

## **AMERICANS WITH DISABILITIES ACT**

### **What is the Americans with Disabilities Act (ADA)?**

The Americans with Disabilities Act<sup>1</sup> is a far reaching and complex federal law which prohibits discrimination against persons with disabilities.

### **What is a “disability” for purposes of the ADA?**

The ADA defines a “disability<sup>2</sup>” in three ways:

- A disability is a mental or physical impairment that substantially limits one or more “major life activities” such as walking, seeing, hearing, sleeping, or taking daily care of one’s self.
- A disability is having a record of such a mental or physical impairment.
- A disability is also “being regarded as having such an impairment.”

Whether an individual has a disability under the ADA is a legal, not medical, question.

### **Does the ADA prohibit physicians from discriminating against persons with disabilities in the delivery or provision of health care services and treatment?**

Yes. The ADA forbids disability-based discrimination<sup>3</sup> in the delivery of health care services and treatment in two contexts – “public accommodation<sup>4</sup>” and “public entity<sup>5</sup>.” The standards to be applied in each of these two contexts differ.

The ADA forbids discrimination against disabled individuals “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>6</sup> Under the ADA, the term “public accommodation” includes “professional offices of health care providers.”<sup>7</sup>

The ADA also prohibits public entities such as state universities, state hospitals, public schools, local health departments, or state or local government funded clinics from denying or

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<sup>1</sup> Americans With Disabilities Act of 1990; 42 U.S.C. § 1210; Pub. L. No. 101-336, 104 Stat. 328 (1990).

<sup>2</sup> 42 U.S.C. § 12102(2); see also 29 C.F.R. § 1630.2(g)

<sup>3</sup> The ADA also protects individuals from discrimination on the basis of their relationship or association with a person with a disability. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8; see also Senate Report at 30; House Education and Labor Report at 61-62; H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess. 38-39 (1990) [hereinafter House Judiciary Report]. Further, the Act prohibits retaliation or coercion against individuals because they have opposed any act that the ADA makes unlawful, have participated in the enforcement process, or have encouraged others to exercise their rights secured by the ADA. 42 U.S.C. § 12203; 29 C.F.R. § 1630.12; see also Senate Report at 86; House Education and Labor Report at 138; House Judiciary Report at 72.

<sup>4</sup> See 42 U.S.C. §§ 12181-12189.

<sup>5</sup> See 42 U.S.C. §§ 12131-12165.

<sup>6</sup> 42 U.S.C. § 12182(a).

<sup>7</sup> 42 U.S.C. § 12181(7)(F).

excluding qualified individuals with disabilities from participation in the benefits of that entity's services, programs, or activities.<sup>8</sup>

**Is a physician prohibited from refusing to treat persons who have AIDS, are HIV positive, appear to have AIDS, appear to be HIV positive, or have hepatitis C?**

Yes. Under the ADA, it is unlawful conduct for a physician, who is otherwise qualified to treat the patient's condition, to refuse treatment to a patient because the patient has AIDS, is HIV positive, or is perceived to have either condition. An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.<sup>9</sup> Persons with HIV disease, both symptomatic and asymptomatic, have physical impairments that substantially limit one or more major life activities and are, therefore, protected by the law.<sup>10</sup>

Also, under Washington State's Law Against Discrimination, it is also unlawful to discriminate against a patient that has HIV or hepatitis C.<sup>11</sup> **See AIDS/HIV/STD; and DISCRIMINATION.**

**Does the ADA require barrier-free architecture for physical access to hospitals, clinics, and private physician offices?**

Generally, yes<sup>12</sup>. The ADA dictates barrier-free architecture in new construction and modification or removal of physical barriers in existing construction for places of public accommodation<sup>13</sup> and public entities.<sup>14</sup> If such premises are physically inaccessible to disabled persons, then these places discriminate against disabled persons by effectively denying them access to the services provided.<sup>15</sup>

Of particular importance are structural barriers to parking spaces, entrances, doors, hallways, exits, restrooms, water fountains, and telephones.<sup>16</sup> Structural barriers to physical access must be removed unless it is structurally impractical to do so or unless it would result in a significant, burdensome expense.<sup>17</sup>

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<sup>8</sup> 42 U.S.C. § 12131(1); 42 U.S.C. § 12132; 28 C.F.R. § 35.130.

<sup>9</sup> 56 FR 35694, July 26, 1991.

<sup>10</sup> *Id.*

<sup>11</sup> RCW 49.60.172.

<sup>12</sup> See both Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990. Also, the U.S. Department of Health and Human Services Office for Civil Rights provides a manual on Access to Medical Care for Individuals with Mobility Impairments, located here [http://www.ada.gov/medcare\\_mobility\\_ta/medcare\\_ta.htm](http://www.ada.gov/medcare_mobility_ta/medcare_ta.htm) (2011)

<sup>13</sup> 42 U.S.C. § 12182(b)(2)(A)(iv).

