

How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers

[Summary of this Guide](#)

Introduction

The Americans with Disabilities Act (ADA) is a federal civil rights law that applies to people with disabilities and protects them from discrimination. The Equal Employment Opportunity Commission (EEOC), a Federal government agency, enforces the sections of the ADA that prohibit employment discrimination. This Guide explains these ADA employment rules for the food service industry.

The ADA is important to food service employers and employees. Food service employers must avoid discriminating against people with disabilities while obeying strict public health rules. Food service workers with disabilities have rights under the ADA when applying for jobs or when working for a restaurant, cafeteria, or other food service employer.

This Guide has three parts: (1) basic information about the ADA; (2) an explanation of the relationship between the ADA and the FDA Food Code ⁽¹⁾; and (3) a discussion of the ADA's rules that prohibit employment discrimination against qualified people with disabilities.

General Information About the ADA

1. What is the ADA?

The Americans with Disabilities Act is a Federal law that prohibits most employers from discriminating against a qualified person who has a disability.

The EEOC enforces the employment parts of the ADA. The EEOC has more than 50 offices in cities throughout the U.S. and in Puerto Rico.

To find the EEOC office near you, check the EEOC web site at <http://www.eeoc.gov/offices.html>.
You also can call the EEOC at 1-800-669-4000/1-800-669-6820 (TTY).

2. Is my business covered by the ADA?

The employment provisions of the ADA apply to businesses that have 15 or more employees on the payroll. ⁽²⁾ This includes full and part-time employees. If you have several sites that are all owned, operated, and managed by your business, then you must count all the employees at these sites. But, if you have different sites that are not owned, operated, or managed by the same business, then you have to count all the employees only if your business is an "integrated enterprise." See Appendix E for information about "integrated enterprises."

3. Who is protected by the ADA?

The ADA protects a person with a disability who is qualified for the job.
The ADA does not provide a list of disabilities. The ADA has a legal test to decide if a person has a condition that is severe enough to be an ADA disability.
The ADA defines a current **disability** as:

- a medical condition or disorder (called an **impairment**)
- that **substantially limits** a person
- in doing basic activities (called **major life activities**).

The ADA also protects a person who has a record of a disability or is regarded as having a disability.

Examples of **impairments** include hearing loss, limited eyesight, loss of a limb, or an illness from a pathogen ⁽³⁾ transmissible through food, as listed in the FDA Food Code at section 2-201.11.

In order for an impairment to be serious enough to be an ADA disability, the impairment must substantially limit a major life activity.

Examples of **major life activities** include walking, seeing, hearing, breathing, caring for oneself, performing manual tasks, sitting, standing, lifting, learning, and thinking.

Example 1: Hanh has severe diabetes that seriously limits her ability to eat. Even when taking insulin to help manage her diabetes, Hanh must test her blood sugar several times a day, and must strictly monitor the availability of food, the time she eats, and the type and quantity of food she eats, to avoid serious medical consequences. Hanh has an impairment that substantially limits her ability to eat. She is a person with a disability under the ADA.

A major life activity is **substantially limited** under the ADA if it is **severely limited either permanently or for a long time** by an impairment. An impairment also may cause **serious, long-term effects** that, in turn, severely limit a major life activity.

Example 2: Dani contracted Hepatitis A, which led to liver failure and the need to have a liver transplant. In the eight-month period during which she has been waiting for a new liver, she has been substantially limited in her ability to care for herself. Dani is a person with a disability under the ADA.

The ADA protects people with serious, long-term conditions. It does not protect people with minor, short-term conditions.

Example 3: Chen contracted typhoid fever due to the ingestion of the bacterium *S. Typhi*. The symptoms of his illness included high fever, extreme fatigue, headaches and joint pain. However, he received antibiotics from his doctor and his condition began to improve within a week. He completely recovered within a few weeks. Chen is not a person with a disability under the ADA.

The ADA lets the employer hire the most qualified person for the job, regardless of disability.

- To be qualified, a person with a disability must:

- meet job-related requirements (such as having the required education, experience, skills or licenses) and
- be able to perform the job's "essential functions" (that is, the duties that are central to the job) with or without a reasonable accommodation.
- A **reasonable accommodation** is a change in the job application process, in the way a job is performed, or to other parts of the job (like employer-sponsored training, benefits, or social events) that enables a person with a disability to have equal employment opportunities. See questions 20-27 for more about reasonable accommodations.

4. Does the ADA allow an employer to consider the difficulty or expense of a reasonable accommodation?

Yes. The ADA requires employers to provide reasonable accommodation to a qualified person with a disability **unless** to do so would be an **"undue hardship."**

Undue hardship means significant difficulty or expense. A requested reasonable accommodation poses an undue hardship if:

- it involves a significant difficulty that disrupts the business;
- it involves a significant expense; or
- it requires the employer to change the basic nature of its business.

If the employer can show that one particular reasonable accommodation will cause an undue hardship, it is not required to provide that reasonable accommodation. See question 24 for more on undue hardship.

Example 4: Ashley applies for a wait staff position at a nightclub. She has a vision impairment that makes it very difficult for her to see in dim lighting. Ashley requests, as a reasonable accommodation, that the nightclub be brightly lit. The employer would probably be able to show that this accommodation poses an undue hardship. Bright lights would damage the atmosphere of the club and make it difficult for the patrons to see the stage shows.

Example 5: Kyung applies for a job as a cashier at a fast food restaurant. Kyung is qualified for the job in every way, but the employer is reluctant to hire him, fearing that Kyung's cleft palate will offend customers. If the employer refuses to hire Kyung for this reason, the employer will not be able to show undue hardship. An employer cannot claim undue hardship based on customers' (or employees') fears or prejudices about a person's disability.

5. Does the ADA let employers consider the health or safety of the employee or co-workers in deciding whether to hire or fire employees or make other employment decisions?

Yes. Under the ADA, an employer may refuse to hire or may terminate a person who would pose a **"direct threat"** to the health or safety of himself or others in the workplace.

Direct threat means a **significant** risk of **substantial** harm. A risk is a direct threat only if it cannot be avoided or reduced to safe levels by a reasonable accommodation. An employer must not rely on rumors or on general information about a medical condition. Instead, an employer must figure out, based on facts, whether the individual in question poses a direct threat.

