

2018 ADA COMPLIANCE OFFICER TRAINING HANDOUT

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Contents

Background of the Americans with Disabilities Act ("ADA")	2
Basics of the ADA	3
Basic Requirements for Compliance	4
Access to Facilities	5
Government Programs and Services	6
Access to Open Records and Open Meetings	8
Employment Issues	8
Transition Plans and Self-Evaluation	19
Website Accessibility	20
Costs	23
What Every City and County Needs to Have	24

Background of the Americans with Disabilities Act (“ADA”)

ADA was signed into law July 26, 1990 by President George H.W. Bush. The law prohibits discrimination on the basis of disability and protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas. ADA also requires newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.*

The ADA protections are divided into five titles:

- Title I: Employment. This title requires covered employers to provide reasonable accommodations for applicants and employees with disabilities and prohibits discrimination on the basis of disability in all aspects of employment.
- Title II: Public Services. Public services, including state and local agencies, are prohibited from denying services to qualified individuals with disabilities or participation in programs or activities that are available to people without disabilities. Public transit systems must also be accessible to individuals with disabilities.
- Title III: Public Accommodations. Public accommodations include facilities such as restaurants, hotels, grocery stores, retail stores, etc., as well as privately owned transportation systems. This title requires that all new construction and modifications must be accessible to individuals with disabilities. For existing facilities, barriers to services must be removed if readily achievable.
- Title IV: Telecommunications. Telecommunications companies offering telephone service to the general public must have telephone relay service to individuals who use telecommunication devices for the deaf (TTYs) or similar devices.
- Title V: Miscellaneous. This title provides miscellaneous provisions that are intended to apply broadly across all the other titles and includes a provision prohibiting retaliation of, intimidation of, coercion of, threats to, or interference with individuals with disabilities or those attempting to aid people with disabilities in asserting their rights under the ADA.

This training class covers pertinent portions of titles I and II. Title II includes the following subparts:

- Subpart A – General
- Subpart B – General Requirements
- Subpart C – Employment
- Subpart D – Program Accessibility
- Subpart E – Communications
- Subpart F – Compliance Procedures

Under the ADA, the Attorney General issues regulations implementing subpart A of title II and the Secretary of Transportation issues regulations implementing part B of title II. Title II

regulations are codified at 28 CFR part 35. The regulations were revised in 2010 and include revisions to the ADA Standards for Accessible Design.

Basics of the ADA

The ADA protects the rights of people who have a physical or mental impairment that substantially limits their ability to perform one or more major life activities. Title II of the ADA applies to all state and local governments and all departments, agencies, special purpose districts, and other instrumentalities of State or local government (“public entities”). It applies to all programs, services, or activities of public entities, from adoption services to zoning regulation.

Examples of prohibited actions are:

1. A city museum with an oriental carpet at the front entrance cannot make people who use wheelchairs use the back door out of concern for wear and tear on the carpet, if others are allowed to use the front entrance.
2. A public health clinic cannot require an individual with a mental illness to come for check-ups after all other patients have been seen, based on an assumption that this patient’s behavior will be disturbing to other patients.
3. A county parks and recreation department cannot require people who are blind or have vision loss to be accompanied by a companion when hiking on a public trail.

Public entities can implement rules necessary for safe operation of a program, service or activity as long as the rules are based on an objective assessment of actual risk. Some examples:

1. A parks and recreation department may require all participants to pass a swim test in order to participate in an agency-sponsored white-water rafting expedition. This policy is legitimate because of the actual risk of harm to people who would not be able to swim to safety if the raft capsized.
2. A rescue squad cannot refuse to transport a person based on the fact that he or she has HIV. This is not legitimate, because transporting a person with HIV does not pose a risk to first responders who use universal precautions.
3. A Department of Motor Vehicles may require that all drivers over age 75 pass a road test to renew their driver’s license. It is not acceptable to apply this rule only to drivers with disabilities.

ADA requires “reasonable” accommodations be made if necessary for persons with disabilities to have a fair and equal opportunity to participate in civic programs and activities. Examples of reasonable accommodations:

1. Service animals
2. Mobility devices such as wheelchairs
3. Auxiliary aids and services such as text telephones (TTYs) and Braille

Basic Requirements for Compliance

1. ADA Coordinator (28 C.F.R. pt. 35, § 35.107(a))
 - a. Public entities that have 50 or more employees are required to have a grievance procedure and to designate at least one responsible employee to coordinate ADA compliance. The term “ADA Coordinator” is commonly used as a title for this employee.
 - b. ADA Coordinator’s role is to coordinate the government entity’s efforts to comply with the ADA and investigate any complaints that the entity has violated the ADA. The Coordinator serves as the point of contact for individuals with disabilities to request auxiliary aids and services, policy modifications, and other accommodations or to file a complaint with the entity; for the general public to address ADA concerns; and often for other departments and employees of the public entity. The name, office address, and telephone number of the ADA Coordinator must be provided to all interested persons.
 - c. According to the *ADA Best Practices Tool Kit for State and Local Governments*, the following qualifications would help an ADA Coordinator be effective:
 - i. familiarity with the state or local government’s structure, activities, and employees
 - ii. knowledge of the ADA and other laws addressing the rights of people with disabilities, such as Section 504 of the Rehabilitation Act, 29 U.S.C. § 794
 - iii. experience with people with a broad range of disabilities
 - iv. knowledge of various alternative formats and alternative technologies that enable people with disabilities to communicate, participate, and perform tasks
 - v. ability to work cooperatively with the local government and people with disabilities
 - vi. familiarity with any local disability advocacy groups or other disability groups
 - vii. skills and training in negotiation and mediation
 - viii. organizational and analytical skills
2. Notice of the ADA’s provisions (28 C.F.R § 35.106)
 - a. ADA public notice requirement applies to all public entities, regardless of size.
 - b. Three main considerations for the notice: (1) target audience; (2) information to be included; and (3) where and how notice is to be provided.
3. Grievance Procedures (28 C.F.R. § 35.107(b))
 - a. Local governments with 50 or more employees are required to adopt and publish procedures for handling grievances related to Title II of the ADA.
 - b. Procedures should include:
 - i. a description of how and where a complaint under Title II may be filed with the government entity;

