



# **A Review of Issues Relating to Accessible Parking and the Workplace under the Americans with Disabilities Act**

**ADA National Network Technical Guidance**

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# Introduction

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Automobile parking is likely one of the most coveted work-related fringe benefits for people around the country. Consequently, parking tends to come at a premium to both workers and employers. At no time, do ADA Network technical assistance staff fail to receive inquiries relating to issues about accessible parking in the context of employment. For this reason we felt it helpful to put together a technical guidance addressing difficult issues relating to accessible parking in the employment context. We often get questions such as the following:

**Question:** We have an employee who is requesting a van accessible parking space because she uses a wheelchair. We do not have wheelchair accessible spaces in our parking facility. What obligations do we have regarding parking and employees with disabilities?

The answer depends on various factors relating to the employee with a disability, her essential job functions, the work site, and whether an employer makes parking available for employees. Generally, Title I of the Americans with Disabilities Act (ADA) makes it unlawful to discriminate on the basis of disability in all employment-related activities. Once an employee with a disability makes a request for a reasonable accommodation, the employer must engage in an interactive process to determine appropriate reasonable accommodations, work adjustments, or other modifications so the employee can perform essential job functions and participate in other aspects of work – including travel to work and parking.

Examples of parking-related accommodations may include:

- Restriping an additional accessible parking space as a reasonable accommodation where available accessible spaces are continually occupied;
- Restriping accessible parking spaces where none were previously available;
- Assigning an accessible parking space reserved for a specific employee with a disability to prevent others from occupying the space;
- Allowing an employee to use customer accessible parking if employee accessible parking is unavailable;
- Make other work-related adjustments if providing accessible parking is not possible, is inconsistent with a Seniority Rule or Collective Bargaining Agreement, or parking privileges are not provided.

This technical guidance reviews issues involving parking and employees with disabilities. Other relevant topics are reviewed for clarification, including the definition of an “accessible parking space” as well as applicable separate barrier removal obligations related to parking facilities owned by private business and government entities.

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# A. Applicable Law

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Title I of the Americans with Disabilities Act prohibits discrimination on the basis of disability in all aspects of employment -- including but not limited to:

- Recruitment, hiring, and terminations;
- Compensation, assignment, or classification;
- Promotion, transfer, recall, or layoff;
- Job descriptions and advertising;
- Parking, fitness rooms, toilet rooms, cafeterias, and other facilities for employee use;
- Training, testing, and apprenticeship programs;
- Seniority Systems and Collective Bargaining Agreements;
- Healthcare coverage, wellness plans, and other fringe benefits;
- Retirement plans and leave; or
- Other terms and conditions of employment.

Title I covers private employers, employment agencies and labor unions with 15 or more employees, and it covers state and local government entities with any number of employees. Section 501 of the Rehabilitation Act of 1973 covers federal workers. Both statutes contain identical provisions prohibiting discrimination on the basis of disability as amended by the [ADA Amendments Act of 2008](#).

## 1. A person must have a “disability” to be protected under the ADA

A disability is defined as:

- A physical or mental impairment that substantially limits one or more major life activities;
- Having a record of such an impairment; or
- Being regarded as having such an impairment. See, 42 U.S.C. § 12102 (as amended by the ADA Amendments Act of 2008).

Affected “major life activities” can include basic activities that the average person can perform without difficulty; e.g., walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, eating, sleeping, performing manual tasks, caring for oneself, learning, thinking, concentrating, interacting with others, and working. See, 29 C.F.R. § 1630.2(g).

Other affected life activities may include the operation of "major bodily functions; e.g., functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." See, 42 U.S.C. § 12102(2)(A-B). Hence, an impairment that substantially limits involuntary bodily functions can qualify as a disability depending on the effect that such impairments

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might have on work performance or participation in ancillary employment activities. See, 29 C.F.R. § 1630.2(h - i).

