

# How to Accommodate Physical Job Requirements in Compliance with the Americans with Disabilities Act (ADA)

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## I. INTRODUCTION

The Americans with Disabilities Act (ADA) was signed into law in 1990 to prohibit discrimination against individuals with disabilities.<sup>1</sup> Title I of ADA addresses discrimination in employment.<sup>2</sup> As a Talent Management Consultant I work with companies across many industries to help them understand how the ADA impacts them. This ranges from helping organizations conduct job analyses and create job descriptions, to creating policies and procedures on how to handle ADA accommodation requests and advising clients on responding to requests, to helping clients through the legal process when ADA claims arise. Over the years I have become acutely aware that most small to mid-sized companies do not understand the ADA and how to apply it to the roles in their organization.

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1) *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

2) *See 42 USCA Ch. 126, Subch. I – Employment of the Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

There are two areas that I find organizations struggle the most when it comes to the ADA. The first is understanding what the essential functions<sup>3</sup> of job roles are and how to evaluate that. The second is how to work through the accommodation process<sup>4</sup>. The failure to understand how to evaluate the essential functions of a role and how to determine accommodations under the ADA can be costly.<sup>5</sup> Therefore, it is imperative for organizations to understand the ADA, how to evaluate jobs within their organization, and how to work through the accommodation process.

When dealing with ADA accommodations, employers most often find themselves challenged with how to accommodate the physical job requirements that are necessary to complete the essential functions of the role. This paper is intended as a guide for small to mid-sized organizations to provide them with a resource to help navigate the ADA within their organization; from understanding what the ADA is, to ensuring that they are compliant. First, it is critical to understand what protections are afforded to employees under Title I of the ADA<sup>6</sup> and how those protections impact employers, thus this guide will begin by outlining those important features.

By first evaluating and understanding the written law, we will then be able to evaluate how to apply the law to everyday use in an organization. Section III will address how to determine the physical requirements needed to complete the essential functions of the job. In this section, we will discuss how to conduct an evaluation of the role<sup>7</sup> to determine physical requirements and if physical abilities tests or medical exams are appropriate evaluation tools. Section IV will discuss how to take that job analysis and determine which functions are essential to the role and what makes a function essential. By understanding the information contained in Sections III and IV, employers will be able to create ADA compliant job descriptions that can assist them in better being able to determine

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- 3) See *Determining the Essential Functions of the Position*, §6:55, Employment Discrimination Coordinator Analysis of Federal Law, (Nov. 2022 Update). (“An essential function is one that bears more than a marginal relationship to the job at issue; it is a fundamental job duty that can extend beyond an employee's technical skills and experience.”)
  - 4) See Johnson, Betsy, *Americans with Disabilities Act: Guidance for Employers on Reasonable Accommodations and Undue Hardship*, The Lexis Practice Advisor Journal™, (Spring 2020). (“The ADA Affirmatively requires employers to make reasonable accommodations to the known limitations of employees or applicants, provided that the accommodation does not pose an undue hardship on the operation of the business of the employer.”)
  - 5) In the 2017 case of EEOC v. United Postal Service, the EEOC claimed disability discrimination for failure to provide reasonable accommodation. UPS settled for \$2 million. See *Disability Discrimination in the Workplace Costs Employers*, <https://hrdailyadvisor.blr.com/2017/08/29/disability-discrimination-workplace-costs-employers/> (Accessed: October 30, 2022).
  - 6) See 42 USCA Ch. 126, Subch. I – Employment of the *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).
  - 7) See *How to Conduct a Job Analysis*, <https://www.indeed.com/career-development/how-to-conduct-a-job-analysis>, (Accessed: October 27, 2022). (“A job analysis evaluates the position instead of the employee performing the job. The goal of a job analysis is to define the unique set of abilities and expertise that each position requires.”)

appropriate accommodations under the ADA, which we will discuss in Section V. And in Section VI, we will guide employers through a “checklist” of how they can create a compliant accommodation process in their organization.