- ii. if a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative;
 - iii. a description of the time frames and processes to be followed by the complainant and the government entity;
 - iv. information on how to appeal an adverse decision; and
 - v. a statement of how long complaint files will be retained.
 - c. Procedures must be available in alternative formats so they are accessible to all persons with disabilities.
- 4. Other Requirements
 - a. All public entities, regardless of size, are required to evaluate all of their services, policies, and practices and to modify any that did not meet ADA requirements.
 - b. Public entities with 50 or more employees were required to develop a transition plan detailing any structural changes that would be undertaken to achieve program access and specifying a time frame for their completion. The 2010 Standards encourage public entities to conduct new self-evaluations and develop new transition plans.

Access to Facilities

Any facility built or altered after January 26, 1992, must be “readily accessible to and usable by” persons with disabilities.

- Requirements differ for existing versus altered or new facilities.
- Structural changes are not required when other accommodations are feasible.
- Entities are not required to take any action that would result in undue financial and administrative burdens. Undue hardship is determined on a case-by-case basis.
- While public programs and services must generally be accessible, not all facilities must necessarily be accessible. For example, if a local government has several swimming pools and cannot afford to make all pools accessible, the government can choose to only make some pools accessible considering the location of the pools, the availability of public transportation, hours of operation and programs offered at each site. However, the general location of these accessibilities is also considered for reasonableness.
- A safe harbor exists for existing facilities with regards to compliance with the 2010 ADA Standards. Under the safe harbor, if a facility was in compliance with the 1991 Standards or Uniform Federal Accessibility Standards as of March 15, 2012, a public entity is not required to make changes to meet the 2010 Standards. There are some areas not subject to the safe harbor (because they were not addressed in the original standards). These include swimming pools, play areas, exercise machines and equipment, court sport facilities, and boating and fishing piers.
- When an entity alters a facility, the facility must comply with the 2010 ADA Standards. An alteration is defined as remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, changing or rearranging plan

configuration of walls and full-height or other fixed partitions, or making other changes that affect (or could affect) the usability of the facility. Newly constructed facilities must also meet the 2010 Standards.

- Some areas addressed by the 2010 Standards:
 - Parking—minimum number of accessible spaces
 - Accessible entrances
 - Accessible routes to programs and services
 - Shelves, counters and aisles

Government Programs and Services

Title II applies to state and local government entities, and, in subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, to all activities of State and local governments regardless of whether these entities receive Federal financial assistance

- This Title prohibits discrimination in the way local governments provide or offer **services**, programs, or activities, including public transportation, public education, employment, **recreation**, health care, social services, courts, voting, and town meetings.

Public entities are required to give primary consideration to the type of auxiliary aid or service requested by the person with the disability. They must honor that choice, unless they can demonstrate that another equally effective means of communication is available or that the aid or service requested would fundamentally alter the nature of the program, service, or activity or would result in undue financial and administrative burdens.

The ADA requires more than a plan to get everyone into our buildings, but we must also provide full access to our programming.

Project Civic Access, a wide-ranging effort to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life.

How do I know they are disabled? You cannot ask about medical issues but can ask if disabled, if they need an accommodation and what is needed.

Public entities may not ask individuals using such devices about their disability but may ask for a credible assurance that the device is required because of a disability. If the person presents a valid, State-issued disability parking placard or card or a state-issued proof of disability, that must be accepted as credible assurance on its face. If the person does not have this documentation, but states verbally that the device is being used because of a mobility disability that also must be accepted as credible assurance, unless the person is observed doing something that contradicts the assurance. For example, if a person is observed running and jumping, that may be evidence that contradicts the person's assertion of a mobility disability. However, the fact

that a person with a disability is able to walk for some distance does not necessarily contradict a verbal assurance -- many people with mobility disabilities can walk, but need their mobility device for longer distances or uneven terrain. This is particularly true for people who lack stamina, have poor balance, or use mobility devices because of respiratory, cardiac, or neurological disabilities.

We must train our employee population to understand this as well.

Here are few examples for courts, jails, recreation and solid waste.

