

THE AMERICANS WITH DISABILITIES ACT **(ADA) HANDBOOK**

An overview and resource
handbook for employers
and their HR professionals



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Unum: Your benefits partner

As a leading provider of group disability benefits in the U.S. for 42 years,¹ we understand how the complexities of disability laws can challenge even the savviest HR expert. And for many employers, managing applicants and employees appropriately under the many disability laws and concepts can be very difficult.

We hope you'll find this handbook to be a helpful reference tool. It's part of our commitment to help you get the most from your benefits programs so you can build a stronger workforce, and ultimately, a stronger business.





Introduction to the ADA

How to use this handbook

Did you know that, for fiscal year 2017, there were 28,868 disability discrimination charges filed with the Equal Employment Opportunity Commission (EEOC)?

That same year, the EEOC recovered more than \$135.2 million from charges brought by those claiming disability discrimination. This figure does not include monetary benefits obtained through litigation.³

Today, providing a level playing field for disabled individuals in the employment context not only makes sense, it is the law. The Americans with Disabilities Act (ADA) protects employees from discrimination and requires employers to provide reasonable accommodation.

Since the ADA was passed in 1990, the courts have provided some guidance on its terms. In reaction to the way the courts were interpreting the ADA, Congress redefined many of those terms in the ADA Amendments Act of 2008, which became effective January 1, 2009. The Equal Employment Opportunity Commission (EEOC) issued regulations effective May 24, 2011, which further clarified employer obligations under the ADA. It will be important for you to understand how the ADA and the new regulations work together so you can help your business stay in compliance.

At Unum, we have extensive experience with disability, and offer our ADA Services for employers wishing to partner with a knowledgeable vendor on its ADA issues. We are committed to assisting employees with disabilities to maximize their opportunities to participate in the workforce. We have prepared this handbook to help you understand and comply with ADA requirements so that your business will benefit by including people of all abilities.

This handbook is not intended to be a definitive document about issues relating to the ADA, nor does it constitute legal advice. Instead, we have outlined a conceptual framework to help you appreciate how the law integrates with the way you do business. We encourage you to consult your own attorney about your responsibilities under the ADA and other relevant legislation when deciding how to proceed with an applicant or employee who may be disabled.

Unum & the ADA and FMLA

As a leader in disability insurance,⁴ Unum provides claims handling, return-to-work and stay-at-work services, and leave management solutions that assist employers in realizing the human and economic gains inherent in the principles of the ADA and the Family and Medical Leave Act (FMLA). See page 16 for more information.



A brief caution to employers

In addition to the need for compliance with the ADA, your business location's professionals should be aware of states' civil rights laws that protect disabled individuals from employment discrimination. A few states provide higher levels of protection than the ADA for disabled individuals, such as more generous definitions of disability, pregnancy protections, or treatment of people in drug rehabilitation programs. In addition to state law, there are other laws providing protection to disabled individuals, such as the federal Rehabilitation Act of 1973 and Civil Rights Act of 1964. Work with your own legal counsel to make sure you understand your responsibilities under both state and federal non-discrimination laws.

An overview of the law

What the law does

Congress designed the ADA to provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities and to include the broadest number of people for protection under the law. Congress explicitly stated that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes or the failure to remove societal and institutional barriers.

Because the ADA is designed to eliminate discrimination based on stereotyping, misinformation and personal preference, Congress intended that the ADA:

- enhance job opportunities, the availability of services and the overall quality of life for people with disabilities in the U.S.; and
- increase the pool of talented and qualified employees available to help businesses compete in today's demanding marketplace.

How the ADA is organized

The ADA contains five sections (or "titles") that cover different topics related to Americans with disabilities. Title I is the focus of this handbook. It prohibits employers with 15 or more employees from discriminating against job applicants and employees with disabilities. It covers job application procedures, hiring, promotion, discharge, compensation, training and other aspects of employment.



Agencies responsible for ensuring compliance with ADA

Title I: Employment

- EEOC

Title II: Public Services Provisions and Services Operated by Private Entities

- Justice Department
- Transportation Department

Title III: Public Accommodations

- Justice Department

Title IV: Telecommunications

- Federal Communications Commission

Title V: Miscellaneous Provisions

- EEOC and others

Title V also applies to the employment context by:

- prohibiting coercion of or retaliation against an individual who asserts rights under the ADA;
- defining the relationship of the ADA to other federal and state laws; and
- clarifying that underwriting and risk classification practices are allowable if they are consistent with state law and not a subterfuge to evade the ADA's intent.

