

Disability Law: Employment, Community Access, and Public Accommodations

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Clarity at Work

What is Disability?

- Physical Disability
- Intellectual/Developmental Disability;
- Mental Illness;
- Traumatic Brain Injury;
- Sensory Impairments (Blind/Low Vision, Deaf/Hard of Hearing);
- ADD/Learning Disabilities;
- Autism Spectrum Disorder; or
- Functional limitation consistent with the Americans with Disabilities Act.

Understanding Disability

- Nearly everyone experiences a significant illness or disability at some point in life; yet economic, political, social, and cultural factors complicate the legal and medical frameworks through which societies often address issues of disability and access.

Conceptions of Discrimination on the Basis of Disability

- Contemporary employment, health care, governmental and rehabilitation programs and policies affecting people with disabilities are still frequently modeled on outmoded and medicalized stereotypes about disabilities.
- Modern Disability Rights Movement





ADAPT

Independent Living Movement

Disability Rights and Education Defense Fund

U.S. Disability Laws

- Architectural Barriers Act 1968
- Rehabilitation Act of 1973
- Education For All Handicapped Children Act of 1975/IDEA
- Voting Accessibility For The Elderly And Handicapped Act of 1984
- Air Carrier Access Act of 1986
- Fair Housing Amendments Act of 1988
- Family and Medical Leave Act 1992
- Genetic Information Non-Disclosure Act 2008

Americans with Disabilities Act

- The ADA is a federal civil rights law for people with disabilities.
- It covers employment, state and local government services, public accommodations, and telecommunications for the deaf.
- The ADA is designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same opportunities that are available to persons without disabilities.
- Enacted in 1990 with huge, bi-partisan support, signed into law by President George H. W. Bush

ADA Amendments Act of 2008

- Courts narrowed the original 1990 ADA's definition of disability so that almost no one was covered
- ADA Amendments Act of 2008 changed the definition of "disability" so that individuals who use *mitigating measures* are now protected
- Definition of disability includes impairments that are transitory* or episodic, such as epilepsy, which were not considered a disability under the previous version
- Includes individuals who are "regarded as" having a disability

Working with the ADA

- What does “person with a disability” mean under the Americans with Disabilities Act?
- What is the ADA? What are the parts of the ADA?
- What is a reasonable accommodation or modification?
- What are some of the other laws that establish disability rights?

Structure of the ADA

- **Title I: Employment**
- **Title II: State and Local Government Services and Programs**
- **Title III: Private Entities Operating Public Accommodations or Commercial Facilities**
- **Title IV: Telecommunications**
- **Title V: Miscellaneous**

Defining Disability in the ADA

- Actual Disability
- Record Of
- Regarded As
- Association
- Retaliation (for protected activity)
- Qualified: Essential Requirements

Who is covered?

All people with disabilities, visible and hidden, including:

- a person with a physical or mental impairment that **substantially limits** one or more **major life activities** OR
- a person with a **record** of such an impairment (even if that record is inaccurate), OR
- a person who is “**regarded as**” having such an impairment

Who is NOT covered?

Some people are explicitly excluded from coverage, including:

- current users of illegal drugs (but those with a history of drug or alcohol abuse are covered, and an employer may continue to conduct drug tests on employees for illegal drugs.)
- those with "sexual behavior disorders" such as transvestitism or transsexualism, AND
- those who have the conditions of compulsive gambling, kleptomania, or pyromania.
- Those with ordinary vision loss that can be corrected

TITLE I - EMPLOYMENT



- Applies to private employers, State and local governments, employment agencies, and labor unions
- Must have 15 or more employees
- Prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment
- Only required to accommodate a “known” disability. Must request an accommodation
- Title I with respect to private employers is enforced by the Equal Employment Opportunity Commission (EEOC).

Qualified Individual with a Disability

- Has a physical or mental impairment that substantially limits a major life activity
- A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the ***essential functions*** of the position ***with or without reasonable accommodation***.
- Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions.

