

Americans with Disabilities Act

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16-01 Introduction

A. 1990 Act

The Americans with Disabilities Act (ADA) was passed July 26, 1990, as Public Law 101-336 (42 USC Sec. 12101 *et seq*), and became effective on January 26, 1992. The ADA is landmark federal legislation that opens up services and employment opportunities to the 43 million Americans with disabilities. The law was written to strike a balance between the reasonable accommodation of citizens' needs and the capacity of private and public entities to respond. It is not an affirmative action law but is intended to eliminate illegal discrimination and level the playing field for disabled individuals.

On September 25, 2008, the ADA Amendment Act of 2008 (ADAAA) was signed into law and became effective on January 1, 2009. The ADA was amended as a result of Supreme Court decisions that narrowed the definition of disability in unexpected ways.¹

While the ADA has five separate titles, Title II is the section specifically applicable to “public entities” (state and local governments) and the programs, services, and activities they deliver. The Department of Justice (“DOJ” or the “Department”), through its Civil Rights Division, is the key agency responsible for enforcing Title II and for coordinating other federal agencies’ enforcement activities under Title II.

The Department’s Title II regulations for state and local governments are found at Title 28, Code of Federal Regulations, Part 35 (abbreviated as 28 CFR pt. 35). The ADA Standards for Accessible Design are located in Appendix A of Title 28, Code of Federal Regulations, Part 36 (abbreviated as 28 CFR pt. 36 app. A). Those regulations, the statute, and many helpful technical assistance documents are located on the ADA Home Page at <http://www.ada.gov> and on the ADA technical assistance CD-ROM, available without cost from the toll-free ADA Information Line at 1-800-514-0301 (voice) and 1-800-514-0383 (TTY).

B. ADA Fundamentals

The cornerstone of Title II of the ADA is this: no qualified person with a disability may be excluded from participating in, or denied the benefits of, the programs, services, and activities provided by state and local governments because of a disability.²

¹ Sutton v United Airlines Inc. 527 U.S. 471 (1999), School Board Of Nassau County v Arline, 480 U.S. 273 (1987), Toyota Motor Manufacturing, Kentucky, Inc. v Williams, 534 U.S. 1884 (2002)

² 42 U.S. Chapter 126, Subchapter II, Part A, §12132

16-02 Disability Defined and Who is Covered

A. ADA Definition

The ADA defines disability as a mental or physical impairment that substantially limits one or more major life activities.³ ADA protection extends not only to individuals who currently have a disability, but to those with a record of a mental or physical impairment that substantially limits one or more major life activities, or who are perceived or regarded as having a mental or physical impairment that substantially limits one or more major life activities.⁴

B. Determining Whether an Individual has a Disability

Three things to ask when determining whether an individual has a disability *for purposes of the ADA* are:

One: Does the individual have an impairment?

A *physical* impairment is a physiological disorder or condition, cosmetic disfigurement, or anatomical loss impacting one or more body systems.⁵ Examples of body systems include neurological, musculoskeletal (the system of muscles and bones), respiratory, cardiovascular, digestive, lymphatic, and endocrine.⁶

A *mental* impairment is a mental or psychological disorder.⁷ Examples include mental retardation, emotional or mental illness, and organic brain syndrome.⁸

The Department's regulations also list other impairments, including contagious and non-contagious diseases; orthopedic, vision, speech and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; specific learning disabilities; HIV disease (with or without symptoms), tuberculosis, drug addiction, and alcoholism.⁹

Two: Does the impairment limit any major life activities?

An impairment cannot be a disability unless it limits something, and that something is one or more major life activities. A major life activity is an activity that is central to daily life.¹⁰ According to the Department's regulations, major life activities include walking, seeing, hearing, breathing, caring for oneself, sitting, standing, lifting, learning, thinking, working,¹¹ and performing manual tasks that are central to daily life.¹² The

³ 42 USC § 12202(2)(A).

⁴ 42 USC § 12102(2)(B) & (C).

