

[skip navigation](#)

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[ADA Home Page](#) | [ADA Publications](#) | [Enforcement](#) | [Site Map](#) | [Search](#)

ADA Best Practices Tool Kit for State and Local Governments

Chapter 1

ADA Basics: Statute and Regulations

A. Introduction

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act ("ADA") saying these words, "Let the shameful wall of exclusion finally come tumbling down."¹ One of the most important civil rights law to be enacted since the Civil Rights Act of 1964, the ADA prohibits discrimination against people with disabilities.

What does the ADA mean for state and local governments in the delivery of their programs, services, and activities, as well as their employment practices? In the broadest sense, it requires that state and local governments be accessible to people with disabilities.

Accessibility is not just physical access, such as adding a ramp where steps exist. Accessibility is much more, and it requires looking at how programs, services, and activities are delivered. Are there policies or procedures that prevent someone with a disability from participating (such as a rule that says "no animals allowed," which excludes blind people who use guide dogs)? Are there any eligibility requirements that tend to screen out people with disabilities (such as requiring people to show or have a driver's license when driving is not required)?

Before you begin your accessibility audit, you need to understand the answers to several basic questions.

- What is the ADA, and are there any other laws or regulations I need to know about to do an accessibility evaluation?
- What is a "disability" under the ADA, and is having one enough to be covered by the ADA?
- What types of barriers are there to accessibility?
- What are states' and local governments' obligations under the ADA?

¹ Speech of President George H.W. Bush at the signing of the Americans with Disabilities Act of 1990, reprinted at <http://www.eeoc.gov/ada/bushspeech.html>.

B. The Legal Landscape

Before looking at the individual parts of the ADA, it's best to look at the whole picture. Having an overview of the laws, regulations, and other legal requirements helps to put everything in context.

The Rehabilitation Act of 1973

Broader than any disability law that came before it, Section 504 of the Rehabilitation Act made it illegal for the federal government, federal contractors, and any entity receiving federal financial assistance to discriminate on the basis of disability.² Section 504 obligates state and local governments to ensure that persons with disabilities have equal access to any programs, services, or activities receiving federal financial assistance.

Covered entities also are required to ensure that their employment practices do not discriminate on the basis of disability.

The Americans with Disabilities Act of 1990

The ADA is built upon the foundation laid by Section 504 of the Rehabilitation Act. It uses as its model Section 504's definition of disability and then goes further. While Section 504 applies only to entities receiving federal financial assistance, the ADA covers all state and local governments, including those that receive no federal financial assistance. The ADA also applies to private businesses that meet the ADA's definition of "public accommodation" (restaurants, hotels, movie theaters, and doctors' offices are just a few examples), commercial facilities (such as office buildings, factories, and warehouses), and many private employers.

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

In addition, the Department has the ability to enforce the employment provisions of Title I of the ADA as they pertain to state and local government employees. DOJ is the only federal entity with the authority to initiate ADA litigation against state and local governments for employment violations under Title I of the ADA and for all violations under Title II of the ADA.

² Rehabilitation Act of 1973 § 104, 29 U.S.C. § 794 (2006).

Some Helpful Tools

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

The ADA Standards for Accessible Design (the ADA Standards)

The ADA Standards for Accessible Design, or the "ADA Standards," refer to the requirements necessary to make a building or other facility architecturally (physically) accessible to people with disabilities. The ADA Standards identify what features need to be accessible, set forth the number of those features that need to be made accessible, and then provide the specific measurements, dimensions and other technical information needed to make the feature accessible.

Caution: You may hear the acronym ADAAG used to refer to the ADA Standards. ADAAG stands for the Americans with Disabilities Act Accessibility Guidelines, which are issued by the United States Architectural and Transportation Barriers Compliance Board (called the "Access Board" for short). ADAAG is not the same as the ADA Standards. The Department's regulations must be consistent with the ADAAG, but the ADAAG contains guidelines, not enforceable standards.

