

The Americans with Disabilities Act (ADA) Handbook

An overview and resource handbook
for employers and their HR professionals

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Unum: Your benefits partner

As the leading provider of disability insurance,¹ we understand how the complexities of disability laws can challenge even the savviest HR expert. And for many employers, managing applicants and employees appropriately under the many disability laws and concepts can be very difficult.

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





Introduction to the ADA

How to use this handbook

Did you know that, for fiscal year 2010, there were 25,165 disability discrimination charges filed with the Equal Employment Opportunity Commission (EEOC)? That is fully 25% of the total number of EEOC charges in 2010, the biggest jump in any category.²

That same year, the EEOC recovered more than \$76 million from charges brought by those claiming disability discrimination. This figure does not include monetary benefits obtained through litigation.³

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

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

At Unum, we have extensive experience with disability, and we are committed to assisting employees with disabilities to maximize their opportunities to participate in the workforce. We have prepared this handbook to help you understand and comply with ADA requirements so that your business will benefit by including people of all abilities.

This handbook is not intended to be a definitive document about issues relating to the amended ADA, nor does it constitute legal advice. Instead, we have outlined a conceptual framework to help you appreciate how the law integrates with the way you do business. We encourage you to consult your own attorney about your responsibilities under the ADA and other relevant legislation when deciding how to proceed with an applicant or employee who may be disabled. This is especially important since we designed this handbook to give you a baseline understanding of the ADA without focusing on and describing each exception or special rule that might apply to your specific business and workforce.

We hope you'll find this handbook to be a helpful reference tool.

Unum & the ADA and FMLA

As the leader in disability insurance,⁴ Unum provides claims handling, return-to-work services, stay-at-work services and leave management services that assist employers in realizing the human and economic gains inherent in the principles of the ADA and the Family Medical Leave Act (FMLA). See the “Compliance assistance” section on page 14 for more information regarding leave management services.



A brief caution to employers

In addition to the need for compliance with the ADA, your business location(s) professionals should be aware of states’ civil rights laws that protect disabled individuals from employment discrimination. A few states provide higher levels of protection for disabled individuals which may differ from the ADA. For example, some states have more generous eligibility requirements than the ADA. In addition to state law, there are other laws providing protection to disabled individuals such as the federal Rehabilitation Act of 1973 and Civil Rights Act of 1964. Therefore, it makes sense for you and your HR professionals to work with your own legal counsel to make sure you all understand your responsibilities under both state and federal non-discrimination laws.

An overview of the law

What the law does

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

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

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

How the ADA is organized

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



Agencies responsible for ensuring compliance with ADA

Title I: Employment

- EEOC

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

- Justice Department
- Transportation Department

Title III: Public Accommodations

- Justice Department

Title IV: Telecommunications

- Federal Communications Commission

Title V: Miscellaneous Provisions

- EEOC and others

Title 5 also applies to the employment context by:

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

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

Communicating the facts

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

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

Who is protected under the ADA?

The ADA prohibits discrimination by employers against qualified individuals with disabilities. To be considered qualified, individuals must have all relevant certifications, education and experience as well as be able to perform the essential functions of the job they hold or seek, with or without reasonable accommodation. Put another way, employees who cannot do the essential functions of the job — with or without reasonable accommodation — are not protected by the ADA. The only exception to this rule is when an employer regards a person as disabled. See page 8 for more on regarded as disabled. Understanding some of the key terms of the law — including disability, discrimination, essential functions and reasonable accommodation — can make complying with the ADA easier.

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

1. Standard is not demanding.
2. Look at whether the impairment substantially limits a major life activity as compared to most people in general population. Need not severely restrict.
3. Substantial impairment is not object of focus. No extensive analysis required. Focus is on whether discrimination occurred.
4. Individualized assessment is necessary but standard is much lower than it used to be.
5. Comparison of limitation as compared to most people in general population will not need scientific analysis.
6. Do not consider corrective measures except eyeglasses or corrective lenses.
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. Impairment need only limit one major life activity.
9. Impairment can last less than six months.



