



Preventing Discrimination In The Workplace



Introduction

On July 26, 1990, President George Bush signed the Americans with Disabilities Act of 1990 (ADA) into law. This law extends federal civil rights protection to individuals with disabilities, which had previously been provided to every citizen regardless of race, sex, national origin or religion. Title I of the ADA guarantees equal opportunity for individuals with disabilities in all areas of employment, including recruitment, hiring and discharge, advancement, leaves and benefits, training and social and recreational activities.

It is estimated that 43 million American men, women and children have a disability. With this number in mind, consider the 1986 Harris poll which reported that 67 percent of persons with disabilities between the ages of 16 and 64 were unemployed, and two-thirds of those said they would like to have a job. The 1986 Harris poll went on to identify a number of barriers to employment which included inadequate transportation and insufficient workplace accommodations. The ADA requires the elimination of such barriers, therefore enhancing job availability to people with disabilities. Furthermore, a 1991 Harris survey of Americans' attitudes toward people with disabilities demonstrates that strong public support for the ADA exists. Specifically, 83 percent endorse the "reasonable accommodations" requirements on employers, and 95 percent agree with prohibitions against job discrimination based on disability.

With the passage of the ADA, the public's changing attitude, and the elimination of physical barriers, individuals with disabilities will now be able to enter the workforce without limitation and, once in the workforce, perform the essential tasks without incurring discrimination.

Title I of the ADA sets out requirements and gives guidance to employers to ensure that people with disabilities do not incur discrimination in any aspect of the employment process or environment. This brochure will outline information which will be a useful tool to employers and employees, alike.

Who is Covered?

The ADA applies to private employers, employment agencies, labor organizations and joint labor-management committees, as well as to all state and local government entities. The term employer is defined by the U.S. Equal Employment Opportunity Commission's (EEOC) final rules as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such person." The act and final rules specifically exempt from the definition of employer the following entities:

- the U.S. Government;*
- corporations wholly owned by the U.S. Government;*
- Indian tribes;
- private membership clubs (other than labor organizations) that are tax-exempt under Section 501(c) of the Internal Revenue Code of 1986.

(*The U.S. Government and any corporations owned by the U.S. Government are covered by the Rehabilitation Act of 1973, as amended.)

Special Situations

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

Effective Dates

Beginning July 26, 1992, employers with 25 or more employees are prohibited from discriminating against qualified individuals with disabilities. Two years later, on July 26, 1994, all employers with 15 or more employees will be covered. Employers with fewer than 15 employees are exempt. The EEOC and the Department of Justice (DOJ) regulations clearly mandate that all state and local governments, regardless of the number of employees and the receipt of federal funds, are covered by either the ADA employment provisions or Section 504 of the Rehabilitation Act of 1973. Government entities are covered by Section 504 until the ADA effective date is triggered in relation to the number of people they employ. All governments with fewer than 15 employees must abide by the Section 504 employment requirements.

EFFECTIVE DATES OF EMPLOYMENT PROVISIONS		
ADA Titles	Minimum # of Employees	Effective Date
Title I (Employment)	25	July 26, 1992
Title I (Employment)	15	July 26, 1994
Title II (State & Local Governments)	1	January 26, 1992

Who Is Protected?

Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he/ she actually has a disabling condition, has a record of such a condition, or is regarded as having a physical or mental impairment that substantially limits a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working. An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA. This means that the applicant or employee must:

- satisfy the job requirements in the areas of educational background, employment experience, skills, licenses, and any other qualification standards that are job related;
- be able to perform those tasks that are essential to the job with or without reasonable accommodation.

The ADA does not interfere with the right to hire the best applicant. Nor does the ADA impose any affirmative action obligations. The ADA imply prohibits the employer from discriminating against a qualified applicant or employee because of his/her disability.

Additionally, under the Civil Rights Act of 1991, American citizens employed abroad by U.S. owned corporations are also protected from employment discrimination.