## II. HOW ADA PROTECTS EMPLOYEES

The Americans with Disabilities Act of 1990 was established to prohibit discrimination against those with disabilities. While the ADA covers areas of discrimination beyond employment, such as transportation, for the purposes of this guide, our focus will be on the ADA with respect to protections regarding the employment of those with disabilities.<sup>8</sup>

Our history includes dark details of how those with disabilities were viewed and treated, from being institutionalized to abused to considered less than whole humans. But our history also includes advocacy for the disabled, long before the passing of the ADA, from groups such as the League of the Physically Handicapped.<sup>9</sup> Years of advocacy for rights and fair treatment for those with disabilities eventually led to the passing of the Rehabilitation Act of 1973<sup>10</sup> which required that federally funded programs and services be accessible to those with disabilities. While it was a challenge to get President Carter to implement the regulations outlined under Section 504<sup>11</sup> of the Rehabilitation Act, he did eventually sign the regulations into effect and thus paved the way for the ADA.<sup>12</sup>

The ADA expanded protections well beyond what the Rehabilitation Act of 1973 provided to disabled Americans. It included protections involving services such as transportation and communication as well as protections surrounding employment. Title I<sup>13</sup> of the ADA specifically addresses discrimination in employment practices, including hiring, employment, and termination.

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8) For additional resources on the ADA, see <https://www.dol.gov/general/topic/disability/ada>.

9) The League of the Physically Handicapped was formed in 1935 in New York City to advocate for employment of disabled persons during the Great Depression. See ADA 30 “Our History”, <https://www.nyc.gov/site/mopd/events/our-history.page?slide=4>, (Accessed: October 31, 2022).

10) *Rehabilitation Act of 1973*, PL 93-112, 87 Stat. 355, (1973).

11) Section 504 of the Rehabilitation Act of 1973 provided that “No otherwise qualified handicapped individual in the United States, as defined in Section 7 (6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”

12) President Carter promised that Section 504 would be a top priority, but failed to take action once in office. This led to nationwide protests and the eventual signing of Section 504. To read more about this historic event, see *The 25 Day Siege That Brought Us 504*, <https://www.independentliving.org/docs4/ervin1986.html>, (Accessed Oct. 30, 2022).

13) See 42 USCA Ch. 126, Subch. I – Employment of the *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

Title I requires that employers make reasonable accommodation to qualified individuals<sup>14</sup> with disabilities and prohibits discrimination on the basis of disability in all aspects of employment including hiring, employment, and termination.<sup>15</sup> This includes retaliation against a candidate or employee for requesting accommodation or for filing a complaint or claim of disability discrimination.<sup>16</sup>

In addition, Title I<sup>17</sup> restricts an employer's ability to question or physically examine a job candidate for the purpose of determining disability status. An employer is prohibited from directly asking a candidate or employee if they have a disability, but may ask a candidate or employee if they are able to perform the essential functions of the role. Under the ADA an employer cannot conduct physical abilities tests or medical exams unless a candidate has been extended and accepted a contingent offer of employment. The employer must have an established protocol that dictates how the tests are administered to candidates in a consistent and non-discriminatory manner. For example, an employer can elect to conduct medical exams for all employees in a certain classification such as roles that require heavy lifting requirements. However, an employer cannot elect to conduct medical exams only on candidates that have a BMI in the obese range. An employer must be able to show that any examination completed is job related and a business necessity.<sup>18</sup>

### III. PHYSICAL REQUIREMENTS OF THE JOB

Every job has physical requirements.<sup>19</sup> When we think of physical job requirements, we commonly think of physical activities such as sitting, standing, and lifting. Some jobs, such as

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14) *Definition of "Qualified Individual" Under Title I of the ADA*, §6:48, Employment Discrimination Coordinator, (Nov. 2022).

15) The Department of Labor's Office of Disability Employment Policy (ODEP) provides resources to employers on the basic regulations of the law. See <https://www.dol.gov/agencies/odep>.