This handbook does not cover the three other titles, which generally do not apply to the worksite: public services, public accommodations and services operated by private entities (to make their goods, services, facilities, privileges, advantages and accommodations available to people with disabilities) and telecommunications.

Communicating the facts

Every employee must have access to information about his or her rights under the law. If your business is covered under the ADA, you are required to post notices — available from the Equal Employment Opportunity Commission (EEOC) — describing the applicable provisions so that applicants, employees and others are aware of their rights.

It is important to establish a culture of compliance with the ADA. Integrating the spirit and principles of the ADA into your business operations allows your organization to retain valuable resources — employees who develop disabilities — and to attract new talent that may or may not have disabilities. Training your managers on ADA issues is an important step toward compliance.

Who is protected under the ADA?

The ADA prohibits discrimination by employers against qualified individuals with disabilities. To be considered qualified, individuals must have all relevant certifications, education and experience as well as be able to perform the essential functions of the job they hold or seek, with or without reasonable accommodation. Put another way, employees who cannot do the essential functions of the job — with or without reasonable accommodation — are not protected by the ADA. The only exception to this rule is when an employer regards a person as disabled. See page 9 for more on “regarded as disabled.”

Nine rules of construction to be used to determine if an impairment substantially limits a major life activity.

1. **The term “substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts.** An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability.
2. Look at whether the impairment substantially limits a major life activity as compared to most people in general population. Need not severely restrict.
3. Substantial impairment is not object of focus. No extensive analysis required. Focus is on whether discrimination occurred.
4. Individualized assessment is necessary, but standard is much lower than it used to be.
5. Comparison of limitation as compared to most people in the general population will not need scientific analysis.
6. Do not consider corrective measures except eyeglasses or corrective lenses.
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. Impairment need only limit one major life activity.
9. Impairment can last less than six months.



Disability defined

The definition of disability under the ADA differs from the definition of disability in an insurance contract, and generally is broader. By enacting the ADA Amendments Act of 2008, Congress changed the definition of disability, giving more individuals the protection of the ADA. This handbook incorporates the 2008 changes, which were effective January 1, 2009. It also incorporates the regulatory changes made by the EEOC regarding the definition of disability, effective May 24, 2011, as well as regulatory changes on wellness programs and pregnancy. The ADA’s broader definition of disability allows an individual to qualify for protection under the law in one of three ways, namely that the individual:

- has a disability;
- has a record of a disability; or
- is regarded as having a disability.

Let’s look at each one of these separately.

First, a person is protected as disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities. In the ADA Amendments Act, Congress redefined these three components:

- a physical or mental impairment;
- that substantially limits;
- one or more major life activities.

An employee or applicant must meet all three criteria to meet the definition of disability.

Physical impairments can range from neurological or respiratory conditions to cosmetic disfigurements or anatomical losses. *Mental impairments* include emotional or mental illness and can include certain learning disabilities or other conditions.

Substantially limited was redefined by the 2009 changes and the new regulations.

The EEOC has given employers nine rules of construction to use to determine if an impairment substantially limits a major life activity but never actually defines “substantially.” They have said that “substantially limits” means not “significant” or “severely restricting” but “important.”

Multiple impairments that combine to substantially limit one or more major life activities can also be a disability. An example of this would be a person who has a lung impairment and a back impairment which combine to substantially limit the major life activity of walking. This person would be considered disabled even if the lung and back impairments on their own are not disabling.

Also, if a person has an impairment that limits only one major life activity, it is sufficient to qualify that person as disabled. Therefore, if an employee with asthma is substantially limited in the major life activity of breathing, that person is likely to be considered disabled, even if he or she is otherwise unimpaired in other activities such as walking or running.

An employee with an impairment that is episodic or in remission is considered to have a covered impairment if the impairment, when active, substantially limits one or more major life activities. This includes conditions such as epilepsy, hypertension, multiple sclerosis, asthma and diabetes.

When you evaluate whether an impairment substantially limits a major life function, you may not consider mitigating measures such as:

- medication;
- assistive technology;
- behavioral modifications or accommodations;
- modifications, etc.