Disability defined

The concept of disability under the ADA differs from the definition of disability in an insurance contract. In amending the ADA in 2008, Congress broadened the definition of disability, giving more individuals the protection of the ADA. This handbook incorporates the 2008 changes which were effective January 1, 2009. It also incorporates the regulatory changes made by the EEOC regarding the definition of disability, effective May 24, 2011.

The ADA's broader definition of disability allows an individual to qualify for protection under the law in one of three ways, namely that the individual:

- actually satisfies the definition of disability;
- has a record of a disability; or
- is regarded as having a disability.

Let's look at each one of these separately.

First, a person is protected as disabled if he or she has a physical or mental impairment that substantially limits one or more of the major life activities. Congress has broken down "disability" into three components:

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

An employee or applicant must meet all three criteria to qualify as disabled under the amended ADA.

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

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

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

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

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

Also, if a person has an impairment that limits only one major life activity, it is sufficient to qualify that person as disabled. Therefore, if an employee with asthma is substantially limited in the major life activity of breathing

that person is likely to be considered disabled, even if he or she is otherwise unimpaired in other activities such as walking or running.

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

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

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

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

The only time employers can consider mitigating measures is when they create negative effects. For instance, if the medication or other treatment an individual is taking substantially limits a major life activity (again, including a major bodily function), even if the condition for which he/she is being treated would not otherwise have such an effect, the individual will be considered disabled under the new ADA. An example of this might be someone who has a condition that is treated by medication which causes a different problem such as hearing loss or some organ failure which was not otherwise caused by the underlying condition. Because of the effectiveness of the medication (a mitigating measure), the person would be considered disabled.

Major life activities:

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

This list includes:

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending

- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working
- sitting
- reaching
- interacting with others

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

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

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

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

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

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

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

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

Second, the definition of disability under the ADA may also be satisfied when there is a record of having such a disability. This part of the definition seeks to prohibit discrimination against people who may have a history of disability, such as cancer survivors. The ADA Amendments Act did not alter the language of the ADA in this area so presumably, the record of disability must still show that the previous impairment significantly limited one or more major life functions. Employer knowledge of the person's record of disability is, in most jurisdictions, required to show discrimination because of the record of disability. One change that the 2011 regulations made was to give those with a record of disability the right to get reasonable accommodation.

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

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

of six months or less) and minor are not considered protected under this "regarded as" definition.

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

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

Discrimination: What's illegal?

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

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

- make an inappropriate inquiry about disability;
- fail to hire an otherwise qualified individual with a disability in order to avoid making a reasonable accommodation; or
- fail to make reasonable accommodation for an otherwise qualified individual with a disability unless the accommodation would create an undue hardship for your company (see pages 11 and 12 for more information about reasonable accommodation).

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

- use pre-employment tests that reveal the effects of a sensory, manual or speaking skills impairment unless the tests focus on relevant job skills or aptitudes. Standards or tests that are likely to elicit information about a disability are impermissible. All applicants must be required to take the same tests, without regard to disability, and the tests or job standards cannot be used unless they are job-related and necessary to the business;

- restrict otherwise qualified applicants or employees with disabilities from employment opportunities or job benefits unless no reasonable accommodation can be made to enable them to perform essential job functions;
- eliminate a qualified applicant who is caring for a family member with a disability simply because you believe that person will miss more work than an applicant without such a commitment; and
- enter into contractual relationships — such as those with employment agencies, labor unions, employee benefit providers and others — that result in discrimination against employees with disabilities.

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

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

The employment decisions you and your HR professionals make regarding disabled individuals must be based on the facts available — not presumptions — regarding the capabilities and limitations of applicants and employees who are disabled. You cannot speculate about the employee's ability to do the job in the future. As an employer, you should have protocols on how to interact with disabled applicants and employees. The protocols must include how medical records are maintained (such as a separate that is secured by lock or password). See page 11 for more information about an employer's obligation to interact.