Example 6: Julio delivers pizza for a restaurant. His job requires driving a delivery car most of the day. Julio's employer often sees him suddenly falling asleep while waiting at the restaurant for his next delivery assignment. The employer is concerned that Julio might fall asleep while driving and cause an accident, hurting himself and others. When the employer asks Julio about his habit of falling asleep suddenly, Julio states that he has been diagnosed with sleep apnea. Based on this information, the employer may ask Julio medical questions or require that he take a medical exam to figure out if he is a **direct threat** when driving. If the medical inquiries or exam reveal that Julio has an impairment that causes him to fall asleep without warning, the employer may be able to establish that employing Julio to drive poses a significant risk of substantial harm to the safety of Julio and others. In making this determination, the employer must consider whether there is a reasonable accommodation that would eliminate the risk or reduce it to a safe level.

The ADA and Diseases Transmissible Through Food

The FDA Food Code addresses the issue of employee health for those employees who work around food. One of the Food Code's intentions is to protect the public from diseases transmissible through food. The FDA Food Code addresses the Big 4 pathogens:

- *Salmonella* Typhi,
- *Shigella* spp.,
- Shiga toxin-producing *Escherichia coli*
- Hepatitis A virus

Under the ADA, the Centers for Disease Control and Prevention (CDC) must annually publish a list of infectious and communicable diseases.⁽⁴⁾ The Big 4 pathogens listed in the Food Code are included on the CDC list.⁽⁵⁾ See Appendix F for more information about the Big 4.

The FDA Food Code also discusses symptoms of gastrointestinal illness such as diarrhea, vomiting and fever.

6. As a restaurant business, may I ask an applicant during the job interview about her health and about diseases transmissible through food, as listed in the FDA Food Code at section 2-201.11(A)? May I use the FDA Food Code's "Model Form 1-A" before making a job offer?

No. It is too early to ask these questions at the job interview. The ADA prohibits it. At the job interview, you should decide if the person is qualified for the job. See question 13. The best course of action is to follow the guidance of Model Form 1-A, which says food employers should ask questions about symptoms and diseases transmissible through food only after a conditional job offer has been made.

7. After I make a conditional job offer, may I ask about diseases transmissible through food or use Model Form 1-A?

Yes. After you make a conditional job offer, you may ask about diseases transmissible through food. You may ask questions about an applicant's health and require a medical exam. You must treat all applicants in the **same job category** the same.

Example 7: Carla and Anjali both apply for wait service jobs at a diner. Carla coughs throughout the interview. The owner tells both women he intends to hire them. He then requires Carla, but not Anjali, to fill out Model Form 1-A (which asks about foodborne illnesses.) This would violate the ADA, which requires that the employer treat all applicants for wait staff positions the same.

You also may ask medical questions of a **current employee**, as explained in question 9.

8. May I cancel a conditional job offer without violating the ADA if an applicant is diagnosed with an illness due to one of the diseases transmissible through food, as listed in the FDA Food Code at section 2-201.11(A)?

If the applicant is diagnosed with an illness due to one of the diseases listed in the Food Code (the Big 4) and **is disabled by that illness**, you must follow the requirements of the ADA.

The steps to follow: If the applicant is disabled by the illness, then you may cancel the job offer **only** if:

- it is for a food handling job; and
- you determine that either there is no reasonable accommodation that would eliminate the risk of transmitting the disease through food, or any such accommodation would be an undue hardship to your business.

If, however, the applicant has one of the diseases listed in the Food Code, but does not have an **ADA disability**, the requirements of the ADA do not apply.

9. May I require a current employee to report whether he has a disease transmissible through food as listed in the FDA Food Code or to fill out Model Form 1-A from Annex 7 of the FDA Food Code?

Yes, you may require current employees to make these reports. The ADA itself recognizes the danger to public health presented by diseases transmissible through the handling of food. See 42 U.S.C. . 12113(d)(1) and (2). The ADA also says that you may follow any state, county or local food handling law designed to protect the public health from the infectious and communicable diseases identified by the CDC. See 42 U.S.C. . 12113(d)(3). Such state, county or local food handling laws may include the Food Code's reporting requirements.

Therefore, food service employers who follow the FDA Food Code reporting requirements do not violate the ADA. The FDA Food Code reporting requirements are:

- In section 2-201.11(A), an employee has to **report** whether he is diagnosed with an illness due to one of the Big 4 listed pathogens.
- In section 2-201.11(B), an employee has to **report** whether he has any **symptoms** relating to intestinal illness, boils or infected wounds.
- In section 2-201.11(C), an employee has to **report** if he has had a **past illness** due to one of the listed pathogens.
- In section 2-201.11(D), an employee has to **report** if he meets one of the specific **high-risk conditions** for becoming ill due to one of the four listed pathogens.⁽⁶⁾

- In section 2-201.13, an employee must get a **medical clearance** before the employer may lift the employee's exclusion or restriction.

You may also ask medical questions of a particular employee who handles food if you have an objective factual basis, i.e., concrete reasons, for linking the employee's medical condition to workplace safety or job performance. For example, if you see that an employee is vomiting or has other symptoms of a gastrointestinal illness, you may ask her if she has one of the Big 4 diseases. You have an objective reason to believe that the employee may pose a risk to workplace safety because you have observed the symptoms that the FDA has determined are likely to transmit one of the listed foodborne illnesses.

The ADA and the Food Code's Provisions on "Exclusions" and "Restrictions"⁽⁷⁾

Under the FDA Food Code, a food employee must report if he has certain symptoms, including diarrhea, fever, vomiting, jaundice, or sore throat with fever, which are associated with a gastrointestinal illness. An employee with such a symptom must be **restricted** from performing certain duties, including food handling. The restriction must remain in place until the employee is free from the suspected infectious agent. You should review the FDA Food Code, section 2.201.13, for a complete explanation of how to remove restrictions.

A food employee also must report if he is **diagnosed with an illness** due to one of the Big 4 pathogens. If he is, he must be excluded from the food establishment. The exclusion may be removed if the employer obtains approval from the regulatory agency that has authority over the establishment, and the employee provides written medical documentation that he is free from the pathogen and can work as a food employee. See FDA Food Code, section 2.201.13 for a complete explanation of how to remove exclusions.

