

# **The Americans With Disabilities Act**

## **What Persons With Fibromyalgia Need to Know**

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**by Alison S. Levy, M.S.**

If you are a person with fibromyalgia syndrome (FMS), you know how its affects can influence your ability to maintain steady employment. The Americans with Disabilities Act (ADA) is a civil rights law passed in 1990 designed to level the playing field for people with disabilities and to ensure equal participation in our society. This article will highlight your basic rights under the employment provisions of the ADA and provide resources to assist you in understanding them.

**The ADA: What is it?** The Americans with Disabilities Act prohibits discrimination against people with disabilities in five areas:

Title I: Employment

Title II: State and local government (programs, services, and transportation)

Title III: Public accommodations (places of business)

Title IV: Telecommunications

Title V: Miscellaneous

Under the employment provisions of the ADA, the law prohibits discrimination throughout the recruitment and job application process, hiring, layoff/firing, advancement, compensation, training, leaves, benefits, and other terms, conditions, and privileges of employment such as health insurance, company parking spaces, and access to company-sponsored events for employees, to name a few.

**Which employers are covered by the ADA?** The employment provisions of the ADA apply to private employers, state and local governments, employment agencies, and labor unions. Employers with 15 or more employees (including both part-time and full-time workers) are covered by the ADA. Entities receiving Federal government funding are covered by a separate law, the Vocational Rehabilitation Act of 1973. (For details, contact the U.S. Department of Justice at 800/514-0301.)

**Who is protected from employment discrimination?** Employment discrimination is prohibited against “qualified individuals with disabilities.” This includes applicants for employment as well as current employees. Because disability affects each person differently, the ADA provides a definition of “disability” rather than an exhaustive list that may eliminate people who truly should be covered by law.

There are three parts of the definition of “disability” under the ADA. An individual is considered to have a “disability” if (s)he: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Great emphasis is placed on the first part of the definition of disability. If you can prove that you are substantially limited in your ability to perform a major life activity, such as hearing, speaking, walking, breathing, performing manual tasks, learning, caring for yourself, and working, then you are covered by the ADA. The second part of the definition protects individuals with a *record of* a disability, and would cover, for example, a person who has recovered from cancer or mental illness. The third part of the definition protects individuals who are *regarded as having* a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the “negative reactions” of customers or co-workers.

**Who is a “qualified” individual with disability?** A qualified individual with a disability is a person who meets the legitimate skill, experience, education, or other requirements of an employment position that (s)he holds or seeks, and who can perform the “essential functions” (i.e., fundamental job duties) of the position with or without reasonable accommodation. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these tasks with a reasonable accommodation.

**What is a reasonable accommodation?** The Equal Employment Opportunity Commission (EEOC) *Technical Assistance Manual* defines reasonable accommodation as “a modification or adjustment to a job, the work environment, or the way things are usually done that enables a qualified individual with a disability to enjoy an equal employment opportunity”. Reasonable accommodations generally fall into three categories: (1) changes in the job application process so that a qualified applicant can be considered for a job; (2) changes in the work environment or the manner in which the job is performed; and (3) changes so that an employee with a disability can enjoy equal benefits and privileges of employment.

**Who decides what is “reasonable?”** When a qualified individual with a disability requests an accommodation, the employer must make a reasonable effort to provide an accommodation that is *effective for the individual* (e.g., gives the individual an equally effective opportunity to apply for a job, perform essential job functions, or enjoy equal benefits and privileges).

The process of deciding what is “reasonable” is conducted on a “case-by-case basis” because the nature and extent of a disabling condition and the requirements of a job will vary in each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness (e.g., whether the accommodation will provide an individual with a disability the opportunity to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability). The process *must* be interactive and involve both the employer and the employee.

**When should I disclose my fibromyalgia?** Disclosing your disability is a very personal decision and depends on your situation. The ADA does not require an individual to disclose a disability. However, an employer is not obligated to provide a reasonable accommodation unless (s)he is made aware of your needs. If you need an accommodation to participate in a job interview, you may want to disclose your disability early on to ensure that you can fully

participate in the interviewing process. Otherwise, you could wait and disclose your FMS after you receive a job offer or when you have determined you need an accommodation.