16) *Morrissey v. Laurel Health Care Company*, 946 F.3d 292, (2019). (The Court held that an employer cannot retaliate against an employee for a request for accommodation.)

17) See 42 USCA Ch. 126, Subch. I – Employment of the *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

18) See *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, (3<sup>rd</sup> Cir. 1999). This case discusses physical ability tests and evaluating tests for job relatedness for the position in question and consistency with business necessity. It also addresses the history of the business necessity doctrine and issues that have surrounded the threshold issue.

19) For a visual depiction of the most common physical job requirements, see Occupational Requirements Survey, U.S. Bureau of Labor Statistics, <https://www.bls.gov/ors/factsheet/visual-overview-of-physical-demands.htm>, (Accessed: October 31, 2022).

police officers<sup>20</sup> or firefighters<sup>21</sup>, have much more strenuous physical requirements. Employers need to ensure that they are hiring individuals who are physically capable of performing the functions of the role. In order to do this, employers first need to understand what physical capabilities are necessary for the completion of that role.

There are several ways that an employer can evaluate a role to understand what physical requirements are needed in order for an employee to be able to perform the functions of that role. A multi-pronged approach is recommended in order to obtain the most comprehensive data. Begin by conducting a job analysis<sup>22</sup> that includes interviewing incumbents in the role to determine the functions of that role. Ask questions regarding what tasks they complete on a daily and weekly basis and what percentage of their time they spend on each task or category of tasks. Then conduct a job observation<sup>23</sup> in which you select a few incumbents and spend time observing them performing the functions of the role. Once you have completed the job interviews and observations, compare your results to the current job description and make updates as necessary, paying close attention to the physical requirements needed to complete the required duties of the role. In addition to conducting a job analysis, there are resources available to assist organizations in developing well-crafted and compliant job descriptions, such as the Bureau of Labor Statistics (BLS) job descriptions.<sup>24</sup>

Once the job analysis is complete, additional considerations may be needed, such as determining if certain physical fitness standards<sup>25</sup> are necessary for the position such as weight, height, or lifting requirements. If a position requires extreme or repetitive physical exertion, an employer may consider if a pre-employment medical exam or physical abilities test (PAT) is appropriate for the position.<sup>26</sup>

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- 20) *Police Officer*, [https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=4df55b5e-b4a5-403f-9092dacc9436e865&cclid=19000101\\_000001&jobId=452898&source=IN&lang=en\\_US&itk=JDINAWEXZ5](https://workforcenow.adp.com/mascsr/default/mdf/recruitment/recruitment.html?cid=4df55b5e-b4a5-403f-9092dacc9436e865&cclid=19000101_000001&jobId=452898&source=IN&lang=en_US&itk=JDINAWEXZ5), (Accessed: October 25, 2022).
  - 21) *Firefighter*, <https://www.indeed.com/jobs?q=firefighter&l=&from=searchOnHP&vjk=bae116795d5538cf>, (Accessed: October 25, 2022).
  - 22) *How to Conduct a Job Analysis*, <https://www.indeed.com/career-advice/career-development/how-to-conduct-a-job-analysis>, (Accessed: October 27, 2022).
  - 23) *Job Analysis: Methods Of: Observation*, <https://job-analysis.net/G013.htm#:~:text=The%20Observation%20method%20of%20Job,of%20the%20job%20can%20be>, (Accessed: November 1, 2022).
  - 24) BLS or the Bureau of Labor Statistics provides job description information that can assist organizations in researching and creating job descriptions including information on job duties, work environment, and pay. For an example, see *Accountants and Auditors : Occupational Outlook Handbook* : U.S. Bureau of Labor Statistics (bls.gov), [www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm](http://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm), (Accessed: Nov. 1, 2022).
  - 25) *Physical Fitness Standards*, p 441, *Employment Practices Guide*, Wolters Kluwer, (2022).
  - 26) Roberts, Delia, Et.al., *Current Considerations Related to Physiological Differences Between the Sexes and Physical Employment Standards*, Vol 41, No. 6, Supp. 2. *Applied Physiology, Nutrition, and Metabolism* (2016).