The hiring process

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

- **Access:** Accommodations during the hiring process may be required to assist an applicant in gaining access to the interview locations. You may need to modify architectural barriers or alter the location of the interview as an accommodation.
- **Testing:** If you require tests, they must be given to all applicants for similar positions and measure only skills required for the job. You must also make reasonable accommodations for people with disabilities to take the test, such as providing a reader or audio-taped test for someone with impaired vision.
- **Application and interview:** During the hiring process, you may not ask if the applicant has a disability or about its nature or severity, unless the condition is obvious, like when an applicant wears a brace. However, you can describe the job and ask about the applicant's ability to perform the essential job functions. You may not selectively ask some applicants that you suspect are disabled to demonstrate how they will do the job, but not ask all applicants to undertake a similar demonstration. Moreover, you can ask disability-related questions if you are asking for voluntary self identification of disability for affirmative action purposes or if you are a federal contractor taking affirmative action under the Rehabilitation Act. In these cases, you must inform the applicant that it isn't necessary to answer, and that not answering will have no effect on the employment decision. You must also advise the person that the information will be used only in accordance with the law. Finally, the information must be kept separately from the employment application.

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

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



Essential job functions

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

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

These questions can help determine if job functions are essential:

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

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

Reasonable accommodation under the law

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

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

According to EEOC regulations, reasonable accommodations include:

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

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

For current employees, reasonable accommodation may include:

- holding a job open for a reasonable period of time while the employee recovers, if it doesn't cause undue hardship for your business;
- reassigning a qualified employee to another vacant position; or
- limiting hours, altering the company's physical layout to provide access or providing adaptive equipment if reasonable.

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

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The interactive process is at the heart of the ADA.

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

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

The interactive process is at the heart of the ADA. The employee must be involved in the dialogue about what accommodation would be effective. Once an employee requests an accommodation, you and he or she must communicate. How you interact must be reasonable under the circumstances and may involve communication in person, by telephone, by email, or otherwise. The communication must allow both you and your employee to exchange information. You must take the initiative to find out what the employee's precise disability limitations are due to the disability and what potential reasonable accommodations could be made that would overcome the limitations. You should undertake a good faith effort to identify reasonable accommodations; interacting expeditiously with your employee is often one part of that process. Although you have the final say in what accommodation you offer, your decision should, at a minimum, consider the preference of the employee. The accommodation need not be the best accommodation available as long as it is effective.

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

- making adjustments or modifications to help a person with daily activities on and off the job, such as prosthetic limbs, wheelchairs, hearing aids, eyeglasses or personal care attendants;
- lowering quality or production standards;
- providing amenities or conveniences that aren't job-related and that you don't make available to employees without disabilities, such as private hot plates, microwave ovens or refrigerators;
- making accommodations for a person with a disability who is not otherwise qualified for the job;
- hiring or promoting an unqualified individual, regardless of disability;

- hiring or retaining a disabled individual who poses a direct threat to the safety or health of himself or herself or other employees or customers, unless the threat can be eliminated by reasonable accommodation;
- disrupting an established seniority system;
- creating a direct threat to the health and safety of the workplace; or
- creating a new job for a disabled individual.

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

Did you know?

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

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

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

With this provision in your policy, it means that we not only can help you by assisting your employees in returning to work but also by helping your employees stay at work. Some of the accommodations that might be provided under this provision include adaptive equipment such as ergonomic chairs, magnifying screens, and split or one-handed keyboards, plus recommendations on how to modify work schedules.

Undue hardship

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

- the cost of the proposed accommodation, particularly balanced against the projected benefit of the accommodation;
- your business unit's finances;
- your company's finances;
- the number of employees at your facility;
- the nature of your operation; and
- the effect of the accommodation on your company.

In most cases, an undue hardship based on expense is unlikely, since studies show that 19% of workplace accommodations cost nothing, and 69% cost under \$500. Affordable accommodations can include an ergonomically correct workstation, a larger screen or fonts for visually impaired employees, or a flexible schedule in certain circumstances.