- Parks and recreation department cannot require people who are blind or have vision loss to be accompanied by a companion when hiking on a public trail.
- Parks and recreation department may choose to provide a special swim program for people with arthritis. But it may not deny a person with arthritis the right to swim during pool hours for the general public.
- Rules that are necessary for safe operation of a program, service, or activity are allowed, but they must be based on a current, objective assessment of the actual risk, not on assumptions, stereotypes, or generalizations about people who have disabilities. For example:
 - A parks and recreation department may require all participants to pass a swim test in order to participate in an agency-sponsored white-water rafting expedition. This policy is legitimate because of the actual risk of harm to people who would not be able to swim to safety if the raft capsized.
 - Requiring people to show a driver's license as proof of identity in order to enter a secured government building would unfairly screen out people whose disability prevents them from getting a driver's license. Staff must accept a state-issued non-driver ID as an alternative.
 - A rescue squad cannot refuse to transport a person based on the fact that he or she has HIV. This is not legitimate, because transporting a person with HIV does not pose a risk to first responders who use universal precautions.
 - A public health clinic cannot require an individual with a mental illness to come for check-ups after all other patients have been seen, based on an assumption that this patient's behavior will be disturbing to other patients.
- Cannot require people with a mobility disability to put solid waste at the curb for pick-up.

Emergency Communications

The telecommunications relay service (TRS), reached by calling 7-1-1, is a free nationwide network that uses communications assistants (also called CAs or relay operators) to serve as intermediaries between people who have hearing or speech disabilities who use a text telephone (TTY) or text messaging and people who use standard voice telephones. The communications assistant tells the voice telephone user what the TTY-user is typing and types to the TTY-user what the telephone user is saying. When a person who speaks with difficulty is using a voice

telephone, the communications assistant listens and then verbalizes that person's words to the other party. This is called speech-to-speech transliteration.

Video relay service (VRS) is a free, subscriber-based service for people who use sign language and have videophones, smart phones, or computers with video communication capabilities. For outgoing calls, the subscriber contacts the VRS interpreter, who places the call and serves as an intermediary between the subscriber and a person who uses a voice telephone. For incoming calls, the call is automatically routed to the subscriber through the VRS interpreter.

Staff who answer the telephone must accept and treat relay calls just like other calls. The communications assistant or interpreter will explain how the system works.

The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and case law under section 504 of the Rehabilitation Act and are to be determined on a case-by-case basis.

Access to Open Records and Open Meetings

1. ADA Title II requires local governments to provide effective communication with disabled persons. Persons with disabilities must be able to receive information from local governments and convey information to local governments.
2. Local governments must provide auxiliary aids and services (examples include providing a reader, large print or an interpreter) to enable effective communication.
3. Local governments may require reasonable advance notice of the need for aids or services.
4. Local governments are permitted to utilize an alternative aid or service (one different from the aid or service requested by the disabled person) if the entity can demonstrate that the alternative is equally effective or that the requested aid or service would result in a fundamental alteration of the goods or services provided to the public or in an undue financial and administrative burden. “Undue burden” is defined as a significant difficulty or expense. This determination should be made by a high level official—no lower than a department head and the determination must be in writing and state the reasons for the decision.
5. According to the Open Records Counsel, they have not issued any opinions on ADA issues.

Employment Issues

As outlined above, the ADA has five titles, but only Titles I and II apply to local governments. Title I prohibits employment discrimination and includes local governments in the definition of “employer.”

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, State and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including State and local governments. It also applies to employment agencies and to labor organizations.

Title I prohibits employers from discriminating against a “qualified individual with a disability.” It covers job applications, hiring, advancement, discharge, compensation, training, and any other employment term, condition, or privilege. It restricts questions that can be asked about an applicant’s disability before a job offer is made, and it requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship. Religious entities with 15 or more employees are covered under title I. [56 Fed. Reg. 35736]

Title I complaints must be filed with the U. S. Equal Employment Opportunity Commission (EEOC) within 180 days of the date of discrimination, or 300 days if the charge is filed with a designated State or local fair employment practice agency. Individuals may file a lawsuit in Federal court only after they receive a “right-to-sue” letter from the EEOC.

Charges of employment discrimination on the basis of disability may be filed at any U.S. Equal Employment Opportunity Commission field office. Field offices are located in 50 cities throughout the U.S. and are listed in most telephone directories under “U.S. Government.” For the appropriate EEOC field office in your geographic area, contact:

(800) 669-4000 (voice)

(800) 669-6820 (TTY)

www.eeoc.gov

While the employment provisions of the ADA apply to employers of fifteen employees or more, the Title II provisions apply to all sizes of local entities, regardless of number of employees. State and local governments, therefore, must comply with some ADA requirements regardless of size.

Title II prohibits discrimination in the way local governments provide or offer services, programs, or activities, including public transportation and facilities. It requires that employers give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, **employment**, transportation, recreation, health care, social services, courts, voting, and town meetings). Individuals with disabilities must be able to access employment services of the organization.

State and local governments are required to follow specific architectural standards in the new construction and alteration of their buildings. They also must relocate programs or otherwise provide access in inaccessible older buildings, and **communicate effectively with people who have hearing, vision, or speech disabilities**. Public entities are not required to take actions, however, that would result in undue financial and administrative burdens. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

Complaints of Title II violations may be filed with the Department of Justice within 180 days of the date of discrimination. In certain situations, cases may be referred to a mediation program sponsored by the Department. The Department may bring a lawsuit where it has investigated a matter and has been unable to resolve violations. For more information, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

(800) 514-0301 (voice)
(800) 514-0383 (TTY)

www.ada.gov

Title II may also be enforced through private lawsuits in Federal court. It is not necessary to file a complaint with the Department of Justice (DOJ) or any other Federal agency, or to receive a “right-to-sue” letter, before going to court.