Major Life Activities

- Seeing
- Hearing
- Walking
- Speaking
- Breathing
- Learning
- Working
- Caring for oneself
- Performing manual tasks
- Standing
- Lifting

Now also include:

- Bending
- Eating
- Sleeping
- Reading
- Concentrating
- Thinking
- Communicating

Substantially Limits

- An impairment is a disability if it substantially limits the condition, manner, or duration under which an individual can perform a major life activity as compared to most people in the general population

Duration of Impairment

- Temporary non-chronic impairment of short duration, such as a broken bone that is expected to heal normally, usually not substantially limiting
- Impairments that are **episodic** or **in remission** are disabilities if they would substantially limit a major life activity when active
- Episodic conditions that impose only minor limitations are not substantially limiting

“Regarded As” Disabled

- Broader definition of “regarded as” disabled will cover anyone subjected to an action prohibited by the ADA because of a real or perceived physical or mental impairment
- No longer need to show that Employer perceived individual as being substantially limited in a major life activity, only that they perceived an impairment

Mitigating Measures

These are no longer included when determining whether someone qualifies as “disabled” entitling them to protection under the ADA:

- Medication, medical supplies and equipment, low vision and hearing devices, prosthetics, mobility devices, etc.
- Use of assistive technology
- Learned behavioral or adaptive neurological modifications
- Reasonable accommodations

The Accommodation Principle

- Reasonable accommodation is a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions.
- Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has *rights and privileges in employment* **equal to** those of nondisabled employees.
- The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness, i.e., whether the accommodation will enable the person with a disability to do the job in question.

Reasonable Accommodations

Under the ADA: Title I

- An employee is a “qualified individual” with a disability if she can perform the “essential functions” of the job, with or without “reasonable accommodations”
- Must accommodate known physical or mental limitations of an “otherwise qualified” applicant or employee
- No denial of employment opportunities based on the need for Reasonable Accommodation
- Costs of reasonable accommodations cannot be charged to persons with disabilities.
- Individuals with disabilities cannot be required to accept separate benefits.

Limitations on Reasonable Accommodations

- Employer not required to make an accommodation if it imposes "undue hardship" on employer's business.
- "**Undue hardship**" is "an action requiring significant difficulty or expense" when considered in light of factors:
 - nature & cost of the accommodation in relation to the size, resources, nature, & structure of the employer's operation
 - Where facility making the accommodation is part of a larger entity, structure & overall resources of larger organization will be considered, as well as administrative & financial relationship of the facility to larger organization
 - Larger employers expected to make accommodations requiring greater effort or expense than smaller employers

The Process

Request:

- Can come before or after employee is hired
- Part-time, full time, probationary
- No magic words
- Non-disclosure/confidentiality

Interactive process:

- continues past initial attempt/offer of RA
- Requires direct and good faith communication
- Employer may request supporting documentation
- Must be consultative

Job Accommodation Network

- <https://askjan.org/soar.cfm>
- The Job Accommodation Network (JAN) is the leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues. Working toward practical solutions that benefit both employer and employee, JAN helps people with disabilities enhance their employability, and shows employers how to capitalize on the value and talent that people with disabilities add to the workplace.
- JAN is funded by a contract from the U.S. Department of Labor, [Office of Disability Employment Policy \(ODEP\)](#) (#1605DC-17-C-0038). Its development has been achieved through the collaborative efforts of ODEP, [West Virginia University](#), and private industry throughout North America.

ADA Title II – Public Services

- State and local governments, and their instrumentalities:
- State/City/County programs and activities
- Courts
 - Participating in trials and hearings, as participants/litigants and as observers
 - Access to publications, libraries, Internet sites
 - Mediation or ADR programs
 - Trainings and educational programs
 - Juror selection process
- City Council Meetings
- Police & Fire Departments

ADA Title II: State and Local Governments

- May not refuse to allow a person with a disability to participate in a service, program, or activity because of the disability.
- Are required to make reasonable modifications to policies, practices and procedures that deny equal access.
- Must furnish auxiliary aides and services when necessary to assure effective communication.
- May not impose special charges on individuals to cover the costs of necessary measures.
- May not impose an accommodation or benefit

Program Access

- The program must be accessible-must have equal opportunity to benefit
- People must not be excluded from programs, services and activities because buildings are inaccessible.
- Barrier removal, alternate site, other methods of access
- When separate programs are allowed, a person may still choose to participate in the regular program. This may change the obligations of the entity for the regular program.
- Absence of a person with a disability does not relieve an entity of its obligation to make a program accessible.

Examples

- Assisting a person in filling out forms and guiding them through the application process for services when their disability makes it difficult to follow the process.
- If a local museum offers sign language tours, it cannot prevent a person who is deaf or hard of hearing from going on a different tour and does not eliminate the obligation to provide auxiliary services for different tours.
- A county recreational program may require that all participants in its scuba program pass a swim test, if it can demonstrate that it is necessary for safe participation in the class. This is allowed, even though it may tend to screen out people with certain types of disabilities.