Most people who have a disease resulting from the Big 4 pathogens are not disabled by them. These diseases are usually short-term and/or minor. If a person does not have an ADA disability, the food service employer may follow the Food Code's guidance on exclusions without considering the ADA.⁽⁸⁾

But, when a person is disabled by one of the diseases caused by a Big 4 pathogen, the food service employer must consider the ADA in addition to the provisions in the FDA Food Code. The ADA says that an employer may refuse to assign or continue to assign an employee to a job involving food handling if that employee is disabled by one of the diseases on the CDC list (which includes the Big 4 pathogens) and if the risk of transmitting the disease cannot be eliminated by reasonable accommodation. See 42 U.S.C. § 12113(d)(3).

This means that when an employee claims to be disabled by one of the diseases listed in the Food Code and requests reasonable accommodation, you must follow these steps:

The steps to follow: If the employee is disabled by one of the diseases listed in the Food Code, you may follow the Food Code's requirement that the employee be excluded from the food establishment only if you determine that:

- there is no reasonable accommodation that would eliminate the risk of transmitting the disease while also allowing the employee to work in his food handling position, or

- all reasonable accommodations would pose an undue hardship on your business; and
- there is no vacant position not involving food handling for which the employee is qualified and to which he can be reassigned.

See questions 20-27 for more on reasonable accommodation and undue hardship. These steps must be followed even for employees who serve a "highly susceptible population," for example, older adults obtaining food in a nursing home or hospital. See FDA Food Code, section 1-201.10(B)(44).

10. Does the ADA require the employer to hold open a job for an employee who has been excluded from the food establishment due to the requirements of the FDA Food Code?

To meet the requirements of the ADA, you only have to hold the job open if the employee has an ADA disability.

The steps to follow: If an employee is disabled by the disease and has been given a reasonable accommodation or has been excluded from the food establishment you must:

- return the employee to the full duties of her original position once the need for the accommodation or exclusion has passed, i.e., once the risk of transmitting the disease through food no longer exists, unless holding the position open would pose an undue hardship.
- If holding the position open for the entire period of the accommodation or exclusion would pose an undue hardship, you must determine if there is a vacant equivalent position for which the employee is qualified and to which she can be returned without causing undue hardship.

You may fill the job without violating the ADA if the employee does not have an ADA disability. However, if you are covered by the Family and Medical Leave Act, and the employee is eligible for such leave, you may be required to reinstate the employee. See question 27 for information about the Family and Medical Leave Act.

11. An employee reports that she has a symptom of a food-related disease or actually has the disease. May I mention her name to my other employees, who now may have to get tested?

No, the ADA prohibits you from disclosing the name of the employee who may have caused the exposure to a food-related disease, unless disclosing the name is required by another Federal law. The ADA says that medical information is confidential.

You may inform your other employees that they may have been exposed and may have to be tested.

Example 8: The head of the wait staff, Hasad, informs his supervisor that he has Hepatitis A. The supervisor must keep this information confidential and should not inform the staff that Hasad has Hepatitis A. The supervisor may, however, inform the staff that a case of Hepatitis A has been

reported and that employees should continue to take steps for safeguarding public health.

An employer must not keep medical information in an employee's personnel file. Medical information should be kept in a separate medical file. Only those few employees who really need the medical information for work-related reasons should have access to the file. If the information is stored in a computer file, the employer should limit the number of persons who have access to it. [\(9\)](#)

The ADA's Rules About Applying for a Job

12. Do I have to help an applicant with a disability so that she can apply for a job?

Yes, if the help is requested. The ADA requires that an employer provide a reasonable accommodation so that an applicant with a disability can apply for a job. For example, if you use a computer-based application form and a person with a disability tells you that he wants to apply for a job but cannot use the computer terminal, you would have to provide another way for him to apply.

Example 9: Eliana applies for a bookkeeping position. After reviewing her resume, the employer decides to interview her and tells her to come to the second floor office for her interview. Eliana asks whether the building has an elevator and is told that it does not. She asks if the interview can be held on the first floor because she uses a wheelchair. Unless this imposes a significant difficulty or expense, the employer should accommodate Eliana by interviewing her on the first floor.

13. May I ask an applicant questions about her health right away?

No. Employers may not ask about an applicant's medical condition or require a medical exam until after deciding that the person has the necessary job skills and making a conditional job offer. Questions should focus on ability to do the job. You may ask the applicant if she can do the job and to describe her skills and experience. You may ask about gaps in employment and education.

If an applicant has an obvious disability that may prevent her from doing an important part of the job, **you may ask her to show or describe how she would perform that job function.**

You also may ask if she will need help to do the job (or a "reasonable accommodation"). But you may not ask for details about the disability. (For information regarding the use of Model Form 1-A, see question 6.)

Example 10: Bakari, whose right hand was amputated, applies for a job as a host. One requirement of the job is to wrap forks and knives in cloth napkins that the wait staff then places on tables. The employer may ask Bakari, even before making a job offer, to show how she would perform this job requirement or if she might need an accommodation.

14. Before I make a job offer, may I find out if the applicant has filed a workers' compensation claim in the past?

No. But you may ask about the applicant's medical, disability, and workers' compensation history after you make a conditional job offer, as long as you do this for everyone in the same job category.

15. Before I make a job offer, may I ask if the applicant currently uses drugs illegally or drinks?

Yes. Someone who currently uses drugs illegally is not protected under the ADA. Therefore, an employer **may** ask an **applicant** about her **current illegal use of drugs**. Questions may involve illegal drugs (cocaine, crack, heroin) and the illegal use of prescription drugs. An employer also may require an applicant to take a drug test. (If the drug test is positive, the employer may validate the test results by asking about lawful drug use or other possible explanations for the positive result, other than the illegal use of drugs.)

An employer also may ask an applicant whether she **drinks alcoholic beverages**. ⁽¹⁰⁾

16. Before I make a job offer, may I ask if the applicant is an alcoholic or a former drug addict?

No. Alcoholism and past drug addiction may be disabilities. The ADA does not allow questions about disabilities before making a conditional job offer. (But you may ask about current illegal use of drugs and whether the applicant currently drinks alcohol. See question 15.)

