

Disabilities and the ADA

The Americans with Disabilities Act prohibits discrimination against people with disabilities, whether they're employees, job applicants or guests.

CONTENTS

Overview.....	3
Who does the ADA protect?.....	3
People with a physical or mental impairment.....	3
People with a record of impairment.....	5
People regarded as having an impairment.....	5
Accommodating employees and job applicants with disabilities (ADA, Title I).....	5
Which employers are covered by Title I of the ADA?.....	6
Specific requirements of Title I of the ADA.....	6
Medical exams and medical questions.....	8
Keeping disability information confidential.....	8
Defending against charges of discrimination.....	8
Foodhandlers with infectious or communicable diseases.....	8
The ADA and health insurance plans.....	9
Poster requirement.....	10
How ADA's Title I is enforced.....	10
Suggestions for employer compliance with Title 1 of the ADA.....	11
Avoiding discrimination when you serve guests with disabilities (Title III of the ADA).....	11
Specific requirements of Title III.....	12
Removing barriers in existing facilities.....	13

National Restaurant Association Legal Problem Solver for Restaurant Operators

What makes a business “accessible”?13

Providing aids and services to ensure access13

Ensuring accessibility in alterations and new construction14

Defending against charges of discrimination15

Enforcement of Title III of the ADA.....15

Ways to make your operation more accessible to guests with disabilities15

Tax incentives15

 Tax credit16

 Tax deduction16

 Tax credit or tax deduction?17

State laws.....17

 Legalizing marijuana for medical use.....17

OVERVIEW

The Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, [42 U.S.C. Section 1210 et. seq.](#), is a federal law that prevents discrimination against people with disabilities. It affects restaurant operators in two ways: **Title I** of the law prohibits operators from discriminating against **employees** and **job applicants** with disabilities or perceived disabilities. **Title III** prohibits businesses from discriminating against **guests** with disabilities or perceived disabilities.

WHOM DOES THE ADA PROTECT?

The ADA protects **people with disabilities**. The law defines “disabilities” broadly, and the [ADA Amendments Act of 2008](#) extended the law’s protections even further. Generally, the ADA protects three categories of people:

- people with a physical or mental impairment that substantially limits one or more major life activities
- people with a record of a physical or mental impairment that substantially limited a major life activity, or
- people regarded as having such impairment.

In considering whether someone has a protected disability, the ADA generally looks at a person’s condition **before** any “mitigating measures”—such as medication, prosthetics, assistive technology, hearing aids, or other medical equipment to help control or eliminate the person’s condition—are taken into account. (There’s one exception: Ordinary eyeglasses or contact lenses may be taken into account when determining whether or not a person has a disability. See more below.)

PEOPLE WITH A PHYSICAL OR MENTAL IMPAIRMENT

The ADA protects **people with a physical or mental impairment that substantially limits one or more major life activities**. Having an impairment does not automatically entitle a person to the ADA’s protections. For the person to be protected by the ADA, the impairment must substantially limit one or more major life activities.

Definitions:

“Substantially limits”: The Equal Employment Opportunity Commission, in May 24, 2011, regulations, outlined several “rules of construction” to be used in determining the meaning of the term “substantially limits.” Among these rules:

1. “Substantially limits” is to be construed as broadly as the ADA allows.
2. An impairment need only **substantially limit**, not prevent or significantly restrict, the ability of an individual to perform a major life activity compared to most people in the general population.
3. Determining whether an impairment substantially limits a major life activity requires an individualized assessment. The EEOC calls these “predictable assessments.” Under this concept, some impairments will

be considered disabilities in virtually all cases, such as deafness, blindness, intellectual disability (formerly called mental retardation), missing limbs, autism, cancer, diabetes, HIV infection, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, etc.)