⁵ 28 CFR § 35.104(1)(i)(A).

⁶ 28 CFR § 35.104(1)(i)(A).

⁷ 28 CFR § 35.104(1)(i)(B).

⁸ 28 CFR § 35.104(1)(i)(B).

⁹ 28 CF. § 35.104(1)(ii).

¹⁰ Toyota Motor Mfg., Kentucky, Inc. v Williams, 534 U.S. 184 (2002).

¹¹ Bragdon v Abbott, 524 U.S. 624, 638-49 (1999). The Supreme Court has questioned whether "working" is a major life activity. However, "working" is identified as a major life activity under the regulations for Title II of the ADA, 28 CFR § 35.104, and the regulations for Title I of the ADA, 29 CFR § 1630.2(I).

¹² Toyota, 534 U.S. 184.

Supreme Court has also decided that reproduction is a major life activity.¹³ This is not a complete list. Other activities may also qualify, but they need to be activities that are important to most people's lives.

Three: Is the limitation on any major life activity substantial?

Not only must a person have an impairment that limits one or more major life activities, but the limitation of at least one major life activity must be "substantial." An impairment "substantially limits" a major life activity if the person cannot perform a major life activity the way an average person in the general population can, or is significantly restricted in the condition, manner, or duration of doing so. An impairment is "substantially limiting" under the ADA if the limitation is "severe," "significant," "considerable," or "to a large degree."¹⁴ The ADA protects people with serious, long-term conditions. It does not protect people with minor, short-term conditions.

Here are some things to think about when trying to decide if an impairment is substantially limiting:

- What kind of impairment is involved?
- How severe is it?
- How long will the impairment last, or how long is it expected to last?
- What is the impact of the impairment?
- How do mitigating measures, such as eyeglasses and blood pressure medication, affect the impairment? The Supreme Court has ruled that, if an impairment does not substantially limit one or more major life activities because of a mitigating measure an individual is using, the impairment may not qualify as a disability.¹⁵ Remember, however, that mitigating measures such as blood pressure medication may sometimes impose limitations on major life activities, and those must be considered as well.

¹³ Bragdon v Abbott, 524 U.S. 624 (1988).

¹⁴ Toyota, 534 U.S. 184.

¹⁵ Sutton v United Airlines, Inc., 527 U.S. 471 (1999).

16-03 Qualified Person with a Disability

Having an impairment that substantially limits a major life activity may mean that a person has a disability, but that alone does not mean that the individual is entitled to protection under the ADA. A person with a disability must also qualify for protection under the ADA. A “qualified individual with a disability” is someone who meets the essential eligibility requirements for a program, service, or activity **with or without** (1) reasonable modifications to rules, policies, or procedures; (2) removal of physical and communication barriers; and (3) providing auxiliary aids or services for effective communications.¹⁶

Essential eligibility requirements can include minimum age limits or height requirements (such as the age at which a person can first legally drive a car or height requirements to ride a particular roller coaster at a county fair). Because there are so many different situations, it is hard to define this term other than by examples. In some cases, the only essential eligibility requirement may be the desire to participate in the program, service, or activity.

What happens if an individual with a disability does not meet the eligibility requirements? In that case, you will have to look further to determine if the person with the disability is entitled to protection under the ADA. When a person with a disability is not qualified to participate or enjoy a program, service, or activity under Title II, there may be ways to enable the individual to participate, including, for example:

- Making a reasonable modification to the rule, policy, or procedure that is preventing the individual from meeting the requirements,
- Providing effective communication by providing auxiliary aids or services, or
- Removing any architectural barriers.

A. Reasonable Modification

Public entities must reasonably modify their rules, policies, and procedures to avoid discriminating against people with disabilities. Requiring a driver’s license as proof of identity is a policy that would be discriminatory because there are individuals whose disability makes it impossible for them to obtain a driver’s license. In that case it would be a reasonable modification to accept another type of government-issued I.D. card as proof of identification.