Exceptions to the Definitions of Disability and Qualified Individual With a Disability

The terms disability and qualified individual with a disability do not include individuals currently engaging in the illegal use of drugs. However, an employer may not exclude an individual who:

- has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs;
- is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- is erroneously regarded as engaging in such use.

The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination and the employer will not have to show that the administration of the test is job related and consistent with business necessity.

The term disability does not include: sexual behavior disorders; compulsive gambling; kleptomania; pyromania; psychoactive substance use disorders resulting from current illegal drug use; homosexuality; and bisexuality.

Types of Discrimination Prohibited

The ADA prohibits nearly all employers (public and private) from discriminating against any qualified individual with a disability. It extends to the full range of employment activities, including:

- job application and recruiting procedures;
- hiring and discharge;
- employee compensation and fringe benefits;
- job assignment;
- advancement;
- leaves of absence, sick leave or any other leave;
- job training;
- activities sponsored by an employer including social and recreational programs; and
- any other term, condition or privilege of employment.

The term discrimination under Title I of the ADA makes it unlawful on the basis of disability to limit, segregate, or classify a job applicant or employee in a way that adversely affects his/her employment opportunities or status. This concept is summarized in the legislative history of the ADA: "Covered entities are required to make employment decisions based on the facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do" (Senate Report 101-116, p.28).

Also, the ADA prohibits an employer from retaliating against an applicant or employee for asserting his/her rights under the ADA. The Act also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual's family, business, social or other relationship/ association with an individual with a disability.

Medical Examinations and Inquiries About a Disability

If a disabled individual is applying for a job, an employer cannot ask the applicant if he/she is disabled or ask about the nature or severity of the disability. An employer can ask if he/she can perform the duties of the job with or without reasonable accommodation. An employer can also ask the disabled individual to describe or to demonstrate how, with or without reasonable accommodation, he/she will perform the duties of the job.

An employer cannot require the disabled individual to take a medical examination before he/she is offered a job. Following a job offer, an employer can condition the offer on the applicant passing a required medical examination, but only if all entering employees for that job category have to take the examination. However, an employer cannot reject the disabled individual because of information about his/her disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business. The employer cannot refuse to hire the applicant because of his/her disability if he/she can perform the essential functions of the job with an accommodation.

Once the disabled individual has been hired and starts working, the employer cannot require that he/she take a medical examination or inquire about the disability, unless they are related to the job and necessary for the conduct of the employer's business. The employer may conduct voluntary medical examinations that are part of an employee health program, and may provide medical information required by State workers' compensation laws to the agencies that administer such laws.

Information obtained about the medical condition or history of the applicant shall be collected and maintained on separate forms, kept in separate medical files and treated as a confidential medical record.

Direct Threat

An employer may impose a qualification standard that requires that an employee not pose a direct threat to his or her own safety or the safety of others. This standard, like all others, must apply to all applicants and employees and not just those with disabilities.

The determination of direct threat must be made on a case-by-case basis. The employer should identify the specific risk to the individual or to others and must make sure that the direct threat cannot be eliminated or reduced by a reasonable accommodation.

Employers may only consider risks when they pose a **significant risk of substantial harm**. The employer can only evaluate current risks that cannot be alleviated with a reasonable accommodation. Business cannot speculate that an individual may pose a risk in the future because his or her disability may become more severe. Employers may not deny individuals with disabilities employment opportunities because of slightly increased risks. The EEOC lists four factors to consider when determining the existence of direct threat:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur;
- The imminence of the potential harm.

Only objective, factual evidence and valid medical analyses are sufficient to determine whether a person will pose a direct threat. Employers must not make decisions based on generalized fears about someone's risk to themselves or others, and should make the determination based on input from the individual with a disability, his/her experience in similar positions and the opinions of doctors, physical therapists and rehabilitation counselors who are familiar with the individual and have expertise on the relevant disability.