The ADA and confidential information

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

In the hiring process, if an employee is pre-offer, the ADA prohibits all disability-related questions and medical

examinations, even if the questions or examinations are related to the job. It is permissible to describe the job and ask if the applicant can perform the functions of the job, with or without reasonable accommodation. Avoid asking about whether the applicant has a disability that would prevent the person from doing the job. Keep the focus on the applicant's abilities.

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

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

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

As always, to ensure that you are meeting all privacy requirements, you should check with your own legal counsel to make sure you understand your obligations under both federal and your state's privacy laws.



Remedies under the law

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

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

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

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

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

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

Interplay between the ADA and the Family Medical Leave Act

One complex and difficult issue for employers is the interplay between the Family Medical Leave Act (FMLA) and the ADA. The FMLA applies to employers with 50 or more employees. Employers should keep in mind that the leave provided by the FMLA is for serious health conditions which may in some cases cover more minor conditions than a disability as defined under the ADA. Also, leave under the FMLA is limited to 12 weeks (taken continuously, under a reduced schedule, or intermittently) while ADA leave is more generalized to what is reasonable for the employer. Finally, the time provided by the employer under the FMLA can run concurrently with the time provided as a reasonable accommodation under the ADA. Work with your legal counsel to review your policies to ensure that you are compliant with both the ADA and the FMLA. You should use a consistent process when you are

considering employment action involving a disabled employee who has been out on leave. The FMLA regulations were significantly amended effective January 2009, and changed to include non-traditional families in the “son or daughter” definitions in 2010. If you have not already done so, you will need to take the time to review your HR policies against the new amended regulations.

Compliance assistance

For employers struggling to deal with these issues, Unum provides comprehensive leave management services, including:

- consistent administration of leaves in compliance with all applicable laws and regulations;
- integrated intake, management and reporting of federal or state leave; and
- systematic tracking and reporting of all family and medical leaves.

Our Leave Management Center assumes compliance with FMLA and more than 140 state leave laws, such as family leaves, pregnancy, emergency response, organ donor leaves, and others.

Unum's leave management service integrates with our short term disability benefit administration. We manage leave for more than one million employees across all 50 states.

Tax credits that can help

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

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

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

Resources and technical assistance: *Just a click away*

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

Abilities! (National Center for Disability Services)

516-747-5400

A non-profit organization of more than 140 corporations that provides information and technical assistance to help employers integrate workers with disabilities.

<http://www.abilitiesonline.org/index.aspx>

AbleData

800-227-0216

Free information about 17,000 adaptive devices for all disabilities.

<http://www.abledata.com>

Americans with Disabilities Act Document Center

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

<http://www.jan.wvu.edu/links/adalinks.htm>

Council of State Administration for Vocational Rehabilitation

202-638-4634

Provides information about the agency in your state that provides employment assistance to people with disabilities.

http://www.rehabnetwork.org/directors_contact.htm

Department of Justice

800-514-0301

<http://www.usdoj.gov>

Disability and Business Technical Assistance Centers

800-949-4232

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

<http://www.adata.org>

Equal Employment Opportunity Commission (EEOC)

202-663-4900

Offers “*Americans with Disabilities Act of 1990 — EEOC Technical Assistance Manual*” that includes a comprehensive resource directory. To order, call 800-669-3362.

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

GettingHired.com

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

<http://www.GettingHired.com>

Job Accommodation Network

800-526-7234

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

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


Additional resources available from Unum:

Just ask your Unum representative

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

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

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



^{1,4} Gen Re 2010 U.S. Disability market surveys, 2011, JHA Disability market Surveys 1997-2010, and annual survey of the Employee Benefits Research Institute (EBRI) for 21 years prior to 1997.

² Equal Employment Opportunity Commission website, "Charge Statistics FY 1997 Through FY 2010", [cited August 12, 2011]. Available at <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm?renderforprint=1>

³ Equal Employment Opportunity Commission website, [cited August 12, 2011.] Available at <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-monetary.cfm>

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