

# ► WHAT EMPLOYERS NEED TO KNOW ABOUT THE ADA & ADAAA

Frequently Asked Questions



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1 [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm). Accessed 9/9/16.

2 [www.eeoc.gov/eeoc/publications/fs-ada.cfm](http://www.eeoc.gov/eeoc/publications/fs-ada.cfm). Accessed 9/9/16.

3 [www.eeoc.gov/facts/ada17.html](http://www.eeoc.gov/facts/ada17.html). Accessed 9/9/16.

4 [www.eeoc.gov/laws/statutes/adaaa\\_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm). Accessed 9/9/16.

5 [www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm). Accessed 9/9/16.

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

The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.<sup>1</sup>

Title I of the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal "sector employees" under section 501 of the Rehabilitation Act, as amended, and its implementing rules.<sup>2</sup>

The provisions of the ADA which prohibit job discrimination will be enforced by the U.S. Equal Employment Opportunity Commission (EEOC).<sup>3</sup>

## 2. How did the Americans with Disabilities Act Amendment Act (ADAAA) change the ADA?

On September 25, 2008, the president signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.

The ADAAA makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.<sup>4</sup>

## 3. How does the ADAAA define disability?

The ADAAA and the final regulations define a disability using a three-pronged approach:

- ▶ a physical or mental impairment that **substantially limits** one or more **major life activities** (sometimes referred to in the regulations as an ("**actual disability**")), or
- ▶ a record of a physical or mental impairment that substantially limited a major life activity ("**record of disability**"), or
- ▶ when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("**regarded as**").<sup>5</sup>

### Understanding the ADA's 3-Pronged Definition of Disability<sup>1</sup>

<b>Actual Disability</b>	The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.
<b>Record of Disability</b>	The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.
<b>Regarded As</b>	The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

#### 4. What are “major life activities”?

They are basic activities that most people in the general population can perform with little or no difficulty. Examples of major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The ADAAA also says that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The ADA regulation adds several other examples—hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability. For example, cancer affects the major bodily function of normal cell growth and diabetes affects the major bodily function of the endocrine system.

To meet one of the first two definitions of “disability,” an individual must either have an impairment that substantially limits performance of one major life activity or have a record of an impairment that substantially limited one major life activity. It does not matter if the major life activity is from the first list (such as hearing or lifting) or the new list of major bodily functions. It is possible in many situations that an individual will be substantially limited (or have a record of such a limitation) in more than one major life activity.<sup>6</sup>

#### 5. When does an impairment “substantially limit” a major life activity?

To have a disability (or to have a record of a disability), an individual must be substantially limited in performing a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual in performing a major life activity to be considered “substantially limiting.” All of these tests of substantial limitation were deemed by Congress to be too demanding. Rather, determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity (which could be a major bodily function) with that of most people in the general population. However, the proposed regulation says that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities.<sup>7</sup>

#### 6. What are mitigating measures?

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA provides a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), reasonable accommodations, and even behavioral modifications. Another example of a mitigating measure includes surgical interventions that do not permanently eliminate an impairment.<sup>8</sup>

#### 7. May the effects of mitigating measures be considered when determining whether someone has a disability?

The ADAAA directs that the positive effects from an individual’s use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure.<sup>8</sup>

#### 8. Are ordinary eyeglasses or contact lenses considered “mitigating measures” under the ADA?

No. “Ordinary eyeglasses or contact lenses”—defined in the ADAAA and the regulations as lenses that are “intended to fully correct visual acuity or to eliminate refractive error”—**must be considered** when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses to correct a routine vision impairment is not, for that reason, a person with a disability under the ADA. However, the ADAAA and the regulations do allow even individuals with fully corrected vision to challenge uncorrected vision standards that exclude them from jobs. An employer must be able to show that the challenged standard is job-related and consistent with business necessity.<sup>9</sup>

#### 9. Are pregnant employees covered under Title I of the ADA?

In some circumstances, employees with pregnancy-related impairments may be covered by the ADA. Although pregnancy itself is not an impairment within the meaning of the ADA and thus is not a disability, pregnant workers and job applicants are not excluded from the ADA’s protections. Changes to the definition of the term “disability” resulting from the enactment of the ADA Amendments Act of 2008 make it much easier for individuals with pregnancy-related impairments to demonstrate that they have disabilities and are thus entitled to the ADA’s protection.