**How can I inform my employer about my FMS?** There are several steps that you may want to take *prior* to disclosing your disability and requesting a reasonable accommodation:

- ❖ Prepare a brief, functional description of what fibromyalgia syndrome is and how it relates to your work. Try to focus on what you can do more than what you cannot do as a result of FMS.
- ❖ Develop a short list of reasonable accommodations that will enable you to complete the essential functions of your job. Refer to the Job Accommodation Network list for people with FMS and chronic pain in Table 1.
- ❖ Document your disclosure and efforts to obtain reasonable accommodations. Develop a written letter to your employer in which you disclose that you are a person with a disability covered by the ADA and that you are requesting a reasonable accommodation enabling you to complete the essential functions of your job. Contact the Job Accommodation Network or visit its website (see Table 2) and obtain the publication, “Ideas on How to Request an Accommodation”. Written documentation of your efforts will provide you with evidence if problems arise later.

**What are some examples of reasonable accommodations?** Reasonable accommodations must be provided in the job application process to enable a qualified applicant to have an equal opportunity to be considered for a job. For example, a person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible. A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form. Without such accommodations, these individuals may have no opportunity for a job. (*TA Manual*, Title I, p. III-3)

Job restructuring or job modification is a form of reasonable accommodation which enables many qualified individuals with disabilities to perform jobs effectively. Job restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a job. However, an employer is not required to reallocate *essential* functions of a job as a reasonable accommodation. Job restructuring is frequently accomplished by exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal job functions performed by one or more other employees.

**What are some sample accommodation scenarios pertinent to individuals with chronic pain and FMS? The Job Accommodation Network provides the following examples:**

- ❖ An appointment secretary was reprimanded for poor attendance due to chronic pain. She was provided periodic rest breaks when at work and allowed to telecommute part-time.
- ❖ A human resources manager had chronic pain due to a car accident. The individual was having difficulty getting to work on time. He was accommodated with a flexible schedule to allow more time to access public transit.

❖ A switchboard operator with chronic pain and fibromyalgia was accommodated with flexible scheduling, rest breaks, and an adjustable workstation. The adjustable workstation allowed her to alternate between a sitting and standing position.

❖ An individual with chronic pain due to a back injury was having difficulty sitting throughout the day. She was accommodated with a reclining workstation.

❖ A medical technician with chronic pain was restricted from doing repetitive work which involved doing typing throughout the day. He was transferred to another job requiring less repetition.

❖ An assembly line worker with chronic pain was having difficulty standing for long periods. He was accommodated with a sit-lean stool and anti-fatigue matting.

**I applied for a job, and they asked me to get a physical. Is this legal?** An employer may *not* ask or require a job applicant to take a medical examination before making a conditional job offer. Further, an employer cannot make a pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about a person's ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe how (s)he would perform these functions. An employer can require a physical once a conditional job offer is made, but only if the employer requires a physical for everyone in that job category.

**Can an employer establish specific attendance and leave policies?** Yes. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

**What is undue hardship?** An undue hardship is an action that requires “significant difficulty or expense” in relation to the size of the employer, the resources available, and the nature of the operation. An employer is not required to make a reasonable accommodation if it would impose an *undue hardship* on the operation of the business. However, if a particular accommodation would impose an undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship.

For example: If restructuring a job to accommodate an individual with a disability creates a heavier workload for other employees, this may constitute an undue hardship. But if other employees complain because an individual with a disability is allowed to take additional unpaid

leave or to have a special flexible work schedule as a reasonable accommodation, such complaints or other negative reactions would not constitute an undue hardship.

**Are there tax deductions or credits for businesses?** Any business may take a full tax deduction, up to \$15,000 per year, for expenses incurred while removing specified architectural or transportation barriers (see Section 190 of the Internal Revenue Code). Tax credits are also available under the Targeted Jobs Tax Credit Program (TJTCP) for employers who hire individuals with disabilities referred by state or local vocational rehabilitation agencies, State Commissions on the Blind, and the U.S. Department of Veteran's Affairs and are certified by a State Employment Service. The TJTCP program promotes the hiring of several "disadvantaged" groups including people with disabilities.

Under this program, a tax credit may be taken for 40% of the first \$6000 of an employee's first-year salary. The TJTCP is reauthorized each year by Congress.