Examples of reasonable modifications:

- Granting a zoning variance to allow a ramp to be built inside a set-back.
- Permitting a personal attendant to help a person with a disability to use a public restroom designated for the opposite gender.
- Permitting a service animal in a place where animals are typically not allowed, such as a cafeteria or a courtroom.

¹⁶ 28 CFR § 35.105

Are there times when a modification to rules, policies, and procedures would not be required? Yes, when providing the modification would fundamentally alter the nature of the program, service, or activity.¹⁷

A fundamental alteration is a change to such a degree that the original program, service, or activity is no longer the same. For example, a city sponsors college-level classes that may be used toward a college degree. To be eligible to enroll, an individual must have either a high school diploma or a General Educational Development certificate (“G.E.D”). If someone lacks a diploma or G.E.D. because of a cognitive disability, would the city have to modify the policy of requiring a high school diploma or G.E.D.? Probably not. Modifying the rule would change the class from college level to something less than college level and would fundamentally alter the original nature of the class.

B. Effective Communication

People with disabilities cannot participate in government-sponsored programs, services, or activities if they cannot understand what is being communicated. What good would it do for a deaf person to attend a city council meeting to hear the debate on a proposed law if there was no qualified sign language interpreter or real-time captioning (that is, a caption of what is being said immediately after the person says it)? The same result occurs when a blind patron attempts to access the internet on a computer at a county’s public library when the computer is not equipped with screen reader or text enlargement software. Providing effective communication means offering auxiliary aids and services to enable someone with a disability to participate in the program, service, or activity.

Types of Auxiliary Aids and Services

There are a variety of auxiliary aids and services. Here are a few examples.

- **For individuals who are deaf or hard of hearing:** qualified sign-language and oral interpreters, note takers, computer-aided transcription services, written materials, telephone headset amplifiers, assistive listening systems, telephones compatible with hearing aids, open and closed captioning, videotext displays, and TTYs (teletypewriters).
- **For individuals who are blind or have low vision:** qualified readers, taped texts, Braille materials, large print materials, materials in electronic format on compact discs or in e-mails, and audio recordings.
- **For individuals with speech impairments:** TTYs, computer stations, speech synthesizers, and communications boards.

Persons with disabilities should have the opportunity to request an auxiliary aid, and you should give ‘primary consideration’ to the aid requested. Primary consideration means that the aid requested should be supplied unless: (1) you can show that there is an equally effective way to communicate; or (2) the aid requested would fundamentally alter the nature of the program, service, or activity.

¹⁷ 28 CFR § 35.130(b) (7).

Example: A person who became deaf late in life is not fluent in sign language. To participate in her defense of criminal charges, she requests real time computer-aided transcription services. Instead, the court provides a qualified sign language interpreter. Is this effective? No. Providing a sign language interpreter to someone who does not use sign language is not effective communication

The Cost of Doing Business

The expense of making a program, service, or activity accessible or providing a reasonable modification or auxiliary aid may not be charged to a person with a disability requesting the accommodation.¹⁸

Example: If a person asks for a sign language interpreter at a court hearing, the cost may not be passed along to the person requesting that accommodation.

Barriers to Accessibility

Examples:

Architectural

- A building has just one entrance that is up a flight of stairs and has no ramp.
- The door to the only public restroom in a building is 28 inches wide.

Policies and Procedures

- Requiring a driver's license to obtain a library card from the public library.
- A "No Animals" rule (without an exception for service animals) to enter a pie baking booth at a county fair.

Effective Communication

- No assistive listening system for public meetings by a City Council.
- A state's website that cannot be accessed by blind people using screen reader software or those with low vision using text enlargement software.

¹⁸ 28 CFR § 35.130(f).

16-04 What is Covered

A. Programs, Services, and Activities

Public entities may provide a wide range of programs, services, and activities. Police, fire, corrections, and courts are services offered by public entities. Administrative duties such as tax assessment or tax collection are services. Places people go such as parks, polling places, stadiums, and sidewalks are covered. These are just some examples (and by no means a complete list) of the types of programs, services, and activities typically offered by state and local governments.