4. Comparing an individual's performance of a major life activity to that of the general population will not necessarily require scientific, medical or statistical analysis, although such analysis may be used.
5. The ameliorative effects of mitigating measures are ignored for the purposes of determining whether a person has a substantial impairment. However, the negative effects of mitigating measures, such as the side effects of the medications, should be considered. (The ADA Amendments Act of 2008 made an exception for "ordinary eyeglasses or contact lenses," which may be taken into account in determining whether or not a person has a disability. A person who wears ordinary eyeglasses for a routine vision impairment, for example, is not (for that reason) considered to be a person with a disability.)
6. An impairment that is episodic or in remission is a disability, even if not active or in remission.
7. Only one major life activity need be substantially limited.
8. To determine whether an individual has an actual disability ("prong one" of the definition of covered persons, above) or a record of a disability ("prong two" of the definition), impairments that last or are expected to last less than six months *may still qualify and be substantially limiting*. The EEOC specifically declined to create a bright-line exclusion for short-term limitations. Duration is just a factor, along with severity.

For example, in [Summers v. Altarum Inst. Corp.](#), No. 13-1645 (4th Cir., Jan. 23, 2014), a court ruled that a temporary impairment caused by an injury may be a covered disability under the ADA if the impairment is "sufficiently severe" to limit a major life activity. An employee's temporary condition – in this case, leg injuries that kept the employee from walking normally for seven months – may constitute an actual disability under the statute.

"Major life activity": The ADA includes examples of major life activities covered by the law.

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

- reading
- concentrating
- thinking
- communicating
- working
- operation of major bodily functions, includes, according to the EEOC, virtually every physiological function: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, mental or psychological disorder, emotional or mental illness, specific learning disabilities, etc.
- A “major life activity” also encompasses new activities such as “interacting with others.”

The list is not exhaustive.

The EEOC makes it plain that the intention is to include virtually all physical and mental conditions, except those which have never been considered impairments, such as genetic predisposition to a disease (now covered by the Genetic Information Nondiscrimination Act), pregnancy (but not pregnancy-related disability), eye color, left-handedness, and personality traits such as a bad temper.

PEOPLE WITH A RECORD OF IMPAIRMENT

The ADA also protects **people who have a record of a physical or mental impairment that substantially limited a major life activity, but who have recovered or are recovering** from such an impairment. Examples include people with a history of mental or emotional illness, heart disease or cancer; and recovered alcoholics or drug addicts.

PEOPLE REGARDED AS HAVING AN IMPAIRMENT

The ADA further protects **people who have impairments that do not substantially limit major life activities but who are viewed by others as having such an impairment**, as well as **people who have no impairment but who are viewed by others as having an impairment**. Examples include victims of severe burns, individuals who use hearing aids and people with controlled diabetes or epilepsy.

Under the EEOC rules, people who are regarded as disabled do not need to show that they are substantially limited in a major life activity. They only need to show that they were regarded by an employer as having a disability, and because of that were subject to an adverse employment action.

ACCOMMODATING EMPLOYEES AND JOB APPLICANTS WITH DISABILITIES (ADA, TITLE I)

Title I of the ADA affects how employers deal with employees and job applicants. Title I prohibits employers from discriminating against any individual with a disability who with or without reasonable accommodation can perform the essential functions of a job. The ban on discrimination covers all aspects of employment, including job-

application procedures, hiring and firing, compensation, advancement, job training and any other term, condition or privilege of employment.

WHICH EMPLOYERS ARE COVERED BY TITLE I OF THE ADA?

Title I of the ADA covers employers of 15 or more employees. The EEOC defines this to include any employer with at least 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Employers of fewer than 15 employees are not covered.

SPECIFIC REQUIREMENTS OF TITLE I OF THE ADA

Title I, as interpreted by the EEOC in regulations that took effect May 24, 2011, requires employers to

- reasonably accommodate the known physical or mental limitations of a job applicant or employee with a disability, unless the employer can show that the accommodation would impose an undue hardship on the employer's business
- not deny employment opportunities to a job applicant or employee with a disability simply because the employer does not want to make a reasonable accommodation
- not limit, segregate or classify an applicant or employee in a way that adversely affects that person's status or opportunities because of his or her disability
- not discriminate against a individual because of that person's relationship or association with an individual with a disability (spouse, child, etc.)
- not use employment tests or other selection criteria that tend to screen out people with disabilities unless the employer can show that the test or criteria is job-related and consistent with business necessity
- choose and administer employment tests in the most effective manner to make sure results accurately reflect the employee's or applicant's skills, aptitude or whatever other factor the test purports to measure, rather than any impairment in sensory, manual or speaking skills (unless these skills are the factors the test purports to measure).