17. I have made conditional job offers to several people and obtained basic medical information from each of them. May I require a follow-up medical exam of just one person?

Yes, you may require a follow-up examination of just one person if the exam is medically related to the basic information already obtained in the first medical inquiry or exam.

Example 11: XYZ cafeteria gives Fletcher and Yvette conditional job offers of employment for kitchen positions. Fletcher writes on Model Form 1-A that he recently returned from a trip out of the country where he was exposed to typhoid fever. Yvette's completed form did not report any disease or exposure. Fletcher is not sick, but because of what Fletcher disclosed on Model Form 1-A, XYZ may conduct a follow-up medical exam to figure out whether he is carrying a food-related disease. It does not have to conduct a similar exam of Yvette.

18. May I take away the conditional job offer solely because the medical exam shows that the person has a disability?

No. You may not take away a job offer solely because a person has a disability. If you believe that the disability will prevent the person from performing the essential functions of the job or raise a safety issue, you should not automatically take away the conditional job offer. Instead, you need to figure out if there is something you can do change how the job is done, let the person take breaks, and so forth so that the person can do the job without posing a direct threat. You may only withdraw the job offer if there is no accommodation that would allow the person to perform the essential functions of the job without posing a direct threat or an undue hardship.

Example 12: Jacob applies for a kitchen job, is qualified, and is given a conditional offer. Jacob discloses that he is diabetic and wears a medical-alert bracelet. The restaurant manager knows that section 2-303.11 of the FDA Food Code prohibits employees involved in food preparation from wearing jewelry on their arms and hands, including medical-alert bracelets. As a reasonable accommodation, the manager should allow Jacob to wear the medical-alert tag as a necklace.

19. If a person is HIV positive or has been diagnosed with AIDS, may I take away the conditional job offer?

No. You may not take away a conditional job offer made to a HIV-positive person or to any other person for disability-related reasons if the person can do the job safely or if there is a reasonable accommodation that will enable him to do the job without posing a direct threat. HIV is not listed on the CDC list or in the FDA Food Code as a disease

transmissible through the food supply. Fear about HIV or AIDS, or concern about others' reactions, does not justify taking away a job offer.

Example 13: In response to post-offer questions from the employer, Luka discloses that he is HIV-positive. HIV is not listed as one of the foodborne illnesses on the CDC list. The employer may not take away the conditional job offer because it is concerned about co-worker reactions or because it assumes that someone with HIV would tire too easily.

Reasonable Accommodation

20. What is a reasonable accommodation?

A reasonable accommodation is a change to the job application process, in the way a job is done, or to other parts of the job (like employer-sponsored training, benefits, or social events), that enables a person with a disability to have equal employment opportunities. The applicant, the employee, a health care provider, a relative, a friend, or another representative acting on behalf of the applicant or employee, may request the reasonable accommodation.

21. If an employee or her representative NEVER requests a reasonable accommodation, do I have to give one?

Generally, no. However, if you are aware that an employee may need an accommodation but is unable to ask for one due to his disability, you may have to start the reasonable accommodation discussion with the employee.

Example 14: Abner has Down's Syndrome and works in a utility position. Every day, the manager talks to the utility staff about specific tasks. The manager, who knows that Abner has Down's Syndrome, notices that Abner performs several of his assigned tasks but as the day goes on, forgets to perform other tasks. Because of his disability, Abner may be unable to remember his assignments and unable to request a reasonable accommodation to change how assignments are made. In this case, the employer may need to raise the matter with Abner.

22. An employee's doctor sent me a note saying the employee needs some special help at work because of a medical condition, but the doctor never said the employee needed a "reasonable accommodation." Is this a request for accommodation?

Yes. The ADA does not require an applicant, employee, or a representative to say the words "reasonable accommodation." The worker or a representative must tell the employer that he needs **a change at work for a reason related to a medical condition**. If a representative makes the request, the employer should discuss the matter with the worker as soon as possible.

Example 15: Querida injured her back in a car accident and was out of work for several months. She is ready to go back to her restaurant job as an alley coordinator, where she reviews and garnishes plates from the cooking line and ensures all food is correct, cooked properly, and ready to eat. Querida's mother calls the restaurant just before Querida returns and informs the manager that Querida's injury is permanent and that it is very painful for her to stand for long periods of time. She will need to sit 10 minutes for every hour that she stands. Although Querida did not make the request herself, the restaurant will have to consider whether it can

provide her with this or some other reasonable accommodation. The restaurant also may request that Querida provide medical documentation establishing that she has a disability and needs a reasonable accommodation.

A request does not have to be in writing. It can be communicated during a spoken conversation, through a sign language interpreter, or in other ways. The employer must consider a request for accommodation as soon as it is made, whether orally or in writing. However, the employer may request the employee or applicant to submit a written confirmation of the request for record-keeping purposes.

The employer needs to take the request seriously and treat it as the first step in finding an effective accommodation. But the employer is not always required to give the employee exactly what he wants.

23. My assistant manager has a back problem and says that she needs extra breaks during the day to do special stretching exercises recommended by her doctor. I don't know if her back problem is serious enough to be an ADA disability. What should I do?

Often, it makes business sense to work with a person (like the assistant manager) who has an impairment and asks for a reasonable accommodation (like extra breaks), instead of focusing entirely on whether she has a disability and is protected by the law. See question 3 for the definition of disability.

But there are some situations where it is clear that a person has a disability under the ADA.

Example 16: Phoebe has an intellectual disability which significantly limits her ability to think and learn. She would like to apply for a position as a dishwasher at a local fast food restaurant. The application process is computerized. Phoebe cannot use the computer and asks to apply for the job in person. Unless granting the request would pose a significant difficulty or expense for its business, the employer should accommodate Phoebe by allowing her to apply for the position in a different way.

It is also important not to jump to the conclusion that it would be impossible to accommodate specific types of disabilities.

