

The following information was taken from the ADA National Network training entitled "ADA Basic Building Blocks"

General Nondiscrimination Overview And Title III Overview- Part 1

Learning Objectives: Topic 1

- Understand the three-part definition of disability under the ADA.
- Give examples of impairment and major life activity.
- Recognize the factors that must be considered in determining substantial limitation.
- Know that association and retaliation discrimination are prohibited by the ADA.
- Remember that certain conditions are specifically excluded from the definition of disability.
- Understand how to determine if someone is a qualified person with a disability.

Summary: Topic 1

Although Titles I-IV of the ADA each have a specific focus and are enforced by different Federal agencies, all four titles have some things in common. These are the **"general nondiscrimination requirements" of the ADA, or "cross-cutting" issues, because they apply (or cut across) all of the sections of the ADA.** These cross-cutting issues cover the ADA definition of disability and definition of qualified person with a disability, as well as the requirements for integration, equal opportunity, eligibility criteria, reasonable modification, effective communication, surcharges and additional requirements, personal services and devices, and direct threat.

However, be aware that **depending on which title applies, some of these cross-cutting issues differ slightly**; these differences will be pointed out later on in the course.

The next three sections of this course (Topics 4-6) focus on these cross-cutting, general nondiscrimination requirements.

Definition of Disability

The ADA protects individuals with disabilities. In order to understand who is protected by the ADA, it is vital to know how the ADA determines disability. Both the ADA and the ADA Amendments Act (ADAAA) use a **three-part definition of disability. To be considered a person with a disability**

under the ADA, an individual must meet only one part of the definition (not all three parts).

Under the ADA, an individual with a disability is a person who:

- **Has a physical or mental impairment that substantially limits one or more major life activities;**
- **Has a record of such an impairment;**
 - For example: a history of cancer, heart disease or mental illness
- **Is regarded as having such an impairment.**
 - For example: having high blood pressure or prominent facial scar

This three-part definition is based on the definition under the Rehabilitation Act. It reflects the specific types of discrimination experienced by people with disabilities. Accordingly, the **ADA definition of disability is not the same as the definition of disability in other laws**, such as state workers' compensation laws or other federal or state laws that provide benefits for people with disabilities and disabled veterans.

The ADA uses the terms [impairment](#), [major life activity](#), and [substantial limitation](#) in its definition of disability. Before you can apply the ADA definition to individuals, it is vital you understand what these phrases mean within the context of disability.

Impairment

Physical or Mental Impairment

There are physical and mental impairments that can impact disability status.

A **physical impairment** is a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems

A **mental impairment** is any mental or psychological disorder such as:

- Intellectual disability
- Emotional or mental illness
- Specific learning disabilities

Example: A person who cannot read due to dyslexia might be considered an individual with a disability because dyslexia, which is a learning disability, is an impairment. However, a person who cannot read because of dropping out of school would not be an individual with a disability, because lack of education is not an impairment.

The ADA, the ADAAA and the implementing regulations do not list all diseases or conditions that make up "physical or mental impairments" because given the variety of possible impairments, it would be impossible to provide a comprehensive list.

Exclusions from the Definition of Disability

Under the ADA, a physical or mental impairment does not include:

- **Simple physical characteristics**

Examples: eye or hair color, left-handedness.

- **Normal deviations in height, weight, or strength.**

- **Common personality traits**

Examples: poor judgment, quick temper or irresponsible behavior.

- **Environmental, cultural or economic disadvantages**

Examples: lack of education or a prison record.

- **Homosexuality and bisexuality**

The ADA also states that **the term "disability" does not include the following sexual and behavioral disorders:**

transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.

Major Life Activity and Substantial Limitation

Major Life Activity

An impairment is a "disability" under the ADA and the ADAAA only if it substantially limits one or more major life activities. A major life activity is an **activity that most people in the general population can perform with little or no difficulty.**

Major life activities were not defined in the ADA statute of 1990, but were defined in the regulations implementing the law. The ADA Amendments Act (ADAAA) provides a more expanded list of major life activities.

Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working.

Major life activities also include "major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.

It is important to note that the lists **appearing in the EEOC regulations and the ADAAA are just examples** of major life activities and are not intended to be exhaustive.

The ADAAA also added language stating that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability” and that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

Substantial Limitation

Three factors to consider in **determining whether a person's impairment substantially limits** a major life activity are:

- **Nature and severity** of the impairment
- **Duration or expected duration** of the impairment
- **Permanent, long term, or expected impact** from the impairment

An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be “substantially limiting.” Instead, the EEOC Proposed Regulations Implementing the ADAAA say that an individual’s ability to perform a major life activity should be compared to the ability of “most people in the general population.”

Examples:

- A person with a minor vision impairment, such as 20/40 vision, does not have a substantial impairment of the major life activity of seeing.
- A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

In the ADAAA, Congress directed the Equal Employment Opportunity Commission (EEOC) to revise its regulatory definition of “substantially limited” because significantly restricted imposes too high a standard for determining disability. The ADAAA does not provide a new definition for the term “substantially limits.” Instead, it rejects the Supreme Court’s interpretation of “substantially limits” by providing a rule of construction stating that the term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADAAA.

The assessment of whether an impairment rises to the level of a disability must always be based on an assessment of the impact of the condition on an individual’s life. An assessment of an individual’s ability to perform a major life activity compared to “most people in the general population,” can often be made “using a common-sense analysis without scientific or medical evidence.”

“Impairments for which an individualized assessment “can be conducted quickly and easily, and that will consistently result in a determination that the

person is substantially limited in a major life activity include:

deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

“Impairments that may be substantially limiting for some individuals but not for others, and therefore may require somewhat more, though still not extensive, analysis: asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism.

“Temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity: common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.

“However, an impairment may still be substantially limiting even if it lasts or is expected to last fewer than 6 months, such as a 20-pound lifting restriction lasting several months.”

Sometimes, an individual may have two or more impairments, neither of which by itself substantially limits a major life activity, but that together have this effect.

Example: A person has a mild form of arthritis in her wrists and hands and a mild form of osteoporosis. Neither impairment by itself substantially limits a major life activity. Together, however, these impairments significantly restrict her ability to lift and perform manual tasks. In such a situation under the ADA, the individual is considered to have a disability.

Mitigating Measures

Prior to the ADAAA (before 2009), in response to a Supreme Court decision (*Sutton v United Airlines*), the EEOC regulations required that mitigating measures such as eyeglasses, hearing aids, or medication determining whether a person has a disability under the ADA had taken into consideration. In the ADAAA, Congress specifically rejected this finding. Instead, Congress stated that the determination of disability must be made without regard to mitigating measures, with an exception being made for “ordinary eyeglasses or contact lenses.”

Examples of mitigating measures include medication, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, reasonable accommodations and auxiliary aids or services, behavioral or neurological modifications, and surgical interventions that do not permanently eliminate an impairment.