When considering the use of medical exams an employer must be careful to ensure that the exam is appropriate to evaluate that the employee is physically healthy to perform the functions of the role but that the medical information obtained does not provide the employer with information that would allow them to potentially discriminate against the employee in violation of any state or federal laws, such as the Genetic Information Nondiscrimination Act of 2008 (GINA).<sup>27</sup> For example, in the case of the *EEOC v. Founders Pavilion, Inc.*, the EEOC filed charges and came to a settlement agreement against Founders Pavilion, a long-term care facility, for conducting post-offer medical exams in which they collected family history information and then used that information in employment decisions.<sup>28</sup>

Physical Abilities Tests, or PATs, can be a great way for an employer to evaluate a candidate's ability to perform physical activities that mimic the physical requirements of the job. For example, I worked with a client in the rubber molding industry that required mold operators to be able to lift up to 100 pounds. In an average day a mold operator may be required to lift a sheet of rubber weighing 100 pounds up to 10-15 times. However, in addition to simply lifting the sheet of rubber onto the mold, the operator must also be able to maneuver that sheet of rubber back and forth on the mold machine as they are working that piece through the machine, which also requires strength and may involve lifting and replacing the sheet. As part of the pre-hire process, candidates are asked to demonstrate their ability to lift a sheet of rubber onto the molding machine and shift the sheet around on the machine. Not all PATs are an exact demonstration of the work performed, but may be an assessment designed to evaluate fitness attributes that roles require. An example of this would be the type of PAT that candidates are often required to complete to apply for law enforcement roles, such as a corrections officer.<sup>29</sup>

It is important to understand that when using PATs in hiring decisions, the tests must be valid and reliable.<sup>30</sup> There are also considerations that must be taken to understand what physiological differences between the sexes may need to be accounted for in the testing and the required results.<sup>31</sup> Some differences to consider include stature, body composition, muscular strength, and

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27) *Genetic Information Nondiscrimination Act of 2008*, Pub.L 110-233, 122 Stat. 881, (2008).

28) *Founders Pavilion Will Pay \$370,000 to Settle EEOC Genetic Information Discrimination Lawsuit*, EEOC Press Release, U.S. Equal Employment Opportunity Commission, [https://www.eeoc.gov/newsroom/founders-pavilion-will-pay-370000-settle-eeoc-genetic-information-discrimination-lawsuit#:~:text=NEW%20YORK%20%2D%20Founders%20Pavilion%2C%20Inc,\)%2C%20the%20agency%20announced%20today](https://www.eeoc.gov/newsroom/founders-pavilion-will-pay-370000-settle-eeoc-genetic-information-discrimination-lawsuit#:~:text=NEW%20YORK%20%2D%20Founders%20Pavilion%2C%20Inc,)%2C%20the%20agency%20announced%20today), (Accessed: Nov. 1, 2022).

29) For an example of a PAT for a corrections officer position, see *MTI's Correctional Officer Fitness Assessment*, <https://mntactical.com/knowledge/mti-correctional-officer-fitness-assessment/>, (Accessed: Nov. 1, 2022). The Assessment explains the attributes required and how each test ties to those attributes.

30) Milligan, Gemma, Et.al, *Validity and Reliability of Physical Employment Standards*, Vol. 41, No. 6, Supp. 2, Applied Physiology, Nutrition, and Metabolism, (2016).