B. Integrated Setting

One of the main goals of the ADA is to provide people with disabilities the opportunity to participate in the mainstream of American society. Commonly known as the “integration mandate,” public entities must make their programs, services, and activities accessible to qualified people with disabilities in the most integrated way appropriate to their needs.¹⁹

Separate or special activities are permitted under Title II of the ADA to ensure that people with disabilities receive an equal opportunity to benefit from the government’s programs, services, or activities.²⁰ However, even if a separate program is offered to people with disabilities or people with one kind of disability, a public entity cannot deny a person with a disability access to the regular program. Under the ADA, people with disabilities get to decide which program they want to participate in, even if the public entity does not think the individual will benefit from the regular program.²¹

¹⁹ 28 CFR § 35.130(d).

²⁰ 28 CFR § 35.130(b)(1)(iv).

²¹ 28 CFR § 35.130(b)(2).

16-05 Facilities

The ADA treats facilities that were built before it went into effect differently from those built or renovated afterwards. **The key date to remember is January 26, 1992**, when Title II's accessibility requirements for new construction and alterations took effect.²²

A. Before January 26, 1992

Facilities built before January 26, 1992, are referred to as “pre-ADA” facilities.²³ If there is an architectural barrier to accessibility in a pre-ADA facility, you may remove the barrier using the ADA Standards for Accessible Design or the Uniform Federal Accessibility Guidelines (UFAS) as a guide, or you may choose to make the program, service, or activity located in the building accessible by providing “program access.”²⁴ Program access allows you to move the program to an accessible location, or use some way other than making all architectural changes to make the program, service, or activity readily accessible to and usable by individuals with disabilities.

B. After January 26, 1992

Any facility built or altered after January 26, 1992, must be “readily accessible to and usable by” persons with disabilities. For ADA compliance purposes, any facility where construction commenced after January 26, 1992, is considered “new,” “newly constructed,” or “post-ADA.” “Readily accessible to and usable by” means that the new or altered building must be built in strict compliance with either the ADA Standards for Accessible Design or UFAS.

Altering (renovating) a building means making a change in the usability of the altered item. Examples of changes in usability include: changing a low pile carpet to a thick pile carpet, moving walls, installing new toilets, or adding more parking spaces to a parking lot. Any state or local government facility that was altered after January 26, 1992, was required to be altered in compliance with the ADA Standards or UFAS.

When part of a building is altered, the alterations must be made in strict compliance with architectural standards, including creating an accessible path of travel to the altered area.

²² 28 CFR § 35.151

²³ 28 CFR §§ 35.150 - 35.151.

²⁴ 28 CFR § 35.150.

16-06 Enforcement and Remedies

A. Filing a Complaint

An individual or a specific class of individuals or their representative alleging discrimination on the basis of disability by a state or local government may either file:

- An administrative complaint with the Department of Justice or another appropriate federal agency; or
- A lawsuit in federal district court.

If an individual files an administrative complaint, the Department of Justice or another federal agency may investigate the allegations of discrimination. Should the agency conclude that the public entity violated Title II of the ADA, it will attempt to negotiate a settlement with the public entity to remedy the violations. If settlement efforts fail, the agency that investigated the complaint may pursue administrative relief or refer the matter to the Department of Justice. The Department of Justice will determine whether to file a lawsuit against a public entity to enforce Title II of the ADA.

B. Potential Remedies

Potential remedies (both for negotiated settlements with the Department of Justice and court-ordered settlements when the Department of Justice files a lawsuit) include:

- Injunctive relief to enforce the ADA (such as requiring that a public entity make modifications so a building is in full compliance with the ADA Standards for Accessible Design or requiring that a public entity modify or make exceptions to a policy);
- Compensatory damages for victims; and/or
- Back pay in cases of employment discrimination by state or local governments.