Record of and Regarded as Having Such an Impairment

Record of Such an Impairment

The **second part of the ADA definition** of disability addresses individuals who have a record of an impairment and protects:

- People who have a history of a disability, whether or not they currently are substantially limited in a major life activity.
- People with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, controlled or in remission.
- People with a history of mental illness.
- People who may have been misclassified or misdiagnosed as having a disability.
- A person who may at one time have been erroneously classified as having an intellectual disability or having a learning disability.

Regarded as Having Such an Impairment

The **third part of the ADA definition of disability** addresses individuals who are regarded as having an impairment. This part of the definition **protects people who are "perceived" as having disabilities from discriminatory decisions based on stereotypes, fears, or misconceptions about disability.**

Such protection is necessary because, as the Supreme Court has stated and the Congress has reiterated, "society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments."

An individual may be protected under this "regarded as" part of the ADA definition of disability in three circumstances:

1. **The individual may have an impairment that is not substantially limiting but is perceived by the covered entity as constituting a substantially limiting impairment.**

Example: Juanita, an individual with mild diabetes controlled by medication, is barred by the staff of a private summer camp from participation in certain sports because of her diabetes. Even though Juanita does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does.

2. **The individual may have an impairment that is only substantially limiting because of the attitudes of others toward the impairment.**

Examples:

- Kenan, a three-year-old child born with a prominent facial disfigurement, has been refused admittance to a private day care program on the grounds that his presence in the program might upset the other children. Kenan is an individual with a physical impairment that substantially limits his major life activities only as the result of the attitudes of others toward her impairment.
 - Cheyenne was an experienced assistant manager of a convenience store who had a prominent facial scar. She was passed over for promotion to store manager. The owner promoted a less experienced part-time clerk, because he believed that customers and vendors would not want to look at Cheyenne. The employer discriminated against her on the basis of disability, because he perceived and treated her as a person with a substantial limitation.
3. **The individual may have no impairment but be regarded by the employer or other covered entity as having a substantially limiting impairment.**

Examples:

- Andrew is excluded from a private elementary school because the principal believes rumors that he is infected with the HIV virus. Even though these rumors are untrue, Andrew is protected under the ADA, because he is being subjected to discrimination by the school based on the belief that he has an impairment that substantially limits major life activities (i.e., the belief that he is infected with HIV).
- An employer discharged an employee based on a rumor that the individual had cancer. This person did not have any impairment, but was treated as though she had a substantially limiting impairment.

Qualified Person with a Disability

Under the ADA, a qualified person with a disability is **someone who meets the essential eligibility requirements with or without reasonable modifications, auxiliary aids and services, or removal of barriers.**

The ADA protects people with disabilities from being discriminated against on the basis of their disability. It does not, however, entitle them to jobs, benefits, programs or services for which they are not otherwise qualified. In other words, not every person with a disability is necessarily qualified to receive services from public or private agencies.

Examples:

- A recreation program for senior citizens requires that participants must be at least 55 years of age or older. The recreation program cannot deny participation to a 60-year-old woman who has an intellectual disability simply because of her disability.
- On the other hand, a Meals on Wheels program requires that participants must be 55 years of age or older to receive meals. Meals on Wheels does

not have to serve a 30-year-old person who is a quadriplegic, no matter how much that person might need such a service.

For purposes of determining eligibility for participation in the services and programs offered by a public or private entity, **a person with a disability is considered to be qualified if the individual meets the essential eligibility requirements** with or without:

- Reasonable modifications to rules, policies or practices;
- Auxiliary (communications) aids or services; or
- Removal of architectural, communications or transportation barriers.

The "essential eligibility requirements" for participation in many activities may be minimal.

Example: Most public and private entities provide information about their programs, activities and services upon request. In such situations the only 'eligibility requirement' for receipt of such information would be the request of it.

However, under other circumstances, the "essential eligibility requirements" imposed by a public entity may be quite stringent.

Example: A medical school may require those admitted to its programs to have successfully completed specified undergraduate science courses - Wong v. Regents of the University of California., 192 F.3d 807 (9th Cir. 1999).

Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards. Mere speculation that it is unreasonable falls short of this requirement. There is a duty to gather sufficient information from the individual with a disability and qualified experts as needed to determine what accommodations are necessary.

Title I Employment Provisions

The definition of qualified person with a disability under the employment provisions in Title I is more comprehensive. In brief, however, **an employer is not required to hire or retain an individual with a disability who is not qualified to perform a job.**

A qualified individual with a disability, as defined under Title I, is someone who "satisfies the skill, experience, education and other job-related requirements of the employment position, and, who with or without reasonable accommodation, can perform the essential functions of such position."

The ADA requires an employer to focus on the essential functions of a job to determine whether a person with a disability is qualified. This is an important nondiscrimination requirement. Many people with disabilities who can perform essential job functions are denied employment because they cannot do things that are only marginal to the job.

Example: A file clerk's job description may state that the person holding the job answers the telephone. However, the basic functions of the job are to file and retrieve written materials, and telephones actually or usually are handled by other employees. A person whose hearing impairment prevents use of a telephone and who is qualified to do the basic file clerk functions should not be considered unqualified for this position.

Association and Retaliation

Disability-based discrimination is not always limited to persons with disabilities. At times, those who associate with individuals with disabilities may be subjects of discrimination. Therefore, the ADA states an entity **may not discriminate against individuals or entities because of their relationship (association) with a person with a disability.**

Furthermore, **retaliation or coercion is prohibited for individuals who exercise their rights under that ADA**. Several examples of association and retaliation are provided below.

Examples of Association

- A county recreation center may not refuse admission to a summer camp program to a child whose brother has tuberculosis.
- A local government could not refuse to allow a theater company to use a school auditorium on the grounds the company has recently performed at a hospice for people with HIV.
- If a private sports arena refuses to admit an individual with a mobility disability and her sister, due to the individual's mobility impairment, the arena would be discriminating against both individuals.
- An employer may not fire an employee because his covered son has a disability that is costly to the employer's health care plan (*Trujillo v. PacifiCorp*, 524 F.3d 1149 (10th Cir. 2008)).

Examples of Retaliation

- A state tax office delays a tax refund for Amy because she testified in a Title II grievance proceeding involving inaccessibility of the tax office. The state has illegally retaliated against Amy.
- A restaurant refuses to serve a customer because she filed an ADA complaint against the restaurant.
- A dry cleaner refuses to serve an individual because he encouraged another customer to file an ADA complaint against the dry cleaner.

In order to prove retaliation, there must be a causal connection between the protected activity by the person with a disability and the adverse action against that person. The adverse action must have been taken for the purpose of retaliating (Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir.1997)). The timing between the protected act and the alleged retaliation must be unusually suggestive of a retaliatory motive before the causal link could be inferred (Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751 (3rd Cir. 2004)).