The ADA provides a specific application of the direct threat standard in regard to individuals who have infectious or communicable diseases that may be transmitted through the handling of food. When an individual has one of the diseases listed by the Centers for Disease Control (CDC) of the Public Health Service and applies for work or works at a job involving food handling, the employer must consider whether there is a reasonable accommodation that will eliminate the risk. If no accommodation is possible, the employer would not be required to hire a job applicant. However, the employer would be required to accommodate an employee by reassigning him/her to a non-food handling job, if such a position is available. In August 1991, CDC issued a list of infectious and communicable diseases that are transmitted through food handling. The list does not include AIDS or the HIV virus.

Essential Functions

The ADA requires employers to give equal consideration to qualified individuals with disabilities. Like any other applicant, a person with a disability is qualified if he/she satisfies the skill, experience, education and other job-related requirements and can perform the **essential functions** of a job. Having a disability does not inherently entitle someone to protection under Title I. A hearing impaired applicant who also failed the CPA exam would not have a discrimination case against an accounting firm that only hires CPA's. The applicant would not meet the qualification standards that the accounting firm has established for all potential employees. Before making employment decisions about applicants with disabilities, employers must have an idea of what tasks are essential to the position. The ADA regulations define essential functions as the **fundamental job duties of a position**. Determining the essential functions is done on a case-by-case basis, but the EEOC lists evidence or criteria for employers to consider when determining if a task is essential. They include:

- Written job descriptions prepared before advertising an opening;
- The amount of time past employees in the same position spent doing the activity;
- The terms of a collective bargaining agreement.

The ability to perform the essential functions of a position is the key to determining if any applicant, with or without a disability, is qualified for a position. A qualified person with a disability cannot be fired from or refused a position because he/she is unable to perform some tasks that are not essential to that job. These are known as **marginal functions**. Employers need to determine how often someone in the same position as the person with a disability needs to accomplish the marginal function, and if there are other workers available to perform the marginal function.

Example: if cashiers in a grocery store are required to carry merchandise to customers' cars on a given shift rather infrequently and other employees can take packages to the cars without significantly interfering with their own job, carrying would be a marginal, not an essential job function.

Reasonable Accommodation

Certain qualified individuals with disabilities may need a reasonable accommodation to perform the essential functions of a job. An **accommodation**, as defined by the EEOC, **is any change in the work environment or the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities**. Accommodations do not always require sophisticated equipment and engineering. Employers can put a desk up on blocks or lower a drafting board for wheelchair users, devise a flex-time arrangement or provide a small tape recorder for an employee who may have trouble taking large amounts of notes at meetings and seminars. Other examples of accommodations include mg auxiliary aids such as reading equipment for an employee with a visual impairment, assistive listening devices for hearing impaired individuals, and adapted computers for people with manual or dexterity impairments.

Determining if an accommodation is necessary involves cooperation between the employer and the worker.

Often the process is as simple as asking the employee what he/she needs to perform the essential functions of a job. In other cases, the essential functions of the job may need to be reviewed to assess if they accurately reflect what the position was created to accomplish. A good rule of thumb for when an accommodation is appropriate is to establish the overall task a job is intended to accomplish, rather than naming as the essential functions certain abilities that may or may not be necessary to complete the task.

Example: the essential function of a loading dock position may not be carrying packages from the delivery truck to the storage room, as most people may think. The essential function can be described as getting the packages to the storage area. A worker who injures his/her back and can no longer carry packages, but can lift them, would still be able to perform the essential function with an accommodation, such as a wheeled dolly, that would allow him/her to push the packages to the storage room.

There are three categories of accommodation:

- Those required to ensure equal opportunity in the application process, such as making sure a test site is wheelchair accessible;
- Those required to enable employees to perform essential job functions, such as providing a sign language interpreter at a staff meeting for an employee with a hearing impairment;
- Those needed to allow a person with a disability to enjoy equal benefits and privileges of employment as are available to workers without disabilities. For example, if a business has a bowling league, the owner must ensure that it plays at lanes that are wheelchair accessible, or that have other accessibility features appropriate for all its employees. Structural changes at the worksite, such as access ramps and usable employee restrooms, might also be necessary for mobility limited employees.