31) Roberts, Delia, Et.al., *Current Considerations Related to Physiological Differences Between the Sexes and Physical Employment Standards*, Vol 41, No. 6, Supp. 2. Applied Physiology, Nutrition, and Metabolism (2016).

endurance. By failing to evaluate the PATs for validity and reliability, and ensuring that the tests account for physiological differences between the sexes, employers risk implementing PATs that may create a disparate impact in their hiring practices.<sup>32</sup>

#### IV. IS IT AN ESSENTIAL FUNCTION?

The ADA requires employers to make reasonable accommodations to qualified individuals to enable them to perform the essential functions of their job.<sup>34</sup> Determining what is an essential function of a position is not always an easy task. There are several factors that must be considered when determining if a function is essential to a role. These include, but are not limited to, how much the position exists to perform the function, how often the function must be performed, how many employees are available or required to perform the function, and how specialized the function is.<sup>35</sup> Take for example the rubber mold operator position we discussed earlier. The position exists to mold rubber; every operator must be able to lift up to 100 pound sheets of rubber repeatedly throughout each workday and the function is specialized to that position. Therefore, the function is essential.<sup>36</sup> Now consider the role of a firefighter. While firefighters do not run into burning buildings every day and carry individuals out of building every day, the position exists for that very purpose and all firefighters must be able to perform those tasks. They receive specialized training in order to be able to safely perform the functions of the job such as entering burning buildings,

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32) Roberts, Delia, Et.al., *Current Considerations Related to Physiological Differences Between the Sexes and Physical Employment Standards*, Vol 41, No. 6, Supp. 2. Applied Physiology, Nutrition, and Metabolism (2016).

33) In *EEOC v. Dial Corp*, 469 F.3d 735, (8<sup>th</sup> Cir. 2006), the court ruled that the PAT was not a valid test and did not represent the physical requirements of the job. The outcome of the test implemented was a disparate impact against female candidates. The EEOC filed a case on behalf of the female claimants and the court ruled in favor of the EEOC that Dial Corp's PAT was discriminatory.

34) *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

35) *Instructions for Identifying Essential Functions*, <http://www.wiu.edu/hr/documents/essentialfunctions.pdf>, (Accessed: Nov. 1, 2022).

36) *Lewis v. Peabody Rocky Mountain Services, LLC*, Slip Copy (D. Colo. 2022). Lewis filed claims of sex discrimination and perceived disability discrimination claiming that she was discriminated against for being required to take a physical ability test upon return from a WC claim, in which she was required to lift 80 lbs. This was noted in the job description as an essential function of her position and the company reserved the right to conduct the physical ability test, however, she argued that during her 8 years in the role she never had to do this level of lifting. She was unable to complete the test successfully. She then requested that she be put in a position that did not require this and was instead terminated from employment. The court ruled that she did not meet the requirements to show a prime facie case for either sex discrimination or perceived disability discrimination on the basis that she was unable to show that the test was unfairly administered to her or that she was qualified for the positions for which she was not moved into when asked to be transferred. This is a very recent case, decided on Sept. 15, 2022 and it has been appealed.

running up and down flights of stairs, and carrying individuals out of buildings. These functions are essential even though they are not performed on necessarily a regular basis.<sup>37</sup>

#### A. What is a “Qualified Individual” Under ADA?

The ADA defines a “qualified individual” as a person with a disability who, with or without accommodation, can perform the essential functions of the job that they hold or desire to hold.<sup>38</sup> To determine if an individual is qualified, you must first look at whether the individual can perform the essential functions of the role. If not, then is there a reasonable accommodation that would allow the individual to perform those essential functions?<sup>39</sup>

If the individual cannot perform the essential functions of the role, with or without accommodations, employers are required to take it one step further and determine if there are other vacant positions within the organization that the individual is a “qualified individual” for, in which they would be able to complete the essential functions of the role, with or without accommodation. The District Courts are split on whether this “reassignment” clause under the ADA is a mandatory accommodation or not, with some Districts determining that it does not require mandatory reassignment when employers have most-qualified hiring policies in place and other Districts saying that it does.<sup>40</sup>

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37) *Adair v. City of Muskogee*, 823 F.3d 1297, 1309-10 (10th Cir. 2016). Adair was a firefighter who was injured on the job and claimed he was discharged in retaliation for the WC claim and in violation of ADA. Adair was required to complete a physical ability test upon return from WC and was unable to do so, he was then deemed permanently incapacitated by the WC doctor. As a result, he was given the option to retire or be terminated. The court ruled that the frequency in which the physical requirement is engaged in does not automatically eliminate the requirement from being an essential function of the job. When evaluating essential functions, it is important to consider not just the frequency of the function but the role of the position to which that function is assigned.