WHAT DOES IT MEAN TO MAKE A “REASONABLE ACCOMMODATION”?

The ADA **requires employers to make reasonable accommodations** to the known disabilities of employees or job applicants. In general, an accommodation is any change in the work environment or in the way things are usually done that enables an individual with a disability to enjoy equal employment opportunities and benefits. An accommodation is not required unless it is reasonable, meaning it does not impose an undue hardship on the employer.

Among the examples of reasonable accommodation an employer can provide:

- make it easy for employees with disabilities to get to, enter and use existing facilities
- restructure a job

- offer a part-time or modified work schedule
- reassign the disabled person to a vacant position
- provide devices such as audio recordings, phone headsets or electronic visual aids
- raise or lower furniture
- adjust or modify exams, training materials or policies
- provide qualified readers or interpreters.

The EEOC regulations specify that only individuals with actual disabilities *or* a record of a disability are entitled to reasonable accommodations. Individuals who are *only* regarded as disabled are not.

WHEN DOES AN ACCOMMODATION IMPOSE AN “UNDUE HARDSHIP”?

The ADA requires employers to make reasonable accommodations to the needs of an employee or job applicant with a known disability **as long as the accommodation does not impose an undue hardship**.

The ADA defines undue hardship as an action requiring significant difficulty or expense -- that is, an action that is unduly costly, extensive, substantial or disruptive, or that will fundamentally alter the nature of the services offered.

In determining what constitutes an undue hardship, factors such as the size of the business, its overall financial resources and the cost of the accommodation will be taken into consideration. For example, in some businesses it would be a reasonable accommodation to let an employee come in an hour late (if that would accommodate the employee’s disability and still have the employee perform the essential functions of the job). However, this accommodation could constitute an undue hardship if a small business has no one else available to help customers during that hour.

EMPLOYEES/APPLICANTS MUST BE ABLE TO PERFORM A JOB’S ESSENTIAL FUNCTIONS

Title I of the ADA prohibits employers from discriminating against **individuals with disabilities**.

To be considered for a job, employees or applicants with disabilities **must be able to perform the job's essential functions** with or without accommodation.

Essential functions under the ADA are the primary functions necessary for the performance of a job. Attendance is generally considered an essential function of many jobs, for example. While an employer may be required to accommodate a reasonable number of absences or modified work schedule, it need not accommodate substantial or unpredictable absences.

In determining what the essential functions are, consideration will be given to the employer's judgment as to what functions are essential. Written job descriptions -- prepared before an employer advertises a job or interviews applicants -- also will serve as evidence of the functions an employer considers essential.

MEDICAL EXAMS AND MEDICAL QUESTIONS

Under the ADA an employer may not conduct a pre-employment medical examination or make pre-employment inquiries into the nature, severity or existence of a disability. The employer may, however, inquire about the applicant's ability to perform job-related functions.

After an offer of employment has been made and before an applicant starts work, an employer may require a medical examination and may condition the offer of employment on the results of the examination, as long as all new employees are required to be examined and information from the examination is kept confidential and maintained in a separate medical file.

A test to determine whether an employee is using illegal drugs is not considered a medical examination under the ADA.

KEEPING DISABILITY INFORMATION CONFIDENTIAL

Once the employer learns of an applicant's or employee's disability, such information must be kept confidential and must not be communicated to anyone who does not need to know. For example, if an employee has epilepsy, it would be important for the employee's supervisor to know about his or her condition, in the event of a seizure. If an establishment has an employee or employees responsible for rendering first aid, such employee or employees would also need to know but other workers would not need to know.

DEFENDING AGAINST CHARGES OF DISCRIMINATION

Employers may defend themselves against disability-related job-discrimination charges in the following ways:

- An employer can show that the alleged discriminatory standards or criteria are job-related and consistent with business necessity and that the worker could not have performed the job even with reasonable accommodation.
- An employer can show that the individual in question poses a direct threat to the health and safety of the employee or others in the workplace. "Direct threat" means a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation.

