

# REASONABLE ACCOMMODATIONS: THE AMERICANS WITH DISABILITIES ACT AND THE NEW JERSEY LAW AGAINST DISCRIMINATION

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## Frequently Asked Questions: A Basic Overview of the Laws

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### AN INTRODUCTION

The Americans with Disabilities Act has been protecting employees with disabilities for over 30 years. The New Jersey equivalent is known as the New Jersey Law Against Discrimination and is one of the broadest and most expansive laws protecting employees with disabilities in the country. Together, the NJ LAD and the ADA provide strong and broad support for people with intellectual and/or developmental disabilities to seek and obtain accommodations, so they may work in the community.

In more recent years, a self-advocacy movement has swept the country, especially among those with disabilities. The following materials are intended to help you understand what your rights are in the workplace as a person with a disability, under both the federal law (ADA) and the state law (NJ LAD). You will learn, among other things, everything you need to know about requesting a reasonable accommodation, as well as the rules surrounding disability disclosure. You will gain all the knowledge you need to empower yourself in your workplace.

## I. Americans with Disabilities Act (ADA)

**Q: WHAT IS THE AMERICANS WITH DISABILITIES ACT (ADA)?**

**A:** The ADA is a civil rights and federal anti-discrimination law that provides and protects, among other things, the right to a reasonable work accommodation for a qualified person with a disability.

One of the purposes of the ADA is to give persons with disabilities the same opportunity to compete in the workplace based on the same performance standards and requirements that employers expect of their employees who have no disabilities.

**Q: HOW DO I KNOW WHETHER MY EMPLOYER HAS TO FOLLOW THE ADA?**

**A:** Title I of the ADA applies to “covered entities”. The term covered entities includes private employers with 15 or more employees, state and local government employers, employment agencies, labor organizations, and joint labor-management. 42 U.S.C. 12111(2) and (5); Federal executive agencies are exempt from the ADA, but they have to comply with the Rehabilitation Act of 1973, which is identical to the ADA. 42 U.S.C. 12111(5)(B); 29 U.S.C. 791; 29 U.S.C. 794a.

**Q: WHAT IS A REASONABLE ACCOMMODATION?**

**A:** Any modification or change to the application or hiring process, to the job, to the way the job is done, or the work environment that allows a person with a disability who is qualified for the job to perform the essential functions of that job.

### **Q: WHAT IS A QUALIFIED INDIVIDUAL?**

**A:** Under the ADA, a qualified individual is a person with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8).

The term “qualified” means that you satisfy the skill, experience, education, and other job-related requirements of the position sought or held, and can perform the essential job functions of the position, with or without reasonable accommodations. 42 U.S.C. 12111(8).

### **Q: WHAT ARE “ESSENTIAL JOB FUNCTIONS?”**

**A:** The term “essential job functions” means the fundamental job duties of the employment position that the individual with a disability holds or desires. The term essential functions does not include “marginal functions” of the position. 42 U.S.C. 12111(8). Marginal functions are work functions that are non-essential. Therefore, if a person with a disability cannot perform this function, it could be eliminated from his/her/they job functions and/or given to another employee.

An employer does not have to eliminate an essential function, (i.e., a fundamental duty of the position). This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA. This means that a person who is not a “qualified” individual is not protected under the ADA.

In simple terms, you have to be able to do the job in order to be protected under the ADA.

### **Q: HOW DOES THE ADA DEFINE DISABILITY?**

**A:** Under the ADA, the word “disability” means: a person-

- (1) who has a physical or mental impairment that substantially limits one or more **major life activities** OR
- (2) a person who has a history or record of such an impairment OR
- (3) a person who is perceived by others as having such an impairment.

42 U.S.C. 12102(1).

### Q: WHAT DOES “MAJOR LIFE ACTIVITY” MEAN?

A: “Major life activity” means related to “one’s five senses, ability to ambulate and substantial cognitive deficiencies.” 42 U.S.C. 12102(2); School Board of Nassau County v. Arline, 480 U.S. 273, 279-280 (1987); State v. Allen, 334 N.J. Super. 133, 139 (N.J. Super. 2000).

On January 1, 2009, the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 went into effect and added the term, “major bodily activities”, to the term defining disability. Major bodily functions include functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system. 42 U.S.C. 12102(2)(B).

### Q: WHAT ARE SOME EXAMPLES OF MAJOR LIFE ACTIVITIES?

A: Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

### Q: CAN AN EMPLOYER DENY YOU A REASONABLE ACCOMMODATION?

A: An employer can deny a request for a reasonable accommodation if it can show that your request would cause the employer “undue hardship” on the business.

The term “undue hardship” means an action requiring **significant difficulty or expense**. 42 U.S.C. 12112(5).