Example 17: Kelsey has an incurable skin condition, called vitiligo, in which patches of skin turn white and do not produce melanin. These areas of her skin have no protection from the sun, and they become painful if exposed to the sun for extended periods of time. Kelsey applies for a job at a restaurant with a large outdoor seating area, open from mid-spring through early fall. Well-qualified for the position, Kelsey receives a conditional offer of employment and then asks for a reasonable accommodation: being assigned only to serve inside tables. To decide whether it can provide this accommodation, the restaurant considers several questions: Is there enough business inside the restaurant so that Kelsey can only work inside? Are there enough staff to cover all of the tables outside if Kelsey only works inside? The restaurant also should consider other alternatives. For example, if a portion of the outside patio is in the shade, there may be enough tables either there alone or in combination with inside tables for Kelsey to carry a full work load. The restaurant also may ask Kelsey to provide medical documentation establishing that she has an ADA disability and needs a reasonable accommodation.

24. An employee requested an accommodation that would be very difficult and/or expensive. Do I still have to provide it?

You do not have to provide a reasonable accommodation if doing so will be an undue hardship. Undue hardship means significant difficulty or expense, significant disruption of the business, or a change to the basic nature of the business. See question 4 for more on undue hardship.

If the person with a disability asks for a reasonable accommodation that is an **undue hardship** for your business, you must decide if there is another accommodation that is less difficult or expensive.

Example 18: Grace works as the morning manager of a cafeteria with a brisk breakfast business. She opens the cafeteria each morning. After several years on the job, Grace is diagnosed with major depression and starts to take medication. The medication causes Grace to feel groggy in the morning. As a result, she is often late. She asks the restaurant for a later start time. One of Grace's essential functions is to open the restaurant, and it is an undue hardship for the employer if Grace opens late. (But note: just because one possible reasonable accommodation will not work does not mean that you have no obligation to see if there is another accommodation that will work. For example, could Grace be reassigned to another shift or another job?)

It is very important that you and your employee work together to figure out whether there is an accommodation that would allow the employee to do the job.

25. May I automatically reject a request to use a service animal as a reasonable accommodation?

No, you may not automatically reject this request from a person with a disability. The FDA Food Code has special rules for service animals.

Special rule for service animals: FDA Food Code Section 2-403.11 prohibits handling of animals, but allows employees to use service animals. Section 6- 501.115 states that service animals may be permitted in areas not used for food preparation. Employees may handle their service animals if, after handling a service animal, the employee washes his hands for at least 20 seconds using soap, water, and vigorous friction on surfaces of the hands, followed by rinsing and drying as per Section 2-301.12.

You also have to figure out if the service animal would be an "undue hardship" on your business, or whether the service animal would pose a direct threat to the health or safety of your other employees or the public. See questions 4 and 5 for more on undue hardship and direct threat. An employee with a disability is permitted to handle his service animal at work unless the employer demonstrates that it would cause an undue hardship or pose a direct threat.

Example 19: Adelio, who is blind and uses a service animal, applies to work as a cashier at a company's snack bar. Adelio explains that the dog can sit near the cash register area while Adelio works. The company may not automatically reject Adelio because he uses a service animal. The company must allow Adelio to keep his dog near the cash register area unless it can prove that doing so would impose a significant difficulty or expense or a significant risk of substantial harm.

(A food service business's obligation to **accommodate a customer who uses a service animal** is enforced by the **Department of Justice**. For information on this issue, go to www.usdoj.gov/crt/ada/animal.htm or call (202) 307-0663 (voice and TDD).)

26. My restaurant has several locations in the city. One of my employees with a disability can no longer do his job at one location, even with a reasonable accommodation. There are no other openings at that location, but there are several at another restaurant that would be appropriate. Do I have to consider placing the employee at the other restaurant?

Yes. Reassigning an employee with a disability to a vacant position is a reasonable accommodation and must be considered if you cannot accommodate an employee in his current job. You must consider reassignment before concluding that you cannot provide any accommodation at all.⁽¹¹⁾ If you operate restaurants in different locations and there are no vacancies in the facility where the employee works, you need to consider vacancies in other locations.

Example 20: Remy works as a cashier and as a host escorting diners to their seats at one of his employer's three area restaurants. Because of a disabling degenerative disease, Remy can no longer perform the function of escorting diners to their seats. He now needs to sit while at work. There are no vacancies at the restaurant where Remy currently works, but there is a vacant cashier position (for which he could sit) at one of the other restaurants. Remy is qualified as a cashier. The ADA requires that he be offered the position. (But remember, if a seniority system is involved, you should refer to the special rules on seniority systems, described in EEOC's *Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*. See fn. 11).

You do not have to create a new position for the employee, and you may require that the employee have the required experience or training for the reassignment.⁽¹²⁾

27. Are there other types of reasonable accommodations that I should consider?

There are many accommodations that enable people with disabilities to apply for jobs, be productive workers, and enjoy equal employment opportunities. These include:

- Equipment specially made for use by a person with a disability (for example, keyboards designed for one-handed use) or regular equipment that a person with a disability can use to make doing a job easier (for example, a hand cart)
- Making written materials accessible (for example, use of braille)
- Making changes to the physical structure of the workplace (installing a ramp for employee use)
- Job-restructuring, by moving minor tasks to other employees or altering when and/or how a task is performed
- Allowing an employee (for example, a bookkeeper) to work at home
- Modifying a work schedule (for example, changing a start/end time)
- Modifying a workplace rule (for example, a rule barring transfers between restaurants)
- Modifying supervisory methods (for example, by giving an employee detailed job assignments)
- Allowing an employee to take leave

This list is not meant to include every possible accommodation that an employer might provide to a person with a disability.

There is a separate federal law about taking time off for serious medical conditions. That law, the **"Family and Medical Leave Act,"** applies to employers with 50 or more employees. These employers must give "eligible" employees up to 12 weeks of leave every 12 months for an employee's own serious medical condition or the serious medical condition of a close family member. This law also covers child birth and adoption. The U.S. Department of Labor enforces this law, not the EEOC. For more information, see the Department of Labor's website at www.dol.gov/esa/whd/fmla/.

Performance and Conduct of Employees

28. If an employee's job performance gets worse over time, may I get medical information from the employee or require a medical exam?

As a general rule, you should not routinely ask for medical information when an employee's job performance gets worse over time. Instead, you should directly address the performance issue.