Your assessment must be made without regard to mitigating measures. An exception is made for ordinary eyeglasses and contact lenses; however, employers may not screen out people with ordinary eyeglasses and contact lenses unless there is a business necessity.

The only time employers can consider mitigating measures is when they create negative effects. For instance, if the medication or other treatment an individual is taking substantially limits a major life activity (again, including a major bodily function), even if the condition for which he/she is being treated would not otherwise have such an effect, the individual will be considered disabled under the new ADA.

In any event, employers must assess whether the individual is substantially limited “as compared to most people in the general population.”

Major life activities:

There is now a list of activities that may be considered major life activities, but Congress specifically indicated that there may be major life activities that are not on the list.

This list includes:

- | | | |
|---------------------------|-------------|---------------------------|
| • caring for oneself | • walking | • concentrating |
| • performing manual tasks | • standing | • thinking |
| • seeing | • lifting | • communicating |
| • hearing | • bending | • working |
| • eating | • speaking | • sitting |
| • sleeping | • breathing | • reaching |
| | • learning | • interacting with others |
| | • reading | |

Working, sleeping, concentrating, thinking and communicating were added to the other previously accepted major life activities by the 2008 amendments. Sitting, reaching and interacting with others were added by the 2011 regulations.

Major life activities also include the operation of major bodily functions such as:

- | | |
|----------------------------------|--------------------------|
| • functions of the immune system | • circulatory |
| • normal cell growth | • endocrine |
| • digestive | • reproductive functions |
| • bowel | • special sense organs |
| • bladder | • skin |
| • neurological | • genitourinary |
| • brain | • hemic |
| • respiratory | • lymphatic |
| | • musculoskeletal |

Special sense organs (those that help us hear, see, smell, touch, etc.), skin, genitourinary, hemic, lymphatic and musculoskeletal systems were added by the 2011 regulations.

Because of these changes, we now know that people with a wide range of conditions are considered disabled, even if the conditions do not generally affect their ability to work (but may need time off from work to get treatment). Here are some examples of impairments that are now likely to be considered disabling:

- heart disease
- muscular dystrophies
- multiple sclerosis
- hypertension
- depression
- broken bones that do not heal properly
- carpal tunnel or other cumulative trauma disorders
- back impairments
- emotional and mental illness
- orthopedic, visual, speech and hearing impairments
- epilepsy
- tuberculosis
- diabetes
- HIV infection and AIDS
- cancer (even if in remission)

Virtually always disabling conditions: In the new regulations, the EEOC developed a list of impairments that will almost always be considered disabling. This list covers *deafness, blindness, intellectual disability, missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder and schizophrenia.*

Although employers will still have to do an individual assessment of whether the person's impairment is a disability, in virtually all cases, the above impairments will qualify.

Second, the definition of disability under the ADA may also be satisfied when there is a record of having such a disability. This part of the definition prohibits discrimination against people who may have a history of disability, such as cancer survivors.

One change that the 2011 regulations made was to give those with a record of disability the right to get reasonable accommodation.

And third, a person may be protected as disabled if he or she is simply regarded as having such an impairment. This protection was put into place because Congress was seeking to target discrimination based on perceptions or attitudes as well as actual impairments.

A manager who treats an employee differently from other employees because of an actual or perceived impairment may be violating the ADA, arguably even if the employee is not in fact disabled. Employees who claim that they are regarded as disabled often use managers' stray comments to support their claims that they were treated poorly or differently. Training for managers to be more sensitive in what they say will help employers avoid this type of case.

That said, individuals with actual or perceived impairments that are transitory (having an actual or expected duration of six months or less) and minor are not considered protected under this "regarded as" definition.

It is clear that employers don't have to accommodate individuals who claim "regarded as" discrimination. If an employee seeks to pursue discrimination and failure-to-accommodate claims, the employee will add a "regarded as" claim.

One important thing to remember is that managers must not prohibit a person with a physical or mental condition from doing a job just based on the manager's beliefs; current medical information is required.

Discrimination: What's illegal?

The ADA prohibits discrimination in a broad range of employment activities, including the application and interview process, hiring, promotion and termination, job training, compensation and virtually any other term or condition of employment.