Employers need only supply accommodations for conditions they know of in advance. For instance, if someone with a visual impairment does not tell an employer the type of print that is easiest for him/her to read before arriving for a pre-employment written test, the employer would not be expected to provide an examination in the format the applicant requires. However, the applicant can ask for an accommodation when he/she discovers the problem and the employer would be required to reschedule the test, make a new copy with large print, supply a reader or any other accommodation that would not be an undue hardship.

Undue Hardship

An employer does not have to make every accommodation an employee asks for. An accommodation would not be reasonable if it imposes **undue hardship** on the employer. An employer would not have to provide an accommodation that **imposes significant difficulty or expense**. The ADA regulations do not state a bottom line figure for expense. Once again, the determination is made on a case-by-case basis, but the EEOC lists some factors to consider in determining if an accommodation would present an undue hardship. The factors are:

- The nature and net cost of the accommodation;
- The availability of tax credits and deductions and outside funding;
- The financial resources of the facilities involved;
- The impact of the accommodation on the operation of the facility.

The definition of "facility" is not often clear-cut. Every business is not necessarily its own facility. An independent franchise owner whose only relationship to the parent company is an agreement to pay an annual franchise fee and to buy its products, might not be expected to provide expensive accommodations or auxiliary aids. The facility is the one store. But, if the store receives financial assistance from the parent company, such accommodations may be reasonable and required based on the parent company's resources. Employers cannot claim undue hardship based on financial expense if outside funding is available to pay for the accommodation. But when choosing between two or more effective accommodations, an employer can supply the least expensive one. Businesses are not mandated to provide the best accommodation, just the one that allows the disabled employee to perform the essential job duties.

Employers do not have to provide accommodations that affect the operation of their businesses. As an example, a nightclub owner may not have to provide an employee with any type of accommodation that would alter the ambience of the club or that would make it difficult for patrons to see the stage, such as turning up the lights for a hostess with a vision impairment. However, the employer would have to provide another accommodation if one is available, such as offering the employee a position in the club's better lit restaurant section or providing the hostess with a small flashlight to help her guide patrons to their tables.

Health Insurance

The ADA does not require employers to provide additional insurance for employees with disabilities. It only requires that employees with disabilities have equal access to the coverage provided to other employees. Employers cannot fire or refuse to hire someone with a disability because the current health plan does not cover this person's disability or the disability of any family member or dependent, or because the individual's or family member's disability may increase the Employer's future health care costs. The ADA does not compel a business to change its insurance carrier because the current company limits coverage for pre-existing conditions, or places limitations on certain medical procedures, as long as all employees have this coverage.

Example: an employer can continue to offer health insurance plans that contain pre-existing condition exclusions, even if this would adversely affect people with disabilities. Therefore, an individual's pre-existing condition would not be covered by the employer's health insurance plan, but any health problem unrelated to the pre-existing condition must be covered.

Similarly, an employer can offer a health insurance plan that limits the coverage of blood transfusions to five per year, for all employees, even though an employee with hemophilia may require more than five transfusions in a given year. However, the employee could not be denied coverage for another procedure, otherwise covered, because the plan would not cover any additional blood transfusions needed for the procedure.

Record Keeping

The ADA amends the record-keeping requirements that most business owners are already familiar with from Title VII of the Civil Rights Act of 1964, as amended. Employers must now keep all records on file for one year, instead of six months, and must report information on temporary and seasonal employees. A new section of the requirements clarifies that the EEOC can investigate employers to determine if they comply with the reporting and record-keeping requirements of the two Acts.

Enforcement Procedures

The provisions of the ADA which prohibit job discrimination will be enforced by the U.S. Equal Employment Opportunity Commission. Any individual who believes he/she has been discriminated against on the basis of his disability must file a complaint with the EEOC within 180 days from the date the discriminatory act took place.