But, sometimes the **objective facts** give you a reason to believe that a medical condition is causing danger at work or hurting the employee's performance. When poor job performance or danger appear to be linked to a medical cause, you may ask for medical information or require a medical examination. ⁽¹³⁾

Example 21: Gabriella works as a grill cook. She told a co-worker that on three separate occasions she felt dizzy and that one time she almost fainted. The employer would be allowed under the ADA to ask Gabriella medically-related questions about this condition because it is possible that Gabriella might faint while standing over a hot grill, which presents a significant risk of substantial harm to Gabriella and her co-workers.

29. What if I learn for the first time during a performance review that an employee believes his disability is the cause of his poor performance or misconduct? Do I have to excuse the poor performance?

No. As long as you treat this employee as you would any other employee who performed poorly or violated conduct rules, you will not violate the ADA, even if he has a disability.

Example 22: Abby works as a janitor for a restaurant, cleaning floors and bathrooms. She did not disclose a disability when you hired her. At her performance review, during which you discuss performance problems, she says she has a learning disability and does not always understand instructions. Abby asks that instructions be given to her both orally and in writing so that she can take time to review them carefully. You may address her poor performance through your regular performance review process. However, you must consider providing a reasonable accommodation to enable Abby to meet the performance standards in the future. Before providing an accommodation, you may request that Abby provide medical documentation establishing that she has a disability and needs a reasonable accommodation.

30. What if an employee engages in conduct that normally would result in termination? Do I have to excuse the conduct if the employee claims it was caused by a disability?

No. As long as you treat this employee the same as you would any other who engaged in similar misconduct, you may terminate this employee.

Example 23: Nestor, a bartender, has been stealing liquor. Each time he pours a scotch for a customer, he puts a bit in a glass for himself. After noticing that scotch sales do not match purchases, the manager watches Nestor and notices him siphoning off the liquor. He suspends Nestor and later informs him that his employment is terminated for violating a workplace rule against theft. Nestor says that he is disabled by alcoholism. The manager may still terminate Nestor for stealing the liquor.

Similarly, an employee who illegally uses drugs is not protected under the ADA and may be terminated.

Example 24: Alice returns from a break smelling of marijuana smoke. You send her for a drug test, which comes back positive. Alice tells you that before you hired her she was diagnosed as a drug addict and completed a drug rehabilitation program. Even though Alice's record of drug addiction means that she might have been protected by the ADA as a person with a record of a disability, her current illegal use of drugs means that you may terminate her without violating the ADA.

31. One of the dishwashers at my restaurant has autism. Autism affects the way he talks and walks, and some of the other kitchen employees make fun of his mannerisms. He is clearly upset by the teasing. The kitchen is a lively place and all of the employees tease and joke with each other. Do I need to address the situation?

Yes. Even if your business has an informal atmosphere that includes teasing and banter among the employees, you need to ensure that such conduct does not go too far. It would be illegal harassment if it were based on disability, unwelcome, and serious and/or occurred numerous times.

As an employer, you are responsible for preventing and eliminating harassment. You should take steps to correct such behavior as soon as possible. If an employee files an ADA charge against your business claiming that he was subjected to harassment on the basis of disability, an investigation would look at the comments and conduct at issue, but also at the steps you took to eliminate and/or prevent the behavior.

Complaints or Charges Against Employers

32. Someone filed a "charge" against my business. Now what happens?

A complaint or a "charge" of discrimination means only that someone thinks that an employer discriminated against her for reasons that are not legal under Federal equal employment opportunity law: disability, or race, color, national origin, religion, sex, or age. A charge does not mean that you in fact did anything wrong. (On the EEOC web site, www.eeoc.gov, there is a link that explains "How to File a Charge.")

The EEOC will send you a copy of the charge and request a response and supporting information. Prior to a formal EEOC investigation, you may be given the opportunity to mediate the issues raised in the charge. Mediation is a less expensive and less time-consuming way of resolving an employment dispute; in fact, the EEOC mediation program is FREE, voluntary, and confidential.

Depending on how the mediation goes, the EEOC may then investigate the charge. If the EEOC finds "reasonable cause" to believe that you discriminated against the charging party, it will invite you to conciliate the charge (this is a chance to deal with the charge informally). In some cases, where conciliation fails, the EEOC will file a civil court action. If the EEOC finds no discrimination, or if conciliation fails and the EEOC chooses not to file

suit, it will issue a "notice of a right to sue," which gives the person 90 days to file a private court action. For a detailed description of the process, check out the EEOC website and click on the link to "Small Businesses," and then the link to "When A Charge Is Filed Against My Company."

33. An employee filed a charge against my business, claiming that he had been discriminated against on the basis of his disability. The EEOC found that there was no reasonable cause to support the claim. I am very angry that this employee accused me of such behavior and I am considering terminating him. Is this permitted?

No. If you terminate an employee because he filed a charge of employment discrimination against you, you are retaliating against that employee. Retaliation on the basis of filing a charge is prohibited by the ADA. Once you receive a charge, you need to be careful not to retaliate against the person who filed it, especially if the person still works for you. Sometimes, an employer is angry that she and her business have been charged with discrimination. But be careful: it is not unusual for the EEOC or a court to rule that there was no discrimination but that there was retaliation!

Example 25: Soledad and Taja worked as hosts for a large restaurant. After the head host retired, Soledad and Taja applied for the now-vacant position. The owner chose Soledad. Taja, believing that the owner did not select her because she has a disability, filed a charge with the EEOC. Taja's hours were reduced substantially soon after the employer received notice of the charge. An EEOC investigator learns that Soledad is the owner's niece and the owner states that he chose her because of this family connection. The owner also said that he reduced Taja's hours for financial reasons, but the investigator learns that the restaurant hired a new host to fill the hours taken away from Taja. Based on these facts, the EEOC may find that there is no reasonable cause to support the disability discrimination claim but that the restaurant retaliated against Taja for filing the charge.

You may not retaliate against a person who files a charge of discrimination. You also may not retaliate against someone who "participates" in the EEOC process by, for example, requesting a reasonable accommodation or serving as a witness in support of a co-worker's charge of discrimination. Additionally, you also may not retaliate against someone who opposes conduct that she believes is discriminatory by, for example, signing a petition protesting a perceived discriminatory practice at your company.