What does Title I of the ADA Require?

- Employers may not discriminate with regard to employment terms, conditions, or privileges.
- Employers can’t segregate qualified disabled employees into separate work areas or separate lines of advancement (56 Fed. Reg. 35746).
- Any qualification standard, employment test, or other criteria that screens out or tends to screen out a disabled person (or a class of such persons) on the basis of disability is prohibited-unless shown to be job related and consistent with business necessity. An employer may require, as a qualification standard, that persons not pose a direct threat to their health and safety or that of others (56 Fed. Reg. 35737).
- Employers may not discriminate against a qualified individual because the person has a family, business, social, or other relationship with a disabled person, but they don’t have to accommodate these nondisabled persons (56 Fed. Reg. 35737).
- Employers must make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it would impose an undue hardship on government operations (56 Fed. Reg. 35737).

- Employers can't deny employment opportunities to the otherwise qualified because you would have to make reasonable accommodation for an individual's physical or mental impairments (56 Fed. Reg. 5737; 35749).
- Discrimination is prohibited against a person who opposes a practice made unlawful by the ADA or because a person makes a charge, testifies, assists, or participates in an investigation, proceeding, or hearing to enforce the ADA (56 Fed. Reg. 35737).
- Employers can't coerce, intimidate, threaten, harass, or interfere with someone exercising the rights granted and protected by the ADA, nor someone aiding/encouraging exercise of the rights [56 Fed. Reg. 35737].
- Employers can't conduct a medical examination of applicants or employees, nor make inquiries as to whether they are disabled or the nature or severity of a disability [56 Fed. Reg. 35737].

Who is Protected Under Title I?

- Qualified persons with a disability.
- Persons who have a known association with a disabled person.
- Persons who aid or encourage others to exercise any right granted or protected under the ADA.
- Individuals regarded as disabled.

Who is Disabled?

The regulations define a person as disabled if the individual meets any one of three tests: a physical or mental impairment substantially limiting one or more of the "major life activities," a record of such an impairment, or being regarded as having such an impairment (56 Fed. Reg. 35735). A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems listed in 56 Fed. Reg. 35735.

Impairments do not include physical, psychological, environmental, cultural, or economic characteristics. Age itself is not an impairment, but conditions commonly associated with age, such as hearing loss or arthritis, are impairments (56 Fed. Reg. 35741). The existence of an impairment is determined without regard for mitigating measures such as medicines, or assistive or prosthetic devices [56 Fed. Reg. 35740].

"Substantially limits" means unable to perform -or significantly restricted (in condition, manner, or duration) in performing - a major life activity that the average person can perform. Impairments may be substantially limiting for some, but not for others. It depends on, for example, the stage of a disease or the presence of other impairments. Here are some factors to consider:

- the nature and severity of the impairment;
- the duration or expected duration of the impairment; and

- the permanent or long-term impact (or the expected impact) of the impairment.

Decisions on whether a person is substantially limited in a major life activity must be made on a case-by-case basis.

“Major life activities” are activities the average person can perform with little or no difficulty. These include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Multiple impairments that combine to substantially limit one or more of a person’s major life activities also constitute a disability (56 Fed. Reg. 35742).

A person is substantially limited in the major life activity of working if the person is significantly restricted in the ability to perform a class of work- or a broad range of jobs in various classes - when compared to an average person with comparable training and skills. The inability to perform one particular job or narrow range of jobs doesn’t constitute a substantial limitation in the major life activity of working.

“Record of impairment” covers individuals such as recovering alcoholics or rehabilitated drug users -people with a history of disability and includes people misclassified as having a mental or physical impairment. The record establishing the disability may be an educational, medical, or employment record. However, a record identifying a person as disabled for some other purpose (identifying someone as a disabled veteran, for example) may not necessarily establish that person as disabled under the ADA [56 Fed. Reg. 35742].

Determining whether an individual is regarded by an employer as having an impairment that substantially limits a major life activity can be discerning because this issues addresses discrimination by an employer because of myths, fears, or stereotypes caused by the impact of the employee’s medical condition on productivity, safety, insurance, liability, attendance, acceptance by coworkers or the public, or cost of accommodation or workers compensation.

There are three ways a person may be regarded as having a disability. The person may:

1. have an impairment not substantially limiting but perceived by the employer as substantially limiting.
2. have an impairment that is only substantially limiting because of the attitudes of others toward the impairment.
3. have no impairment at all, but is regarded by the employer as having a substantially limiting impairment.

Who is a Qualified Individual With A Disability?

A “qualified individual with a disability” is a person who:

1. satisfies the skill, experience, education, and other job-related requirements, and
2. with or without a reasonable accommodation, can perform the essential functions of the position [56 Fed. Reg. 35743].

This analysis should be made when hiring a disabled person and based on the person's capabilities at that time. You can't speculate that the employee may become unable to do the job in the future or that employing the person may increase health insurance premiums or workers compensation costs (56 Fed. Reg. 35743).

Can Applications and Test Be Used?

Employers can generally ask about an applicant's or employee's ability to perform a job, but can't ask if someone has a disability or subject a person to tests that tend to screen out the disabled. Applications should be narrowly tailored to address only job-related needs consistent with business necessity. Any test or question must be an accurate reflection of the skills or qualifications needed for the job; even then, it's subject to challenge if a qualified applicant or employee could meet the job performance standards with a reasonable accommodation.