Temporary Impairments. Employers frequently ask whether "temporary disabilities" are covered by the ADA. While the duration of an impairment may be considered, this does not determine ADA protection. The crucial question is whether an impairment "substantially limits" one or more major life activities. This question is answered by looking at the extent and impact of the impairment. Temporary, non-chronic impairments that may last a short time and that have little or no long term impact are usually not deemed disabilities; e.g., sprains, concussions, appendicitis, common colds, or influenza. Conversely, a broken leg that heals normally within a few months, for example, would be a temporary disability under the ADA if the condition substantially limits the major life activity of walking.

## **2. Reasonable accommodations**

Employers are required to interactively consider and facilitate "reasonable accommodations" when requested by a job applicant or an employee. A "reasonable accommodation" is any change or adjustment to a job or work environment that permits an applicant or employee with a disability to participate in the job application process, perform essential job functions, and to enjoy benefits and privileges of employment equal to those enjoyed by all employees. See, 42 U.S.C. § 12112(b); 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.9; 29 C.F.R. § 1630.2(o).

Hence, modifications to the work environment or adjustments in how work is performed can include:

- Making existing facilities accessible by removing physical barriers;
- Job restructuring;
- Part-time or modified work schedules;
- Acquiring or modifying equipment;
- Modifying policies, tests or how tests are taken, or training materials;
- Providing qualified readers or interpreters; and
- Reassignment to a vacant position.

Making facilities "readily accessible" to individuals with disabilities includes those areas that must be accessible for the employee to perform essential job functions – in addition to non-work activity areas; e.g., break, lunch, and training rooms, bathrooms, and parking facilities. *Id.*

## **3. Accommodations not required if they cause undue hardship on business operation**

Employers need not provide a reasonable accommodation if doing so imposes undue hardship on business operation. "Undue hardship" means significant difficulty or expense in light of the overall resources and circumstances of the particular employer. Undue hardship refers not only to financial difficulty, but to accommodations that are

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unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. See, 42 U.S.C. § 12112(b); 42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p).

Mere inconvenience will not support a claim of undue hardship. Instead, undue hardship must be based on individualized assessment of specific circumstances that show that a requested accommodation would cause significant difficulty or expense on business operations. A determination of undue hardship can be based on the following factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- The type of employer operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and/or,
- The impact of the accommodation on the operation of the facility. See, 29 C.F.R. § 1630.2(p)(2).

Also, recall that reasonable accommodation is available only to applicants and employees with disabilities “qualified” to perform essential job functions. A “qualified” individual with a disability is one who can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation. See, 29 C.F.R § 1630.2(m). For instance, if a disability or significant medical condition poses a “direct threat” on the health and safety of the employee or coworkers that cannot be reasonably and safely accommodated, an employer has no obligation to keep the worker employed because he is no longer qualified to perform essential job functions.

#### **4. The required interactive process**

The ADA Amendments Act of 2008 obligates employers to engage in an “interactive process” with the individual making a request to determine appropriate reasonable accommodations. The aim is to work together and identify disability-based functional limitations along with potential accommodations that may help overcome barriers to performing job functions or accessing a parking facility. See, 29 C.F.R. § 1630.2(o)(3). Moreover, the purpose section of the ADAAA advises employers to focus on whether they have complied with their obligations and avoid unreasonably scrutinizing the nature or duration of a disability. Thus, the threshold issue of whether an impairment “substantially limits” a major life activity can no longer impose extensive or unreasonably intrusive analysis. See, 29 C.F.R. 1630.1(c)(4); 29 C.F.R. 1630.2(j) (1)(iii); see also *Brady v. Wal-Mart Stores Inc.*, 2nd Cir. No. 06-5486-cv (July 2, 2008)(holding that

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Wal-Mart failed to engage in the interactive process for identifying a reasonable accommodation when it failed to engage with an employee it perceived to have a disability that compromised ability to work).