38) *Definition of “Qualified Individual” Under Title I of the ADA*, §6:48, Employment Discrimination Coordinator, (Nov. 2022).

39) *Wells v. Shalala*, 228 F.3d 1137, (10<sup>th</sup> Cir. 2020). The *Wells* case is an ADA case established what is referred to as the Wells Test, a two-part test used to determine if an individual is “qualified” for the position, with or without accommodation. The first part of the test is to determine if the duties the individual cannot perform are essential. The second part of the test is to determine if there are accommodations available that will allow the individual to perform the essential tasks. If part one is yes and part two is yes, the individual is qualified. If part one is yes and part two is no, the individual is not qualified.

40) Wilson, Belen, *Mandatory Reassignment Under the Americans with Disabilities Act: The Fourth Circuit Weighs In*, 12 Wake Forest L. Rev. Online 1, The Wake Forest Law Review, (Jan. 31, 2022).



## V. ACCOMMODATIONS UNDER THE ADA

The accommodation process is an interactive process with the individual seeking accommodation. The employer must engage in a two-way communication with the individual to determine what a reasonable accommodation would be that will allow the individual to perform the essential functions of the role. Keep in mind that this is very individualized. An accommodation that will work for one individual may not work for another similarly situated individual. The employer is also not required to provide the accommodation that the individual requests, but is required to work in collaboration and in good faith with that individual to find an accommodation or accommodations that will allow the individual to be able to complete the essential functions of the role.<sup>41</sup>

One possible accommodation that many employers are not aware could be a reasonable accommodation under the ADA is unpaid leave. This could be intermittent leave to attend doctor's visits or for medical "flare ups" (i.e. conditions such as MS) or this could be an extended leave.<sup>42</sup> For example, in the case of *King v. Steward Trumbull Memorial Hospital (2022)*,<sup>43</sup> King filed suit against the Hospital for terminating her employment after she sought a leave of absence as a reasonable accommodation due to asthma. The court ruled that the Hospital failed to engage in the interactive accommodation process with King and that her request for a leave that would allow her to then return to work at a later date and be able to perform the essential functions of her role was a reasonable request that would not cause an undue business hardship to the Hospital.

The ADA does aim to protect employers by stating that employers are not required to provide accommodations that would constitute an undue business hardship. While the ADA does not clearly define what constitutes an undue business hardship, there have been court cases decided that help to

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41) *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794, (9<sup>th</sup> Cir. 2017). Dunlap worked for LNP and was required as an essential function of her job to be able to lift up to 55 pounds to move product from one location to another. She sustained an injury and was put on light duty and was unable to meet the lifting requirement. LNP terminated her employment due to her inability to meet the lifting requirement. At jury trial, the jury was instructed that they could consider whether or not an accommodation allowing her to move the product from one location to another would have been a reasonable accommodation and if LNP discriminated against Dunlap under ADA by failing to consider such as an accommodation. The jury found in favor of Dunlap. Upon appeal, the 9<sup>th</sup> Circuit court upheld the decision.

42) *Employer-Provided Leave and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>, (Accessed: Nov. 3, 2022).

