

Navigating the ADA

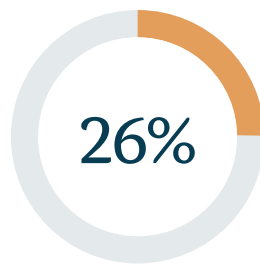
The Americans with Disabilities Act –
A guide for employers

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The ADA is a 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**. This guide will explain what this means for employers and highlights what they need to know to comply with the ADA.



of adults in the United States have some type of disability¹



Defining disability



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 major life activity includes, but is not limited to:

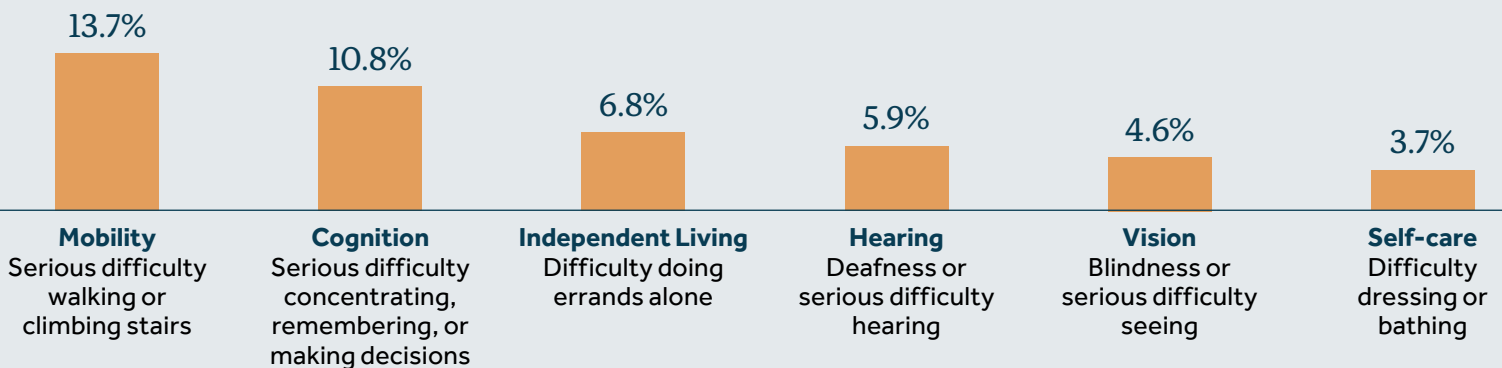
- › Caring for oneself
- › Working
- › Performing manual tasks
- › Sleeping
- › Walking
- › Thinking or concentrating
- › Lifting

When is a disability impairment assumed?

If an individual has one of the following conditions, an impairment that meets the definition of disability is assumed:

- › 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

Percentage of adults with functional disability types¹:



Disability discrimination protection

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.”



Qualified individuals are protected from disability discrimination in employment. There are many forms of disability discrimination against individuals, including:

- › On the basis of a disability in any aspect of employment, including job application, compensation, benefits, selection and support for training.
- › Indirectly by use of standards, criteria, or methods.
- › Because of an association with a disabled person.
- › Requiring certain medical examinations and inquiries.
- › Failure to grant a reasonable accommodation.



What makes a job function essential?

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.

While employers understand that they cannot treat an individual differently from others because of that person’s actual or perceived disability, gray areas in regulations often complicate day-to-day decision making when it comes to administering ADA. We’ll take a deeper dive into these gray areas on the following pages.

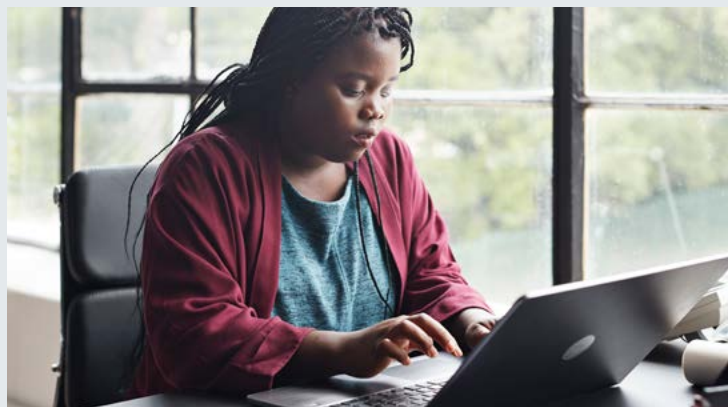
The ADA’s definition of disability is not intended to create a demanding standard.

In fact, amended regulations introduced in 2011 state that “impairment need not prevent or significantly or severely restrict a major life activity.” Given the leniency 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.**

Certain medical inquiries and examinations are prohibited under the ADA

Before a job offer: medical inquiries and exams are always prohibited.

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.



What interview questions should be avoided?



- › 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?

When a 'conditional' job offer is made: medical inquiries and exams are allowed in some cases.

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" should be related to the job, but if the employer withdraws an offer of employment because the applicant failed to pass, the employer must show either:

- › The exclusionary criteria does not have a disparate impact on individuals with disabilities.
- › The exclusionary criteria is job-related and consistent with business necessity (and that no reasonable accommodation could be made).

After employment begins: medical inquiries and exams are allowed in some cases.

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 their own safety or that of others due to a medical condition.

Employers should only request medical information from an employee if the need for an accommodation is not known or obvious.

The Equal Employment Opportunity Commission position is that 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.

John:

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 not consistent with business necessity.



Jane:

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 dialysis treatments twice a week.

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.