You may be held legally responsible for employment discrimination, and could have to pay for both compensatory and punitive damages, if you or your HR professionals:

- make an inappropriate inquiry about disability;
- fail to hire an otherwise qualified individual with a disability in order to avoid making a reasonable accommodation; or

- fail to make reasonable accommodation for an otherwise qualified individual with a disability unless the accommodation would create an undue hardship for your company (see page 12 for more information about reasonable accommodation).

Under the ADA, you and your HR professionals may not:

- use pre-employment tests that reveal the effects of a sensory, manual or speaking skills impairment unless the tests focus on relevant job skills or aptitudes. Standards or tests that are likely to elicit information about a disability are impermissible. All applicants must be required to take the same tests, without regard to disability, and the tests or job standards cannot be used unless they are job-related and necessary to the business;
- restrict otherwise qualified applicants or employees with disabilities from employment opportunities or job benefits unless no reasonable accommodation can be made to enable them to perform essential job functions;
- eliminate a qualified applicant who is caring for a family member with a disability simply because you believe that person will miss more work than an applicant without such a commitment; and
- enter into contractual relationships — such as those with employment agencies, labor unions, employee benefit providers and others — that result in discrimination against employees with disabilities.

In addition, you may not deny employment to a qualified applicant simply to avoid increased benefit costs associated with insuring a person with a disability. However, your company can continue to offer bona fide employee benefit plans that contain exclusions and limitations based on risk classifications as long as they are consistent with state law and are not used as a subterfuge for evading the intent of the ADA.

Be aware that employees with disabilities are entitled to participate as fully in workplace activities, including training, as other employees. You may need to provide reasonable accommodation to assist disabled employees to participate on a par with their co-employees.

The employment decisions you and your HR professionals make regarding disabled individuals must be based on the facts available — not presumptions — regarding the capabilities and limitations of applicants and employees who are disabled. You cannot speculate about the employee's ability to do the job in the future. As an employer, you should have protocols on how to interact with disabled applicants and employees. The protocols must include how medical records are maintained (such as a separate computer that is secured by lock or password). See page 12 for more information about an employer's obligation to interact.

The hiring process

Under the ADA, you must include qualified individuals with disabilities in your efforts to fill jobs, whether from within or outside the company. Reasonable accommodations may be required during the application process for an applicant with disabilities. Here is how the ADA specifically affects your hiring process:

- **Access:** Accommodations during the hiring process may be required to assist an applicant in gaining access to the interview locations. You may need to modify architectural barriers or alter the location of the interview as an accommodation.
- **Testing:** If you require tests, they must be given to all applicants for similar positions and measure only skills required for the job. You must also make reasonable accommodations for people with disabilities to take the test, such as providing a reader or audio-taped test for someone with impaired vision.
- **Application and interview:** During the hiring process, you may not ask if the applicant has a disability or about its nature or severity, unless the condition is obvious, like when an applicant wears a brace. However, you can describe the job and ask about the applicant's ability to perform the essential job functions. You may not selectively ask some applicants that you suspect are disabled to demonstrate how they will do the job, but not ask all applicants to undertake a similar demonstration. Moreover, you can ask disability-related questions if you are asking for voluntary self-identification of disability for affirmative action purposes or if you are a federal contractor taking affirmative action under the Rehabilitation Act. In these cases, you must

inform the applicant that it isn't necessary to answer, and that not answering will have no effect on the employment decision. You must also advise the person that the information will be used only in accordance with the law. Finally, the information must be kept separately from the employment application.

- **Decision not to hire:** You do not have to hire an applicant who does not meet job qualifications. For example, if you have a job that requires full-time regular attendance, such as a receptionist job, you do not have to hire an applicant who can only work part time or who can't perform the essential functions of the job.

Before you make an offer in the hiring process, you can ask disability-related questions only if you are asking for voluntary self-identification of disability for affirmative action purposes or if you are a federal contractor taking affirmative action under the Rehabilitation Act. In these cases, you must inform the applicant that it isn't necessary to answer, and that not answering will have no effect on the employment decision. You must also advise the person that the information will be used only in accordance with the law. Finally, the information must be kept separately from the employment application.



Essential job functions

The essential functions of a job are those necessary for accomplishing the job's purpose and are not marginal or peripheral. Basically, essential job functions are what must happen to accomplish the purpose of the job. A careful and thorough definition of the essential functions of all jobs within your company, with written job descriptions, can go a long way in helping you comply with the ADA.