The EEOC can enforce charges of discrimination in two ways: administrative and judicial action brought by the EEOC on behalf of the complainant, or privately filed suits. This means that the EEOC will initially try to enforce Title I administratively through investigation, conciliation, or voluntary means. If this is not successful or the employer has a history of resisting compliance with Title I, the EEOC can file a civil suit against the employer on behalf of the complainant. The EEOC has 180 days from the date the complaint was filed to take action. If no action has been taken within this time, the EEOC must issue a right-to-sue notice so an individual can bring the employer to court.

Remedies

Title I's enforcement procedures and the remedies available to a complainant are based on Title VII of the Civil Rights Act of 1964, which permits equitable relief and the recovery of attorneys' fees from the employer if the complainant prevails. Equitable relief may include injunctions (ordering the employer to perform or refrain from doing a] , Particular act), reinstatement, back pay, promotions, hirings, and reasonable modifications.

Also, under the Civil Rights Act of 1991, Title VII is amended to allow compensatory and punitive damages and therefore these remedies are available under Title I of the ADA. Compensatory and punitive damages allow for pecuniary losses that have not yet occurred, emotional pain, :suffering, inconvenience, mental anguish, and loss of enjoyment of life. The monetary damages allowed are limited according to the size of the violating employer. Employers with 15 to 100 employees can only be sued for \$50,000; those with 101-200

employees can be sued for up to \$100,000. Damages are capped at \$200,000 for companies with 201-500 employees and \$300,000 maximum for companies with more than 500 employees. These dollar limitations are in addition to any equitable relief, including back pay, that is owed the employee.

With respect to discrimination based on disability, the Civil Rights Act applies only to employers subject to Title I. Private employers and state and local governments with fewer than 15 employees, who are not subject to Title I cannot recover compensatory and punitive damages.

Tax Credits For Employers

The federal government provides two tax incentives for employers to make accommodations in their facilities for employees with disabilities and an additional incentive for hiring certain individuals with disabilities.

I. \$15,000 Annual Tax Deduction

All businesses, regardless of size, that need to remove certain architectural and transportation barriers may avail themselves of section 190 of the Internal Revenue Code, which allows a tax deduction of up to \$15,000 each year for the removal of barriers to disabled individuals. (Note: Prior to January 1991, the maximum allowable deduction was \$35,000.) This applies only to the removal of barriers at existing places of business or trade. Design areas which are covered include: grading, toilet rooms, walks, water fountains, parking lots, public telephones, ramps, elevators, entrances, controls, doors, and doorways, stairs, warning signals, floors, hazards, signage including the international symbol of accessibility, standards for rail facilities, standards for buses and standards for rapid and light rail vehicles.

An additional provision in Section 190 covers other barrier removal, which may include a substantial barrier to the access or use of a facility or public transportation vehicle; a barrier to one or more major classes of disabled individuals (such as visual or hearing impaired persons or wheelchair users); and the removal of such barriers being accomplished without creating any new barrier that significantly impairs access to or use of the facility or vehicle. This provision is meant to cover other barrier removal efforts which are not specifically in Section 190. If such barrier removal is covered under the ADA design standards or in a local code section governing provisions for people with physical disabilities, it would be eligible for this tax deduction.

II. \$5,000 Annual Tax Credit

As part of the Omnibus Reconciliation Act of 1990, Congress created a new tax credit for access expenditures to assist small businesses in complying with the ADA. The Internal Revenue Code Section 44 now allows an eligible small business to elect a non-refundable tax credit for expenditures paid or incurred after November 5, 1990. However, the expenditure cannot be used by businesses to correct prior violations of the ADA. This credit shall equal 50 percent of the amount of the eligible access expenditures for any tax year between \$250 and \$10,250. Consequently, the maximum amount of the credit for any taxable year is \$5,000.

An eligible small business is defined as any person (term includes corporation) that:

1. had gross receipts (reduced by returns and allowance) for the preceding taxable year that did not exceed \$1 million, or
2. had no more than 30 full-time employees, and
3. elects the application of the disabled access credit for the tax year.