### **Documentation of disability**

When the need for a reasonable accommodation is not obvious, an employer may request reasonable documentation from an appropriate licensed professional to establish the connection between the disability and need for the requested accommodation:

**Illustration:** Tom has a heart condition and wears a cardiac monitor. His doctor approved him to have an accessible parking permit because he can only walk a limited distance. He asks HR that he be allowed to park his car in accessible customer parking as a reasonable accommodation. He explained that customer wheelchair accessible parking is adjacent to the office facility, while employee parking is over a block away forcing Tom to experience physical hardship in the long walk.

First, HR may request medical documentation, because Tom's disability was not known and is not readily observable. Second, Tom should be allowed to park in customer accessible parking as a preliminary accommodation while medical documentation is obtained. Alternatively, the employer may allow Tom a flexible window of time for work arrival, if facilitating an accessible parking space imposes an undue hardship.

Realize that employers remain obligated to engage in the "interactive process" and work with the employee toward implementation of reasonable accommodations -- even if medical documentation is unavailable when the request is made. This obligation is based on the fact that the ADA Amendments Act changed the burden of proof by obligating the employer to first show a court that it acted timely to facilitate a reasonable accommodation without imposing conditions (such as requiring medical documentation) before an accommodation can be provided. See, 29 C.F.R. 1630.2(j)(1)(iii). (Nine Rules of Construction). As a matter of policy, the ADA Amendments Act shifted the burden of proof to the employer as a measure to keep employees with disabilities working while the reasonable accommodation process moves forward.

## **B. Employee Parking Facilities**

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Businesses and public entities making parking available for employees must provide accessible parking for employees with disabilities. However, as the illustration below indicates, there are two important considerations when reviewing a parking accommodation request and employer-provided parking:

**Illustration:** Lori asks her supervisor for help in obtaining an accessible parking space for her wheelchair lift-equipped van, because accessible spaces are always occupied. However, HR tells Lori that employee parking

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facilities are already compliant with the required minimum number of accessible car spaces and additional spaces will not be created. HR also tells Lori that taking away as many as two regular parking spaces to create an additional van accessible space will create a problem of overcrowding in the parking facility and cause undue hardship for others.

First, HR reported that facilities are already compliant with ADA minimum accessible parking requirements. This refers to separate (non-Title I) ADA architectural accessibility barrier removal requirements such as those in the 2010 ADA Standards for Accessible Design. However, Title I still requires the employer to interactively engage with Lori and determine an appropriate accommodation in view of accessible parking overcrowding. If an accessible parking space is not available, then other modifications or adjustments should be considered; e.g., extended arrival work time, modified work schedule, creating an additional accessible parking space by taking up two existing regular parking spaces, etc.

Second, this employer may audit available accessible parking spaces for compliance and ensure that only authorized employees park in reserved accessible spaces. Regrettably, people are occasionally found to be occupying accessible spaces either without authorization or by fraudulent use of State issued parking placards. However, employers that control private parking facilities have discretion to independently verify whether or not an employee using accessible parking has a legitimate disability-based need to occupy an accessible space.

## **Non-Title I related separate barrier removal obligations applicable to businesses and public entities.**

A business or government entity that provides employee parking must designate the required minimum number of accessible parking spaces consistent with applicable ADA regulations and the [2010 ADA Standards for Accessible Design](#). See, 28 C.F.R. § 35.151 (new constructions and alterations); 28 C.F.R § 35.150 (existing facilities); 28 C.F.R. § 36.401 (new construction); 28 C.F.R. § 36.402 (alterations); 28 C.F.R. § 36.304 (removal of barriers).

For instance, required accessible parking spaces must be calculated separately for each parking facility -- not calculated based on the total number of parking spaces provided on a site; e.g., in a facility housing 24 parking spaces, at least one space must be an ADA-compliant Van Accessible space; in a facility housing 201-300 spaces, at least 7 must be ADA accessible; and, one of six (or fraction of six) required accessible parking spaces, but always at least one, must be van accessible in each parking facility. See, 2010 ADA Standards for Accessible Design at Section 208.2 (minimum number) and 208.2.4 (required van accessible spaces). Also, note that employee parking facilities are covered by the barrier removal standards. Id at 208.2.3.3 (parking for Guests, Employees, and Other Non-Residents).