If a job requires full-time attendance, strict adherence to a schedule or the ability to work overtime, consider including that as part of the job description.

These questions can help determine if job functions are essential:

- Must employees in the position actually perform the function? For example, if typing is considered to be essential but you have never required an employee in the position to type, then typing is not an essential job function.
- Would removing the function fundamentally change the job? An editor's job would not be the same if proofreading were no longer required.
- Is the function essential because of your company's size? A function may not be essential in a large organization, but smaller businesses often need an employee to perform many different functions that are all crucial to the job.
- Did you hire an employee for a particular expertise? If so, that specialized task would be an essential job function.

You may want to consider developing job descriptions that include functional requirements of the job such as prolonged keying, regular lifting in excess of 20 pounds, or whatever else is functionally required by the job. You could also include "environmental" functions like predictable, reliable attendance, the ability to interact professionally in an office environment, or the ability to multitask in a fast-paced environment. The more clear and current your job descriptions are, the easier your task will be in assessing a person's ability to perform the essential functions of the job.

Reasonable accommodation under the law

The ADA applies not only to job applicants and employees who currently have disabilities, but equally to current employees who become disabled.

The ADA requires you, as an employer, to make reasonable accommodations for otherwise qualified disabled individuals if doing so will allow the employee to perform the essential functions of the job. The law is designed to require employers to remove barriers that prevent qualified applicants and employees with disabilities from performing essential job functions, provided the accommodations don't create an undue hardship on your business.

According to EEOC regulations, reasonable accommodations include:

- adjustments to the application process so an individual with a disability can be considered for a desired position;
- changes in the work environment or in how a job is performed so an individual with a disability can perform the essential functions of the job; or
- modifications that enable an employee with a disability to enjoy the same employment benefits and privileges as other employees.

For example, there may be a need to modify your existing facilities so individuals with disabilities can get access to and use them. There could also be a need to revise job structures or work schedules, modify equipment or devices, provide qualified readers or interpreters or change your policies, tests or training materials.

For current employees, reasonable accommodation may include:

- restructuring job duties;
- holding a job open for a reasonable period of time while the employee recovers, if it doesn't cause undue hardship for your business;
- reassigning a qualified employee to another vacant position;

- modifying an employee's work schedule;
- altering the company's physical layout to provide access, or
- providing adaptive equipment.

Accommodations in schedules and leaves are some of the most challenging accommodations for employers to make. The purpose of leaves as a reasonable accommodation is to allow an employee to recover to be able to return to work. The leave obligation may extend beyond any leave protected by the Family and Medical leave Act (FMLA). So far, the EEOC has not changed its position that indefinite leaves are not reasonable accommodations. In any event, employers must interact with their employees and offer reasonable accommodation before taking any adverse employment action against employees on leave. Check with your outside counsel to determine what duration of leave is reasonable given your business and policies.

The ADA requires an individualized assessment of each accommodation request. Whether a particular accommodation would be considered reasonable in relation to the ADA is directly related to the specifics of the employee's situation, the medical support you are relying on, your accommodation plan, and how clearly your business needs are articulated. The employee's needs and desires are identified in an interactive process.

The interactive process

The interactive process is at the heart of the ADA. The employee must be involved in the dialogue about what accommodation would be effective. Once an employee requests an accommodation, you and he or she must communicate. How you interact must be reasonable under the circumstances and may involve communication in person, by telephone, by email or otherwise. The communication must allow both you and your employee to exchange information. You must take the initiative to find out what the employee's precise disability limitations are due to the disability and what potential reasonable accommodations could be made that would overcome the limitations. You should undertake a good faith effort to identify reasonable accommodations; interacting expeditiously with your employee is often one part of that

process. Although you have the final say in what accommodation you offer, your decision should, at a minimum, consider the preference of the employee. The accommodation need not be the best accommodation available as long as it is effective.

When considering reasonable accommodations, you should keep in mind that they do not have to include:

- making adjustments or modifications to help a person with daily activities on and off the job, such as prosthetic limbs, wheelchairs, hearing aids, eyeglasses or personal care attendants;
- lowering quality or production standards;
- making accommodations for a person with a disability who is not otherwise qualified for the job;
- hiring or promoting an unqualified individual, regardless of disability;
- hiring or retaining a disabled individual who poses a direct threat to the safety or health of himself or herself or other employees or customers, unless the threat can be eliminated by reasonable accommodation;
- disrupting an established seniority system; or
- creating a new job for a disabled individual.