Cross-cutting Issues - Nondiscrimination Requirements

Integration

Integration is central to the purpose of the ADA. **Individuals with disabilities must be integrated to the maximum extent appropriate.**

An individual participating in state and local government programs or private entity programs and public accommodations must be a **qualified person with a disability**. This means the person must meet the same criteria for the program that persons without disabilities are required to meet.

Example: If participants in a senior citizens activity must all be age 55 or older, then someone with a disability that wants to join the group must be at least age 55 to be a qualified person with a disability.

Separate programs are permitted when necessary to ensure [equal opportunity](#).

Examples:

- Museums do not typically allow visitors to touch exhibits because handling can cause damage to the objects. A municipal museum may offer a special tour for people with vision impairments during which they are permitted to handle these objects with supervision.
- A private athletic facility may sponsor a separate basketball league for people who use wheelchairs.

However, people with disabilities **cannot be required to accept separate benefits**. People with disabilities are entitled to participate in the regular program even if an entity believes that person could not benefit from the program.

Examples:

- A museum cannot exclude a person who is blind from a tour because of assumptions about his/her inability to benefit from the tour experience.
- A person who is deaf cannot be excluded from a concert because of the belief that the person cannot enjoy music.

Lastly, people with disabilities **may not be excluded from regular programs, although [direct threat](#) and legitimate safety requirements and fundamental alteration defenses still apply.**

Examples:

- A state cannot require that someone with a mobility disability apply for a special automobile license if she or he prefers to use a regular plate.
- A supermarket cannot require that someone who uses a wheelchair use an adapted shopping cart if she or he chooses not to.
- A university dorm cannot prohibit a student in a wheelchair from participating in a roommate assignment program because of fears that frequent visits by personal attendants would be intrusive to the roommate or that the student would use more than half of the allocated space because of the wheelchair (Coleman v. Zatechka, 824 F.Supp. 1360 (D.Neb. 1993)).
- A prison may segregate prisoners with HIV for safety reasons due to legitimate fears of transmission of the disease through common high-risk prison activities (Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991)).
- States are not required to provide community-based Medicaid services to everyone who requests them regardless of the cost (Lewis v. New Mexico Dept. of Health, 94 F.Supp.2d 1217 (D.N.M. 2000))

Equal Opportunity

People with disabilities **must not be denied equal opportunity to participate and benefit from programs and services.** This requirement parallels the requirements of the Civil Rights Act of 1964.

Examples:

- A city may not refuse to admit a person to a city council meeting because she or he is deaf.
- A theater may not refuse to admit a person with an intellectual disability to theater because of his or her disability.

Furthermore, people with disabilities **must be afforded the opportunity to participate in programs, activities, goods, and services.**

Examples:

- A city recreation department may not prevent a child who is blind from participating in an after school activity program.
- A zoo may not refuse to admit people with Down Syndrome.
- A clerk in a video store may not refuse to rent an adult movie to an adult with an intellectual disability.
- A hair stylist may not refuse to cut the hair of someone with extensive facial scarring.

The opportunity provided to people with disabilities **must be equal to and as effective as the opportunity provided to others.**

Example: People with disabilities may not be limited to certain performances at a theater.

The ADA does not guarantee that the person with a disability achieve an identical result or level of achievements as people without disabilities.

Examples:

- A person who uses a wheelchair may not be excluded from an exercise class at a health club because she or he cannot do all of the exercises and achieve the same result as participants without disabilities.
- Someone who is blind cannot be refused the opportunity to attend a movie. Even though that person may not be able to see the action on the screen, she or he must be allowed the opportunity to enjoy the experience of attending the movie with friends or family members.

The ADA also **permits the provision of additional services and benefits to people with disabilities that are not generally provided to people without disabilities.** However, people with disabilities cannot be required to take advantage of those different services and benefits. Instead, if they want to do so, they must be allowed to participate in the services and benefits offered to the general public.

Example: A museum offers a tour once a week on Fridays that allows people who are blind to touch the objects. However, Juan, who is blind, chooses to take a standard tour at the museum on Tuesday. The museum must allow Juan to take the standard tour even though they offer another tour that would allow Juan to touch the museum objects.

Eligibility Criteria

Eligibility criteria **intended to screen out people with disabilities are prohibited** unless the criteria are necessary for the provision of the service, program or activity.

Example: A county recreation program requires that participants be able to walk in order to participate in a county-sponsored advanced free-style swim class. This requirement assumes that users of wheelchairs probably cannot swim well enough to participate. An unnecessary blanket exclusion like this violates the ADA.

However, the county-sponsored swim class can require that all participants complete the pre-requisite class, "Beginner's Free Style Swimming." Eligibility criteria like this are permissible when an entity can show that requirements are necessary for the provision of service.

In addition, eligibility criteria that are neutral but have the effect of screening out people with disabilities are prohibited unless the criteria are necessary for the provision of the program, service or activity.

Example: A driver's license cannot be the sole form of photo identification accepted for securing a card at a public library, or cashing a check at a bank or retail store.

This discriminates against individuals whose disability (e.g. blindness or an active seizure disorder) makes it impossible for them to drive. Requiring “some type of state-issued photo identification cards” would not have the effect of screening out people with disabilities.

Legitimate safety requirements may be imposed. These safety requirements must be based on real risks, not on speculations, generalizations or stereotypes.

Examples:

- A swimming program may require that participants pass a swimming test if it can demonstrate that this is necessary for the safe participation in the class, even if this tends to screen out people with disabilities.
- A person using a wheelchair may be excluded from participation in a basketball league if the recreation center can demonstrate that the exclusion is necessary for safe operation.

Reasonable Modifications

When necessary to ensure equal opportunity and avoid discrimination, public and private entities must make reasonable modifications to their policies, practices, and procedures.

This obligation requires public and private entities to deal flexibly with unanticipated situations in a way that does not deny people with disabilities an equal opportunity to participate. The obligation **applies to written as well as informal policies, practices and procedures.**

Example: It is a reasonable modification of a movie theatre’s practices to require a patron to move to another seat in order to provide designated seating to a companion of a wheelchair user. The theatre had the obligation and power to move their patrons around to comply with ordinances and internal policies ([Fortyune v. American Multi-Cinema, Inc.](#), 364 F.3d 1075 (9th Cir. 2004)). ^{R101}

A public or private entity is **not required to make the modification if it can demonstrate that a modification would fundamentally alter the nature of its service, program, or activity.**

Examples:

- A man with low vision asked the manager of a planetarium to raise the lights so he could read the large print program provided. However, the planetarium is not required to modify its practice of low lighting as this would fundamentally alter the experience for everyone, given that the darkened room is required for the solar system experience. However, it still has an obligation to provide effective communication which it could do by offering this patron a clipboard with a small reading light attached.
- A person with a mobility impairment said a tour of a Nebraska State building was not accessible to her because of the rapid pace set by the tour guide. The building management agreed to modify the pace of the tour, as needed, and to provide a staff person to assist if requested for all future tours. Management also apologized for the way the complainant was treated during the tour.