FOODHANDLERS WITH INFECTIOUS OR COMMUNICABLE DISEASES

Restaurateurs are concerned they could inadvertently violate the ADA by taking steps aimed at protecting public health. One common question in the restaurant industry is whether an employer can move a food-handling employee into a non-food-handling position because of concerns that an employee has an infectious or communicable disease.

The Centers for Disease Control and Prevention publishes an annual list of infectious and communicable diseases that can be transmitted through the handling of food. If an individual employee has one of the diseases on the list,

employers will not violate the ADA by transferring food-handling individuals into non-food-handling positions. These diseases can be transmitted through food-handling, according to the government's list:

- Hepatitis A virus
- Norwalk and Norwalk-like viruses
- Salmonella typhi
- Shigella species
- Staphylococcus aureus, and
- Streptococcus pyogenes.

The list does not include AIDS or HIV infection.

A foodservice employer may require employees to report symptoms and/or a diagnosis of pathogens on the list. If an employee contracts one of the above diseases, the employer should not publicize the employee's name but may put other employees on alert and test other employees. The medical results must be kept confidential and should be maintained separate from the employee's personnel file.

The EEOC's guide on [How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers](#) looks at how restaurateurs can comply with public-health rules without violating the ADA. The guide looks at the interplay between the ADA and the Food and Drug Administration's Food Code. Many states and localities use the Food Code to regulate safety and public health in restaurants.

In the event of a pandemic, or global flu epidemic, the EEOC's [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#) helps employers develop a plan to manage their workplace without violating the ADA. Consult the guidance for answers on such questions as:

- May an employer send employees home if they display flu-like symptoms during a pandemic?
- How much information may an employer seek from an employee who calls in sick?
- May an employer compel all employees to get a flu vaccine regardless of their medical condition or religious beliefs?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying the employees' fitness for duty?

THE ADA AND HEALTH INSURANCE PLANS

The ADA prohibits covered employers from discriminating against a qualified individual with a disability in **any privilege of employment**.

The ADA does not require employers to provide health insurance. However, if an employer offers health insurance to employees, the employer-provided health insurance is considered a "privilege of employment" and the employer is prohibited by the ADA from directly, indirectly or through a health-care provider discriminating against an individual with a disability in the health insurance provided by the employer. (The chapter on employee benefits covers more on the Affordable Care Act.)

The law on how the ADA affects employer-provided health insurance is still evolving, but the following guidance is suggested:

- An employer may not refuse to hire and may not fire an individual with a disability because either the individual or a family member or dependent with a disability would increase the employer's insurance costs.
- An employer must provide all employees, including employees with disabilities, equal access to the insurance plan.

POSTER REQUIREMENT

Employers are required to post an EEOC poster that includes information on the ADA (among other information covered under other statutes enforced by the EEOC, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, etc.) in a conspicuous place. See the chapter on records and posters for more information on this and other posters.

HOW ADA'S TITLE I IS ENFORCED

Remedies and procedures for claims filed under Title I of the ADA are essentially the same as those for claims filed under Title VII of the Civil Rights Act of 1964 ([42 U.S.C. § 2000e](#)). Generally, ADA job-discrimination claims must be filed with the EEOC within 180 days of the date of the claimed discrimination. In states with EEOC-approved fair-employment-practices agencies, job-discrimination claims can be filed within 300 days.

Usually, the EEOC has 180 days after the filing to investigate the charge and either bring a civil action against the employer or issue a right-to-sue letter to the individual who filed the complaint.

Note: The statute of limitations for filing pay-related discrimination claims under the ADA may be longer than 180 days or 300 days because of the Lily Ledbetter Fair Pay Act, signed into law Jan. 29, 2009. Under that law, the statute of limitations for filing pay-discrimination claims starts not on the date the alleged discrimination took place, but on the most recent date the employee is affected by the original discriminatory act. An employee discriminatorily denied a pay raise on Jan. 1, for example, would not be required to file a discrimination claim within 180 or 300 days of Jan. 1. Instead, the employee's clock for filing a claim would start anew with each payroll period, since the employee is allegedly not being paid the full amount at any time after the original discriminatory act.