An employee is considered full-time if such employee is employed at least 30 hours per week for 20 or more calendar weeks in the tax year.

Eligible access expenditures specifically include amounts paid or incurred:

1. for the purpose of removing architectural, communication, physical or transportation barriers which prevent a business from being accessible to, or usable by, individuals with disabilities;
2. to provide qualified interpreters or other effective means of making aurally delivered materials available to individuals with hearing impairments;
3. to provide qualified readers, taped text and other effective methods of making visually delivered materials available to individuals with visual impairments;
4. to acquire or modify equipment or devices for individuals with disabilities; or
5. to provide other similar services, modifications, materials or equipment.

The Section 44 tax credit can be elected in more than one taxable year, provided that eligible access expenditures were paid by an eligible small business; however, if the Section 44 credit is elected in a taxable year, no deduction or credit is allowed for access improvements under any other IRS code provision.

III. Targeted jobs Tax Credit

The Targeted Jobs Tax Credit (TJTC), Section 51 of the Internal Revenue Code, was originally established in 1977 and was re-authorized through December 31, 1991 by the Omnibus Budget Reconciliation Act of 1991. Congress extended the expiration date to June 1992 and TJTC supporters are looking to extend the credit beyond this date.

TJTC offers employers a credit against their tax liability if they hire individuals from nine targeted groups, which include persons with disabilities. The credit applies only to employees hired by a business or a trade, not to household employees such as maids and chauffeurs.

Employers can attain a credit equal to 40% of the employee's first year's wages up to \$6,000, for a maximum credit of \$2,400 per employee. Individuals must be employed by the employer at least 90 days or have completed at least 120 hours (14 days or 20 hours for summer youths).

Persons with disabilities can contact their local State - Federal Vocational Rehabilitation office to receive a voucher. This is given to the employer, who completes the appropriate section, and then mails it to the nearest local Employment Service Office. That agency will then send the employer a certificate which validates the tax credit.

General Information

Equal Employment Opportunity Commission

1801 L. Street, NW
Washington, DC 20507

(202) 663-4900 (Voice), (800) 800-3302 (TDD)
(202) 296-6312 (Voice for 202 Area Code)
(202) 663-4494 (TDD for 202 Area Code)

For questions concerning Sections 44 and 190 of the Internal Revenue Code contact:

Mark Pitzer, Attorney
Office of Chief Counsel
Internal Revenue Service
Department of the Treasury
111 Constitution Avenue, NW
Washington, DC 20224
(202) 566-3292

Employers' Checklist

- Create a job description for each position that includes the following:
 - The date
 - Job objectives
 - Essential functions
 - Marginal functions (those that can be reassigned)
 - Minimal qualifications (i.e. degrees, experience, licensing, etc.)
 - Job locations
 - Equipment/tools
 - Collective bargaining agreements (if applicable)
- Recruit/ advertise the job in a nondiscriminatory manner. (Utilize both newspaper ads and job listings on recorded tape operated by county employment office.)
- Job application/ test must be nondiscriminatory (such as the utilization of large print or oral examinations when necessary).
- Interview sites must be accessible.
- Make reasonable accommodations to known disabilities of job applicants.
- Do not make pre-employment inquiries about whether an individual has a disability or about the nature and severity of a disability.
- Medical examinations must follow a conditional offer of employment, be required of all employees for that job function, determine fitness-for-duty as to essential functions or determine what reasonable accommodations are needed. Voluntary medical examinations (such as for a corporate wellness program) are allowed.
- Provide equal access to insurance benefits for all employees.
- Provide reasonable accommodation to employees. Examples:
 - Modification of work environment
 - Auxiliary aids
 - Job restructuring
 - Reassignment to vacant position
- Ensure that any new construction or alterations to the workplace are accessible.
- Apply for any eligible tax incentives.
- Fulfill record keeping requirements.
- Consult EEOC's Title I regulations.