make the business accessible to people with disabilities.
- **Employee benefits:** A self-insured employer offers group health insurance to its employees. The plan has a \$1 million lifetime limit for all disabilities. However, after the employer discovers that an employee’s daughter has leukemia, the employer amends the plan to limit lifetime cancer benefits to \$100,000.
- **Workplace privileges:** An employer has a workplace cafeteria for use by its employees. However, the entrance to the cafeteria is inaccessible to people using wheelchairs because the entrance is too narrow.

“Qualified” under the ADA?

To be covered by the ADA, a person must not only have a disability, he or she must also be qualified to perform a specific job with or without a reasonable accommodation. An employer may lawfully refuse to hire or retain a person who is not qualified to perform the job.

For example, an applicant for an attorney position who has not graduated from law school is not qualified for the position. Thus, even though the individual has a disability, the ADA does not apply because he or she is not qualified for the job.

The ADA defines a qualified person with a disability as a person who:

- Satisfies the required skills, experience, education and other job-related requirements of the employment position.
- Can perform the essential job functions of the position, with or without a reasonable accommodation.

IMPORTANT: Just because a person with a disability is deemed qualified for a job does not mean the employer is required to hire that person. The employer is entitled to hire the person who is deemed the best candidate for the job from the pool of qualified applicants. In other words, the ADA is not an affirmative action statute for people with disabilities. Instead, it simply ensures that people with disabilities are given an equal opportunity to compete with those who do not have disabilities.

For example, a person with cerebral palsy is a recent college graduate and is qualified for an accountant position. However, instead of hiring the person with cerebral palsy, the employer hires a person without a disability who has the same educational background, but also has three years' experience in accounting. Even though the person with the disability is qualified for the job, the employer is free to hire the person without the disability who has more practical experience.

Reasonable accommodation

In certain circumstances, an employee with a disability will require an employer to make certain modifications in the workplace. This is simply a logical byproduct of the fact that a person's disability may sometimes create specific limitations for the person, although not insurmountable limitations. Under the ADA, these modifications and adjustments are referred to as "reasonable accommodations."

Definition: A reasonable accommodation is defined as any change an employer makes that enables a qualified person with a disability to:

- Have equal opportunity in the job application and selection process.
- Perform the essential job functions.
- Enjoy the equal benefits and privileges of employment.

Examples of barriers in the workplace that might require an accommodation for a person with a disability:

- Physical barriers that make it difficult to enter and maneuver within the work site or to use necessary equipment. For example, a doorway is too narrow for a wheelchair.
- The way people communicate serves as a barrier. For example, a company's inter-office communication takes place through written memos, and a person with a vision impairment is unable to read the memos.
- Rigid work schedules that allow no flexibility. For example, people with disabilities may need extra breaks, time to take medication or time to see a therapist.



Examples of reasonable accommodations:

- Modifying a work schedule or allowing an employee to work part time (this is the most common accommodation).
- Reassignment to a vacant position the person with a disability is qualified to perform.
- Making buildings accessible and removing barriers.
- Providing readers and interpreters.
- Modifying exams, training materials or policies.
- Providing or modifying equipment.
- Restructuring of non-essential job functions. (An employer is not required to restructure essential job functions.)

Employee responsibility: Employers are required to provide a reasonable accommodation only to the known limitations of an employee with a disability. Generally, it is the *employee's responsibility* to tell the employer about the need for an accommodation and to *affirmatively* request the accommodation needed. Usually, courts will not presume that the employer was aware of the employee's need for an accommodation. If the employee does not request the accommodation until after the employer takes an adverse action, the employee may be denied the opportunity for an accommodation. Although not required, it is best if accommodation requests are made in writing.

Limitations of accommodations: Employees are only entitled to accommodations that are effective, not necessarily the best accommodation or the accommodation of their choice. For example, a ramp may reasonably accommodate a person with a mobility disability even if an elevator is the preferred accommodation. However, employers should consult with employees when trying to determine what accommodation to provide.

Work-related accommodations: An employer is obligated only to provide equipment that is needed to specifically perform a job. For example, no obligation exists to provide equipment the person uses in daily life, such as glasses, hearing aid, wheelchair or guide dog.