- A person who used a wheelchair and was assisted by a service animal complained that he was denied access to a restaurant. The restaurant owners apologized for their employee's conduct and agreed to comply with the ADA. They also agreed to provide training to be conducted by a trade association to educate its employees about the ADA and service animals.

A public accommodation may refer to an individual with a disability to another public accommodation if the person is seeking services outside the public accommodation's area of specialization and, in the normal course of business, the public accommodation would make a similar referral to an individual without a disability. Such referrals may not be made, however, if the services needed are ones that are normally provided by the public accommodation.

Examples:

- A dentist may not refer a patient with HIV to another dentist for a basic teeth cleaning. Teeth cleaning was within the dentist's specialization (U.S. v. Morvant, 898 F.Supp. 1157 (E.D.La.,1995)).
- A hospital improperly referred a patient to another hospital due to his HIV status and fears that the hospital possessed about AIDS. Patient needed to be treated for a simple allergy reaction to a drug, something that the hospital was capable of doing (Howe v. Hull, 873 F.Supp. 72 (N.D.Ohio 1994))

Effective Communication

Reference: [Title I Technical Assistance Manual, 3.10](#) ^{R9}

[Title II Technical Assistance Manual, 7.1000](#) ^{R13}

[Title III Technical Assistance Manual, 4.3100, 4.3200](#) ^{R16}

What is Effective Communication?

Communication with individuals with disabilities **must be as effective as communication with others**. The effective communication obligation extends to individuals with disabilities who have physical, mental, and sensory disabilities, such as vision, hearing, or speech impairments, that substantially limit the ability to communicate.

Under the ADA, **communication barriers must be eliminated that prevent individuals with disabilities from enjoying equal opportunity** to participate in and benefit from:

- Programs, services and activities of state and local governmental entities;
- Goods, services or activities offered by public accommodations; and
- Employment opportunities in both the public and private sectors.

The obligation to communicate effectively with people who have disabilities **applies to the presentation and exchange of information in all forms including sound, print, graphics and voice.**

Examples:

- Hospitals that provide televisions for use by patients and hotels, motels and places of lodging that provide televisions in five or more guest rooms must provide closed caption decoder service upon request.
- Tax bills and other print communication by a state or local government must be made available to individuals with vision impairments in a form that is usable by them. Large print, Braille, electronic formats and audio tapes would need to be produced upon request to ensure effective communication.

Auxiliary Aids and Services

Auxiliary aids and services include a wide range of devices, techniques and procedures that enable persons with disabilities to participate fully in the exchange of information. The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.

Example: Hector, who is deaf, is shopping for film at a camera store. Exchanging written notes with the sales clerk would be adequate to ensure effective communication. He then stops by a new car showroom to look at the latest models. The car dealer would be able to effectively communicate general information about the models available by providing brochures and exchanging notes by pen and notepad, or perhaps by means of taking turns at a computer terminal keyboard. If Hector becomes serious about making a purchase, the services of a qualified interpreter may be necessary because of the complicated nature of the communication involved in buying a car.

Who is Obligated to Provide Effective Communication?

Under the ADA, effective communication obligations apply to:

- Private entities,
- Employers in both the public and private sectors.
- Public accommodations,
- State and local government entities,

Let's further explore examples of effective communication for each of these groups:

- **Private entities:** Appropriate aids and services could range from simply offering the use of paper and pen to communicate with a customer who has a speech or hearing disability to having large print handouts available at a conference. However, as a general rule a private entity is

not required to alter its inventory to carry accessible or special products that are designed or easier to use by customers with disabilities.

Example: A bookstore customarily carries only regular print versions of books. The ADA does not require the bookstore to expand its inventory to include large print books or books on audiotapes. However, the bookstore may be required to special order the large print or audio books if it regularly makes special orders for unstocked goods and the accessible goods can be requested from its regular supplier.

- **Employers:** Auxiliary aids and services are required as reasonable accommodations to applicants when necessary to afford equal employment opportunity. They are also required for employees as reasonable accommodations to enable them to perform the essential functions of the job and to fully enjoy all the benefits of employment, unless provision of such aids and services would impose an undue hardship on the employers.
- **Public entities:** Communications with individuals who have disabilities must be as effective as communications with other persons participating in a public entity's programs, services and activities.

Examples:

- Informational materials published by state and local governments must be made available in a variety of different formats upon request. These include large print versions, electronic formats, audiocassettes and Braille.
- Information published on websites run by public entities should be accessible to users with disabilities (*Martin v. Metropolitan Atlanta Rapid Transit Authority*, 225 F.Supp.2d 1362 (N.D.Ga. 2002))
- Seasonal guides to town-sponsored recreational activities should be readily available in large print or electronic formats and should be converted to audiocassettes or Braille upon request from a local resident.
- Meetings, forums, and programs sponsored by state and local government entities should be accessible to individuals with a variety of disabilities, including hearing and speech impairments. Assistive listening devices should be provided, and videotapes shown should all be open captioned. In addition, every effort should be made to secure the services of sign language interpreters upon request. Even when interpreter services are requested less than 24 hours before the event, state and local governments should make their best efforts to hire interpreters.

Note: Some communication barriers are structural in nature such as signage and alarm systems. Removal of these communications barriers may be dealt with as part of the facility accessibility requirements for governmental entities and for places of public accommodation

Tell Me More ...

People with disabilities are entitled to auxiliary aids and services, unless the result is a fundamental alteration, undue burden, or undue hardship.

- A **fundamental alteration** is a modification that is so significant that it alters the essential nature of the good, services, facilities, or programs.
- **Undue burden and undue hardship** are defined as "significant difficulty or expense."

However, **providing a particular auxiliary aid or service that would result in a fundamental alteration or undue burden does not necessarily relieve an entity of its obligation to provide effective communication.**

Example: It may be an undue burden for a small private historic house museum on a shoestring budget to provide a sign language interpreter for a person who is deaf wishing to participate in a tour. But, providing a written transcript of the tour as an alternative would unlikely result in an undue burden.

Surcharges

Additional charges or surcharges **cannot be imposed on people with disabilities to cover the costs of providing ADA-mandated access to goods and services** such as auxiliary aids and services, barrier removal, alternatives to barrier removal and/or other modifications that provide an equal opportunity to people with disabilities.

Examples:

- A movie theater cannot charge persons with hearing impairments a rental fee for using their assistive listening devices while watching a movie.
- A state cannot charge a fee for its handicap parking placards. See *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999) and *Klingler v. Director, Dept. of Revenue, State of Mo.*, 433 F.3d 1078 (8th Cir. 2006).

However, the Department of Justice has stated that **a reasonable, fully refundable deposit may be required for use of auxiliary aids and services** such as an assistive listening device, cassette player, or TTY.