Job criteria that-even unintentionally-screen out or tend to screen out disabled persons (or a class of disabled persons) because of their disabilities may not be used unless the employer demonstrates the criteria are job-related and consistent with business necessity. Selection criteria such as vision, hearing, walking, and lifting requirements; safety requirements; and employment tests, even if job-related, can't be used to exclude a disabled person if that person could satisfy the criteria with a reasonable accommodation. To show a safety requirement is job-related, the requirement must satisfy the "direct threat" standard.

An employer cannot ask about an individual's workers compensation history or the extent of leave necessary to accommodate a disability, although the employer may state the attendance requirements of the position and ask whether the employee can meet them [56 Fed. Reg. 35732; 35737).

An employer must ensure that the interview or test site and the application process are accessible. Disabled persons can't be excluded from jobs merely because a disability prevents them from taking a test, or negatively influences the results of a test. Employment tests must be administered to eligible applicants or employees with sensory, manual, and speaking disabilities in a way that doesn't require the use of the impaired skill.

Employment tests that require the use of sensory, manual, or speaking skills, where the tests are intended to measure those skills, are permissible (if the skill is an essential function of the job). A disabled person may not realize prior to the administration of a test that an accommodation will be needed to take the test. In such a situation, upon becoming aware of the need for an accommodation, the person must inform the employer.

The employer may ask, on a test announcement or application form, that disabled persons who need reasonable accommodation to take a test tell the employer within a reasonable time before the test. The employer may also ask that documentation of the need for an accommodation accompany the request [56 Fed. Reg. 35750).

An employer isn't required to offer every applicant a choice of test format. When it's not possible to test in an accessible format, the employer may be required, as a reasonable accommodation, to evaluate the skill of the person in another manner.

Can Physical Agility Testing Be Used?

Physical agility tests aren't medical examinations and may be given to applicants and employees. Such tests must be given to all similarly situated applicants or employees regardless of disabilities. If the test would screen out or tend to screen out disabled persons, the employer must show that the test is job-related and consistent with business necessity and that performance can't be achieved with a reasonable accommodation [56 Fed. Reg. 35750). Because they may tend to screen out the disabled, policies requiring agility tests should be closely examined to ensure they're job-related and not really a medical exam.

How Are Medical Exams and Questions Affected By The ADA?

Medical exams and inquiries must serve a legitimate business purpose. Medical information is required to be kept confidential, except that:

- supervisors may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- government officials investigating compliance with the ADA shall be provided with relevant information upon request.

Medical information may not be used for any purpose inconsistent with the ADA.

Pre-employment (Job applicants)

- Employers may ask narrowly tailored pre-employment medical questions about the applicant's ability to perform job-related functions.
- Employers can collect voluntary data necessary to satisfy affirmative action requirements of the Rehabilitation Act.
- Employers can't inquire as to whether an applicant has a disability.
- Employers can't inquire about an applicant's workers compensation history.

Post-offer (pre-employment)

Employers may condition an offer of employment on the result of a medical exam required post-offer and before the applicant begins employment duties if all entering employees in the same job category are subjected to such an examination. Medical examinations not uniformly given or which tend to screen out the disabled must be job-related and consistent with business necessity. All decisions based on medical exams, whether business related or not, are subject to the reasonable accommodation requirement. That is, even if the applicant's medical exam reveals a disability, the employer may not refuse to hire if the disability can be reasonably accommodated.

Employees

- Employers may require a medical exam or ask questions when needed for an accommodation process.
- Employers may require a medical exam (fitness for duty) or other medical monitoring if job-related and consistent with business necessity. As an example, federal and state laws or a licensing process could require periodic exams for bus drivers or police officers [56 Fed. Reg. 37751].
- Employers may conduct voluntary medical examinations and activities, including voluntary medical histories that are part of an employee health program available to employees at the work site.

Can Different Benefits Be Offered?

The ADA requires an employer to provide equal access to whatever insurance is provided the non-disabled employees. A local government can't refuse to hire a disabled individual because insurance rates or workers compensation claims will rise. However, employers can offer policies with pre-existing condition clauses, or policies that limit coverage for certain procedures to a specific number per year, even if these policy provisions have a disparate impact on the disabled. No regulations have been issued yet on whether policies with a lifetime limit on amount of benefits for certain conditions, such as AIDS, will be allowed.

The ADA doesn't limit insurance plans based on underwriting risks or classifying risks. Thus, the employer may treat a disabled employee differently under an insurance or benefit plan because the disabled represent an increased hazard of death or illness. Even-handed application of actuarial principles in providing benefits is allowable (56 Fed. Reg. 35753).

What is a Reasonable Accommodation?

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables a person with a disability to enjoy equal employment opportunities. It is a means to remove equal employment barriers [56 Fed. Reg. 35747]. Employers are only required to make accommodation to the physical and mental limitations they know about. It's the responsibility of the disabled employee to inform the employer of needed accommodation [56 Fed. Reg. 35748]. A fundamental alteration in the nature of a job or the elimination of an essential job function isn't a reasonable accommodation.

A disabled employee cannot be forced to accept an accommodation. If the employee, however, refuses the accommodation and, as a result, is unable to perform an essential function, the employee is no longer a qualified person with a disability [56 Fed. Reg. 35749].

