

# COMPLIANCE OVERVIEW

Provided by Clarke & Company Benefits, LLC

## Veterans and the Americans with Disabilities Act (ADA)

Title I of the Americans with Disabilities Act (ADA) prohibits employers with 15 or more employees from treating an applicant or employee unfavorably in any aspect of employment because he or she has a disability. The ADA also limits the medical information employers may obtain and prohibits disability-based harassment and retaliation.

The ADA further provides that, absent undue hardship (significant difficulty or expense to the employer), applicants and employees with disabilities are entitled to **reasonable accommodation** to apply for jobs, to perform their jobs, and to enjoy equal benefits and privileges of employment.

This guide, which was prepared by the Equal Employment Opportunity Commission (EEOC), describes how the ADA applies to recruiting, hiring and accommodating veterans with disabilities. It also briefly explains how protections for veterans with disabilities differ under the ADA and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

### HIGHLIGHTS

#### ADA BASICS

- Prohibits employment discrimination based on disability.
- Limits the collection of medical information.
- Requires employers to provide reasonable accommodations to applicants and employees with disabilities, absent undue hardship.

#### ADA APPLICATION TO VETERANS

- Many service-connected disabilities (such as mobility impairments, major depressive disorder and PTSD) are disabilities under the ADA.
- Employers may ask if an applicant is a “disabled veteran” if they are seeking to hire someone with a disability.
- Disabled veterans may need a reasonable accommodation to apply for or perform a job.

#### LINKS AND RESOURCES

- EEOC’s [overview](#) on disability discrimination
- EEOC’s [Facts About the Americans with Disabilities Act](#)
- [Understanding Your Employment Rights under the ADA: A Guide for Veterans](#) (EEOC publication for veterans)

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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## BACKGROUND

Each year, thousands of military personnel stationed around the world leave active duty and return to jobs they held before entering the service, or begin the search for new jobs. Recent veterans report high rates of service-connected disabilities (that is, disabilities that were incurred in, or aggravated during, military service). About 29 percent of recent veterans report having a service-connected disability, as compared to about 13 percent of all veterans. Common injuries incurred by these veterans include missing limbs, burns, spinal cord injuries, post-traumatic stress disorder (PTSD), hearing loss, traumatic brain injuries and other impairments. Other veterans leave service due to injuries or conditions that are not considered service-connected.

There are several federal laws that provide important protections for veterans with disabilities who are looking for jobs or are already in the workplace. Two of those laws—Title I of the ADA and USERRA—protect veterans from employment discrimination.

- Title I of the ADA, which is enforced by the EEOC, prohibits private and state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability. Any veteran with a disability who meets the ADA's definition is covered, regardless of whether the disability is service-connected.
- USERRA has requirements for **reemploying veterans with and without service-connected disabilities** and is enforced by the U. S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ).

## WHAT PROTECTIONS DOES THE ADA PROVIDE TO VETERANS WITH DISABILITIES?

### KEY POINT

Title I of the ADA prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment (including hiring, promotions, job assignments, training, termination, and any other terms, conditions, and privileges of employment) because he or she has a disability, a history of having a disability, or because the employer regards the employee or applicant as having a disability.

This means, for example, that it is illegal for an employer to refuse to hire a veteran because he or she has PTSD, because he or she was previously diagnosed with PTSD, or because the employer assumes he or she has PTSD. Similarly, an employer may not refuse to hire a veteran based on assumptions about a veteran's ability to do a job in light of the fact that the veteran has a disability rating from the U.S. Department of Veterans Affairs (VA).

The ADA also limits the medical information employers may obtain and prohibits disability-based harassment and retaliation.

Finally, the ADA provides that, absent undue hardship ("significant difficulty or expense"), applicants and employees with disabilities are entitled to **reasonable accommodation** to apply for jobs, to perform their jobs, and to enjoy equal benefits and privileges of employment (for example, access to the parts of an employer's facility available to all employees and access to employer-sponsored training and social events).