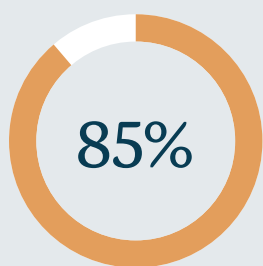


Jane's disability is known and obvious. A request for medical information in this scenario is not job-related and not consistent with business necessity.

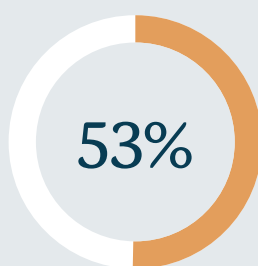
Accommodating individuals with disabilities

The ADA requires that employers provide reasonable accommodations that enable qualified individuals with disabilities to perform the essential functions of that position 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.

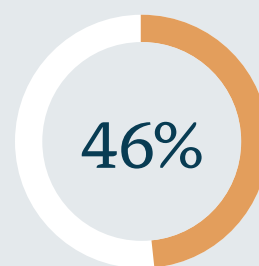
Finding an accommodation is often a win-win for both the organization and the employee. A recent survey indicates that workplace accommodations are not only low-cost, but also positively impact the workplace in many ways:



of employers reported they were able to retain a valued employee.



of employers saw employee's productivity increase.



of employers eliminated costs associated with training a new employee.

Employers also reported significant indirect benefits such as improved interactions with co-workers, increased overall company morale and overall business productivity.²

Source: Accommodation and Compliance: Low Cost, High Impact, Job Accommodation Network (JAN), May 2023



Pregnant Workers Fairness Act (PWFA)

New legislation provides federal protections for pregnant workers effective June 27, 2023

The PWFA requires employers to engage in an interactive process and to make reasonable accommodations for pregnant workers. It differs from the ADA in that the ADA requires an employee to have a disability. While some pregnant employees may have conditions that qualify as a disability, pregnancy itself is not a disability under the ADA. The PWFA expands an employee's rights by covering known limitations related to pregnancy, childbirth, or related medical conditions. Like the ADA, an employer is not required to provide an accommodation if it can demonstrate that doing so would impose an undue hardship on the operation of the business. The law contemplates that the employer and employee will engage in an ADA-style interactive process to achieve an appropriate accommodation.

Who is responsible for requesting an accommodation?



In general, it is an employee's responsibility to request a reasonable accommodation from the employer. However, this request may come from their spouse or a medical provider. Additionally, 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. A request for accommodation does not have to include specific mention of the ADA or even use the term "reasonable accommodation."

An employee may disclose a disability and request accommodation at any time during the employment process. Any request relating to a medical condition should be treated as a potential request for reasonable accommodation.

What are examples of reasonable accommodation requests?

- › 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.
-

Building an effective interactive process

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

The interactive process will differ on a case-by-case basis. However, there are generally four steps that should be taken:

1

Assess the Job

Analyze the employee's job and determine its purpose and essential functions.

2

Determine employee barrier

Consult with the employee regarding their job-related limitations, how they relate to their disability, and whether an accommodation could help them overcome barriers.

3

Identify reasonable accommodation

Work with the employee to implement the accommodation appropriate for both the employee and the employer.

4

Evaluate effectiveness

Follow up with the employee after implementation to ensure the accommodation meets their needs.



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 or access equal benefits and privileges of employment.

When an accommodation imposes undue hardship on an organization

In some cases, providing an 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. If an accommodation would be unduly costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business, it creates an undue hardship. In such instances, the employer is not required to provide that specific accommodation; however, they must try to identify another accommodation that is reasonable.

If no other accommodation exists, the employer should consider reassigning the employee to a vacant position (if one exists) for which the employee is qualified (meaning the employee could perform the essential functions with or without reasonable accommodation). Employers are 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, thorough documentation should be maintained to show how an accommodation would impact the nature of the business, its ability to function, or otherwise adversely affect the business.



What factors should be considered when assessing undue hardship?

- › 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(ies) involved in providing the accommodation, and the effect on resources and expenses.
- › 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.

Are there other considerations for undue hardship based on the size of the company?

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 other benefit programs

The definition of disability under the ADA differs from the FMLA definition of a “serious health condition” and would likely differ from how disability is defined under state leave laws and employer benefit plans. Employers should, therefore, evaluate employee eligibility for benefits and protection under the ADA separately.



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 accommodation options. 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.

Employers should avoid inflexible or “no fault” leave policies, which provide for automatic termination once an employee reaches an employer’s maximum leave limit – even if the maximum limit is extremely generous (e.g. 12 months). The EEOC’s position has generally been 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.

If an employee is approved for STD or LTD, are they ‘disabled’ according to the ADA?

Since 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 (with the exception of pregnancy). 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.

Additional ADA Resources³

- › You can visit the [EEOC website](#) 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.

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.
- › 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 documented 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 not based on their disability.
- › Train Human Resources and managers on their obligations under the ADA – but don't stop there. Make sure your employees are aware of their benefits under the ADA.
- › Foster an environment that helps people with disabilities feel safe and supported and ensure employees are comfortable asking for help when they need it.

New York Life Absence AssistSM offers a coordinated approach to managing ADA alongside your absence programs to ensure efficient, reliable, and consistent experiences across every touch point.

Our full-service ADA administration includes masters-level vocational coaches leading end-to-end coordination of the interactive process.



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Centers for Disease Control and Prevention. Disability Impacts All of Us , May 2023: <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>

Accommodation and Compliance: Low Cost, High Impact, Job Accommodation Network (JAN), May 2023

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