

Veterans with Service-Connected Disabilities and the Americans with Disabilities Act (ADA): A Guide for Employers

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Each year, thousands of military personnel stationed around the world leave active duty and seek to return to jobs they held before entering the service or look to find their first, or new, civilian jobs. According to government statistics, between October 2001 and February 2008, more than 30,000 veterans returned home with service-connected disabilities (e.g., amputations, burns, post-traumatic stress disorder [PTSD], and traumatic brain injuries).

At least two federal laws provide important protections for veterans with disabilities. The Uniformed Services Employment and Reemployment Rights Act (USERRA), which is enforced by the U.S. Department of Labor (DOL), sets forth the requirements for reemploying veterans with and without service-connected disabilities. Title I of the Americans with Disabilities Act (ADA), which the U.S. Equal Employment Opportunity Commission (EEOC) enforces, prohibits private and state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability. Title I of the ADA also generally requires covered employers to make reasonable accommodations – changes in the workplace or in the way things are usually done that provide individuals with disabilities equal employment opportunities. Section 501 of the Rehabilitation Act applies the same standards of non-discrimination and reasonable accommodation as the ADA to Federal Executive Branch agencies and the United States Postal Service.

This guide briefly explains how protections for veterans with service-connected disabilities differ under USERRA and the ADA, and then describes how the ADA in particular applies to recruiting, hiring, and accommodating veterans with service-connected disabilities.

1. 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 those 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 (e.g., Guam) National Guards.

Both USERRA and the ADA include reasonable accommodation obligations; however, USERRA requires employers to go further than the ADA by making reasonable efforts to assist a veteran who is returning to employment **in becoming qualified for a job**. The employer must help the veteran become qualified to perform the duties of the position whether or not the veteran has a service-connected disability requiring reasonable accommodation. This could include providing training or retraining for the position. [See 38 U.S. Code § 4313; 20 C.F.R. §§ 1002.198, 1002.225 - .226.]

Additionally, reasonable accommodations may be available under USERRA for individuals whose service-connected disabilities may not necessarily meet the ADA's definition of "disability." 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 at www.dol.gov/vets.

Title I of the ADA prohibits employers from discriminating against qualified individuals with disabilities with respect to hiring, promotion, termination, and other terms, conditions, and privileges of employment. The ADA also prohibits disability-based harassment and provides

that, absent undue hardship (“significant difficulty or expense”), applicants and employees with disabilities are entitled to reasonable accommodation. Reasonable accommodations under the ADA range from job-restructuring (e.g., shifting marginal – or minor – functions that an employee is unable to perform because of a disability to other employees) to reassignment of an employee with a disability to a vacant position, where the employee’s disability prevents performance of the current position or where providing reasonable accommodation in the current position would result in undue hardship. (See Question 7.) Where providing a particular accommodation would result in undue hardship, an employer must consider whether another accommodation would not.

Under the ADA, an individual may request a reasonable accommodation any time during the application process or during employment. Additionally, the obligation under the ADA to make a reasonable accommodation is ongoing, meaning that an employer may need to provide an additional or different accommodation from one that it is already providing (e.g., when the nature of a disability or a job changes). Documents explaining Title I of the ADA can be found on EEOC’s website at www.eeoc.gov.

2. *Is a veteran with a service-connected disability automatically protected by the ADA?*

No. A veteran must meet the ADA’s definition of disability. The ADA defines an “individual with a disability” as a person who:

- (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.

This definition of disability may differ from the definition used in other laws. For example, the term “disabled veteran” means an individual who has served on active duty in the armed forces, was honorably discharged, and has a service-connected disability, or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department. [See 5 U.S.C.A. § 2108.] Nevertheless, many veterans who were wounded or became ill while on active duty meet both the definition of “disabled veteran” and the ADA’s definition of “individual with a disability.”

Under the ADA, an individual with a disability also must be “qualified” for the job the individual has or wants. To be qualified, an individual with a disability must meet the employer’s requirements for the job (such as education, training, skills, or licenses) and must be able to perform the job’s essential or fundamental duties, with or without reasonable accommodation.

3. *May an employer ask if an applicant is a “disabled veteran” if it is seeking to hire someone with a service-connected 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. [See EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990 (1995) at www.eeoc.gov/policy/docs/preemp.html.] 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 service-connected disabilities.

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

4. *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, that refusal to provide it will not subject the employee to any adverse treatment, and that 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.

5. *May an employer give preference in hiring to a veteran with a service-connected disability over other applicants?*

Yes. The ADA prohibits discrimination “against a qualified individual with a disability because of the disability of such individual.” However, the law neither prohibits nor requires affirmative action on behalf of individuals with disabilities. An employer, therefore, may – but is not required to – hire a qualified individual with a disability (including a veteran with a service-connected disability) over a qualified applicant without a disability.

Specific rules and regulations govern the hiring of veterans by federal employers. Federal agencies are allowed to use “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, promotion, or other employment decisions. [See the U.S. Office of Personnel Management’s question-and-answer guide on “Excepted Service—Appointment of Persons with Disabilities and Career and Career-Conditional Appointments” at www.opm.gov/disability/appointment_disabilities.asp and OPM’s “Vet Guide” at www.opm.gov/veterans/html/vetguide.asp; see also OPM’s Disabled Veterans Affirmative Action Program at www.opm.gov/veterans/dvaap.asp.]

Even where employers do not specifically recruit veterans with service-connected 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 (e.g., “requires extensive standing”) but, instead, should describe the actual function to be performed (e.g., “requires frequent lifting of objects that weigh more than 50 pounds”). Often, reasonable accommodations are available that will allow a veteran with a service-connected disability to perform a function in a way that is different from the way it is typically done.

6. *What are some specific steps employers may take to recruit and hire veterans with service-connected disabilities?*

In addition to measures specifically applicable to federal employers (see Question 5), there are a number of steps that any employer may take to recruit and hire veterans with service-connected 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
- ensuring that on-line job announcements, recruiting information, and application processes are accessible to individuals with disabilities, including applicants who have service-connected disabilities
- making written recruiting materials, such as application forms and brochures, available in alternate formats (e.g., Braille, large print, etc.), 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 service-connected 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
- surveying other employers to learn about their successful outreach efforts

7. *What types of reasonable accommodations may veterans with service-connected disabilities need for the application process or during employment?*

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

- written materials in accessible formats, such as large print, Braille, or on computer disk
- recruitment fairs, interviews, tests, and training held in accessible locations
- modified equipment or devices (e.g., 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; a one-handed keyboard for a person missing an arm or hand)
- physical modifications to the workplace (e.g., 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
- 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

8. *How does an employer know when a veteran with a service-connected disability needs an accommodation?*

Usually, the process of providing a reasonable accommodation will begin with a request from the individual with a service-connected 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 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 website for the Job Accommodation Network (JAN) 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." [See JAN's website at www.jan.wvu.edu.]

9. *May an employer ask a veteran with a service-connected 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 (e.g., 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 (e.g., 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 service-connected 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).

10. *Where can employers find out more about employing veterans with service-connected disabilities?*

This guide includes a list of public and private organizations that can assist employers who want to recruit and hire veterans with service-connected disabilities, or who have more questions about their obligations under USERRA and the ADA. It also includes resources on reasonable accommodation.

Source: Equal Employment Opportunity Commission www.eeoc.gov

This article 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.