43) *Sixth Circuit Reinstates Failure-to-Accommodate Claim Because Employer Prematurely Halted the Interactive Process*, <https://www.jdsupra.com/legalnews/sixth-circuit-reinstates-failure-to-5652990/>, (Accessed: Nov. 3, 2022).

shed some light on what this may mean for employers. In the case of *Searls v. Johns Hopkins Hospital (2016)*,<sup>44</sup> Searls filed a discrimination charge under ADA claiming that Johns Hopkins failed to provide her with reasonable accommodation. After accepting an offer of employment, Searls informed Johns Hopkins that she was deaf and requested a sign language interpreter. As a result of her request for accommodation, Johns Hopkins rescinded her offer of employment. During the trial Johns Hopkins argued that the request for accommodation constituted an undue business hardship. The court rejected this argument on the basis that the salary of the interpreter (\$120,000 annually) was less than 0.007% of the hospital's overall revenue and would not cause an undue financial hardship to the organization. The *Searls* case demonstrates that an employer must conduct a thorough analysis to determine if an accommodation truly constitutes an undue business hardship. An organization that pulls in \$1 million in annual revenue may not be able to afford to install an elevator in their building as an accommodation, but an organization that pulls in \$20 million in revenue could.

## VI. HOW TO CREATE A COMPLIANT ACCOMMODATION PROCESS FOR YOUR ORGANIZATION

Many organizations find themselves caught off guard when a candidate or employee requests an accommodation under the ADA because they never took the time to put a formal process in place. By understanding how the ADA protects individuals with disabilities, what the employer's responsibilities under the ADA are, and creating policies and procedures to effectively manage the ADA process, employers can ensure that when an accommodation request is received, they are able to effectively work through the interactive process with the individual making the request and ensure that they are compliant with the ADA.

First, it is important to know that the ADA applies to organizations with fifteen (15) or more employees.<sup>45</sup> If you are a small organization with less than fifteen employees, you are not required to provide accommodations under the ADA. However, it is important to note that once you reach that number, you will need to put the policies and procedures we are about to discuss in place.

It is important for your employees to know that you abide by the ADA and what your policy and procedures are. Therefore, your organization should create a written ADA policy that includes a statement that your organization abides by the ADA as well as any state laws and provides information to employees on how they can request accommodations and what the interactive accommodation process will look like.<sup>46</sup> This policy should be included in your Employee Handbook that is provided to employees upon hire.

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44) *Searls v. Johns Hopkins Hospital*, 158 F.Supp.3d 427, (US D. Md, 2016).

45) *Americans with Disabilities Act of 1990*, Pub.L. 101-336, 104 Stat. 327 (1990).

46) For a sample ADA policy, see *Employment, Sample Policy – Disability Accommodation (Annotated)*, Bloomberg Law, <https://www.bloomberglaw.com/product/health/document/X6HSON8C000000>, (Accessed: Nov. 4, 2022).

The accommodation request process should be a formal, documented process. The organization should have an accommodation request form that includes information such as the type of accommodation requested, the reason for the request, and the duration of the request. Depending on the type of request, the organization may need to obtain information from the individual's treating physician and should have a Physician's Certification Form<sup>47</sup> that the individual can take to their doctor to have completed. The use of these forms helps to ensure that the organization is gathering the information needed to make an informed decision regarding the accommodation as well as ensure that the request and accommodation process is well documented.

Once the employer receives the completed forms from the individual, the employer should review the forms along with the job description to confirm the essential functions of the role. The employer should then review the requested accommodations to determine if those accommodations would allow the individual to perform the essential functions of the role and if those accommodations are reasonable and do not constitute an undue business hardship. If it is determined that the requested accommodations would allow the individual to complete the essential functions and would not cause an undue hardship, the employer should meet with the individual to discuss providing the accommodation and any necessary steps required to do so. If the employer determines or is unsure that the requested accommodation would allow the individual to be able to complete the essential functions of the role, the employer should schedule a meeting with the individual to discuss their concerns and possible alternative solutions. If, after meeting with the individual, it is determined that no accommodation can be made that would allow them to perform the essential functions of the role, the employer should consider if the individual is qualified for any vacant positions within the organization, with or without accommodation.<sup>48</sup>