Uniform Federal Accessibility Guidelines (UFAS)

These are the architectural standards originally developed for facilities covered by the Architectural Barriers Act, a law that applies to buildings designed, built, altered or leased by the federal government. They also are used to satisfy compliance in new or altered construction under Section 504. State and local governments have the option to use UFAS or the ADA Standards to meet their obligations under Title II of the ADA. However, if states and local governments choose to use the ADA Standards, the elevator exemption contained in the ADA Standards may not be used³. Also, only one set of standards may be used for any particular building. In other words, you cannot pick and choose between UFAS and the ADA Standards as you design or alter a building. DOJ also uses UFAS for certain special-use facilities when the ADA Standards have no scoping or technical provisions, such as for prisons and jails. A downloadable copy of UFAS can be

found at <http://www.access-board.gov/ufas/ufas.pdf> and a searchable copy can be found at <http://www.access-board.gov/ufas/ufas-html/ufas.htm>. Technical assistance on UFAS is available from the U.S. Access Board at 1-800-872-2253 (voice) or 1-800-993-2822 (TTY) or TA@access-board.gov.

Did You Know? When discussing architectural standards, two terms are often used: “scoping” and “technical provisions.”

“Scoping” tells you where and how many accessible elements or features are required under the ADA Standards. “Technical provisions” give you the components, dimensions and installation details of the accessible elements.

For Example. Section 4.1.3(7) of the ADA Standards tells you generally about doors in new construction. There are four different scoping requirements that tell you the percentage or absolute number of which of the following types of doors must be accessible: doors going into a building, doors within a building, doors that are part of an accessible route, and doors as part of egress (i.e., exits for fire and life-safety purposes). Section 4.13 of the ADA Standards tells you the technical provisions for doors that are specific requirements, such as the required clear passage width of a doorway.

³ The elevator exemption, which only applies to non-governmental entities, states that elevators are not required in certain specified facilities. 28 C.F.R. pt. 36 app. A § 4.1.3(5).

C. ADA Fundamentals

The cornerstone of Title II of the ADA is this: no qualified person with a disability may be excluded from participating in, or denied the benefits of, the programs, services, and activities provided by state and local governments because of a disability.⁴ One simple sentence, but it has many words, phrases and ideas to understand.

1. Who is Covered?

Not everyone is covered under the ADA. There are certain basic requirements that must be met in order to be protected. The first and most obvious requirement is that a person must have a disability.

a. Disability Defined

The ADA defines disability as a mental or physical impairment that substantially limits one or more major life activities.⁵ ADA protection extends not only to individuals who currently have a disability, but to those with a record of a mental or physical impairment that substantially limits one or more major life activities, or who are perceived or regarded as having a mental or physical impairment that substantially limits one or more major life activities.⁶

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

One: Does the individual have an impairment?

A *physical* impairment is a physiological disorder or condition, cosmetic disfigurement or anatomical loss impacting one or more body systems.⁷ Examples of body systems include neurological, musculoskeletal (the system of muscles and bones), respiratory, cardiovascular, digestive, lymphatic and endocrine.⁸

A *mental* impairment is a mental or psychological disorder.⁹ Examples include mental retardation, emotional or mental illness, and organic brain syndrome.¹⁰

The Department’s regulations also list other impairments, including contagious and noncontagious

diseases; orthopedic, vision, speech and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; specific learning disabilities; HIV disease (with or without symptoms), tuberculosis, drug addiction, and alcoholism.¹¹

Two: Does the impairment limit any major life activities?

An impairment cannot be a disability unless it limits something, and that something is one or more major life activities. A major life activity is an activity that is central to daily life.¹² According to the Department's regulations, major life activities include walking, seeing, hearing, breathing, caring for oneself, sitting, standing, lifting, learning, thinking, working,¹³ and performing manual tasks that are central to daily life.¹⁴ The Supreme Court has also decided that reproduction is a major life activity.¹⁵ This is not a complete list. Other activities may also qualify, but they need to be activities that are important to most people's lives.

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

Not only must a person have an impairment that limits one or more major life activities, but the limitation of at least one major life activity must be "substantial." An impairment "substantially limits" a major life activity if the person cannot perform a major life activity the way an average person in the general population can, or is significantly restricted in the condition, manner or duration of doing so. An impairment is "substantially limiting" under the ADA if the limitation is "severe," "significant," "considerable," or "to a large degree."¹⁶ The ADA protects people with serious, long-term conditions. It does not protect people with minor, short-term conditions.