In cases where there is federal funding, fund termination is also an enforcement option that federal agencies may pursue.

16-07 Administrative Requirements

A. Designating an ADA Coordinator

If a public entity has 50 or more employees, it is required to designate at least one responsible employee to coordinate ADA compliance. A government entity may elect to have more than one ADA Coordinator. Although the law does not refer to this person as an “ADA Coordinator,” this term is commonly used in state and local governments across the country.

The ADA Coordinator is responsible for coordinating the efforts of the government entity to comply with Title II and investigating any complaints that the entity has violated Title II. The name, office address, and telephone number of the ADA Coordinator must be provided to interested persons.

Benefits of an ADA Coordinator

There are many benefits to having a knowledgeable ADA coordinator, even for smaller public entities that are not required to have one.

For members of the public, having an ADA Coordinator makes it easy to identify someone to help them with questions and concerns about disability discrimination. For example, the ADA Coordinator is often the main contact when someone wishes to request an auxiliary aid or service for effective communication, such as a sign language interpreter or documents in Braille. A knowledgeable ADA Coordinator will be able to efficiently assist people with disabilities with their questions. The coordinator will also be responsible for investigating complaints.

Having an ADA Coordinator also benefits state and local government entities. It provides a specific contact person with knowledge and information about the ADA so that questions by staff can be answered efficiently and consistently. In addition, she or he coordinates compliance measures and can be instrumental in ensuring that compliance plans move forward. With the help of ADA Best Practices Tool Kit for State and Local Governments (<http://www.ada.gov/pcatoolkit/chap1toolkit.htm>), ADA Coordinators can take the lead in auditing their state or local government’s programs, policies, activities, services, and facilities for ADA compliance.

B. Notice of the ADA’s Provisions

The second administrative requirement is providing public notice about the ADA. Regardless of the entity’s size, the ADA notice requirement applies. The ADA notice requirement applies to ALL state and local governments covered by Title II, even localities with fewer than 50 employees.

There are three main considerations for providing notice:

- 1. Who is the target audience for the ADA notice?**

The target audience for public notice includes applicants, beneficiaries, and other people interested in the state or local government's programs, activities, or services. The audience is expansive, and includes everyone who interacts – or would potentially interact – with the state or local government.

2. What information shall the notice include?

The notice is required to include relevant information regarding Title II of the ADA, and how it applies to the programs, services, and activities of the public entity.

The notice should not be overwhelming. An effective notice states the basics of what the ADA requires of the state or local government without being too lengthy, legalistic, or complicated. It should include the name and contact information of the ADA Coordinator.

3. Where and how should the notice be provided?

It is the obligation of the head of the public entity to determine the most effective way of providing notice to the public about their rights and the public entity's responsibilities under the ADA.

Publishing and publicizing the ADA notice is not a one-time requirement. State and local governments should provide the information on an ongoing basis, whenever necessary. If you use the radio, newspaper, television, or mailings, re-publish and rebroadcast the notice periodically.

C. Establishing and Publishing Grievance Procedures

Local governments with 50 or more employees are required to adopt and publish procedures for resolving grievances arising under Title II of the ADA. Grievance procedures set out a system for resolving complaints of disability discrimination in a prompt and fair manner.

Neither Title II nor its implementing regulations describe what ADA grievance procedures must include. However, the Department of Justice has developed a model grievance procedure that is included at the end of this chapter.

The grievance procedure should include:

- A description of how and where a complaint under Title II may be filed with the government entity;
- 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;
- A description of the time frames and processes to be followed by the complainant and the government entity;
- Information on how to appeal an adverse decision; and
- A statement of how long complaint files will be retained.

Once a state or local government establishes a grievance procedure under the ADA, it should be distributed to all agency heads. Post copies in public spaces of public

buildings and on the government's website. Update the procedure and the contact information as necessary.

In addition, the procedure must be available in alternative formats so that it is accessible to all people with disabilities.