As noted in Section IV-A, if there is no accommodation that can be made that would allow the individual to perform the essential functions of the role and there is no vacant position within the organization that the individual is qualified to perform, with or without accommodation, the individual is then determined to not be a "qualified individual" under the ADA and their employment can be terminated.<sup>49</sup> When making this determination, it is critical that each step of the process is documented and that the job descriptions for each position considered is up-to-date. If

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47) For sample forms, see *Reasonable Accommodation Form – Disability*, [https://www.acc.com/sites/default/files/resources/vl/membersonly/SampleFormPolicy/136198\\_0\\_1.pdf](https://www.acc.com/sites/default/files/resources/vl/membersonly/SampleFormPolicy/136198_0_1.pdf), (Accessed: Nov. 4, 2022).

48) *Ten Steps to Comply with The ADA's Interactive Process*, <https://www.jdsupra.com/legalnews/ten-steps-to-comply-with-the-ada-s-29086/>, (Accessed Nov. 5, 2022).

49) *Definition of "Qualified Individual" Under Title I of the ADA*, §6:48, Employment Discrimination Coordinator, (Nov. 2022).

the resulting termination leads to legal action, the courts will look to the documentation to assist in determining if the individual was in fact a qualified individual under the ADA. I recommend to clients that job descriptions are reviewed on an annual basis and that job analyses are conducted every three to five years.

All documentation regarding accommodation requests, reviews, and approvals should be maintained confidentially and kept separate from personnel records. This information should be kept in the employee medical file and only those with a need to know should have access to the records. If the accommodation request is stated for a specified period of time, the employer may request an updated Accommodation Request Form and Physician's Certification Form if the employee needs to extend the accommodation or if there is a change in the employee's circumstances regarding their condition.

## VII. CONCLUSION

The ADA has been described as "vast" and "vague". "The vastness comes from the statute trying to cover a huge amount of ground, ranging from physical accessibility for the disabled to telecommunications to employment discrimination. The vagueness comes from legislators trying to write a law that fits all situations and, in doing so, omitting specifics for any one."<sup>50</sup> It is a complex law and the answers in how to ensure compliance are not simple. This is evident by the courts themselves being split on how to interpret the meaning of the law, as noted in section IV-A, with regards to whether "reassignment" is a mandatory requirement of the law or not when employers have a most-qualified hiring policy in place. And this is not the only issue that the courts have been divided on, with many ADA cases being reversed upon appeal and sent back to the lower courts for review.

While employers cannot guarantee that they will not find themselves fighting an ADA discrimination claim, they can take every step possible to protect themselves by ensuring that they have conducted thorough job analyses and have complete, up-to-date job descriptions for all positions within their organization, have an ADA policy and accommodation request procedure in place, and engage in the interactive process to determine if an individual is a qualified individual under the ADA. Employers must ensure that they are consistent in how they manage accommodation requests, that they are prompt in their response, that they document every step of the way, and that their policies and procedures are reviewed on a regular basis.

Understanding the physical requirements of the roles in your organization is an important factor in being able to determine possible accommodations. Determining necessary medical exams and PATs that may help to evaluate an individual's ability to safely perform the essential functions of the role can be critical to helping determine if an individual is qualified under the ADA.<sup>51</sup> It is important to evaluate if those physical requirements are essential to the position, if they could be performed by another individual in the organization, or if there is another way to accomplish the task.<sup>52</sup> Ultimately, the courts

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50) Brady, Bob, *ADA Complexity Leading to Increased Lawsuits*, HR Daily Advisor, (Oct. 19, 2006).

51) *Adair v. City of Muskogee*, 823 F.3d 1297, 1309-10 (10th Cir. 2016).

52) *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794, (9<sup>th</sup> Cir. 2017).

want to see that you made every effort to work with the individual to attempt to find a workable solution that would allow them to continue to function in their role or find another role within your organization that they could function in; in other words, keep them employed if possible. And ultimately, isn't that what we as the employer should want for our employee as well if we can make it happen?