Example: During check-in, hotels should inform guests who are blind or who have low vision that the hotel will provide, free of charge, large print, Braille, and recorded instructions for all services for which print instructions are

provided for guests. Recorded instructions can be provided on a telephone answering machine or by loaning the guest a cassette recording and cassette player upon check-in. A reasonable, fully refundable deposit may be required for cassette players.

Source: [ADA Guide For Places Of Lodging: Serving Guests Who Are Blind Or Who Have Low Vision](#) ^{R45}

Additional requirements may not be imposed on people with disabilities that are not imposed on others.

Example: A person using a wheelchair for mobility cannot be required to be accompanied by a personal assistant when riding on the public transportation system.

However, **additional charges may be imposed on people with disabilities for services that go beyond what the ADA mandates.**

Example: A seven-car train is required under the ADA to have seven spaces to park and secure the chairs and another seven spaces to fold and store wheelchairs. The rail company may charge a \$200 dollar fee for each additional space beyond those mandated by the ADA (Disabled in Action of PA. v. National Passenger R.R. Corp., 418 F.Supp.2d 652 (E.D.Pa. 2005)).

Personal Services and Devices

Reference: [Title II Technical Assistance Manual, 3.6200](#) ^{R13}
[Title III Technical Assistance Manual, 4.2600](#) ^{R16}

Public entities and public accommodations are **not required to provide personal services or personal devices.**

Examples:

- Wheelchairs, prescription eyeglasses, hearing aids.
- A trial court was not required to provide a filtered environment to a person with multiple chemical sensitivities when providing such an environment would require personal devices such as life-support systems, life support aids, and medical aids (McCauley v. Winegarden, 60 F.3d 766 (11th Cir. 1995)).

Personal service does not need to be provided in activities such as eating, toileting, and dressing, unless it is typically provided by the entity.

Examples:

- A hospital or day care center would be required to provide eating, toileting and dressing services to people with disabilities as they provide them to people without disabilities.
- However, a hospital does not have to provide medical prescriptions to a non-patient. Visitor had requested attaching her breathing apparatus to the oxygen port of her husband's room (Dryer v. Flower Hosp., 383 F.Supp.2d 934 (N.D.Ohio 2005)).

- A school district may have to provide emergency injections to a diabetic student (AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11, 538 F.Supp.2d 1125 (D.Minn. 2008)).

Personal service does not refer to minor assistance such as:

- Librarian retrieving books from a shelf
- Waiter removing the cover from a straw
- Teller in a bank filling out a deposit slip.

Direct Threat

Reference: [Title I Technical Assistance Manual, 4.5](#) ^{R9}

[Title II Technical Assistance Manual, 2.8000](#) ^{R13}

[Title III Technical Assistance Manual, 3.8000](#) ^{R16}

An individual with a disability may be excluded if she or he poses a direct threat to the health or safety of others. If an individual poses a direct threat to the health or safety of others, he or she is not considered a qualified individual with a disability. Therefore, an entity may exclude an individual from an activity, and an employer is not required to hire or continue to employ an individual, if the individual poses a direct threat to the health or safety of self or others.

This exclusion under the ADA is not meant to apply when an individual actually makes a threat against the safety of others. Making a threat may be a legitimate non-discriminatory reason to discipline or fire someone (Sista v. CDC Ixis North America, Inc., 445 F.3d 161(2nd Cir. 2006)).

Direct threat **must be determined on a case by case basis.** For an individual with a disability to pose a direct threat, there **must be significant risk of substantial harm; the threat cannot be remote or unlikely.** Also, **like any qualification standard, this requirement must apply to all** applicants, employees and participants, not just to people with disabilities.

An assessment of direct threat **must be strictly based on valid medical analyses and/or other objective evidence, not on a person's good-faith belief that a threat exists** (Bragdon v. Abbott 524 U.S. 624 (1998)). The abilities or limitations of the particular individual must be evaluated.

Examples:

- An employer cannot assume that a person with a mobility disability who has restricted manual dexterity cannot work in a laboratory because she or he will pose a risk of breaking vessels with dangerous contents. However, a person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver.
- A police department cannot have a rule putting every officer that takes psychotropic drugs in a monitoring program for behavioral and personal issues. This type of policy did not permit any individualized assessment on

whether the officer should be put in the program (Krocka v. Bransfield, 969 F.Supp. 1073 (N.D.Ill.,1997)).

- A chemical company cannot rely solely on their doctors' opinions on the potential direct threat the workplace has on the liver of an applicant with hepatitis when the company doctors were generalists while the applicant's doctors were liver specialists. (Echazabal v. Chevron USA, Inc., 336 F.3d 1023 (9th Cir. 2003)).
- An employee who worked with heavy machinery was a direct threat to the safety of others when he showed a disinterest in regulating his diabetes. The doctor in the case stated that unregulated diabetes can cause unconsciousness, confusion, and impaired judgment. Additional testing was unnecessary because the result would not have refuted his disinterest (Darnell v. Thermafiber, Inc., 417 F.3d 657 (7th Cir. 2005)).

If an individual appears to pose a direct threat because of a disability, the covered entity must **first try to eliminate or reduce the risk** to an acceptable level with reasonable accommodation or reasonable modification of policies, practices and procedures.

Examples:

- A volunteer who has a hearing impairment and wants to answer emergency calls for a small town volunteer fire department might pose a direct threat if the hearing impairment interferes with his or her ability to hear callers. However if this threat can be reduced to acceptable levels or eliminated entirely by the provision of an auxiliary aid such as a telephone with amplification, this individual does not pose a direct threat.
- An elementary school teacher who has tuberculosis may pose a risk to the health of children in her classroom. However, with proper medication, this person's disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a "direct threat."

Tell Me More ...

Usually, the assessment of direct threat will not require the services of a physician. Sources of current medical knowledge include public health authorities such as these:

- [Centers for Disease Control](#) ^{R76}
 - [National Institute of Health](#) ^{R77}
 - [National Institute of Mental Health](#) ^{R78}
 - [Office of Public Health and Science](#) ^{R79}
 - [Office of the Surgeon General](#) ^{R80}
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Overview of Title III

Source: [Title III Technical Assistance Manual, 1.0000](#) ^{R16}

Learning Objectives:

- Identify the entities that must comply with ADA Title III provisions.
- Give examples of places of public accommodations.
- Identify the obligations of an entity under ADA Title III.
- Name the enforcement agency for ADA Title III.
- List the defenses under ADA Title III.

Summary:

Title III only applies to private entities, which are also called public accommodations in the ADA. State and local governments are public entities and are covered by Title II while the operations of the Executive Branch of the federal government are covered by Sections 501 and 504 of the Rehabilitation Act of 1973 as amended.

A public accommodation may not discriminate against an individual with a disability in the operation of a place of public accommodation. Individuals with disabilities may not be denied full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations" offered by a place of public accommodation. The phrase "goods, services, facilities, privileges, advantages, or accommodations" applies to whatever type of good or service a public accommodation provides to its customers or clients. In other words, a public accommodation must ensure equal opportunity for individuals with disabilities.