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

- What kind of impairment is involved?
- How severe is it?
- How long will the impairment last, or how long is it expected to last?
- What is the impact of the impairment?
- How do mitigating measures, such as eyeglasses and blood pressure medication, impact the impairment? The Supreme Court has ruled that, if an impairment does not substantially limit one or more major life activities because of a mitigating measure an individual is using, the impairment may not qualify as a disability.¹⁷ Remember, however, that mitigating measures such as blood pressure medication may sometimes impose limitations on major life activities, and those must be considered as well.

⁴ 42 U.S.C. § 12132; 42 U.S.C. § 12102(2)(B) & (C).

⁵ 42 U.S.C. § 12202(2)(A).

⁶ 42 U.S.C. § 12102(2)(B) & (C).

⁷ 28 C.F.R. § 35.104(1)(i)(A).

⁸ 28 C.F.R. § 35.104(1)(i)(A).

⁹ 28 C.F.R. § 35.104(1)(i)(B).

¹⁰ 28 C.F.R. § 35.104(1)(i)(B).

¹¹ 28 C.F.R. § 35.104(1)(ii).

¹² *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

¹³ *Bragdon v. Abbott*, 524 U.S. 624, 638-49 (1999). The Supreme Court has questioned whether "working" is a major life activity. However, "working" is identified as a major life activity under the regulation for Title II of the ADA, 28 C.F.R. § 35.104, and the regulation for Title I of the ADA, 29 C.F.R. § 1630.2(l).

¹⁴ *Toyota*, 534 U.S. 184.

¹⁵ *Bragdon v. Abbott*, 524 U.S. 624 (1988).

¹⁶ *Toyota*, 534 U.S. 184.

¹⁷ *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

Example: Broken Arm – Under ordinary circumstances, a person with a broken arm is not covered by the ADA. Although a broken arm is an impairment, it is usually temporary and of short duration. Consequently, a broken arm is not considered to be substantially limiting in most circumstances.

Does a person with depression have a disability under the ADA?

You might think the answer would be “no” because depression does not seem to substantially limit any specific major life activity. However, someone who has had major depression for more than a few months may be intensely sad and socially withdrawn, have developed serious insomnia, and have severe problems concentrating. This person has an impairment (major depression) that significantly restricts his ability to interact with others, sleep, and concentrate. The effects of this impairment are severe and have lasted long enough to be substantially limiting.

b. A Qualified Person with a Disability

Having an impairment that substantially limits a major life activity may mean that a person has a disability, but that alone still does not mean that individual is entitled to protection under the ADA. A person with a disability must also qualify for protection under the ADA. A “qualified individual with a disability” is someone who meets the essential eligibility requirements for a program, service or activity **with or without** (1) reasonable modifications to rules, policies, or procedures; (2) removal of physical and communication barriers; and (3) providing auxiliary aids or services for effective communications.¹⁸

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

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

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

¹⁸ 28 C.F.R. § 35.105

Reasonable Modification

Public entities must reasonably modify their rules, policies, and procedures to avoid discriminating against people with disabilities.¹⁹ Requiring a driver’s license as proof of identity is a policy that would be discriminatory since there are individuals whose disability makes it impossible for them to obtain a driver’s license. In that case it would be a reasonable modification to accept another type of government-issued I.D. card as proof of identification.

Examples of Reasonable Modifications

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

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

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

¹⁹ 28 C.F.R. § 35.130(b)(7).

Effective Communication

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

Types of Auxiliary Aids and Services

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

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

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

Example: A person who became deaf late in life is not fluent in sign language. To participate in her

defense of criminal charges, she requests real time computer-aided transcription services. Instead, the court provides a qualified sign language interpreter. Is this effective? No. Providing a sign language interpreter to someone who does not use sign language is not effective communication.

The Cost of Doing Business

The expense of making a program, service, or activity accessible or providing a reasonable modification or auxiliary aid may not be charged to a person with a disability requesting the accommodation.²⁰

Example: What if a person asks for a sign language interpreter at a city council meeting? The cost may not be passed along to the person requesting that accommodation.

²⁰ 28 C.F.R. § 35.130(f).

Examples of Barriers to Accessibility

Architectural

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

Policies and Procedures

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

Effective Communication

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

A Final Word: Every disability is a disability of one. While some people with a particular disability may not be able to perform a certain task or participate in a particular program, service, or activity, others may be able to do so.

Example: Some people with severely impaired vision can drive safely so long as they use specially prescribed optical aids.