**What if I'm discriminated against?** The ADA does not allow an individual with a discrimination concern to go directly to court. Instead, it requires that the aggrieved employee exhaust administrative remedies before filing a civil action in court. This means that an employee's first step in challenging an unlawful employment practice is to file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) or with a State or local fair employment practices agency (FEP) within 180 days after the last act of discrimination.

**What resources can help me?** Regardless of where you are with your employment situation, as a person with fibromyalgia syndrome, you should learn about your rights under the Americans with Disabilities Act. Use the information as a tool to protect your employment status and ensure that you have equal opportunities in the workplace.

Before contacting an EEOC office, it is best to call your regional Disability and Business Technical Assistance Center (DBTAC) at 800/949-4232 (v/tty) for information, materials, technical assistance, or training on the ADA. This number will automatically route your call to the DBTAC in your region. Or visit the DBTAC home page at: <http://www.adata.org/dbtac.htm>.

Another helpful resource is the Job Accommodation Network (JAN) an international toll-free consulting service that provides information about job accommodations and the employability of people with functional limitations. Anyone may call JAN for information. Calls are answered by consultants who understand the functional limitations associated with disabilities and who have instant access to the most comprehensive and up-to-date information about accommodation methods, devices and strategies. The mission of JAN is to assist in the hiring, retraining, retention, or advancement of persons with disabilities by providing accommodation information.

**Can accommodations really help with employment?** According to the National Institute of Neurological Disorders and Stroke, chronic pain is the most costly health problem in America. Costs, including direct medical expenses, lost income, lost productivity, compensation payments and legal charges, are estimated at close to \$50 billion annually.

With the passage of the ADA, an increasing need has developed for individuals with FMS and employers to be knowledgeable about reasonable accommodations for people who have chronic pain. Information about reasonable accommodations can help in hiring and retaining individuals with chronic pain. Some employers have the misconception that people who have disabilities are difficult to accommodate. However, this is not necessarily true. JAN reports that employers who have implemented accommodations for people with disabilities have benefited financially. JAN's data shows that more than half of all accommodations cost less than \$500 and that most employers report benefits in excess of \$5,000 as a result of their efforts.

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## Table 1: Sample Job Accommodations

The following is a list of reasonable accommodation ideas for people with chronic pain as provided by the Job Accommodation Network (JAN). JAN advises that limitations will vary among individuals and that numerous other solutions and considerations may also exist.

### Attendance Issues

- ♦ Allowing for medical treatment
- ♦ Providing flexible schedules
- ♦ Providing flexible leave
- ♦ Allowing a self-paced workload and flexible hours
- ♦ Allowing employee to work from home
- ♦ Providing part-time work schedules

### Fatigue-Related Issues

- ♦ Allowing flexible scheduling and use of leave time
- ♦ Restructuring job to include only essential functions
- ♦ Allowing work from home
- ♦ Allowing frequent rest breaks and providing a place for the individual to lie down if required
- ♦ Prioritizing job assignments
- ♦ Evaluating safety hazards
- ♦ Allowing lateral/vertical moves to other positions
- ♦ Allowing job sharing opportunities

### Muscle Pain & Stiffness-Related Issues

- ♦ Providing accessible work environment (ramps, reserved parking, etc.)
- ♦ Constructing adjustable height workstation to allow alternating between sitting and standing positions
- ♦ Providing ergonomic chair and workstation suited to the individual

### Other Accommodation Options

- ♦ Making facilities readily accessible to and usable by an individual with a disability
- ♦ Restructuring a job by reallocating or redistributing marginal job functions
- ♦ Altering when or how an essential job function is performed
- ♦ Allowing part-time or modified work schedule
- ♦ Obtaining or modifying equipment or devices
- ♦ Modifying examinations, training materials or policies
- ♦ Reassignment to a vacant position
- ♦ Allowing an employee to provide equipment or devices that an employer is not required to provide

## Table 2: Resources

**ADA Information Center:**

800/949-4232 (v/tty)

**Job Accommodation Network:**

United States: 800/526-7234, Canada: 800/526-2262.

The JAN website is: <http://www.jan.wvu.edu/english/whatis.htm>

**Equal Employment Opportunity Commission:**

To locate your EEOC field office, or for more information about the ADA, call 800/669-4000 (voice) or 800/669-6820 (TTY). The EEOC website is: <http://www.eeoc.gov/>