Pregnancy-related impairments are disabilities if they substantially limit one or more major life activities or substantially limited major life activities in the past. Major life activities that may be affected by pregnancy-related impairments include walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions. The term disability should be construed broadly, and the determination of whether someone has a disability should not demand extensive analysis. An impairment does not have to prevent, or severely or significantly restrict, performance of a major life activity to be considered substantially limiting, and impairments of short duration that are sufficiently limiting can be disabilities.

The ADA also covers pregnant workers who are regarded as having disabilities. An employer regards a pregnant worker as having a disability if it takes an adverse action against her (e.g., refuses to hire or terminates her) because of an actual or perceived pregnancy-related impairment, unless the employer can demonstrate that the impairment is transitory (lasting or expected to last for six months or less) and minor.<sup>10</sup>

#### **10. What are examples of pregnancy-related impairments that may be substantially limiting within the meaning of the ADA?**

Examples of pregnancy-related impairments that may substantially limit major life activities include pelvic inflammation, which may substantially limit the ability to walk, or pregnancy-related carpal tunnel syndrome affecting the ability to lift or to perform manual tasks. Impairments that may substantially limit reproductive functions include disorders of the uterus or cervix that may necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Pregnancy-related impairments that may substantially limit other major bodily functions include pregnancy-related sciatica limiting musculoskeletal functions; gestational diabetes limiting endocrine function; and preeclampsia, which causes high blood pressure, affecting cardiovascular and circulatory functions.<sup>10</sup>

#### **11. If an employee is disabled under ADA, will he or she also be disabled for purposes of workers' compensation?**

Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA.<sup>11</sup>

#### **12. What is a "reasonable accommodation?"**

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

For example, reasonable accommodation may include:

- ▶ acquiring or modifying equipment or devices,
- ▶ job restructuring,
- ▶ part-time or modified work schedules,
- ▶ reassignment to a vacant position,
- ▶ adjusting or modifying examinations, training materials, or policies,
- ▶ providing readers and interpreters, and
- ▶ making the workplace readily accessible to and usable by people with disabilities.

Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and to enjoy benefits and privileges of employment equal to those available to other employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.<sup>12</sup>

6, 7, 8 [www.eeoc.gov/policy/docs/qanda\\_adaaa\\_nprm.html](http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html). Accessed 9/9/16.

9 [www.eeoc.gov/laws/regulations/adaaa\\_qa\\_small\\_business.cfm](http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm). Accessed 9/9/16.

10 [www.eeoc.gov/laws/guidance/pregnancy\\_qa.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm). Accessed 9/9/16.

11 [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm). Accessed 9/9/16.

12 The U.S. Equal Employment Opportunity Commission. "The ADA: Your Responsibilities as an Employer." August 1, 2008. [www.eeoc.gov/facts/ada17.html](http://www.eeoc.gov/facts/ada17.html). Accessed 9/9/16.

### Is an employee disabled under ADA also disabled under Prudential's STD or LTD plans?

Not necessarily. The ADA's definition of disability and the definition of disability under Prudential's disability plans are not the same. As a result, someone could be disabled for STD, but not protected by the ADA and vice versa.

For example, Tom is a delivery driver who is covered under his employer's Short Term Disability (STD) plan. Tom breaks his leg in a car accident and begins receiving STD benefits because he is "disabled" according to the STD contract—unable to perform the material and substantial duties of his job. Luckily, Tom's broken leg is a temporary impairment that heals within six weeks with no residual effects. Tom's broken leg does not qualify him as disabled under the ADA because it was of short duration and was not severe enough to "substantially limit" a major life activity.