Some of the factors an employer may consider to determine if it will cause an “undue hardship” are listed below:

- (i) the nature and cost of the accommodation needed under this chapter;

### **A:** *Continued*

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12111(10).

### **Q:** **ARE THERE OTHER RESOURCES FOR EMPLOYERS TO HELP PAY FOR REASONABLE ACCOMMODATIONS?**

**A:** There may be assistance from outside agencies for employers who lack the funds to provide the accommodation. An employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation.

In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.

Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if he/she will pay the difference.

## II. New Jersey Law Against Discrimination (LAD)

### **Q: WHAT IS THE NJ LAW AGAINST DISCRIMINATION?**

**A:** New Jersey's Law Against Discrimination (NJLAD) is the NJ state version of the ADA. It is different from the ADA because it gives employees **MORE** rights and **MORE** protection.

It prohibits discrimination on the basis of disability:

[A]ny unlawful discrimination again against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment. N.J.S.A. § 10:5-4.1

### **Q: HOW DO I KNOW WHETHER MY EMPLOYER HAS TO FOLLOW THE NJ LAD?**

**A:** The NJ LAD applies to employers with as few as **ONE** employee. N.J.S.A. § 10:5-5.

Even if you are the only employee in the company, you **ARE** protected under the NJ LAD.

### **Q: HOW DOES THE NJ LAD DEFINE "DISABILITY?"**

**A:** The LAD definition is **BROADER** than the ADA. The federal requirement that the disability cause a substantial limitation of a major life activity is **REMOVED**. Tynan v. Vicinage, 351 N.J. Super. 385, 397, 798 A.2d 648 (App. Div. 2002).



**A:** *Continued*

Under the LAD, disability means:

[P]hysical or sensory disability, infirmity, malformation, or disfigurement . . . which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection. N.J.S.A. § 10:5-5(q).

In other words, you do not need to prove a substantial limitation of a major life activity. You must just fit into the definition of disability above.

**Q:** **CAN AN EMPLOYER DENY YOU A REASONABLE ACCOMMODATION UNDER THE NJ LAD?**

**A:** New Jersey law requires an employer to make reasonable accommodations for any employee who has a disability, unless it would cause undue hardship on the business. N.J.A.C. 13:13-2.5(b).

Undue hardship considers factors such as the size of the business, the type of operations, the nature and cost of the accommodation needed, and the extent to which the accommodation would involve waiver of an essential requirement of a job. N.J.A.C. 13:13- 2.5(b)(3).

**Q:** **WHAT IF AN EMPLOYER DENIES YOU A REASONABLE ACCOMMODATION?**

**A:** A decision that the employer has failed to make a reasonable accommodation is decided on a case-by-case basis. Failure to accommodate a qualified person if it would not cause undue hardship is discrimination under the NJ LAD.

**Q:** **WHAT ARE SOME EXAMPLES OF REASONABLE ACCOMMODATIONS UNDER THE NJ LAD?**

**A:** Examples of reasonable accommodations are “job restructuring, part-time or modified work schedules or leaves of absence.” N.J.A.C. 13:13- 2.5(b)(1).

### III. Requesting a Reasonable Accommodation

**Q: HOW DO I ASK FOR A REASONABLE ACCOMMODATION UNDER THE ADA?**

**A:** The Equal Employment Opportunity Commission (EEOC), which is a government agency which handles disputes over many issues including reasonable accommodation requests, has provided guidance on making accommodation requests.

To make a request for a reasonable accommodation, you only have to let your employer know that you need an adjustment or change at work for a reason related to a medical condition.

You can use "plain language" to make your request and you do not have to mention the ADA or use the phrase "reasonable accommodation." Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994).

**Q: CAN I ASK FOR A REASONABLE ACCOMMODATION AT ANY TIME WHILE TRYING TO FIND A JOB?**

**A:** Yes, there are three types of reasonable accommodations.

The first is a change to a job application process to allow "a qualified applicant with a disability to be considered for the position such qualified applicant desires."

The second is a change to the work environment or the way the job is done to allow "a qualified individual with a disability to perform the essential functions of that position."

The third is a change that allows "an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."

29 C.F.R. § 1630.2(o)(1)(i-iii)

### **Q: WHAT HAPPENS AFTER I MAKE MY REQUEST?**

**A:** After an employee with a medical condition and/or disability makes a request for a reasonable accommodation, an employer should engage in the “interactive process” to address and resolve the request. 29 C.F.R. § 1630.2(0)(3).

“Interactive process” means that you and your employer should meet to figure out how your disability limits your ability to do your job and what potential reasonable accommodations could overcome those limitations.” In some situations, the employer may need to determine if the individual's medical condition meets the ADA definition of “disability,” a prerequisite for the individual to be entitled to a reasonable accommodation.