The ADA encourages sound return-to-work practices for both work-related and non-work-related impairments. Not every employee resuming work activity after illness, surgery or injury will have restrictions on performing some aspect of his or her job, but some will. It is important for employers in their return-to-work practices to distinguish whether they are providing short-term, temporary job modification (transitional work) or reasonable accommodations for the long term. This distinction can help you avoid creating a job for an employee (an unintended long-term accommodation) when the intent was to assist the healing process in the short term.

A special note about pregnancy

Normal pregnancies are not disabilities under the ADA, but pregnancy-related impairments like gestational carpal tunnel, diabetes, sciatica or edema may be disabilities given the definition under the ADA.

In addition to the ADA, employers must consider accommodation responsibilities under the Pregnancy Discrimination Act (PDA). In 2015, the U.S. Supreme Court created a new standard for accommodating pregnant women in the *Young v. United Postal Services* case. The EEOC then issued revised Enforcement Guidance on the ADA and the PDA that aligned with the *Young* case.

In a case of disparate treatment discrimination, the courts will consider the following:

- PDA plaintiffs may make out the prima facie (threshold) requirements of a case of discrimination by showing “that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’” This is not intended to be an onerous burden.
- Once the prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. Such reasons cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ‘similar in their ability or inability to work’ whom the employer accommodates.
- Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, the pregnant worker may still show that the reason is pretextual by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination.

Did you know?

Did you know that Unum can help you keep your employees at work or assist them as they return to work? For example, some Unum Long Term Disability Insurance policies may include the following worksite modification benefit provision (not available in CA):

“HOW CAN UNUM HELP YOUR EMPLOYER IDENTIFY AND PROVIDE WORKSITE MODIFICATION?

A worksite modification might be what is needed to allow you to perform the material and substantial duties of your regular occupation with your employer. One of our designated professionals will assist you and your employer to identify a modification we agree is likely to help you remain at work or return to work. This agreement will be in writing and must be signed by you, your employer and Unum. When this occurs, Unum will reimburse your employer for the cost of the modification, up to the greater of \$1,000, or the equivalent of two months of your monthly benefit. This benefit is available to you on a one-time only basis.”

With this provision in your policy, we not only can help you by assisting your employees in returning to work but also by helping your employees stay at work.

Some of the accommodations that might be provided under this provision include adaptive equipment such as ergonomic chairs, magnifying screens and split or one-handed keyboards, plus recommendations on how to modify work schedules.

Based on the above, any employer that has a policy of accommodating a large percentage of non-pregnant employees with limitations while denying accommodations to a large percentage of pregnant employees will find it difficult to counter the argument that it is treating pregnant employees worse than non-pregnant employees.

http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#II

Undue hardship

Undue hardship is a defense to providing a reasonable accommodation and refers to any accommodation that causes significant difficulty or expense to you as an employer. To determine whether an accommodation represents an undue hardship for your business, you need to consider:

- the cost of the proposed accommodation, particularly balanced against the projected benefit of the accommodation;
- your business unit's finances;
- your company's finances;
- the number of employees at your facility;
- the nature of your operation; and
- the effect of the accommodation on your company (e.g. impacts to customers, sales, deadlines, other employees).

According to a Job Accommodation Network (JAN) study, employers reported that providing accommodations resulted in such benefits as retaining valuable employees, improving productivity and morale, reducing workers' compensation and training costs, and improving company diversity. These benefits were obtained with little investment. The employers in the study reported that a high percentage (57%) of accommodations cost absolutely nothing to make, while the rest typically cost only \$500.⁵ Affordable accommodations can include an ergonomically correct workstation, a larger screen or fonts for visually impaired employees, or a flexible schedule in certain circumstances.

The ADA and confidential information

The ADA has specific rules prohibiting employers from gathering disability-related information, either in the form of medical examinations or disability-related questions. It also has rules around how to keep confidential information once it is received. The rules vary depending on where in the hiring or employment process you are with an individual.

In the hiring process, if an employee is pre-offer, the ADA prohibits all disability-related questions and medical examinations, even if the questions or examinations are related to the job. It is permissible to describe the job and ask if the applicant can perform the functions of the job, with or without reasonable accommodation. Avoid asking about whether the applicant has a disability that would prevent the person from doing the job. Keep the focus on the applicant's abilities.