Conversely, an employee may qualify for protection under the ADA, but not be disabled under the same STD policy. For example, Sue, an administrative assistant, is successfully treating her epilepsy with medication. Under STD, she is not disabled because she is able to perform the material and substantial duties of her job. However, the ADA does not permit determinations of disability to take into consideration mitigating measures such as medication. As a result, Sue is "disabled" under the ADA and protected from discrimination.

As an employer, you must understand not only how disability is defined under the ADA, but also how this definition integrates with other regulations and benefit programs you offer.

### 13. How does an employee request an accommodation?

According to the EEOC, an accommodation request does not have to be in writing. However, the EEOC suggests that individuals with disabilities might find it useful to document accommodation requests in the event there is a dispute about whether or when they requested accommodation. One way to document an accommodation request is to make a written request.

The ADA does not include specific guidelines or forms for requesting reasonable accommodation. However, some employers have developed in-house forms. If so, employees should use the employer's forms for requesting accommodation. Otherwise, individuals with disabilities can use any method that is effective; the ADA does not require specific language or format.<sup>13</sup>

#### Resources

The Job Accommodation Network (JAN) is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP). Their website, [www.askjan.org](http://www.askjan.org), contains many valuable tools for both employers and individuals with disabilities. Resources include sample accommodation request forms, accommodation ideas grouped by disability and occupation, and a library of ADA publications.

### 14. Is an employer required to ask an employee if he or she requires an accommodation?

An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.<sup>14</sup>

<sup>13</sup> Linda Carter Batiste, J.D., "Fact Sheet Series: Ideas for Writing an Accommodation Request Letter." Job Accommodation Network. December 12, 2012. <http://askjan.org/media/accommrequestltr.html>. Accessed 9/9/16.

<sup>14</sup> [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm). Accessed 9/9/16.

Accommodations Example		
Condition	Limitations/Restrictions	Example of Accommodation
Maintenance mechanic with a below-the-knee amputation as a result of diabetes.	Fitted with prosthesis and undergoing physical therapy to learn mobility with the prosthetic. Able to work in a sedentary position.	The employer provided a temporary light duty position as a maintenance dispatcher in its manufacturing plant for 16 weeks while the employee began to search for more physically appropriate work at the employer.
Customer service representative with chronic obstructive pulmonary disease.	Employee's condition has progressed to where he requires oxygen at all times—he uses oxygen tanks at home and a small portable unit while traveling.	The employer allowed the employee to use an oxygen concentrator at his workstation, providing for the continuous availability of oxygen without tanks while at work. The employer allowed the employee to keep a concentrator at work at all times and store it in a locked closet over the weekends.
Electrician with bipolar disorder.	Hospitalization followed by medication management and weekly counseling sessions. Unable to return to work full time due to fatigue from medication and anxiety about return to work (RTW).	The employer provided part-time employment in the same position at 20 hours per week to assist the employee in getting used to effects of medication and to lessen anxiety about RTW. The employer provided transition to full-time work over several weeks.
Human Resources manager with pregnancy-related sciatica.	Difficulty sitting for longer than 30 minutes at a time. She needs to be able to stand or walk frequently.	The employer temporarily granted the employee a flexible start and end time, which allowed her to avoid peak traffic, thereby reducing her 45 minute commute. The employer also provided an ergonomic chair.

### 15. What should an employer do when a request for an accommodation is received?

The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion.

In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer is not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.<sup>15</sup>

<sup>15</sup> [www.eeoc.gov/policy/docs/accommodation.html#requesting](http://www.eeoc.gov/policy/docs/accommodation.html#requesting). Accessed 9/9/16.



## **16. May an employer request documentation when an employee requests reasonable accommodation?**

Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.