There are three categories of reasonable accommodation. They are:

- accommodations required to ensure equal opportunity in the application process;
- accommodations that enable employees with disabilities to perform the essential functions of the position; and

- accommodations that enable employees with disabilities to enjoy equal benefits and privileges of employment, both at the workplace and at non-work facilities.

Accommodations could include:

- making existing facilities accessible;
 - An employer isn't required to make the entire facility barrier-free, but just the part of the facility that allows the disabled to perform the essential functions of the job.
- restructuring a job by reallocating marginal (non-essential) job functions to other employees;
- assigning the disabled person to a different, vacant position, so long as that position is equivalent in pay and status;
 - Reassignments that result in a demotion may only be made if no accommodations are available that would enable the employee to remain in the current position and there are no equivalent vacant positions.
 - An employer isn't required to maintain the reassigned employee at the same salary level if the employer doesn't do so with non-disabled employees.
 - Also, an employer isn't required to promote the person as an accommodation [56 Fed. Reg. 35730].
- modified work schedules;
- permitting use of accrued leave or providing additional leave for necessary treatment;
- allowing the disabled employee to use aids and services the employer isn't required to provide as a reasonable accommodation;
 - a guide dog, for example.
- adjusting or modifying examinations, training materials, or policies;
- providing qualified readers or interpreters and other similar accommodations [56 Fed. Reg. 35744].

What is the Interactive Process?

The Interactive Process is the name given to the process that an employer utilizes in order to determine the appropriate reasonable accommodation that will enable an employee with a disability to perform the essential functions of the position. The requirement for the interactive process is in the appendix to the administrative rules to the Americans with Disabilities Act (See, 26 CFR part 1630 Appendix). In addition, the Ninth Circuit has made it very clear that participating in a good faith interactive process dialogue is an absolute requirement under the ADA. Employers who fail to do so will be liable for failing to provide a reasonable accommodation. See, e.g., *Barnett v. U.S. Air, Inc.* 228 F.3d 1105, 1112 (9th Cir 200), rev'd on other grounds, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed. 2d 589(2002).

So, what must an employer do to engage in a good faith interactive process? By following the best practices outlined in the steps below and training supervisors and managers, employers will

demonstrate good faith efforts to engage in the interactive process that will reduce liability in failure to accommodate claims.

Create a policy. Do not hide the interactive process requirement, rather publicize it. Inform employees that a requirement of the ADA is that both parties communicate in good faith regarding reasonable accommodations. A good idea is to include a discussion of the interactive process as part of the ADA policy. At a minimum, tell employees that if they request an accommodation, you will review their job description with them, determine the difficulties that their disability causes in their performance of the essential job functions, and brainstorm over accommodations that the employer can provide to assist them. When you update your next handbook, include this on the list of updates.

Review job descriptions. Check that you have accurately described the essential job functions in both job description and any advertisement or job posting for the position. The ADA regulations provide the following considerations in determining whether a job duty is essential:

- The reason that the job exists is to perform that duty;
- A large percentage of work time is spent performing the duty;
- There are no (or a limited number of) other employees available to perform the duty;
- The worker is hired for his or her expertise and the work is highly specialized;
- The employer judges the job duty to be essential to performing the job;
- Serious consequences would occur if the duty were not performed;
- The job duty is required by the terms of a collective bargaining agreement; and
- Individuals in that job in the past performed the duty.

Train supervisors to recognize an accommodation request. Accommodation requests are not always obvious. There is no requirement that an employee request an accommodation in writing. A statement by an employee that he or she is having a problem performing their job because of a medical condition is likely sufficient to constitute an accommodation request. Also train supervisors not to ask questions about the medical condition or disability at issue.

The EEOC provides the following examples of accommodation requests:

- An employee tells his supervisor, “I’m having trouble getting to work at my regularly scheduled starting time because I am undergoing medical treatments.”
- A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.

However, a simple request for a new chair, or some other request, without information that the need is related to a medical condition is probably not sufficient to be an accommodation request.

Arrange a personal meeting with the employee. This is the heart of the interactive process. There may not always be the necessity for a lengthy meeting. If the supervisor

who is asked for an accommodation can easily provide one, then he or she should do so as soon as possible. However, to establish that you have engaged in good faith in the interactive process, best practice is to schedule a meeting with the employee, the employee's supervisor and someone from HR.

A primary goal of this meeting is to determine what problems the employee is having in performing their job tasks because of a disability. This entails soliciting ideas from the employee about what the employer could provide that would enable the employee to perform his or her job duties. The employer may ask the individual relevant questions that will enable it to make an informal decision. In addition to soliciting ideas, the employer may also suggest solutions. The purpose of this brainstorming meeting is to come away with suggestions to enable the employee to continue working.

A couple of suggestions:

- If the employee has a work-related injury, consider involving your workers' compensation carrier to determine whether there are any monies from the state workers' compensation division to assist you in making workplace modifications
- If you are not sure of an accommodation, consider calling in an expert. This can be accomplished through a phone call to the Job Accommodation Network (JAN), or the employer can locate a vocational rehabilitation specialist to assist.
- If the employer consults an outside resource, like JAN, be careful about ensuring confidentiality. Do not disclose the employee's name and identifying information.
- Keep an open mind.
- In choosing the accommodation, it is a good idea to understand the employee's preference, but the employee does not get to choose the accommodation – the employer does. The law requires only that the accommodation be reasonable. Eliminating the requirement to perform an essential job function is not a reasonable accommodation. The employee must still be able to perform the essential job function with an accommodation.