At the stage after an offer is made but before an applicant begins work, you may ask disability-related questions so long as **all** entering employees in the job category are asked the same questions or given the same examinations. Your job offer can be conditional on a satisfactory result for all potential employees.

Once an employee has begun work, you may ask disability-related questions or require medical examinations only if they are job-related or consistent with business necessity. At this stage, you may also conduct voluntary medical examinations as part of an on-site health and wellness program. Once a person is hired, you may always inquire about the person's ability to perform job-related functions. Again, it is most prudent to focus on abilities and not disabilities.

Once you have sensitive medical information, either doctor's notes, notes from the employee describing his or her condition, or examination results, you must maintain that information with the same confidentiality as medical records, and you cannot use the results to discriminate against a qualified individual on the basis of disability. You should keep it in a separate file in a secure

file cabinet to avoid any access of that information by anyone else.

As always, to ensure that you are meeting all privacy requirements, you should check with your own legal counsel to make sure you understand your obligations under both federal and your state's privacy laws. Also, work with your legal counsel to keep track of the EEOC rules on how the ADA applies to your wellness program.

Remedies under the law

If an applicant or employee with a disability believes discrimination has occurred in the workplace, the following are examples of remedies available to him or her that could affect your business:

An injunction — a court could order you to provide auxiliary aids or services, modify existing policies, practices or procedures, or make facilities accessible.

A restraining order — a court could forbid you from taking action that may be discriminatory, such as firing an employee instead of making reasonable accommodation.

Compensatory and punitive damages — a court could assess damages to be paid by your company based upon the size of its employee population:

15 – 100 employees	\$50,000
101 – 200 employees	\$100,000
201 – 500 employees	\$200,000
501+ employees	\$300,000

Court costs, attorney's fees and expert witness fees — a court could order your business to reimburse the applicant or employee for these costs and fees which are often higher than the combined punitive and compensatory damages, and are not subject to any cap.



Tax credits that can help

Your business may be eligible for tax credits that can help ease the financial impact of an accommodation. You may also obtain financial assistance from vocational rehabilitation agencies, or, in undue hardship situations, perhaps from the employee being accommodated. Any assessment of undue hardship, however, must be based only on the net cost to your company, not on the total cost of the accommodation.

A particularly helpful publication produced by the U.S. Department of the Treasury, Internal Revenue Service (IRS), in coordination with the U.S. Department of Health and Human Services (HHS), Office on Disability, is "Living and Working with Disabilities: Tax Benefits and Credits." It can be accessed at <http://www.irs.gov/pub/irs-pdf/p3966.pdf> or by calling 1-800-829-3676 (Voice) or 1-800-829-4059 (TTY/TDD).

Tax credits are constantly shifting; ask your tax advisor for the appropriate IRS form that must be completed or for more information about these tax incentives.

Interplay between the ADA and the Family and Medical Leave Act

One complex and difficult issue for employers is the interplay between the Family and Medical Leave Act (FMLA) and the ADA. The FMLA applies to employers with 50 or more employees. Employers should keep in mind that the leave provided by the FMLA is for serious health conditions which may in some cases cover more minor conditions than a disability as defined under the ADA. Also, leave under the FMLA is limited to 12 weeks (taken continuously, under a reduced schedule, or intermittently) while ADA leave is more generalized to what is reasonable for the employer. The time provided by the employer under the FMLA can run concurrently with the time provided as a reasonable accommodation under the ADA. Finally, employers should evaluate leave as a reasonable accommodation for employees who request FMLA leave but are either not eligible or have exhausted the leave available to them.

Work with your legal counsel to review your policies to ensure that you are compliant with both the ADA and the FMLA. You should use a consistent process when you are considering employment action involving a disabled employee who has been out on leave.

Unum and the ADA

As a natural part of our claims handling process, you can expect:

- Support to align your accommodation policies with ADA regulatory requirements
- Unum correspondence referring employees to your Human Resources department if they need accommodations, which helps fulfill your employee interaction requirements
- Individual return-to-work plans as needed for individuals on claim
- Financial assistance for those with Long Term Disability Insurance to help pay the cost of modifications under the Worksite Modification Benefit
- Partnership with the Job Accommodation Network, (JAN), which can provide more in-depth, case-specific analysis on possible reasonable accommodations

With our additional ADA Services offering, you can choose the level of service specific to your needs

Companies like yours undoubtedly face a higher number of diverse disability and leave-related needs. It can be difficult to keep up with ADA rules and regulations, and many employers are looking for solutions to enhance their ADA management.