More Examples

- Moving a meeting to an accessible ground floor location permanently, or upon request, when it was held in an inaccessible upper floor room before.
 - All areas in the building do not have to be made accessible, but there should be accessible telephones and bathrooms.
 - Back doors and freight elevators can satisfy accessibility requirements as last resorts and only if it provides comparable accessibility.

Reasonable Accommodations

Under the ADA: Title II

- A reasonable accommodation is any modification or adjustment that will enable a qualified person with a disability the same benefit equal to that of a person without a disability.
- If a public entity can demonstrate that a particular modification would ***fundamentally alter*** the nature of its service, program, or activity, or it would cause an ***undue financial hardship*** it is not required to make that modification. However, it should look to another accommodation that would not be a hardship.

Discrimination & Obligations

- May not refuse to allow a person with a disability to participate in a service, program, or activity because of the disability.
- Are required to make **reasonable modifications** to policies, practices and procedures that deny equal access.
- Must **furnish auxiliary aides and services** when necessary to assure effective communication
- May **not impose special charges** on individuals to cover the costs of necessary measures
- **May not impose** an accommodation or benefit

Discrimination & Obligations

- **Program Accessibility**
 - equal opportunity to benefit
- **Building Accessibility**
 - Barrier removal, alternate site, other methods of access
- **Integration**
 - When separate programs are allowed, a person may still choose to participate in the regular program.
 - *Olmstead* – integration mandate

Service Animals

- Beginning on March 15, 2011, only dogs are recognized as service animals under Titles II and III of the ADA.
- A service animal is a dog that is individually trained to do work or perform tasks for a person with a disability.
- Generally, Title II and Title III entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go.

Auxiliary Aids and Services

- assistive listening devices and headsets,
- brailled, large-print, and taped texts, TV decoders, and TDD/TTY (text telephone for the deaf, hearing and speech impaired).
- Auxiliary aids and services do not include devices or assistance of a personal nature, e.g., eyeglasses, hearing aid, or assistance with toileting.

Qualified Sign Language Interpreter

- An interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and
- Can voice to the hearing person what is being signed by the individual who is deaf
- This communication must be conveyed:
 - effectively,
 - accurately, and
 - impartially,
 - through the use of any necessary specialized vocabulary

Section 504 Discrimination

- “Handicapped persons *may* require different treatment in order to be afforded equal access to federally assisted programs and activities, identical treatment *may*, in fact, constitute discrimination.”
- 41 F.R. 20296 (May 17, 1976).

Transportation

- Specific requirements for transportation services offered by state and local governments and private operators
- All new public buses and commuter trains must be accessible (lift-equipped, proper signage, warning symbols, etc.).
- For those people with disabilities who cannot use mainline transportation, paratransit (door-to-door) service must be offered with service response time, cost and availability comparable to the mainline service

Community Integration

- Olmstead, 1999 Supreme Court decision by Justice Ginsburg, interpreting the ADA's "integration mandate"
- Requires public agencies to provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities."
- Right to live in the most integrated setting appropriate to one's needs
- Avoid "unjustified isolation" & segregation
- Increase community based services and supports for reintegration and recovery
- Reallocate funds for supportive housing and evidence-based treatments

Making Courts Accessible

- Assess accessibility, solicit input from people with disabilities, universal design, proactively identify barriers to facilities, equipment and services
- ADA Coordinator
- Local protocols, education, training for court staff, notice to public
- <http://courts.mi.gov/Administration/SCAP/OfficesPrograms/Documents/access/ADA-PowerPoint.pdf>

U.S. DOJ ADA Guidance: Law Enforcement

- Law enforcement agencies are covered under Title II because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds.
- Under the Americans with Disabilities Act (ADA), people who have disabilities are entitled to the same services law enforcement provides to anyone else. They may not be excluded or segregated from services, be denied services, or otherwise be treated differently than other people.

Services Courts *Not* Required to Provide

- Transportation to and from the courthouse
- Legal counsel or advice
- Personal devices such as wheelchairs
- Personal services such as medical or attendant care

<https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/Documents/access/ADA-PowerPoint.pdf>

Title II Compliance & Enforcement

- Most public entities are required to have a grievance procedure available & ADA Coordinators
- An individual or class can file an administrative complaint with a Federal agency or file a lawsuit in Federal district court (DOJ, DOT, DOE, etc.)
- State or Federal District Court
- U.S. Dept. of Justice may intervene

ADA Title III: Places of Public Accommodations

ADA Title III: Places of Public Accommodations

Public accommodations are any place, building, or outdoor space which a member of the public can enter with or without a fee.