REMEDIES FOR DISABILITIES-RELATED JOB DISCRIMINATION

Remedies for an employee or job applicant in ADA cases include:

- a court order requiring the individual to be hired or reinstated, with or without back pay
- reasonable attorneys' fees and costs
- a court order requiring the employer to make reasonable accommodations.

Job applicants or employees who successfully argue in jury trials that an employer intentionally discriminated against them may also be eligible for monetary damages of up to \$300,000, depending on the size of the business. However, damages will not be awarded in ADA Title I cases where a plaintiff alleges the employer failed to make a reasonable accommodation and where the employer can show he or she made a good-faith effort -- in consultation with the employee or applicant, after the employee or applicant informed the employer that an accommodation was needed -- to find a reasonable accommodation that did not cause an undue hardship for the employer.

SUGGESTIONS FOR EMPLOYER COMPLIANCE WITH TITLE I OF THE ADA

Employers can use these suggestions for how to comply with Title I of the ADA.

- Avoid bias in the hiring process by reading more the chapter on equal employment opportunity.
- Make a list of every job in the establishment. Prepare written job descriptions listing the primary functions of each job.
- Make the decision to hire based on an applicant's ability to perform the functions listed in the job description, keeping in mind that the employer is obligated by law to accommodate known disabilities of the applicant unless this creates an undue hardship.
- Talk to the employee or applicant about the accommodations that would enable the applicant to perform the primary job functions. In determining what kind of accommodation to provide, consider the applicant's preference.
- Consult with experts. The [Job Accommodation Network](#) is a free service that offers practical, inexpensive ideas that have proven effective for other employers. Vocational rehabilitation training programs also offer tips.
- Provide individuals with disabilities with a working environment as favorable as that provided to other employees, including access to nonwork areas such as employee lunchrooms, lounges and toilets.
- Evaluate the work performance of individuals with disabilities according to the same criteria you use for other employees. Offer increases in wages and promotions on the same basis as for other employees without regard to the accommodation(s) provided such individuals.

For more information on Title I of the ADA, visit the [EEOC website](#) or contact the EEOC at (800) 669-3362.

AVOIDING DISCRIMINATION WHEN YOU SERVE GUESTS WITH DISABILITIES (TITLE III OF THE ADA)

Title III of the ADA bans discrimination against people with disabilities by "places of public accommodation," including restaurants, bars and other establishments serving food or drinks.

Title III prohibits a foodservice operator from discriminating against an individual with a disability in the full and equal enjoyment of the services the foodservice establishment offers. Further, the ADA requires places of public accommodation to make their services available -- i.e., accessible -- to people with disabilities in the most integrated setting possible.

SPECIFIC REQUIREMENTS OF TITLE III

Title III of the ADA requires places of public accommodation to provide equal opportunity, not just equal treatment, to people with disabilities. Specifically, Title III of the ADA requires a foodservice operator to

- not impose eligibility criteria that limit the opportunity of people with disabilities to fully enjoy the facilities and services provided unless it can be shown these criteria are necessary for providing these services
- make reasonable modifications to policies and practices to accommodate individuals with disabilities unless doing so would fundamentally alter the nature of the accommodations or services provided. For example, the ADA would require businesses to modify a no-pets rule to permit a guide dog.
- **provide "auxiliary aids and services"** to make sure people with disabilities have equal access to goods and services unless it can be shown that this is an undue burden or fundamentally alters the nature of the services provided.
- **remove architectural and communication barriers** in existing facilities **wherever this is readily achievable** -- i.e., easily accomplished without much difficulty or expense.
- if barrier removal is not readily achievable, consider any readily achievable alternative ways of making services or accommodations available. If a ramp cannot be installed because the flight of stairs leading to the front door is too long, for example, other readily achievable alternatives must be considered, such as curbside service or home delivery.

The ADA also requires that:

- new structures be constructed to be accessible
- major renovations in existing structures be made accessible.