Consider whether you need information from the employee's physician. Depending on the complexity of the issue, you may want to communicate through the employee with their physician to obtain information about the restrictions caused by the medical condition and any suggested accommodations. In any such communication be sure to include the safe harbor language required by the Genetic Information Nondisclosure Act (GINA), and limit your request to information that is required as a matter of business necessity. You may consider conferring with counsel regarding the content of the letter.

Continue the dialogue. The interactive process does not end with the interactive process meeting. Once you have found and implemented a reasonable accommodation, best practice is to follow up with the employee on a regular basis to ensure that the accommodation is effective. It is often common that the first accommodation will not be effective and you need to try something else. Your workplace policy should inform the employee that they must inform their supervisor if the accommodation is not effective.

Document the process. Document every step throughout the interactive process. Even though documenting short conversations between the supervisor and the employee may seem trivial, when it comes to defending a claim that you did not provide a reasonable accommodation this information is crucial. Document every conversation and the entire process. Keep the documentation in the employee's confidential medical file, not the personnel file.

Compliance Steps

- Review job descriptions to make sure all “essential functions” are included and “non-essential functions” excluded. “Essential functions” of a job are fundamental job duties and not the marginal functions of the position (56 Fed. Reg. 35743]. If you don't have accurate job descriptions, you may want to create them. Under the ADA, an employer's opinion as to “essential functions” must be considered.
- Make sure job application forms don't include questions regarding disabilities. It's only permissible to ask whether the person is able to perform the “essential functions.” This will require questions that are job- or skill-specific. Make sure there's no checklist of potential disability characteristics.
- Review any pre- and post-employment skills tests and how they are administered. Make sure they truly measure skills and aren't intended to determine whether a person has a disability or to screen out classes of individuals.
- Review drug testing requirements for compliance with the ADA. The ADA provides that if drug testing results reveal information about a person's medical condition beyond whether the person is currently engaged in the illegal use of drugs, the additional information must be kept confidential.
- Ensure those contracting with and receiving local government appropriations are complying with the ADA.
- Engage in the Interactive Process.
- Sensitize and educate current employees about ADA requirements.
- Review existing leave policy. If you don't have one, adopt one and apply it consistently.
- Post required notices regarding rights and benefits under the ADA.

Transition Plans and Self-Evaluation

Regardless of your city/county size, the 1991 ADA regulations required all public entities to evaluate all of their services, policies, and practices and to make modifications to any such services, policies, and practices that did not meet ADA requirements. In addition, if your public entity has 50 or more employees, your city/county is required to develop a transition plan

outlining any structural changes that must be completed in order to achieve access and specifying a time frame for completion of each modification.

1. Self-Evaluation:

- i. Programs, Policies and Practices
- ii. Design standards
- iii. All sidewalks, curb ramps and intersections
- iv. Public Rights of Way
- v. Pedestrian facilities including Accessible Pedestrian Signals (APS)
- vi. Transit stops/operations
- vii. Buildings/facilities
- viii. Parks and all park programs and amenities including swimming pools, playgrounds, areas of sports activity
- ix. Parking lots
- x. Housing Programs
- xi. Emergency Planning
- xii. Hiring/firing practices and Job Descriptions
- xiii. Boards and Commissions
- xiv. Website
- xv. Other forms of communication

2. Transition Plan:

- a. Schedule actions to be taken each year to remove barriers until all barriers are addressed.
- b. Develop cost projections and approve a budget
- c. Monitor progress and update plan regularly (recommendation would be to update on an annual basis)
- d. Identify person responsible for implementing plan
- e. Public participation

3. Deadlines

- a. Dec 2016 – ADA Coordinator & Grievance Procedure
- b. Dec 2017 – Official letter outlining process to develop your Transition Plan
- c. Sept 2018 – Submit self-certification form to TDOT
 - i. <https://www.tn.gov/content/dam/tn/tdot/documents/government-how-do-i-documents/FundingADAcompliance.pdf>
- d. Dec 2019 – Submit completed Transition Plans or risk losing TDOT funding

Website Accessibility

Does my city/county's website need to be accessible?

More and more city and county services are being provided on the city/county website. Online forms, ordinances, event calendars, employment information, council meeting announcements,

and more are all now being made available on the web. In June 2001 Section 508 of the Workforce Rehabilitation Act went into effect specifying the requirements for accessible Information and Communication Technology for federal agencies. You may wonder if non-federal websites are required to comply with the Revised 508 Standards. Section 508 only applies to federal agencies. However, many non-federal websites are still required to be accessible under other laws, such as Section 504 of the Rehabilitation Act of 1973.

Section 504 prohibits discrimination based on disability by federal agencies and recipients of federal assistance. Therefore, if your city or county receives federal funding or assistance, the city/county website is required to be accessible. Regardless, if you are designing a new website, the city/county should include accessibility requirements for the developers.

According to the U.S. General Services Administration, “most accessibility standards are moving toward WCAG 2.0 standards to best meet the needs of people with disabilities. Regardless of whether or not federal regulations apply to your website, designing for all users is a best practice, and will help your organization more effectively meet the needs of all your customers.”

What is an accessible website?

A website that is accessible needs to be navigable by people with visual or mobility limitations. For instance, a citizen with visual impairments may try to read your site with a text reading tool. If the city/county’s site is primarily designed with image files and no descriptive text, the reader will not be able to translate images into readable text.