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**Important:** compliance with separate ADA architectural barrier removal requirements neither mitigates nor exempts a business or public entity from compliance with the Title I reasonable accommodation requirement. Thus, even if a parking facility is compliant with separate ADA architectural barrier removal standards applicable to “new Constructions,” “altered facilities”, or “existing facilities” not planning renovation, an employer may still be required to designate at least one additional accessible parking space to address a request for a reasonable accommodation pursuant to Title I, unless it can show that doing so causes undue hardship on business operation.

## C. Timely Response to a Reasonable Accommodation Request

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Addressing a request for accommodation as soon as practicable is important:

**Illustration:** A company provides parking for all employees. John, an employee with a temporary physical injury using a walker for mobility, requests an accessible parking space -- explaining that the spaces are so narrow that there is insufficient room to pull out his walker to stabilize. His supervisor does not act on the request and fails to forward it to someone with authority to respond. Several weeks later John makes a second request to his supervisor and explains that he is getting to work late due to lacking accessible parking. Two months after the initial request, nothing has been done and John is disciplined for coming to work late due to difficulty maneuvering out of his car in the parking lot.

While the supervisor did not necessarily denied John's request, inaction amounts to denial, and may violate the ADA if John is penalized for coming to work late based on his medical issue. Moreover, regarding “temporary” medical conditions, the employer is obligated to interactively engage with John to determine possible accommodation alternatives without regard to the duration of a medical condition. While a transitory impairment may have an actual or expected duration of six months or less, the condition is still protected when it is a physical or mental impairment that substantially limits one or more major life activities (e.g., it affects walking, standing, internal bodily function, etc.). See, 29 CFR sec 1630.2(j)(1)(ix).

## D. Employee Use of Customer Parking Facilities

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Allowing an employee to occupy an accessible parking space in customer or visitor parking facilities may be a viable type of reasonable accommodation – if it does not



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cause undue hardship on business operation. Policies concerning the use of customer accessible car spaces should be flexibly applied so as to avoid unintentional discrimination if a customer-exclusive policy were strictly enforced.

**Illustration:** Gina works for an auto parts store that employs 17 employees and provides parking for customers and employees in its large parking lot. The lot easily accommodates over 200 cars and is compliant with Title III ADA architectural accessibility standards applicable to private businesses. Gina works the early afternoon shift and has trouble getting an accessible space. The lot is always full and accessible spaces close to the building are usually occupied. Gina, who uses a cane due to a hip injury, notices that a few regular spaces typically remain open but are far from the store and she has difficulty walking long distances. She requests that her employer either reserve an available accessible space for her use or create an additional accessible parking space on a shorter distance to the work facility.

First, the auto parts store has discretion to designate and assign a parking space to an employee as a Title I reasonable accommodation. Second, the store may add accessible parking spaces beyond the minima number of accessible spaces required by the ADA barrier removal standards. And lastly, while it seems reasonable to restripe an additional accessible space as an accommodation, there may be a problem if either customers or other co-workers occupy the newly created space in a “first-come first-served” parking lot. Therefore, Gina should be assign a permanent accessible space to exempt her from the first-come first-served policy as part of her parking reasonable accommodation.