Who Must Comply with Title III?

Source: [Title III Technical Assistance Manual, 1.0000](#) ^{R16}

Title III became **effective on January 26, 1992** and covers public accommodations, commercial facilities, examinations and courses related to licensing or certification, and transportation provided to the public by private entities.

Public accommodations are private entities that own, operate, or lease to places of public accommodation. Places of public accommodation include, but are not limited to, restaurants, hotels, theaters, convention centers, retail stores, shopping centers, dry cleaners, laundromats, pharmacies, doctors' offices, hospitals, museums, libraries, parks, zoos, amusement parks, private schools, day care centers, health spas, and bowling alleys.

A facility may be:

- All or any portion of a building, structure or property complex;
- The site including parking lots, walkways or roads where the building, property, structure or equipment is located.

Places of public accommodations are not limited to actual physical structures with definite physical boundaries. For example, a travel agency that does its business over the phone, mail, or the internet without requiring their customers to set foot into the business is still a public accommodation that must comply with Title III (Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc. 37 F.3d 12 (1st Cir. 1994)).

More specifically, **Title III covers:**

- **Private entities**
- **Commercial facilities** (nonresidential facilities, including office buildings, factories, and warehouses, whose operations affect commerce), and
- Private entities offering certain **examinations and courses related to educational and occupational certification.**

Title III does not cover:

- Entities controlled by religious organizations, including places of worship, or
- Private clubs.

However, **if the facilities of a private club or place of worship are made open or rented to non-members as a place of public accommodation, then those parts of the facility are covered under Title III.**

Example: restaurant, dance hall, daycare center or bingo hall.

Religious entities and private clubs are exempt from ADA public accommodation and commercial facility obligations. However, there are important differences in the two exemptions.

With Regard to Religious Entities and Title III

A religious entity is a religious organization, or an entity controlled by a religious organization. The exemption covers all activities whether religious or secular, even when a religious organization carries out activities that would otherwise make it a public accommodation. Thus, if a church **itself** operates a day care center, a nursing home, a private school, or other program or service, the religious entity would not lose its exemption merely because the services provided were open to the general public.

- If the congregation **rents** space to a private day care center, the day care center is not exempt unless it is also a religious entity. If it is not a religious entity, then the day care center's activities would be covered by ADA public accommodation obligations and the private day care's program and the space it rented must be accessible.

- If a nonreligious entity, such as a community theater, operates what would otherwise be a place of public accommodation in space **donated** by the congregation, the nonreligious entity would also be exempt.

Note: Payment triggers obligations as a public accommodation whereas use of donated space does not. Therefore, the community theater would only be a public accommodation with ADA obligations if a lease exists under which rent or other consideration is paid.

- Although religious entities are exempt from the requirements of the ADA covering public accommodations and commercial entities, a religious entity that has **15 or more employees** would be subject to the employment obligations of Title I.

Note: Many state laws do not exempt religious entities. If a federal law (ADA) requires a different standard than a state law, the law that provides the greater protection for the individual prevails.

With Regard to Private Clubs and Title III:

ADA obligations also do not apply to "private clubs." An entity is a private club for purpose of the ADA if it is a private club as defined under Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin by public accommodations.

Courts have been inclined to find private club status where:

- Members exercise a high degree of control over club operations
- The membership selection process is highly selective
- Fees are substantial
- Operation is nonprofit
- Purpose is not to avoid civil rights law

Facilities of a private club lose their exemption to the extent that they are made available for use by nonmembers as places of public accommodation.

Examples:

- A private country club that would be considered a "private club" for ADA purposes rents space to a private day care center that is also open to the children of nonmembers. Although the private club would maintain its exemption for its other operations, it would have Title III obligations with respect to the operation of the day care center.
- A movie studio is closed off from the public and its premises are only open to employees and registered visitors. Even though the studio includes a commissary, a studio store, and automated teller machine, none of these features are covered by Title III. *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159 (9th Cir. 2000).
- A pro golf tournament, where the players pay a fee to play is a public accommodation under Title III of the ADA. Casey Martin, a professional golfer with a disability, requested that the PGA tour modify their policies to allow

him to use a golf cart during tournament play. The Supreme Court noted that the legislative history of Title III "should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled" and stated, because the PGA leases and operates golf courses to conduct tours, "it is apparent that petitioner's golf tours and their qualifying rounds fit comfortably within Title III's coverage, and Martin within its protection." ([PGA Tour, Inc. v. Martin](#), 532 U.S. 661 (2001)) ^{R121}.

- Title III of the ADA applies to foreign-flagged ships in United States waters to the same extent that it applied to American ships unless it interfered with the ship's internal affairs (*Spector v. Norwegian Cruise Lines Ltd.* (June 6, 2005)).

Obligations under Title III

Source: [Title III Technical Assistance Manual, 3.0000, 4.0000, 5.0000, 6.0000](#) ^{R16}

Under Title III, private entities have **three mandatory areas of obligation**:

1. Operate in a nondiscriminatory manner ensuring individuals with disabilities have the same opportunity to participate in and benefit from the services, activities, and goods offered as all other customers, patrons, or clients;
2. Ensure that communication with individuals with disabilities is as effective as with others, including providing auxiliary aids and services when necessary to eliminate communication barriers; and
3. Provide accessibility by:
 - Removing barriers in existing facilities when removal of barriers is **readily achievable**.

Readily achievable means that the barrier removal can be accomplished with little difficulty or expense in relation to the resources of the entity.

Example: Private entities are only required to remove architectural barriers in existing facilities if removal is "readily achievable." If making the main entrance to an existing place of public accommodation accessible is not readily achievable, the public accommodation can provide access to the facility through another entrance, even though use of the alternative entrance for individuals with disabilities would not be the most integrated setting appropriate.

- Providing **alternatives to barrier removal** when modifications to remove barriers are not readily achievable.
- Providing **accessibility in all renovations or additions to facilities and construction of new facilities by complying with the [ADA Standards for Accessible Design](#)**. ^{R4}

Note: A facility may be all or any portion of a building, structure or property complex, and its site including parking lots, walkways or roads where the building, property, structure or equipment is located.

Also, under the ADA Amendments Act (ADAAA) individuals who are “regarded as having a disability” are not entitled to modifications or accommodations in accessing programs, public accommodations and employment.

Title III - Public Accommodations

Who is Responsible for Providing Accessibility?

Both a landlord who leases space in a building to a tenant and the tenant who operates a place of public accommodation have responsibilities under the ADA. Both the landlord and the tenant have full responsibility for complying with all requirements applicable to places of public accommodation.

The Title III regulation permits the landlord and the tenant to allocate responsibility in the lease for complying with particular provision of the regulation. However, any allocation made in a lease or other contract is only effective between the parties. Both landlord and tenant remain fully liable for compliance.