Example 26: Uri, called as a witness at the trial of Vasanti's disability discrimination complaint, testifies truthfully that the restaurant manager made nasty comments about Vasanti's dwarfism. One month later, Uri is fired for eating a donut before paying for it. Uri files a retaliation charge and the EEOC investigator learns that although there is a rule against eating food before paying for it, Uri is the first employee ever punished for violating it. The EEOC may find reasonable cause to believe Uri's retaliation complaint.

APPENDIX A

FEDERAL TAX INCENTIVES TO ENCOURAGE THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

AND TO PROMOTE THE ACCESSIBILITY OF PUBLIC ACCOMMODATIONS

The Internal Revenue Code includes several provisions aimed at making businesses more accessible to people with disabilities. The following is designed to give you general information about three of the most significant tax incentives. It is not legal advice. You should check with your accountant or tax advisor to find out whether you are eligible to take advantage of these incentives or visit the Internal Revenue Service's website, www.irs.gov, for more information. Additionally, consult your accountant or tax advisor about whether there are similar state and local tax incentives.

Small Business Tax Credit (Internal Revenue Code Section 44: Disabled Access Credit): Small business with either **\$1,000,000 or less in revenue or 30 or fewer full-time employees** may take a tax credit of up to \$5,000 annually for the cost of

providing reasonable accommodations such as sign language interpreters, readers, materials in alternative format (such as Braille or large print), the purchase of adaptive equipment, the modification of existing equipment, or the removal of architectural barriers. **Work Opportunity Tax Credit (Internal Revenue Code Section 51)**

(pending reauthorization as of October 2004): Employers who hire certain targeted low-income groups, including people referred from vocational rehabilitation agencies and individuals receiving Supplemental Security Income (SSI), may be eligible for an annual tax credit up to \$2,400 for each qualifying employee who works at least 400 hours during the tax year. An annual tax credit of up to \$1,500 may be available for each qualifying employee who works at least 120 hours but less than 400 hours during the tax year. Additionally, a maximum credit of \$1,200 may be available for each qualifying summer youth employee.

Architectural/Transportation Tax Deduction (Internal Revenue Code Section 190: Barrier Removal): This annual deduction of up to \$15,000 is available to businesses of any size for the costs of removing barriers for people with disabilities, including the following: providing accessible parking spaces, ramps, and curb cuts; providing wheelchair-accessible telephones, water fountains, and restrooms; making walkways at least 48 inches wide; and making entrances accessible.

APPENDIX B INFORMATION ABOUT REASONABLE ACCOMMODATIONS

Below are a few of the most frequently consulted resources for accommodating qualified people with disabilities. Many other resources exist both nationally and locally, such as organizations of and for individuals with particular types of disabilities. Finding one of these organizations in your area may be as simple as consulting your local phone book. Additionally, the federal government has a web site, www.disabilitydirect.gov, which provides links to many federal resources.

Job Accommodation Network (JAN)- provides lists of accommodations based on specific disabilities as well as links to various other accommodation providers
P.O. Box 6080

Morgantown, WV 26506-6080 (800) 526-7234 or (304) 293-7186 www.jan.wvu.edu

U.S. Department of Labor

Office of Disability Employment Policy

(866) 633-7365 (voice); (877) 889-5627 (TTY) www.dol.gov/odep

ADA Disability and Business Technical Assistance Centers (DBTACs) - 10

federally funded regional centers to provide assistance on all aspects of the ADA.

(800) 949-4232

RESNA Technical Assistance Project - refers people to projects offering technical assistance on technology-related services for individuals with disabilities.

(703) 524-6686 (voice); (703) 524-6639 (TTY) www.resna.org

Employment and Disability Institute

Program on Employment and Disability
School of Industrial and Labor Relations
106 ILR Extension

Ithaca, NY 14853-3901

(607) 255-7727 (voice); (607) 255-2891 (TTY)

ilr_edi@cornell.edu

Business Leadership Network - national program led by employers that engages the leadership and participation of companies throughout the United States to hire qualified job candidates with disabilities. www.usbln.com

APPENDIX C

FINDING QUALIFIED WORKERS WITH DISABILITIES

Many businesses say that they would like to hire qualified people with disabilities, but do not know where to find them. The following resources may be able to help. In addition, you may contact organizations of and for individuals with specific disabilities in your area and consult www.disabilitydirect.gov.

JOB ACCOMMODATION NETWORK (JAN) - provides a variety of resources for employers with employees with disabilities and those seeking to hire employees with disabilities:

P.O. Box 6080
Morgantown, WV 26506-6080
(800) 526-7234 or (304) 293-7186
www.jan.wvu.edu

www.jan.wvu.edu/SBSES/VOCREHAB.HTM (provides links to Vocational Rehabilitation State Offices)

Employer Assistance Referral Network (EARN) - a national toll-free telephone and electronic information referral service to assist employers in locating and recruiting qualified workers with disabilities. EARN is a service of the U.S. Department of Labor, Office of Disability Employment Policy with additional support provided by the Social Security Administration's Office of Employment Support Programs:

1 - 866 - EARN NOW (3276669)
www.earnworks.com

APPENDIX D

INTERNET LINKS TO FOOD SAFETY AND HEALTH SITES

General Food Safety

www.foodsafety.gov A gateway link to government food safety information
<http://www.cfsan.fda.gov/list.html> FDA Center for Food Safety and Applied Nutrition's web page (Includes the FDA 2001 Food Code at <http://www.cfsan.fda.gov/~dms/fc01-toc.html>)
http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_g.htm CDC web page with general information on foodborne illness
http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_t.htm CDC web page with more technical foodborne illness information

State and Local Contacts

http://www.fda.gov/ora/fed_state/directorytable.htm FDA's Directory to State and Local Officials
<http://www.cdc.gov/mmwr/international/relres.html> CDC web page with links to State and Local Health Departments

Outbreak Information

<http://www.cdc.gov/mmwr/preview/mmwrhtml/ss4901a1.htm> Surveillance for foodborne disease outbreaks 1993-1997, CDC

Health Privacy Information

<http://www.hhs.gov/ocr/hipaa/> Department of Health and Human Services HIPAA web site

APPENDIX E

INTEGRATED ENTERPRISES

If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the coverage requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they are considered a single employer. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

- The degree of interrelation between the operations;
- The degree to which the entities share common management;

- Centralized control of labor relations and;
- The degree of common ownership or financial control over the entities.