## WHEN IS A VETERAN WITH A DISABILITY PROTECTED BY THE ADA?

A veteran with a disability is protected by the ADA when he or she meets the ADA's definition of disability and is qualified for the job he or she has or wants. The ADA defines an "individual with a disability" as a person who:

- ✓ Has a physical or mental impairment that substantially limits one or more major life activities;
- ✓ Has a record of this impairment; or
- ✓ Is regarded as having this impairment.

An individual with a disability is qualified if he or she is able to meet an employer's requirements for the job, such as education, training, employment experience, skills or licenses, and is able to perform the job's essential or fundamental duties with or without reasonable accommodation.

As a result of changes to the ADA made by the ADA Amendments Act of 2008, it is now much easier for individuals with a wide range of impairments to establish that they are individuals with disabilities and entitled to the ADA's protections. For example, the term "major life activities" includes not only activities such as walking, seeing, hearing and concentrating, but also the operation of major bodily functions, such as functions of the brain and the neurological system.

Additionally, an impairment need not prevent or severely or significantly restrict performance of a major life activity to be considered substantially limiting. The determination of whether an impairment substantially limits a major life activity must be made without regard to any mitigating measures (for example, medications or assistive devices, such as prosthetic limbs) that an individual uses to lessen an impairment's effects. Also, impairments that are episodic or in remission (for example, epilepsy or PTSD) are considered disabilities if they would be substantially limiting when active.

Although the ADA uses different standards than the U.S. Department of Defense and the VA in determining disability, many more service-connected disabilities will be considered disabilities under the ADA than prior to the ADA Amendments Act. In fact, some service-connected disabilities, such as deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, major depressive disorder and PTSD, will be included to be disabilities under the ADA.

## **MAY AN EMPLOYER ASK IF AN APPLICANT IS A "DISABLED VETERAN" IF IT IS SEEKING TO HIRE SOMEONE WITH A DISABILITY?**

Yes. Although employers generally may not ask for medical information from applicants prior to making a job offer, they may do so for affirmative action purposes. An employer, therefore, may ask applicants to voluntarily self-identify as individuals with disabilities or disabled veterans when the employer is:

- Undertaking affirmative action because of a federal, state or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities; or
- Voluntarily using the information to benefit individuals with disabilities, including veterans with disabilities.

An employer also may ask organizations that help find employment for veterans with disabilities whether they have suitable applicants for particular jobs and may access websites on which veterans with disabilities post resumes or otherwise express interest in employment.

## **WHAT STEPS SHOULD AN EMPLOYER TAKE IF IT ASKS AN APPLICANT TO SELF-IDENTIFY AS A DISABLED VETERAN FOR AFFIRMATIVE ACTION PURPOSES?**

If an employer invites applicants to voluntarily self-identify, the employer must indicate clearly and conspicuously on any written questionnaire used for this purpose, or state clearly (if no written questionnaire is used), that:

- The information requested is intended for use solely in connection with its affirmative action obligations or its voluntary affirmative action efforts; and
- The specific information is being requested on a voluntary basis, it will be kept confidential in accordance with the ADA, refusal to provide it will not subject the applicant to any adverse treatment and it will be used only in accordance with the ADA.

Information collected for affirmative action purposes must be kept separate from the application to ensure that confidentiality is maintained.

## **ARE THERE ANY LAWS THAT ALLOW AGENCIES TO GIVE SPECIAL CONSIDERATION TO VETERANS WITH DISABILITIES WHO ARE LOOKING FOR JOBS WITH THE FEDERAL GOVERNMENT?**

Yes. Under the Veterans' Preference Act, veterans with and without disabilities are entitled to preference over others in hiring from competitive lists of eligibles and may be considered for special noncompetitive appointments for which they are eligible.