## **E. Reasonable Accommodations Are Not Limited to Performance of an Essential Job Function**

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Court decisions and the EEOC recognize that employer obligations to furnish reasonable accommodations is not limited to accommodating essential job functions, but also accommodating or making modifications to ancillary functions important to achieving equal opportunity - such as commuting to and from the office. For example, in one case Pauline Feist, an assistant attorney general for the Louisiana Department of Justice (“LDOJ”), was diagnosed with osteoarthritis of the knee. She requested an on-site parking space to accommodate her disability. The LDOJ declined the accommodation request, and Feist filed a complaint with the EEOC. Five months after filing her complaint, she was terminated by her employer for poor performance. Feist claimed that the LDOJ discriminated in violation of the ADA -- by refusing to provide free on-site parking. Feist also claimed that her employer violated the ADA and Title VII of the Civil Rights Act of 1964 by firing her in retaliation for filing charges. However, the District

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Court for the Eastern District of Louisiana held that Feist’s discrimination claim had to be dismissed because she failed to explain how the denial of the on-site parking limited her ability to perform the “essential functions” of her job. The district court also dismissed her retaliation claim because Feist did not provide evidence that the LDOJ used her ADA complaint as pretext for termination. See, *Feist v. State of Louisiana*, 730 F.3d 450 (5th Cir. 2013).

While the Fifth Circuit Court of Appeals rejected Feist’s retaliation claim, it supported her accommodation claim. In her appeal, Feist argued that reasonable accommodations are not restricted to modifications enabling performance of essential job functions. The Fifth Circuit agreed and held that ADA language and implementing regulations demonstrated that a reasonable accommodation did not need to relate to the performance of essential job functions. The Court emphasized that the ADA contains a two-pronged definition of “reasonable accommodation.” First, “reasonable accommodation” includes “making existing facilities used by employees readily accessible to and usable by individuals with disabilities.” This prong is typically applied to require physical modifications to the workplace. The court noted that reserved on-site parking “would presumably have made the plaintiff’s workplace ‘readily accessible to and usable by’ the employee.

Secondly, the appeals court emphasized that the ADA provides a list of modifications, including but not limited to, job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and stated that “reasonable accommodation” includes “other similar accommodations” (citing 29 C.F.R. § 1630.2(o)(1)) *id.* The court further noted that the EEOC implementing regulations specifically state that providing a parking space may constitute a reasonable accommodation under certain circumstances (citing 29 C.F.R. pt. 1630 App., § 1630.2(o)).

## F. Parking Subject to Seniority Systems or Collective Bargaining Agreements

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Employers may allocate parking privileges on the basis of seniority preference rules or conditions delineated in a “collective bargaining agreement” with a labor union. Conditions may apply to job security, promotions or other rewards to employees; e.g., covered parking adjacent to work facilities or valet parking. However, what happens when an employee not covered under a seniority system or CBA asks to use an accessible parking space in facilities subject to a seniority system or CBA?

**Illustration:** Hanna is required to park her car in an uncovered satellite parking lot about two blocks away from her work facility. Employees outside the seniority system are expected to walk to work. After an accident that left her with a significant mobility impairment and the need

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to use a wheelchair, she requested permission to start parking her car in the covered parking facilities connected to the office building which are only available to senior employees.

Several key principles must be considered when addressing disability-related requests for accommodations under a seniority rule or union work environment:

- 1) The ADA prohibits employers and unions from entering into collective bargaining agreements (CBA) that discriminate against individuals with disabilities. The employment discrimination provisions of the ADA apply to labor unions both as employers and as bargaining agents. Moreover, the National Labor Relations Act (NLRA) imposes a duty of fair representation on unions. That is, they must act reasonably, in a non-discriminatory fashion and in good faith with respect to the employees they represent. The duty of fair representation includes assisting an employee in obtaining a reasonable accommodation, or cooperating with an employer in attempting to determine a reasonable accommodation inside the bargaining unit. If reasonable accommodation is impossible without causing undue hardship or violating a CBA, then the employer (and union if applicable) should negotiate a variance to that part of the Seniority privileges program (or CBA that conflicts with a requested accommodation, such as a flexible work arrival time, or a transfer to a location with less restrictive parking arrangements.)
- 2) To the extent that a reasonable accommodation does not affect terms and conditions of employment (e.g., raising a desk, providing a ramp, Braille signage, or providing an interpreter for staff meetings) an employer does not have to modify a seniority system or negotiate with the union representing its employees. Conversely, seniority system administrators and/or the union must be part of the process of determining a reasonable accommodation where it would cause a material, substantial or significant change in working conditions. The greater that adverse effect, the more likely it is that the accommodation is unreasonable and causes undue hardship by disrupting a seniority system or collective bargaining agreement.
- 3) The reasonable accommodation process may conflict with National Labor Relations Act (NLRA) prohibitions on direct dealing and unilateral changes to terms and conditions of employment. However, unlike Title VII of the Civil Rights Act, the ADA does not contain an exception for collectively bargained seniority systems. Hence, an employer can not automatically reject a requested accommodation that conflicts with or affects the terms of a collective bargaining agreement, such as a request for a light duty job without the requisite seniority or request for job reassignment. The employer must show that the accommodation would be an undue hardship; i.e., unduly disruptive to other employees or to the functioning of the business.