<sup>14</sup> 28 C.F.R. § 35.151.

<sup>15</sup> 42 U.S.C. § 12132.

<sup>16</sup> 28 C.F.R. § 35.151(b).

<sup>17</sup> 28 C.F.R. § 35.151.

**Does the ADA require hospitals, clinics, and private physician offices to furnish “auxiliary aids and services” to individuals with disabilities to assure effective communication?**

Generally, yes. Unless the provision of “auxiliary aids and services”<sup>18</sup> would result in significant difficulty or expense, places of public accommodation such as hospitals, clinics, and private physicians’ offices must enable individuals with disabilities to communicate effectively.

The ADA defines the term “auxiliary aids and services” to include qualified interpreters (or other effective of making aurally delivered materials available to individuals with hearing impairment), qualified readers taped text (or other effective of making visually delivered materials available to individuals with visual impairment), acquisition or modification of equipment or devices, and other similar services and actions.<sup>19</sup> The federal regulations implementing the ADA, list examples for individuals with hearing and visual impairments, which include qualified interpreters, notetakers, assistive listening devices, Brailled materials, taped texts, and qualified readers.<sup>20</sup> See INTERPRETER SERVICES.

**May a physician discuss a patient’s disability or need for accommodation directly with the patient’s employer or a physician representing the patient’s employer?**

Generally, no<sup>21</sup>. A physician may only discuss a patient’s condition with the patient’s employer after the physician has received written permission from the patient to do so.

**May a physician recommend that a patient’s employer make a specific accommodation for a patient?**

Generally, yes. A physician may, with the patient’s consent, recommend a specific accommodation to a patient’s employer.<sup>22</sup> However, a physician should keep the following non-medical considerations in mind:

- Whether an accommodation is reasonable is an employment decision, not a medical conclusion.
- Whether a patient is disabled under the ADA is ultimately a legal, not medical, decision;
- When attempting to advise an employer about the need for accommodation, the physician should connect the specific accommodation requested to the nature of the patient’s condition.
- Because the Washington Law Against Discrimination<sup>23</sup> defines “disability” differently than the federal law, a physician should specify what condition a patient has and whether that condition is cognizable and capable of being diagnosed.

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<sup>18</sup> The determination of whether a condition constitutes an impairment must be made without regard to mitigating measures. 29 C.F.R. pt. 1630 app. § 1630.2(h).

<sup>19</sup> 42 U.S.C. § 12103(1).

<sup>20</sup> 28 C.F.R. § 35.104 (Title II), 28 C.F.R. § 36.303(b)(1), (2) (Title III).

<sup>21</sup> 45 C.F.R. § 164.502(a).

<sup>22</sup> *Id.*

- When addressing accommodation, a physician should state the physician's source of information about the patient's job duties. Unless the physician has done an on-site evaluation of the patient's job or has received an official job description, the physician is relying exclusively on the patient's description of the patient's job functions. Other information may enable the physician to provide more accurate and realistic suggestions.
- When discussing a particular medical condition and any recommended accommodations or work restrictions, a physician should discuss the patient's individual medical situation and individual needs and their impact on the patient's specific job rather than make generalized statements about the condition.

### **May a physician refuse to recommend a specific accommodation?**

Yes.

### **What is a "medical examination" in the context of determining disability accommodations between an employer and an employee?**

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health<sup>24</sup>. The guidance on Preemployment Questions and Medical Examinations lists the following factors that should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used<sup>25</sup>.

In many cases, a combination of factors will be relevant in determining whether a test or procedure is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

Medical examinations include, but are not limited to, the following:

- Vision tests conducted and analyzed by an ophthalmologist or optometrist;
- Blood, urine, and breath analyses to check for alcohol use<sup>26</sup>;
- Blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);

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<sup>23</sup> RCW 49.60.040(7); RCW 49.60.172; RCW 49.60.174.

<sup>24</sup> Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990, 8 FEP Manual (BNA) 404:7191 (1995). This and other ADA guidance are available at <http://www.eeoc.gov>.