Examples:

- A management company leases space in a shopping center to a boutique. In their lease, the parties have allocated to the boutique the responsibility for complying with the barrier removal requirements of the ADA within that store. If the boutique fails to remove barriers, both the landlord (the management company) and the tenant (the boutique) would be liable for violating the ADA and could be sued by a customer.
- In a franchise situation, the franchisee is the operator of the public accommodation. Usually, the franchisor does not own, lease, or operate the premises. The amount of responsibility on the franchisor in complying with the ADA depends the amount of control the franchisor has over the operations of the franchisee under the franchise agreement. (See *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) and *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034 (8th Cir. 1998).

Does Title III Apply To Apartment Houses and Residential Facilities?

ADA requirements for public accommodations do not apply to strictly residential facilities. The Fair Housing Act (as amended - FHAA) covers places offering **long-term residence**.

Although ADA obligations do not apply to strictly residential facilities, including common areas **within** residential facilities, they apply to places of public accommodation within residential facilities.

Areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the areas is not limited exclusively to owners, residents, and their guests.

Examples:

- A private residential apartment complex includes a swimming pool for use by apartment tenants and their guests. Because, the complex also sells pool "memberships" to the general public, the pool is a place of public accommodation.
- A residential condo association has a policy restricting use of its party room to residents and their guests. Since it refuses to rent the room to local businesses and community organizations for meetings, the party room is not a place of public accommodation.
- A private residential apartment complex contains a rental office. The rental office is a place of public accommodation.

A facility can be a residential dwelling under FHAA and still fall in whole or in part under at least one of the 12 categories of places of public accommodation in the ADA. Places offering **short-term lodging** such as inns, motels, and hotels are covered by the ADA as places of public accommodation. Remember that the ADA must be applied on a case-by-case basis and depends on individual circumstance? This type of analysis is needed when looking at the two laws.

Examples:

- A hotel offers both short term lodging and long term residential arrangements. The hotel would be covered both as a place of public accommodation under the ADA and under the FHAA as a dwelling.
- A non-profit organization runs a homeless shelter which permits stays ranging from overnight to those of sufficient length to result in coverage as a dwelling under the FHAA.

Because it permits short terms stays the shelter may also be considered a place of public accommodation as a "place of lodging." In addition, if the shelter provides a significant enough level of social services, such as medical care, meals, counseling, transportation, or training, it may also be covered by the ADA as a "social services center establishment."

Commercial Facilities under Title III

As we said above, Title III also applies to **commercial facilities**. Commercial facilities include office buildings, factories, warehouses and other buildings in which employment may occur. ADA's Title III requirements for new construction and alterations apply to commercial facilities, although **strictly commercial** facilities do not have to provide accessibility through readily achievable barrier removal.

However, a building may contain both **commercial facilities** and places of **public accommodation**.

Examples:

- An office building contains ten offices. Two of the offices are occupied by law and accounting firms offering services to the public. Both are places of public accommodation. The businesses occupying the remaining offices do not fall under any of the categories of places of public accommodation. The legal and accounting establishments must meet all obligations for public accommodations. The landlord must also meet the obligations for public accommodations in that part of the building occupied by, and on the path of travel leading to, these places of public accommodation.
- A commercial facility that is not otherwise a place of public accommodation, such as an ice cream factory, offers a tour to the public. The route along which the tour is conducted is a place of public accommodation, and the tour must be operated in accordance with the requirements for public accommodations. This obligation applies only to the part of the facility along which the tour is conducted and not to work stations or other areas that are merely adjacent to or in view of, the tour route. (Work stations, however, may be covered under Title I if the facility has 15 or more employees.)
- A warehouse that is not otherwise a place of public accommodation holds a sale once a year during which overstocked merchandise is sold to the public. For the duration of the sale, the area of the warehouse which is open to the public is a place of public accommodation.

Examinations and Courses Related to Educational and Occupation Certification

In addition to private entities operating places of public accommodation and commercial facilities, Title III also applies to private entities offering certain examinations and courses related to educational and occupational certification. Examinations and courses related to licensing or certification must be offered in a place and manner accessible to persons with disabilities, or alternative accessible arrangements must be offered.

Examinations covered by these requirements include:

- **Examinations for admission to secondary schools,**
- **College entrance examinations,**
- **Examinations for admission to trade or professional schools,** and
- **Licensing examinations such as bar exams, examinations for medical licenses or for certification as a public accountant.**

Examinations related to licensing or certification **must measure the individual's aptitude and ability with regard to the factor(s) the test is intended to measure**, and not his/her disability

Example: ABC Testing Service administers written examinations designed to test specific skills or areas of knowledge. A person with a vision impairment or learning disability that limits the ability to read written material may be unable to pass such an examination regardless of his or her knowledge or ability in the area the test is designed to measure. ABC

must administer the test in a manner that enables the applicant to demonstrate his or her skill or knowledge, rather than the ability to read.

But, if the test is designed to measure the ability to read written material, it may be administered in a written form because the result will accurately reflect the individual's reading ability.

When necessary the entity administering examinations or courses must provide auxiliary aids or services unless to do so would fundamentally alter the examination or course or result in an undue burden.

Examples:

- For individuals with hearing impairments, oral instructions or other aurally delivered materials could be provided through an interpreter, assistive listening device or other effective method.
- For individuals with visual impairments, providing examinations and answer sheets electronically, in large print or Braille, or providing qualified readers or transcribers to record answers may be appropriate.
- For individuals with learning disabilities additional time or the provision of readers may be necessary because of the individual's limitation in perceiving and processing written information.

The entity administering the examination or course must ensure that the auxiliary aid or service provided is effective.

Example: MNO Testing Service provides a reader for an applicant who is blind who is taking a bar examination. The reader is unfamiliar with specific terminology, mispronounces words, is unable to convey the information in the questions accurately or to follow the applicant's instructions effectively. MNO is not in compliance with the ADA because the results of the examination will reflect the reader's lack of skill, rather than the applicant's knowledge.

Individuals with disabilities may not be required to file their applications to take examinations or courses earlier than other applicants. However, entities that administer tests may require individuals with disabilities to provide advance notice of any modifications or aids that would be required, provided that the deadline for such notice is no earlier than the deadline for others applying to take the examination.

An entity administering courses or examinations may require that an applicant provide documentation of the existence and nature of the disability as evidence that he or she is entitled to modifications or aids. Requests for documentation must be reasonable and must be limited to the need for the modification or aid requested. The testing entity may also require the applicant to authorize the release of records from educational, medical, and psychological authorities (See *Ware v. Wyoming Bd. of Law Examiners*, 973 F.Supp. 1339 (D.Wyo. 1997)). Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program. The applicant may be required to

bear the costs of providing such documentation, but the applicant may not be charged for the cost of any modification or auxiliary aid such as interpreters, provided for the examination.