APPENDIX F

THE FDA FOOD CODE AND THE ADA

Under the ADA, the Centers for Disease Control and Prevention (CDC) must publish annually a list of infectious and communicable diseases. The Big 4 pathogens listed in the Food Code are included on this list. The FDA has concluded that an employee who meets one of the factors described in section 2-201.11 of the Food Code is likely to be at risk for contracting or transmitting one of these diseases. See Annex 3 of the FDA 2001 Food Code at pp. 262-265 available at <http://www.cfsan.fda.gov/~dms/fc01-a3.html#a3-2> (scroll down to section titled "Disease or Medical Condition")

As noted in the section on the ADA and Diseases Transmissible Through Food, the FDA Food Code requires that food employees with certain symptoms be "restricted" for certain duties, and that food employees with certain diseases be "excluded" from the food establishment.

The Food Code states that "restrict" means to limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single use articles. See section 1-201.10(B)(74) available at <http://www.cfsan.fda.gov/~dms/fc01-1.html#1-2> (scroll down to (B)(74))

The Food Code defines "exclude" as: to prevent a person from working as a food employee or entering a food establishment except for those areas open to the general public. See section 1-201.10(B)(29) at <http://www.cfsan.fda.gov/~dms/fc01-1.html#1-2> (scroll down to (B)(29))

The Food Code describes the restrictions and exclusions that apply to food employees in section 2-201.12. See section 2-201.12 at <http://www.cfsan.fda.gov/~dms/fc01-2.html#2-2> (scroll down to section 2-201.12) This section of the Food Code does not include information about the employer's responsibility under the ADA to provide reasonable accommodation to qualified people with disabilities. There is, however, no conflict between the FDA Food Code's exclusion and restriction requirements and the ADA, as made clear by information provided in Annex 3 of the FDA 2001 Food Code. The FDA Food Code's Annex 3 states that food employees must be accommodated to the extent provided under the ADA. It explains that if there is an accommodation that will not pose an undue hardship to the employer and that will prevent the transmission of the disease through food, the accommodation must be offered. See Annex 3 of the FDA 2001 Food Code at pp. 262-263 available at <http://www.cfsan.fda.gov/~dms/fc01-a3.html#a3-2> (scroll down to section titled "Disease or Medical Condition") The guidance of the Food Code is consistent with the requirements of the ADA.

Footnotes

1. References in this Guide to the "FDA Food Code" are to the FDA 2001 Food Code, available online at <http://www.cfsan.fda.gov/~dms/fc01-toc.html>. The Food Code is a model code developed by the FDA which is offered for adoption by local, state, and federal governmental jurisdictions for administration by the various departments, agencies, and other units within each jurisdiction that have been delegated compliance responsibilities for food service, retail food stores, or food vending operations. Once adopted, the Food Code provisions become the regulatory requirements for that jurisdiction. In jurisdictions where the Food Code has **not** been adopted, its provisions

are not requirements for food establishments. In the text of the Guide, we presume that the Food Code has been adopted and, hence, refer to the Food Code as imposing requirements. This Guide applies general principles of the ADA to the Food Code.

2. Food service establishments are also "public accommodations" that are covered by Title III of the ADA, regardless of the number of employees. As public accommodations, food service businesses may need to make physical changes or other modifications to their facilities to serve members of the public with disabilities. The Department of Justice (DOJ) enforces Title III of the ADA and provides free information about it. You can contact DOJ at (800) 514-0301, or log onto www.ada.gov for more information.

3. Pathogen is defined as "[a]ny virus, microorganism, or other substance causing disease." Steadman's Medical Dictionary 1312 (26th ed. 1995).

4. The ADA requires the Secretary of Health and Human Services (HHS) to prepare annually a list of infectious and communicable diseases which may be transmitted through food handling. See

<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-27923.pdf> for a copy of the most recent CDC list (as of September 2004).

5. The upcoming 2005 FDA Food Code may expand the Big 4, to include additional diseases on the CDC list. The ADA rules discussed in this Guide, including those on excluding employees from the food establishment (pages 9-11), would apply to any diseases on the CDC list.

6. This section of the Food Code requires employees to report whether they have had an illness from Hepatitis A virus, or whether they have had an illness from S. Typhi within the past 3 months; Shigella spp. within the past month; or Shiga toxin-producing Escherichia Coli within the past month. Annex 3 of the Food Code indicates that these reporting requirements are based on the periods of communicability for the four pathogens.

7. This Guide provides a brief summary of portions of the Food Code relevant to the ADA. It should not be used as a substitute for the Food Code, which provides far more detail on restrictions, exclusions and other topics.

8. It is even more unlikely that a person who has not been diagnosed with a disease, but has one or more of the gastrointestinal symptoms listed in the Food Code, has an ADA disability by virtue of these symptoms alone.

9. See the EEOC's Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (July 27, 2000) available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> for more on the confidentiality of medical documentation.

10. See the EEOC's Guidance on Preemployment Disability-Related Questions and Medical Examinations (October 10, 1995) available at <http://www.eeoc.gov/policy/docs/preemp.html> for additional guidance on questions related to drinking habits.

11. If reassignment would interfere with a seniority system, special rules apply. See the EEOC's Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (as revised, October 17, 2002), question 31. See <http://www.eeoc.gov/policy/docs/accommodation.html>

12. You must first look for a vacant position that is equal to the employee's current position in terms of pay, status and other factors (like benefits and location). If there is no such position, you must reassign the employee to a vacant lower level position for which he or she is qualified that is as close as possible to the employee's original position. If an employee is reassigned to a lower level position, you do not have to continue to pay his or her original salary, unless you do so for employees without disabilities who are transferred to lower level positions.

13. See the EEOC's Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (July 27, 2000) available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> for more on when you may ask medical questions of employees.