Our **ADA Services** have been designed to meet varying levels of assistance. Whether you need general information, occasional in-depth consultation, or day-to-day support regarding employee requests for workplace assistance, our service levels build on one another to ensure you get the level of service you need. These services are completely confidential and available to our large customers to add to your disability and leave management coverage.

Unum offers you the unique combination of ADA administrative knowledge, plus years of industry-leading experience in assessing disability, managing claims and administering job-protected leaves. That means we offer broad knowledge about available vocational options that can help keep your employees at work or help them return to work. Unum provides proactive identification of potential opportunities to interact by identifying files nearing FMLA exhaustion. And our ADA Services team can assist in assessing which employees qualify for ADA modifications.

Additional resources available from Unum

While Unum cannot provide legal advice, we want to provide as much informational help as we can. Just ask your Unum representative if you have follow-up questions regarding the information in this handbook. If you have questions about Unum's Leave Management Services, you can contact your Unum representative and request the FMLA Handbook.

In addition, Unum products and services may include additional resources such as **HR/BenefitsAnswersNow™**, a web-based library of answers to thousands of benefits questions. The site is organized in a question-and-answer format that's easy to use. Employers can choose from a selection of several monthly newsletters — and access, modify and use hundreds of sample benefit policies and plans.

BenefitsAnswersNow™ is provided by CCH, one of the top information providers in the legal, tax and regulatory markets in the U.S. and Europe.



Contact your Unum representative for more information.

Resources and technical assistance

We hope this handbook has given you a helpful overview of the ADA requirements. For more information, consult:

AbleData

800-227-0216

Free information about 40,000 adaptive devices for all disabilities.

<http://www.abledata.com>

ADA National Network

800-949-4232

Ten federally-funded regional centers providing information, materials, technical assistance and training on the ADA.

<http://www.adata.org>

Americans with Disabilities Act Document Center

An award-winning, comprehensive collection of ADA documents produced by federal agencies; includes regulations, tech sheets, technical assistance manuals and the ADA Standards for Accessible Design.

<http://askjan.org/links/adalinks.htm>

Department of Justice

800-514-0301

<http://www.usdoj.gov>

Disability and Business Technical Assistance Centers

800-949-4232

Centers provide technical ADA assistance and training to state and local governments and private businesses.

<https://www.acl.gov/Programs/Index.aspx>

Equal Employment Opportunity Commission (EEOC)

800-669-4000

Offers “Americans with Disabilities Act of 1990 — EEOC Technical Assistance Manual”

<http://www.eeoc.gov> and

<http://www.eeoc.gov/facts/qanda.html>

GettingHired.com

A commercial national employment and social networking web-based portal that connects and serves disabled job seekers, employers, advocacy organizations and service providers. Exceeding Rehabilitation Act section 508 standards, the GettingHired.com portal enables maximum access regardless of disability type and severity.

<http://www.GettingHired.com>

Job Accommodation Network

800-526-7234

Sponsored by the President’s Committee on Employment of People with Disabilities. Information about devices, job or building modifications and workplace redesign.

<http://janweb.icdi.wvu.edu>



HRAnswersNow® and BenefitsAnswersNow™, provided by CCH, are available with select Unum insurance offerings. Terms and availability of service are subject to change. Service provider does not provide legal advice; please consult your attorney for guidance. Services are not valid after coverage terminates.

1,4 Employee Benefit Plan Review, “Group Accident & Health Surveys 1976-1990” (1977-1991); Gen Re, “U.S. Group Disability Market Surveys 1991-2013” (1992-2014); LIMRA, “U.S. Group Disability Insurance 2014-2016 Annual Sales and In Force” (2015-2017); LIMRA, 4Q 2017 U.S. Workplace Disability Insurance Inforce (2017).

2,3 U.S. Equal Opportunity Employment Commission, “ADA charge data: Monetary benefits — FY 1997 – FY 2017” (accessed July 2, 2018).

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