Think about a citizen with a visual impairment trying to make a tax payment online. Can the page with the forms be read with a text reader? Can the links or buttons to click to begin the download be activated with a voice command system by someone who has no use of their hands? Great strides have been made to make every day activities available to people with disabilities. Local governments need to be aware of these adaptive technologies and strive to make their websites accommodate them at least at a basic level.

Another example, if your site utilizes security tools such as CAPTCHA (Completely Automated Public Turing Test To Tell Computers and Humans Apart) or other forms that cannot be read by a text reading tool, people with hearing and visual impairment will not be able to successfully use the municipal services on your site.

Visual and hearing impairments are not the only challenges to be considered. People with limited manual dexterity will not be able to use websites that do not support keyboard alternatives for mouse commands.

Remember that accessing your services at home, from a personal computer, rather than making a trip to city hall or the county courthouse may make the difference between a person with a disability being able to access your services.

World Wide Web Consortium (WC3) Web Accessibility Initiative

The World Wide Web Consortium (WC3 WAI) Web Accessibility Initiative provides guidelines for design and deploying accessible websites. From the clear guidelines on what an accessible website is, policy samples, how to design an accessible website, testing and evaluating your site, and standards and guidelines, this group sets the standards for accessible websites.

Sites that are required to be accessible as well as those that are coming into compliance as a best practice are working to adopt the WCAG standards (Web Content Accessibility Guidelines).

The WCAG guidelines are summarized into the following categories of standards: perceivable, operable, understandable and robust.

- Perceivable standards are related to text alternatives, captions, content being presented in ways that assistive technologies can interpret and ease of seeing and hearing content.
- Operable content is available with keyboard commands, not just the mouse, length of time the text available for reading, content that does not cause seizures, and content that helps users navigate and find content.
- Understandable content is both readable clear in meaning and purpose
- Robust sites maximize compatibility with current and FUTURE tools.

Technical Suggestions for Website Accessibility

The ADA Website Accessibility Checklist provides the following suggestion for website accessibility:

1. Provide Text Equivalents for Images –

Adding a line of simple HTML code to provide text for each image and graphic will enable a user with a vision disability to understand what it is. Add a type of

- a. HTML tag, such as an “alt” tag for brief amounts of text or a “longdesc” tag for large amounts, to each image and graphic on your agency’s website.
- b. The words in the tag should be more than a description. They should provide a text equivalent of the image. In other words, the tag should include the same meaningful information that other users obtain by looking at the image. In the example of the mayor’s picture, adding an “alt” tag with the words “Photograph of Mayor Jane Smith” provides a meaningful description.
- c. In some circumstances, longer and more detailed text will be necessary to convey the same meaningful information that other visitors to the website can see. For example, a map showing the locations of neighborhood branches of a city library needs a tag with much more information in text format. In that instance, where the map conveys the locations of several facilities, add a “longdesc” tag that includes a text equivalent description of each location shown on the map – e.g., “City

Center Library, 433 N. Main Street, located on North Main Street between 4th Avenue and 5th Avenue.”

2. Provide Documents in Accessible Format – Always provide documents in an alternative text-based format, such as HTML or RTF (Rich Text Format), in addition to PDF. Text-based formats are the most compatible with assistive technologies.
3. Avoid Dictating Colors and Fonts – While the tendency is to seek an aesthetically pleasing format of colors and fonts, people with low vision may need to modify fonts and colors to see the webpage. Websites should be designed so they can be viewed with the color and font sizes set in users’ web browsers and operating systems. Users with low vision must be able to specify the text and background colors as well as the font sizes needed to see webpage content.
4. Include Audio Descriptions and Captions for Videos - Videos need to incorporate features that make them accessible to everyone. Provide audio descriptions of images (including changes in setting, gestures, and other details) to make videos accessible to people who are blind or have low vision. Provide text captions synchronized with the video images to make videos and audio tracks accessible to people who are deaf or hard of hearing.
5. Other Suggestions:
 - a. include a “skip navigation” link at the top of webpages that allows people who use screen readers to ignore navigation links and skip directly to webpage content;
 - b. minimize blinking, flashing, or other distracting features;
 - c. if they must be included, ensure that moving, blinking, or auto-updating objects or pages may be paused or stopped;
 - d. design online forms to include descriptive HTML tags that provide persons with disabilities the information they need to complete and submit the forms;
 - e. include visual notification and transcripts if sounds automatically play;
 - f. provide a second, static copy of pages that are auto-refreshing or that require a timed-response;
 - g. use titles, context, and other heading structures to help users navigate complex pages or elements (such as webpages that use frames).

Costs

When making structural alterations, a local government is limited to 20% of the overall cost of the alterations. If the alterations can be completed for less than 20%, then only that expenditure is required. If the facility is already in compliance with accessibility, no additional expenditure is required. In addition, costs of making a program accessible cannot be passed on to the individual with a disability.

According to ergonomic and job accommodation experts, the costs of reasonable accommodations for an employee with a disability are fairly low:

- 31% of accommodations cost nothing.
- 50% cost less than \$50.
- 69% cost less than \$500.
- 88% cost less than \$1,000.

What Every City and County Needs to Have

- ADA Policy
- Public Notice
- Training; Sensitivity and Awareness
- Resources