<sup>25</sup> Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act, available at: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

<sup>26</sup> *Id.*

- Blood pressure screening and cholesterol testing;
- Nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- Range-of-motion tests that measure muscle strength and motor function;
- Pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- Psychological tests that are designed to identify a mental disorder or impairment; and,
- Diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

There are a number of procedures and tests employers may require that generally are not considered medical examinations, including:<sup>27</sup>

- Tests to determine the current illegal use of drugs;
- Physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);
- Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
- Psychological tests that measure personality traits such as honesty, preferences, and habits; and,
- Polygraph examinations. (Note: Under the ADA, polygraph examinations which purportedly measure whether a person believes he/she is telling the truth in response to a particular inquiry, are not medical examinations. However, an employer cannot ask disability-related questions as part of the examination.<sup>28</sup>

### **Does the ADA prohibit employment discrimination against persons with disabilities?**

Yes. The ADA mandates equal employment opportunities for “qualified” individuals who are also “disabled” and prohibits discrimination against them in job application procedures, hiring, advancement, compensation, training, benefits, discharge, or other terms and conditions of employment.<sup>29</sup> Under some circumstances, the ADA further requires employers to provide a “reasonable accommodation” to a qualified individual with a disability. See

### **DISCRIMINATION.**

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 42 U.S.C. § 12112(a).

## Who is a “qualified” individual to whom the ADA applies?

Under the ADA, a “qualified individual with a disability” is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.<sup>30</sup>

Employees whose disabilities can be corrected with eyeglasses or contact lenses may not be covered under the ADA as having an impairment that substantially limits one or more major life activities, but the employee still may be considered disabled under the “record of” or “regarded as having” definitions of disability.<sup>31</sup> However, determining whether an impairment substantially limits a major life activity must be made without taking into account mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy or supplies, assistive technology, reasonable accommodation or auxiliary aids or services, or learned behavioral or adaptive neurological modifications.<sup>32</sup>

## What is a “reasonable accommodation”?

Generally, a reasonable accommodation is something that enables a disabled employee to perform the essential functions of the job or permits an employee to enjoy similar benefits to those which other employees enjoy.<sup>33</sup> Under the ADA, “reasonable accommodation” may include making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities, and other modifications including job restructuring, part-time or modified work schedules, reassignment to a vacant position, modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.<sup>34</sup>

The ADA does not require wholesale job restructuring or shifting of the essential functions of the job to other employees.<sup>35</sup> The ADA also does not require the creation of a job.<sup>36</sup>

An employer may be relieved of any obligation to provide a reasonable accommodation if the individual’s employment poses a direct threat to the health or safety of others that cannot

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<sup>30</sup> 42 U.S.C. § 12131(2).

<sup>31</sup> 42 U.S.C. § 12102(4)(E)(ii) (ADA Amendments Act of 2008, P.L. 110-325 (2008)); *Sutton v. United Airlines* 527 U.S. 471 (1999) 130 F.3d 893, affirmed. (Court affirmed ruling that correctable myopia did not qualify as a disability under ADA. A person with a physical or mental impairment that is correctable with medication or some other means does not have a disability that limits a major life activity.)

<sup>32</sup> 42 U.S.C. § 12102(4)(E)(i).

<sup>33</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

<sup>34</sup> 42 U.S.C. § 12111(9).

<sup>35</sup> 29 C.F.R. pt. 1630 app. § 1630.2(n).

<sup>36</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o); *See also: White v. York Int’l Corp.*, 45 F.3d 357, 362(10<sup>th</sup> Cir. 1995).

be eliminated by reasonable accommodation.<sup>37</sup> Fear of a direct threat, however, is not enough to relieve an employer of the obligation to provide a reasonable accommodation.<sup>38</sup>

**May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?**

Yes<sup>39</sup>, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

**Does the ADA's prohibition against employment discrimination apply to all employers?**

No. Job discrimination against people with disabilities is illegal if practiced by:

- Private employers,<sup>40</sup>
- state and local governments,<sup>41</sup>
- employment agencies,<sup>42</sup>
- labor organizations,<sup>43</sup> and
- labor-management committees.<sup>44</sup>

The part of the ADA enforced by the EEOC outlaws job discrimination by all employers, including State and local government employers, with 15 or more employees after July 26, 1994.<sup>45</sup>

The Washington Law Against Discrimination<sup>46</sup>, however, also prohibits employment discrimination based on the presence of a physical, mental or sensory disability by all employers with eight or more employees. See DISCRIMINATION.

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<sup>37</sup> 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r).

<sup>38</sup> 29 C.F.R. pt. 1630 app. § 1630.2(r).

<sup>39</sup> EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, available at: [http://www.eeoc.gov/policy/docs/accommodation.html#N\\_21](http://www.eeoc.gov/policy/docs/accommodation.html#N_21). Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

<sup>40</sup> 42 U.S.C. §§ 12111(2), 12112(a).

<sup>41</sup> 42 U.S.C. §§ 12131(1), 12132.

<sup>42</sup> 42 U.S.C. §§ 12111(2), 12112(a).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 42 U.S.C. § 12111(5)(A).

<sup>46</sup> RCW 49.60.040(11), 49.60.180.