SERVICE ANIMALS AND TITLE III

The ADA requires places of public accommodation to allow service animals. Under U.S. Department of Justice rules that took effect March 15, 2011, a "service animal" means a dog (or a qualified miniature horse) that is "individually trained to do work or perform tasks for the benefit of an individual with a disability. Other species of animals, wild or domestic, trained or untrained, are not service animals for purposes of this definition."

The work or task that the animal performs must be directly related to the disability. Places of public accommodation can inquire if an animal is a service animal before allowing it on their premises (unless it is obvious what the animal is for), but may not request documentation that an animal has been certified.

DOJ rules do not include emotional-support animals in the definition of service animals, although state, local or other laws may set different obligations. For example, Oregon has defined “assistance animal” to include not only dogs but “other animals” designated by administrative rule that are trained to work or perform tasks for the benefit of a disabled individual.

REMOVING BARRIERS IN EXISTING FACILITIES

The ADA requires existing facilities to **remove architectural and communication barriers** wherever that is **readily achievable**. This includes removing physical barriers such as steps, curbs, telephones and towel dispensers as well as communication barriers that affect individuals with visual or hearing impairments. A written menu, for example, is a communication barrier to the visually impaired. An audible alarm system is a barrier to the hearing-impaired.

WHAT BARRIER REMOVAL IS “READILY ACHIEVABLE”?

Barrier removal is considered **readily achievable** when it is easy to accomplish and carry out without much difficulty or expense. What is readily achievable for one restaurant may not be for another. Courts make decisions case by case, taking into account such factors as the nature and cost of the action needed; the overall financial resources and size of the facility; and the relationship of the facility to a controlling or parent company with greater resources.

As businesses remove barriers, they must do so in a way that complies with the [Department of Justice's ADA Standards for Accessible Design](#). Effective March 15, 2012, barrier removal must meet the 2010 ADA Standards for Accessible Design. These standards are outlined in the NRA’s [ADA Toolkit for Restaurant Operators: Your Compliance Guide for Title III of the ADA](#).

Sometimes businesses will find there’s no readily achievable way to remove barriers in compliance with the DOJ’s ADA standards. In these cases, the business may have to still consider alternatives to barrier removal.

WHAT MAKES A BUSINESS “ACCESSIBLE”?

The Justice Department in 2010 adopted new ADA Standards for Accessible Design. These technical specifications outline accessibility in every aspect of a business, from the width of aisles to the height of self-service counters.

Portions of the 2010 ADA Standards took effect March 15, 2011 (for example, the rules on service animals). The standards for building alterations and new construction took effect March 15, 2012. The Justice Department offers details on the standards at [ADA.gov](#). The NRA’s [ADA Toolkit for Restaurant Operators: Your Compliance Guide for Title III of the ADA](#) goes into detail about the standards most important for restaurants.

PROVIDING AIDS AND SERVICES TO ENSURE ACCESS

Foodservice operators can be held liable for failing to provide **auxiliary aids and services** to ensure that individuals with disabilities have access to goods, services and accommodations. Businesses are not required to provide these aids and services if doing so constitutes an undue burden.

Examples of auxiliary aids and services include interpreters for people with hearing impairments, or readers for blind customers.

An undue burden is an action that requires significant difficulty or expense, taking into account such factors as cost and an operator's financial resources.

If one auxiliary aid or service constitutes an undue burden, an employer must try to find another that does not. For example, an employer would not have to provide a menu in Braille if one of the servers can help the customer read the menu. An employer would not have to provide an interpreter if he or she could communicate with a hearing-impaired person using a pen and pad.

ENSURING ACCESSIBILITY IN ALTERATIONS AND NEW CONSTRUCTION

The ADA requires new buildings and facilities undergoing alterations to be readily accessible to and usable by individuals with disabilities. "Readily accessible" and "usable by" mean that a facility can be easily and conveniently approached, entered and used by individuals with disabilities.