As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation. On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.<sup>16</sup>

## **17. Is an employer required to provide the accommodation that the employee requests?**

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment).

Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."<sup>17</sup>

16, 17 [www.eeoc.gov/policy/docs/accommodation.html#requesting](http://www.eeoc.gov/policy/docs/accommodation.html#requesting). Accessed 9/9/16.



## 18. Are employers required to develop written job descriptions as a result of ADA?

No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.<sup>18</sup>

## 19. Can an employee request a leave of absence as an accommodation under ADA?

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

- ▶ obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- ▶ recuperating from an illness or an episodic manifestation of the disability;
- ▶ obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- ▶ avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);

- ▶ training a service animal (e.g., a guide dog); or
- ▶ receiving training in the use of Braille or to learn sign language.<sup>19</sup>

## 20. How should an employer handle leave for an employee covered by both the ADA and the Family Medical Leave Act?

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12-month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

<sup>18</sup> [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm). Accessed 9/9/16.

<sup>19</sup> [www.eeoc.gov/policy/docs/accommodation.html#leave](http://www.eeoc.gov/policy/docs/accommodation.html#leave). Accessed 9/9/16.

**Example A:** An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.

**Example B:** An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

**Example C:** An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.<sup>20</sup>

## **21. What financial assistance is available to employers to help them provide reasonable accommodations to employees?**

A special tax credit is available to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to \$5,000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of “eligible access expenditures” that are more than \$250 but less than \$10,250.

A full tax deduction, up to \$15,000 per year, also is available to any business for the expense of removing qualified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, restroom facilities, and transportation vehicles. Additional information discussing the tax credits and deductions is contained in the Department of Justice’s ADA Tax Incentive Packet for Businesses, available from the ADA Information Line. Information about the tax credit and tax deduction can also be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service.<sup>21</sup>

<sup>20</sup> [www.eeoc.gov/policy/docs/accommodation.html#leave](http://www.eeoc.gov/policy/docs/accommodation.html#leave). Accessed 9/9/16.

<sup>21</sup> The U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice, Civil Rights Division. “Americans with Disabilities Act: Questions and Answers.” October 9, 2008. [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm). Accessed 9/9/16.

## 22. How can Prudential support an employer's accommodation efforts?

Prudential's Worksite Modification benefit can help employers identify and provide worksite modifications. This standard disability provision reimburses employers for physical equipment or facility modifications needed to help disabled employees remain at work or return to work. The reimbursement amount is limited as stated in the insurance contract and payable once per employee. Our designated vocational professionals work with the employee, his/her physician, and the employer to identify modifications that may allow the employee to perform the material and substantial duties of his/her job.

Prudential has a team of experienced vocational specialists on staff who are certified rehabilitation counselors and disability management specialists. Their goal is to help employees and employers identify return-to-work obstacles and set up plans to overcome them.

Contact your Prudential representative for additional information.

## 23. Where can an employer access additional information on the ADA, ADAAA, and reasonable accommodations?

There are several resources that employers can access for additional information on the ADA, ADAAA, and reasonable accommodations.

The U.S. Equal Employment Opportunity Commission website: [www.eeoc.gov](http://www.eeoc.gov).

The Job Accommodation Network (JAN) provides free consultation for employers, rehabilitation professionals, and others regarding accommodations for employees: [www.askjan.org](http://www.askjan.org).

ADA Disability and Business Technical Assistance Centers (DBTACs): 800-949-4232 (Voice/TT). The DBTACs consist of ten federally funded regional centers that provide information, training, and technical assistance on the ADA. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

ADA National Network—Information, Guidance, and Training on the Americans with Disabilities Act by DBTAC: [www.adata.org](http://www.adata.org).

### Non-Affiliated Website Disclosure

This FAQ contains links to websites not affiliated with Prudential. These may include federal, state, and local governmental agencies, international agencies, and private entities.

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