Federal agencies also may use specific rules and regulations, called "special hiring authorities," to hire individuals with disabilities outside the normal competitive hiring process, and sometimes are even required to give preferential treatment to veterans, including disabled veterans, in making hiring

decisions. Here are some of the special hiring authorities that federal agencies may be able to use to hire veterans with disabilities:

- The **Veterans' Recruitment Appointment** (VRA) program allows agencies to appoint eligible veterans without competition;
- The **Veterans Employment Opportunity Act** (VEOA) can be used when filling permanent, competitive service positions (allows veterans to apply for jobs that are only open to "status" candidates, which means "current competitive service employees"); and
- The **Schedule A Appointment Authority**, though not specifically for veterans, allows agencies to appoint eligible applicants who have a severe, physical, psychological or intellectual disability.

For more information on veterans' preferences and special hiring authorities, see the "[Vet Guide](#)" on the U.S. Office of Personnel Management (OPM) website.

## **MAY A PRIVATE EMPLOYER GIVE PREFERENCE IN HIRING TO A VETERAN WITH A DISABILITY OVER OTHER APPLICANTS?**

Yes. Although the ADA prohibits discrimination "on the basis of disability," it does not prevent affirmative action on behalf of individuals with disabilities. Thus, a private employer may (but is not required to) hire an individual with a disability who is qualified (including a veteran with a disability) over a qualified applicant without a disability.

In addition, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) requires that businesses with a federal contract or subcontract in the amount of \$100,000 or more, entered into on or after Dec. 1, 2003, take affirmative action to employ and advance qualified disabled veterans. VEVRAA also requires these businesses to list their employment openings with appropriate employment service delivery systems, and to give covered veterans priority in referral to such openings.

## **WHAT ARE SOME SPECIFIC STEPS EMPLOYERS MAY TAKE TO RECRUIT AND HIRE VETERANS WITH DISABILITIES?**

First, the ADA requires employers to ensure that online job announcements, recruiting information and application processes are accessible to individuals with disabilities, including applicants who have service-connected disabilities. There are also a number of steps, in addition to measures specifically applicable to federal employers, that any employer may take to recruit and hire veterans with disabilities, such as:

- ✓ Stating on a job advertisement or vacancy announcement that it is an equal opportunity employer and that individuals with disabilities, including "disabled veterans" or veterans with service-connected disabilities, "are encouraged to apply";

- ✓ Making written recruiting materials, such as application forms and brochures, available in alternate formats (for example, Braille and large print) or assisting veterans with disabilities in completing application materials when necessary;
- ✓ Sending vacancy announcements to, and asking for referrals from, government, community, military organizations and One-stop Career Centers that train and/or support veterans with disabilities;
- ✓ Posting advertisements and vacancy announcements in publications for veterans;
- ✓ Attending job fairs and using online resume databases that connect job-seeking veterans with civilian employers; and
- ✓ Surveying other employers to learn about their successful outreach efforts.

**Compliance Reminder:** Even when employers do not specifically recruit veterans with disabilities, they should make sure that there is nothing in a job announcement or on an application form that would discourage anyone with a disability from applying.

For example, employers should not state in vacancy announcements that applicants must be in "excellent health" or describe how a function must be performed (for example, "requires extended standing"). Instead, employers should describe the actual function to be performed (for example, "requires moving objects that weigh more than 50 pounds").

Often, reasonable accommodations are available that will allow a veteran with a disability to perform a function in a way that is different from the way it is typically done.

## WHAT TYPES OF REASONABLE ACCOMMODATIONS MAY VETERANS WITH DISABILITIES NEED FOR THE APPLICATION PROCESS OR DURING EMPLOYMENT?