Confidentiality and requesting a reasonable accommodation

It is always a personal decision whether an individual discloses to an employer the nature and extent of his or her disability. However, if a person with a disability wishes to receive an accommodation under the ADA, the employer is entitled to ask for reasonable documentation about the nature of the disability and the need for an accommodation. This raises potential privacy concerns for the employee. Therefore, it is essential for the person with the disability to weigh the benefits and possible detriments of requesting an accommodation. However, once an employee provides disability information, the ADA requires that the employer keep it confidential and place it in a file

separate from the person's personnel file and treat it as a confidential medical record.

Undue hardship

An employer is required to make a reasonable accommodation unless the accommodation would constitute an undue hardship for the employer. Undue hardship is defined as an accommodation that requires significant difficulty or expense. Most accommodations can be achieved with relatively little difficulty or expense.

Direct threat

In addition to the undue hardship defense, an employer may refuse to make reasonable accommodations for qualified individuals with a disability who pose a direct threat to themselves or others. (This is sometimes referred to as the health or safety defense.)

Pre-employment inquiries

The ADA prohibits employers from asking disability-related questions before a conditional offer of employment. Employers are limited to questions about an applicant's ability to perform the essential job functions.

Examples of pre-employment questions that are prohibited:

- Do you have a disability?
- Have you ever filed for workers' compensation?
- What prescription drugs are you taking?
- Have you ever been treated for mental health problems?
- How many sick days did you take in the last year?

Examples of pre-employment questions that are allowed:

- Can you perform the functions of this job with or without a reasonable accommodation?
- Please describe or demonstrate how you would perform these functions.
- Can you meet the attendance requirements of the job?
- Do you have the required license to perform this job?

Medical examinations

Before making a conditional job offer: An employer may not make any medical inquiry or conduct any medical examination.

After making a conditional job offer: Before a person starts work, an employer may make unrestricted medical inquiries, but may not refuse to hire a person with a disability based on results of those inquiries, unless the reason for rejection is job-related. All applicants at that employment level must go through the same examination, regardless of whether they have a disability. For example, an employer could not ask only a person with cerebral palsy to undergo a medical examination, unless every applicant at that employment level is required to submit to an examination.

After employment: Any medical examination or inquiry required of a current employee must be job-related and justified by business necessity. Exceptions are voluntary examinations conducted as part of employee health programs and examinations required by other federal laws. For example, an outbreak of spinal meningitis has arisen.



Because this is extremely contagious and poses serious health consequences, a hospital would be justified in having all of its employees tested.

Filing a charge

People who believe they have been discriminated against may contact the Equal Employment Opportunity Commission (EEOC). In Illinois, a charge of employment discrimination on the basis of disability must be filed with the EEOC within 300 days of the alleged discriminatory act. Failure to file in time means the case will not be considered.

What will the EEOC do after a charge of discrimination is filed?

The EEOC will investigate the charge. If it finds evidence of discrimination, it will attempt to reach a settlement and try to persuade the employer to voluntarily stop the discrimination. If a settlement cannot be reached and the employer refuses to stop the discriminatory practices, the EEOC may file a lawsuit in court against the employer. An applicant or employee may request a “right to sue” letter from the EEOC at any time after the 180 days from the date he or she filed the charge. The right to sue letter entitles the applicant or employee to file a lawsuit directly against the employer.

Legal remedies

Remedies for Title I violations include:

- Alteration of illegal hiring practices
- Job reinstatement
- Promotion
- Recovery of pay lost after discriminatory actions
- Restoration of benefits
- Reasonable accommodation
- Attorneys’ and expert witness fees,
- Court costs
- Monetary awards in cases of intentional discrimination or failure to make a good faith effort to provide a reasonable accommodation

Employers may not retaliate against any applicant or employee who files a charge, participates in an EEOC investigation or opposes an unlawful employment practice. ■

For more information:

The Equal Employment Opportunity Commission's Overview of the ADA:
www.eeoc.gov/laws/types/disability.cfm

Equip for Equality's website section on employment:
www.equipforequality.org/issues/discrimination-ada-rights/employment



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1-800-537-2632
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Illinois Department on Aging
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Senior HelpLine:
1-800-252-8966
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www.illinois.gov/aging

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