The degree of accessibility required depends on whether a building is newly constructed or going through alterations:

- **New construction:** Any facility opening for first occupancy after Jan. 26, 1993, must be readily accessible, including everything from parking spaces and restrooms to entrances and work areas. New construction occurring on or after March 15, 2012, must comply with the **2010** ADA Standards for Accessible Design.
- **Alterations:** An alteration is defined as any change that affects or could affect the usability of a facility, such as remodeling, renovation or rearrangement of wall configurations or structural elements. The term does not include minor changes such as painting or hanging wallpaper. When alterations are undertaken, the altered areas must to the maximum extent feasible be readily accessible to individuals with disabilities, including wheelchair users. Alterations that affect an area containing a primary function of the establishment (a restaurant's dining room, for example) trigger an additional requirement -- that the path of travel to the area and the phones, restrooms and water fountains serving it must also be readily accessible. To the extent that the cost of the path-of-travel alterations exceeds 20 percent of the cost of alterations to the primary function area, an employer is not required to make the changes. Alterations occurring on or after March 15, 2012, must meet the **2010** ADA Standards for Accessible Design.
- **Elevators:** Elevators are not required to be installed if the facility is less than three stories high or has less than 3,000 square feet per story, unless the facility is in a shopping center or mall or unless the attorney general determines that a particular category of facilities requires elevators.

DEFENDING AGAINST CHARGES OF DISCRIMINATION

A foodservice operator is not required to provide services or accommodations to an individual with a disability if the individual poses a “direct threat” to the health and safety of others. Direct threat means a significant risk to the health or safety of others that cannot be eliminated by modifying the operator's policies, practices or procedures, or by providing auxiliary aids or services.

ENFORCEMENT OF TITLE III OF THE ADA

Remedies and procedures under Title III of the ADA generally provide for a civil action for preventive relief and reasonable attorneys' fees and costs. Courts also may order a public accommodation to remove barriers, provide aids and services, and modify policies. In addition, if the U.S. Attorney General has reason to believe the facility has engaged in a pattern or practice of discrimination, the Attorney General may bring a civil action for monetary damages and impose a civil penalty of up to \$75,000 for the first violation and up to \$150,000 for subsequent violations.

WAYS TO MAKE YOUR OPERATION MORE ACCESSIBLE TO GUESTS WITH DISABILITIES

Some tips to help businesses comply with Title III of the ADA:

- Order a copy of the NRA's [ADA Toolkit for Restaurant Operators: Your Compliance Guide for Title III of the ADA](#). This guide outlined technical specifications for restaurant accessibility and offers dozens of restaurant-specific details on Title III compliance.
- If the facility is leased, review the lease to determine whether the landlord or the tenant has the responsibility for making alterations required by law. Consult an attorney if necessary.
- Inspect the facility, including sidewalks, parking area, entrances, passageways, floor coverings, restrooms and table/booth configurations, to determine whether architectural and communication barriers to individuals with disabilities, including individuals in wheelchairs, exist.
- Remove architectural and communication barriers when this is easy to accomplish without much difficulty or expense. Strive to make the facility readily accessible. The Justice Department suggests the following priorities if an operator cannot afford to do everything at once: (1) do everything possible to help people with disabilities reach and get into the facility; (2) improve access to dining rooms or other areas of primary functions; (3) work to make restrooms accessible; and (4) make other services accessible.
- Increase the staff's sensitivity to people with disabilities. Ask local rehabilitation agencies for tips or help with training. Employees who are familiar with different disabilities and who make an honest and reasonable effort to accommodate customers can be an operator's greatest asset.

For more information on Title III of the ADA, visit the U.S. Department of Justice's [ADA website](#).

TAX INCENTIVES

TAX CREDIT

Section 44 of the Internal Revenue Code ([26 U.S.C. § 44](#)) allows eligible small businesses to take a "disabled access (tax) credit" for expenses associated with ADA compliance.

What it covers: The credit can be used to cover a variety of expenditures, including:

- removing architectural barriers in facilities (alterations must comply with applicable accessibility standards)
- providing readers for customers or employees with visual disabilities
- providing sign language interpreters
- purchasing adaptive equipment
- fees for consulting services (under certain circumstances).

Amounts spent must be reasonable and may not include spending not necessary to accomplish the intended purposes.

Small businesses must make sure that when they remove barriers (or provide services, modifications, materials or equipment), the barrier-removal or services provided meet the Department of Justice's ADA Standards for Accessible Design.