An employer should respond quickly to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.

### **Q: WHAT HAPPENS IF MY EMPLOYER IGNORES MY REQUEST?**

**A:** If an employer ignores your request, it might be discrimination.

Some of the factors a court or other agency may look at include the following:

- (1) the reason(s) for the delay,
- (2) the length of the delay,
- (3) how much the individual with a disability and the employer each contributed to the delay,
- (4) what the employer was doing during the delay, and
- (5) whether the required accommodation was simple or complex to provide.

**Q: IS THE INTERACTIVE PROCESS DIFFERENT UNDER THE NJ LAD?**

**A:** No, the interactive process under the NJ LAD is the same as it is under the ADA. Under the LAD, once the request for accommodation is made, the employer must initiate “an informal interactive process” with the employee to determine the appropriate accommodation.

Once such a request is made, “both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.”

**Q: HOW IS THE LAW UNDER THE ADA AND LAD THE SAME WHEN IT COMES TO REASONABLE ACCOMMODATIONS?**

**A:** Under both the ADA and LAD, an employer, once notified about a request for a reasonable accommodation, must work with the employee in good faith to find a means and permit the employee to perform their essential job duties. Unless an employer can show that the accommodation would present an undue hardship for the employer, a valid request for an accommodation should be honored, after consultation with the employee.

## IV. Employees with Intellectual and Developmental Disabilities

**Q: CAN SOMEONE WITH I/DD REQUEST A REASONABLE ACCOMMODATION?**

**A:** All employees with a disability may seek a reasonable accommodation, if they require one to perform their essential job duties, unless such accommodations would impose an “undue hardship” on their employer.

**A:** *Continued.*

The goal of the law, as described above is to provide persons with disabilities the right and opportunity to obtain the same employment opportunities as those without a disability.

**Q:** **DOES BOTH THE ADA AND NJ LAD PROTECT PERSONS WITH I/DD?**

**A:** Yes, both the ADA and the LAD apply as it would to any other physical or mental disability.

**Q:** **ARE THERE ANY CASES WHERE SOMEONE WITH I/DD WAS DISCRIMINATED AGAINST AT WORK?**

**A:** Recently, there was a case called EEOC v. Wal-Mart Stores East, L.P., Civil Action No. 2:17-cv-70, where the plaintiff (the person suing) had a developmental disability, specifically Down syndrome. This person was a long-time employee of a Wal-Mart store in Wisconsin.

Walmart changed her work schedule which caused her not to be able to do her job. She had done her job successfully for many years with her old schedule. She needed an accommodation because she had transportation and health issues and needed to leave at different times than her new work schedule.

Walmart refused to engage in the interactive process or permit a change in her schedule to accommodate her needs.

After a trial, the jury returned a verdict for the plaintiff of 125 million which was later reduced to \$300,000, the maximum amount allowed under federal law for compensatory and punitive damages under the ADA.

**Q: WHAT SPECIAL STEPS SHOULD EMPLOYERS HAVE TO TAKE FOR EMPLOYEES WITH I/DD UNDER THE ADA?**

**A:** If an employer has knowledge about a person's disability, the employer has a duty to look into what accommodations may be necessary. This means that for those employees with developmental disabilities or other cognitive impairments, an employer must make efforts to ascertain what accommodations may be necessary.

The court acknowledges that communication process [interactive process] can become more difficult if an employee has a disability that affects his or her mental status. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary.

**Q: WHAT ABOUT UNDER THE NJ LAD?**

**A:** New Jersey's LAD similarly requires an employer to engage in providing a reasonable accommodation to those who have a physical or mental disability to minimize any disadvantage in the workplace.

LAD is a law meant "to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount." N.J.S.A. 10:5-1 to 10:5-42.

Importantly, "[t]he regulations...require employers to 'consider the possibility of reasonable accommodation before firing ... a person with a disability on the grounds that his or her disability precludes job performance.'" N.J.A.C. 13:13-2.5(b)(2).

**Q: CAN YOU SUM UP HOW THE LAW PROTECTS THOSE WITH I/DD IN EMPLOYMENT SITUATIONS?**

**A:** You must always let your employer know if you need an accommodation to perform your job. However, there might be reasons that your disability prevents you from requesting an accommodation. Employers can **STILL** be held to have discriminated against you if they knew or should have known you needed an accommodation.

**Q: WHAT SHOULD BE THE TAKEAWAY FOR PEOPLE WITH I/DD?**

**A:** Employees with developmental disabilities or mental health issues should be encouraged to bring any accommodation requests to the attention of their employers if they need such accommodations to perform their essential job duties. The language in the NJ LAD and the ADA provide strong and broad support for clients with developmental disabilities to seek and obtain accommodations, so they can work in the community.