While not all veterans with service-connected or other disabilities will need an accommodation or require the same accommodation, the following are examples of accommodations that some veterans may need to apply for or perform a job:

- Written materials in accessible formats, such as large print, Braille or on a computer disk;
- Recruitment fairs, interviews, tests and training held in accessible locations;
- Modified equipment or devices (for example, assistive technology that would allow a blind person to use a computer or someone who is deaf or hard of hearing to use a telephone, a glare

guard for a computer monitor used by a person with a traumatic brain injury or a one-handed keyboard for a person missing an arm or hand);

- Physical modifications to the workplace (for example, reconfiguring a workspace, including adjusting the height of a desk or shelves for a person in a wheelchair);
- Permission to work from home;
- Leave for treatment, recuperation or training related to their disability;
- Modified or part-time work schedules;
- A job coach who could assist an employee who initially has some difficulty learning or remembering job tasks;
- Modification of supervisory methods, which may include breaking complex assignments into smaller, separate tasks, adjusting methods of communication (for example, giving instructions in writing rather than orally), or providing some additional feedback or guidance; or
- Reassignment to a vacant position where a disability prevents performance of the employee's current job, or where accommodating the employee in the current job would result in undue hardship

## HOW DOES AN EMPLOYER KNOW WHEN A VETERAN WITH A DISABILITY NEEDS AN ACCOMMODATION?

Usually, the process of providing a reasonable accommodation will begin with a request from the individual with a disability. A family member, friend, health professional, rehabilitation counselor or other representative also may request a reasonable accommodation on the veteran's behalf. The request does not have to mention the ADA or use the term "reasonable accommodation" and simply can be an oral or written statement indicating that the individual needs an adjustment or change in the application process or at work for a reason related to a medical condition.

A request for reasonable accommodation is the first step in an **informal interactive process** between the individual and the employer. The process will involve determining whether the veteran requesting a reasonable accommodation has a disability (where this is not obvious or already known) and identifying accommodation solutions.

Employers should ask the particular veteran requesting accommodation because of his or her disability what is needed to do the job. There also are extensive public and private resources to help employers identify reasonable accommodations for employees with particular disabilities. For example, the Job Accommodation Network's (JAN) [website](#) provides a practical guide for employers on reasonable accommodation, as well as information about accommodations for specific disabilities, including one on "[Accommodating Service Members and Veterans with PTSD.](#)"

## **MAY AN EMPLOYER ASK A VETERAN WITH A DISABILITY WHETHER A REASONABLE ACCOMMODATION IS NEEDED IF NONE HAS BEEN REQUESTED?**

Sometimes. During the application process, an employer may explain what the hiring process involves (for example, an interview, timed written test or job demonstration) and ask all applicants whether they will need a reasonable accommodation to participate in any part of the process.

In addition, if an employer reasonably believes that a veteran with an obvious service-connected disability (for example, a veteran who is blind or missing a limb) who is applying for a particular job will need a reasonable accommodation to do that job, the employer may ask whether an accommodation is needed and, if so, what type. Once a veteran with a disability has started working, an employer may ask whether an accommodation is needed when it reasonably appears that the person is experiencing workplace problems because of a medical condition.

Because many veterans may not view their service-related injuries as disabilities, they may not ask (or know that they are entitled to ask) for a reasonable accommodation. As a result, it may be critical for the employer to initiate a conversation with a veteran who is experiencing problems to determine an appropriate accommodation. Working together, the employer and veteran should identify what the veteran cannot do and then discuss ways to address any identified performance issue(s).

## **HOW DOES USERRA DIFFER FROM THE ADA?**

USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of individuals who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state, District of Columbia and territory (for example, Guam) National Guards.

While the ADA requires employers to make reasonable accommodations for veterans with disabilities, USERRA requires employers to go further than the ADA by making reasonable efforts to assist a veteran who is returning to employment.

First, if the veteran has a disability incurred in, or aggravated during, his or her service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service. If the veteran is not qualified for that position due to disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status and pay, the duties of which he or she is qualified to perform or could become qualified to perform. This could include providing training or retraining for the position at no cost for the veteran.

USERRA also applies to all employers, regardless of size. Information on the reemployment rights of uniformed service personnel can be found on DOL's [website](#).

*Source: Equal Employment Opportunity Commission*