An entity may not refuse to provide modifications or aids for applicants with disabilities on the grounds that those individuals, because of their disabilities, would be unable to meet other requirements of the profession or occupation for which the examination or course is given.

Example: An individual with a disability may not be required to demonstrate that he or she is capable of practicing medicine in order to be provided with an auxiliary aid in taking a test for admission to medical school.

Title III is enforced by the U.S. Department of Justice (DOJ). There is no provision for state or local civil rights agencies to directly enforce Title III of the ADA. They can, however, enforce state or local laws that incorporate or exceed the standards of the ADA, or they can set up alternative dispute resolution mechanisms.

Under Title III:

- Private parties may bring lawsuits to obtain court orders to stop discrimination. No monetary damages will be available in such suits. A reasonable attorney's fee, however, may be awarded.
- Individuals may also file complaints with the Attorney General who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged.
- In suits brought by the Attorney General, monetary damages (not including punitive damages) and civil penalties may be awarded. Civil penalties may not exceed \$50,000 for a first violation or \$100,000 for any subsequent violation.

The Department of Justice (DOJ) will also investigate alleged violations of Title III and undertake periodic compliance reviews of covered entities.

A DOJ investigation may be requested by any individual who believes he or she has been discriminated against or that a specific class of persons has been discriminated against in violation of Title III. Where the DOJ has reason to believe there may be a violation, the DOJ may initiate a compliance review.

Defenses of Title III

The applicable defenses for Title III are undue burden / fundamental alteration and direct threat.

Undue Burden / Fundamental Alteration

A public accommodation is required to provide auxiliary aids and services which are necessary to ensure equal access to the goods, services, facilities,

privileges, or accommodations it offers, unless an undue burden or a fundamental alteration would result.

However, please note: **There is no cost defense to the new construction requirements.**

"Undue burden" is defined as "significant difficulty or expense." A "fundamental alteration" is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.

For more information about "undue burden" and "fundamental alteration," refer to the [Title III Technical Assistance Manual: III-4.3600](#). ^{R16}

Direct Threat

A public accommodation may exclude an individual with a disability from participation in an activity, if that individual's participation would result in a direct threat to the health or safety of others.

The public accommodation must determine that there is a significant risk to others which cannot be eliminated or reduced to an acceptable level by reasonable modifications to the public accommodation's policies, practices, or procedures or by the provision of appropriate auxiliary aids or services.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individual assessment that considers the particular activity and the actual abilities and disabilities of the individual.

Example: A child with HIV was denied admission into a martial arts school. HIV can be transmitted through blood-to-blood contact, and there is a possibility it may be transmitted from blood splashing on the eyes or the unbroken skin. The activities at the martial arts school frequently result in bloody injuries and the fast-paced nature of the martial art may hamper efforts to eliminate contact when the injury occurs. The child's HIV is a direct threat to the safety of other students in this scenario (*Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999)).

For more information about "direct threat," please refer to the [Title III Technical Assistance Manual: III-3.8000](#). ^{R16}

Genetic Discrimination and People with Disabilities

On February 8, 2000, President Clinton issued an executive order prohibiting discrimination against federal employees based on protected genetic information. The executive order defines "protected genetic information" as "(A)

information about an individual's genetic tests; (B) information about the genetic tests of an individual's family members; or (C) information about the occurrence of a disease; or medical condition or disorder in family members of the individual." Current health status information would not be protected under this executive order unless it was derived from the information described above. It prohibits:

- Federal employers from requiring or requesting genetic tests as a condition of being hired or receiving benefits.
- Obtaining or disclosing any genetic information used for medical treatment and research. Under the EO, obtaining or disclosing genetic information about employees or potential employees is prohibited, except when it is necessary to provide medical treatment to employees, ensure workplace health and safety, or provide occupational and health researchers access to data. In every case where genetic information about employees is obtained, it will be subject to all Federal and state privacy protections.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) applies to employer-based and commercially issued group health insurance only. HIPAA is the only federal law that directly addresses the issue of genetic discrimination and prohibits group health plans from using any health status-related factor, including genetic information, as a basis for denying or limiting eligibility for coverage or for charging an individual more for coverage.

Americans with Disabilities Act of 1990

The ADA of 1990 has not been widely used to challenge genetic discrimination. Although the statutory language of the ADA does not reference genetic traits, there was a discussion of the issue during the congressional debates. (<http://fpc.state.gov/documents/organization/108319.pdf>).

The ADA has been interpreted by the EEOC as including genetic discrimination under the third—regarded as—prong of the definition of disability. See EEOC Guidance (<http://www.eeoc.gov/policy/docs/902cm.html>)

"Regarded as... "applies to individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease, or other disorders. Covered entities that discriminate against individuals on the basis of such genetic information are regarding the individuals as having impairments that substantially limit a major life activity..."

The ADAAA, because of the rejection of the Sutton trilogy and the directive of Congress to apply a broader definition of disability, can also be used to challenge genetic discrimination that is asymptomatic under the "regarded as" prong.

Example:

An individual's genetic profile reveals an increased susceptibility to colon cancer. That individual is currently asymptomatic and may never in fact develop colon cancer. After making this individual a conditional offer of employment, the employer learns about the individual's increased susceptibility to colon cancer. The employer then withdraws the job offer because of concerns about matters such as the individual's productivity, insurance costs, and attendance. The employer is treating that individual as having impairment that substantially limits a major life activity. Even though the employee does not actually have a disability, that person has been regarded as having a disability. Accordingly, that individual is covered by the third part of the definition of disability.

Genetic Information Nondiscrimination Act of 2008 (GINA)

On May 21, 2008, the Genetic Information Nondiscrimination Act of 2008 (GINA), referred to by its sponsors as the first civil rights act of the 21st century, was enacted. The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits U.S. insurance companies and employers from discriminating on the basis of information derived from genetic tests.

GINA is divided into two main parts:

- Title I, prohibits discrimination based on genetic information by health insurers; and
- Title II prohibits discrimination in employment based on genetic information.

Title I of GINA prohibits group health plans and health insurance issuers in the group market from using genetic information to adjust premium or contribution amounts for the group covered under the plan. Plans and issuers in the group market are still allowed to increase the premium rate for an employer based on the manifestation of a disease or disorder of an individual enrolled in the plan, but they are prohibited from using the manifested disease or disorder of one individual as genetic information about other group members to further increase the premium.

Title II of GINA prohibits discrimination in employment because of genetic information and, with certain exceptions, prohibits an employer from requesting, requiring, or purchasing genetic information. The law prohibits the use of genetic information in employment decisions — including hiring, firing, job assignments, and promotions — by employers, unions, employment agencies, and labor-management training programs.

As with the ADA and the ADAAA, state genetic non-discrimination laws apply to this issue and may be more stringent. States have a patchwork of genetic-information nondiscrimination laws and they differ in coverage, protections afforded, and enforcement mechanisms.