The tax credit can be used only to adapt existing facilities. It cannot be used for the cost of new construction.

Value of the credit: The tax credit is equal to 50 percent of the eligible access expenditures in a year, up to a maximum expenditure of \$10,250. The business gets no tax credit for the first \$250 of expenditures. Thus the maximum tax credit is \$5,000 in a year.

Who's eligible for the credit: Eligible small businesses have gross annual receipts under \$1 million or 30 or fewer full-time employees in the preceding tax year. A full-time employee is one who worked 30 or more hours a week for 20 or more calendar weeks during the year.

All members of the same controlled group of corporations and all persons under common control are treated as one business for the purposes of the gross-receipts limitation, employee limitation and maximum tax credit.

More information: Download [IRS Form 8826](#).

TAX DEDUCTION

All businesses are entitled to take a \$15,000 annual tax deduction under Section 190 of the Internal Revenue Code ([26 U.S.C. § 190](#)) for removing specified architectural or transportation barriers in order to make their facilities more accessible to and usable by people with disabilities. This includes making steps, doorways, restrooms and parking areas more accessible. In order to qualify for the deduction, the removal of barriers must meet U.S. Department of Justice/Access Board and Treasury Secretary standards.

TAX CREDIT OR TAX DEDUCTION?

An eligible small business can take both the tax credit and the tax deduction for separate expenses. A restaurateur cannot, however, claim both a credit and a deduction for the same expense. The IRS offers information on the credit and deduction in [Publication 907, Tax Highlights for Persons with Disabilities](#) (see "business tax incentives").

STATE LAWS

The ADA does not preempt state laws nor does it invalidate state laws that provide equal or greater protection for individuals with disabilities.

LEGALIZING MARIJUANA FOR MEDICAL USE

As of August 2014, some 21 states (Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Maryland, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oregon, Rhode Island and Vermont) and the District of Columbia have enacted state or local laws legalizing marijuana use for certain medical conditions. Two other states (Colorado and Washington) have legalized recreational use of marijuana. While most of these state laws address the decriminalization of marijuana, a few states (Arizona, Delaware and Connecticut) also prohibit employers to a certain degree in action against employees.

There is no federal right to use marijuana. Indeed, marijuana is illegal under the federal Controlled Substances Act, although the U.S. Department of Justice appears to have curtailed enforcement related to marijuana use in states that authorize the use of medical marijuana.

Some "Q&As" may be instructive on how this growing trend may affect employment policies.

Question: If your workplace is in a state that permits medical or recreational use of marijuana, can employers prohibit marijuana use in the workplace?

Answer: Yes. Even in states that allow the use of marijuana, employers are not prohibited from restricting its use during work hours or on the employer's premises. Possession of marijuana in the workplace presents a more difficult question. Some states, including Connecticut and Hawaii, restrict employees from possessing marijuana in the workplace. Employers need to check state law on the legal use or possession of marijuana, and the extent to which it may protect employees at the worksite.

Question: Can employers prohibit employees from working while under the influence of marijuana?

Answer: No state law prohibits an employer from prohibiting employees from working while under the influence of marijuana. However, employers must be careful. Some state laws regulating marijuana use also include definitions on what constitutes being "under the influence."

Question: If I hire an applicant conditioned on passing a pre-employment drug test and the applicant tests positive for marijuana use, may I refuse to hire on that basis?

Answer: Most states, including states that have enacted laws permitting use of marijuana, permit employers to lawfully refuse to hire an applicant who tests positive for marijuana. However, employers in such states need to carefully check the limits of the state law to be sure.

Question: If an employee tests positive for use of marijuana, may I take disciplinary action?

Answer: Employers should first check to see whether state law permits drug testing and under what circumstances. Some states generally allow employers to conduct drug tests but limit it to random testing rather than testing based on probable cause. If state law permits an employer to conduct drug tests, most states allow the employer to impose disciplinary action if an employee tests positive. Again, check state laws: Some states (such as Arizona and Delaware) prohibit employers from taking action against registered marijuana users simply on the basis of a positive drug test unless there is additional evidence of work impairment.