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- 4) The employee must document evidence of special circumstances that could make an exception to a seniority rule or CBA reasonable. A "special circumstance" can include learning that an employer may be imposing a restriction on one employee while having previously relaxed same restriction for another. Nonetheless, under the ADA, even while employee preference is given consideration, the employer has discretion to choose between equally effective reasonable accommodations; e.g., schedule adjustments, job duty modifications, or providing accessible shuttle service from a remote parking lot.

For example, if a parking facility were fully occupied, it would violate a CBA or seniority rule to dislocate a protected employee to accommodate the requesting employee with a disability. Conversely, if the parking facility were not fully occupied, then a variance to the restricted use of the facility may be viable as a matter of not using a CBA or seniority rule to discriminate on the basis of a disability. Remember, the ADA prohibits employers from imposing seniority rules or entering into collective bargaining agreements to discriminate against individuals with disabilities – whether inadvertently or by design. See, 29 C.F.R. 1625.8 (Bona fide seniority systems). Ultimately, employers must comply with both statutes and balance ADA and union and/or seniority system interests presented by an employee requesting a reasonable accommodation.

## G. Conclusion and Resources

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There are no right or wrong answers for any of these employment-related parking issues. The reasonable accommodation process encourages a good faith interactive dialogue by the employer and the employee with the disability. Each case must be evaluated on an individualized basis because the disability-related issues of an individual are always distinct from other individuals making similar requests.

Both parties should engage in a good faith dialogue and determine viable alternatives without causing undue hardship on business operation. Additionally, an employer is not obligated to provide the best reasonable accommodation, but rather, an appropriate accommodation that allows a qualified employee with a disability to perform essential job functions and allows the employee to enjoy the same level of privileges and benefits of employment enjoyed by non-disabled employees in the same category. Conversely, since an accommodation does not necessarily have to be related to performance of essential job functions, but instead could relate to other privileges or ancillary activities of employment, the employer remains obligated to appreciate that accessible parking may be a necessary part of the equal opportunity employment experience.

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## Other Resources:

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### EEOC Enforcement Guidance: Reasonable Accommodations and Undue Hardship:

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship.

<http://www.eeoc.gov/policy/docs/accommodation.html>

### Job Accommodations Network (JAN)

You can search the JAN web site for specific types of disabilities to address reasonable accommodation requests more effectively and individually.

[www.AskJan.org](http://www.AskJan.org)

JAN article on parking: <https://askjan.org/topics/parking.cfm>

### ADA Checklist for Existing Facilities

This checklist is used to identify accessibility problems and solutions in existing facilities in order to meet on-going barrier removal obligations under Title III of the ADA.

[www.ADAChecklist.org](http://www.ADAChecklist.org)

### Employment Related Regulations:

A comprehensive list of regulations including discrimination, reasonable accommodations, drug testing, and more.

URL: <http://www.southwestada.org/html/topical/employment/index.html>

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Southwest ADA Center

[www.SouthwestADA.org](http://www.SouthwestADA.org)

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