One Man's Ability – and Disability

Jim Abbott played professional baseball. He was the 15th player to ever debut in the major leagues (and never play in the minor leagues) and had a 3.92 earned run average in his rookie year. Jim Abbott was born with one hand. If his home town had applied a blanket requirement that all little league players must have two hands, Jim Abbott might not have had the chance to develop into the professional athlete that he became.

The key to making correct decisions is an individualized assessment. Avoid blanket exclusions, and evaluate each person based on his or her own abilities.

2. What is Covered?

Programs, Services, and Activities

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

Integrated Setting

One of the main goals of the ADA is to provide people with disabilities the opportunity to participate in the mainstream of American society. Commonly known as the "integration mandate," public entities must make their programs, services, and activities accessible to qualified people with disabilities in the most integrated way appropriate to their needs.²¹

Separate or special activities are permitted under Title II of the ADA to ensure that people with disabilities receive an equal opportunity to benefit from your government's programs, services, or activities.²² However, even if a separate program is offered to people with disabilities or people with one kind of disability, a public entity cannot deny a person with a disability access to the regular program. Under the ADA, people with disabilities get to decide which program they want to participate in, even if the public entity does not think the individual will benefit from the regular program.²³

Example: A county may run a summer program for kids with disabilities in June and kids without disabilities in July. The county must allow kids with disabilities to attend either session.

²¹ 28 C.F.R. § 35.130(d).

²² 28 C.F.R. § 35.130(b)(1)(iv).

²³ 28 C.F.R. § 35.130(b)(2).

3. When Was it Built? Why Does it Matter?

The ADA treats facilities that were built before it went into effect differently from those built or renovated afterwards. **The key date to remember is January 26, 1992**, when Title II's accessibility requirements for new construction and alterations took effect.²⁴

Before January 26, 1992

Facilities built before January 26, 1992, are referred to as "pre-ADA" facilities.²⁵ If there is an architectural barrier to accessibility in a pre-ADA facility, you may remove the barrier using the ADA Standards for Accessible Design or UFAS as a guide, or you may choose to make the program, service, or activity located in the building accessible by providing "program access."²⁶ Program access allows you to move the program to an accessible location, or use some way other than making all architectural changes to make the program,

service, or activity readily accessible to and usable by individuals with disabilities.

Example: A small town with few public buildings operates a museum featuring the history of the area. The museum is in a two story building built in 1970, which has no elevator. The town may either install an elevator or find other ways to make the exhibits accessible to people with mobility disabilities. One program access solution in this case might be to make a video of the second floor exhibits for people to watch on the first floor.

There are many ways to make a program, service, or activity accessible other than through architectural modifications. Keep in mind, however, that sometimes making architectural changes is the best solution financially or administratively, or because it furthers the ADA's goal of integration.

²⁴ 28 C.F.R. § 35.151.

²⁵ 28 C.F.R. §§ 35.150 - 35.151.

²⁶ 28 C.F.R. § 35.150.

After January 26, 1992

Any facility built or altered after January 26, 1992, must be "readily accessible to and usable by" persons with disabilities.²⁷ For ADA compliance purposes, any facility where construction commenced after January 26, 1992 is considered "new," "newly constructed," or "post-ADA." "Readily accessible to and usable by" means that the new or altered building must be built in strict compliance with either the ADA Standards for Accessible Design or UFAS.

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

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

Example: A county renovates a section of an administrative building. That renovated section must be altered in compliance with the ADA Standards or UFAS. In addition, the route from the accessible entrance of the building to the renovated section must be made accessible to people with disabilities. Features along the route, such as toilet rooms and water fountains, need to be made accessible as well.

Of course, it is possible for a pre-ADA building (i.e., built before 1992) to have altered elements. In that case, the public entity can provide program access for the programs housed in the non-altered portion of the building by making them available in the parts of the building that have been altered.

New and altered facilities must be built in compliance with the ADA Standards or UFAS regardless of what, if any, programs are located in them. Even if new or altered facilities are not open to the public, they must be accessible to people with disabilities.

²⁷ 28 C.F.R. § 35.151.

4. Enforcement and Remedies

An individual or a specific class of individuals or their representative alleging discrimination on the basis of

disability by a state or local government may either file –

- (1) an administrative complaint with the Department of Justice or another appropriate federal agency; or
- (2) a lawsuit in federal district court.

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

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

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

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

[ADA Tool Kit for State and Local Governments](#)

[ADA Home Page](#)

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