It does not include "private clubs" (those for which members exercise a high degree of control, e.g., substantial fees, membership must be voted on by other members) and operations owned or operated by religious entities, unless the facility rented out for a public function.

Title III Obligations

A public accommodation:

- cannot deny goods or services because a person has a disability or is associated with a person with a disability,
- cannot offer only unequal or separate benefits (participation is an unequal benefit), AND
- must offer services in the most integrated setting possible.
- cannot use contractual or administrative methods that have the effect of discriminating
- Cannot discriminate on the basis of association with a person with a known disability
- Special programs for people with disabilities can still be offered, as long as the programs offered to all other people are still available to those with disabilities.

What are physical access requirements for for public accommodations?

- A newly constructed public accommodation must meet all of the physical access requirements of the ADA Access Guidelines (ADAAG), unless a state standard is stricter.
- A public accommodation being remodeled must have the part being altered accessible to the "maximum extent feasible" according to the ADAAG. If the part being altered is a primary function area (e.g., training center), then that area must be connected to the main entrance by an accessible route which includes accessible bathrooms, drinking fountains, etc. along the route.

ADA Access Guidelines (ADAAG)

- THERE IS NO GRANDFATHER PROVISION!
- Existing public facility not undergoing alterations must be made accessible if "readily achievable," meaning "without much difficulty or expense"
- Entity looks at total budget versus cost of features to determine whether cost of accessibility would be undue. Examples of "readily achievable" alterations are: ramps, curb ramps, rearranging furniture, moving plants, widening doorways, putting tactile markers on elevators.
- If existing facility cannot be made accessible, it must provide service in an alternative manner, e.g., free delivery, taped tours of inaccessible exhibits, dixie cup dispensers on water fountains.

Website and Mobile App Accessibility Under Titles II and III

[Web Content Accessibility Guidelines \(WCAG\) 2.0](#)

U.S. Department of Justice cites to this as acceptable metrics for accessibility

WCAG 2.0 includes different criteria at three different “success levels” of accessibility, e.g.:

- Alt-text and titles for images
- Clean and consistent formatting
- high-contrast color schemes, but minimal color & images
- closed captions for video content
- Simplify steps
- Include live chat and telephone options

Internet Accessibility

Principle 1: Perceivable

- Information and user interface components must be presented to users in ways they can perceive. This means that users must be able to comprehend the information being depicted: It can't be invisible to all their senses.

Principle 2: Operable

- User interface components and navigation must be operable: *The interface cannot require interaction that a user cannot perform.*

Principle 3: Understandable

- Information and the operation of a user interface must be understandable: Users must be able to understand the information as well as the operation of the user interface.

Principle 4: Robust

- Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies: *As technologies and user agents evolve, the content should remain accessible.*

Public (II) v. Private (III) Entities: some differences

- Title III (private) requires “readily achievable barrier removal” as compared to Title II’s (public) “program accessibility requirement”
- Public entities are not required to remove barriers from each facility, even if readily achievable. Physical changes are required when the program is not otherwise accessible.
- Title II and Title III have specific provisions about transportation.
- Title III entities must comply with ADAAG while Title II entities can choose between ADAAG and UFAS.

Accessibility

ADA: Title III

- <http://creeclaw.org/the-cute-puppies-guide-to-title-iii-of-the-ada/>

Relief Under the ADA

- Title I – May file in court only after exhausting administrative remedies through EEOC; federal agency can toll statute while investigating
- Title II – May file in court OR with the US DOJ or other administrative agency as applicable, i.e. DOT, for any relief available under Section 504 including compensatory damages (Sovereign Immunity issues)
- Title III – May file in court for injunctive relief only, with attorney's fees; or file complaint with US DOJ in cases of general public importance or where there is a pattern or practice of discrimination alleged; monetary damages and civil penalties possible

PAVA: Voting Accessibility

- Under HAVA (Help America Vote Act), Protection and Advocacy for Voting Accessibility
- In 2008, Rutgers University study showed a 7% voter gap across the United States among people with disabilities
- North Carolina has a 14.4% gap; the 4th largest gap in nation behind Maryland, Virginia, and District of Columbia