

# NAR INSURANCE PROGRAM

## QUARTERLY RISK REPORT

### Q1 2023

#### IN THE SPOTLIGHT:

## AMERICANS WITH DISABILITIES ACT

Adopted in 1990, the Americans With Disabilities Act (ADA) makes it unlawful to discriminate against people with disabilities. The law has five sections or "titles", two of which apply to REALTOR® associations:

- Title I (Employment) requires employers to provide reasonable accommodations to qualified applicants and employees to enable individuals with disabilities to perform the essential functions of the job. Title I only applies to an employer, such as an association, that has 15 or more employees.
- Title III (Public Accommodation) prohibits entities that own, lease, lease to or operate a place of public accommodation from discriminating against the disabled, and requires the entity to remove certain physical barriers, make modification, and ensure effective communication with disabled individuals.

#### Defining disability

The ADA defines "disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. As a result of the ADA Amendments Act of 2008, the concept of a disability should be interpreted broadly and more conditions are covered by the Act.

#### ADA Obligations

An association's obligations as a place of public accommodation encompass many, if not most, of the services that an association provides: education and events, professional standards hearings, its buildings and facilities, and communications, including its website.

## CLAIMS REPORTED: 19

9 active demands/lawsuits | 10 potential claims

- 4 Professional Standards
- 4 Cyber
- 3 Employment
- 1 Governance
- 1 Trademark
- 1 Crime Loss
- 5 Other

**Trend alert:** 4 times more cyber claims were filed this quarter than in all of 2022. Overall claims are up 3% over Q1 2022.

Public accommodations must comply with **basic nondiscrimination requirements** that prohibit exclusion, segregation, and unequal treatment. This means that associations must operate in a manner to ensure disabled individuals have the same opportunity to participate in and benefit from its goods, services, facilities, privileges, advantages, or accommodations. As such, associations must make "reasonable modifications" to policies, practices and procedures to avoid discrimination.

Associations must ensure **effective communication** with people with hearing, vision, or speech disabilities. This means providing necessary auxiliary aids and services to ensure equal access. However, the ADA does not require a public accommodation to provide an auxiliary aid (or the exact aid requested) if such provision would result in an undue burden or a fundamental change in the nature of the goods, services, facilities, privileges, advantages, or accommodations.

The key to communicating effectively is to consider the nature, length, complexity, and context of the communication as well as the person's normal method(s) of communication. For example, a sign language interpreter

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may not be effective communication if a member doesn't know sign language, just as Braille is only effective for a vision-impaired person who reads Braille.

Additionally, public accommodations must **remove barriers** in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources. Courses and examinations related to professional license must be provided in a place and manner accessible to people with disabilities, or alternative accessible arrangements must be offered.

Finally, in March 2022 the Department of Justice reiterated that [Title III applies to websites](#) and provided guidance, stating that businesses have "flexibility" in how they comply with the ADA's general requirements.

## NAR RESOURCES

[Americans with Disabilities Act Topic Page](#)

[ADA Compliance Kit](#)

[Trending Employment Law Issues](#)

[ADA Websites: What Associations Need to Know](#)

[Window to the Law: ADA Website Accessibility Update](#)

[Set Your Sites to Compliant](#)

[Growing Accessibility Challenges](#)

[The Answer Book](#)

## BEST PRACTICES FOR ADA COMPLIANCE

### Employment

- Have written accommodation policies and procedures (see sidebar on page 4).
- Understand your responsibilities for reviewing requests for reasonable accommodations from employees, such as to act promptly in response to a request, engage in an interactive process with the employee, determine whether the employee has a disability under the ADA, and identify a reasonable accommodation that allows the employee to perform the essential duties of the position.
- Have legal counsel periodically review employment policies for compliance with local, state, and federal requirements.

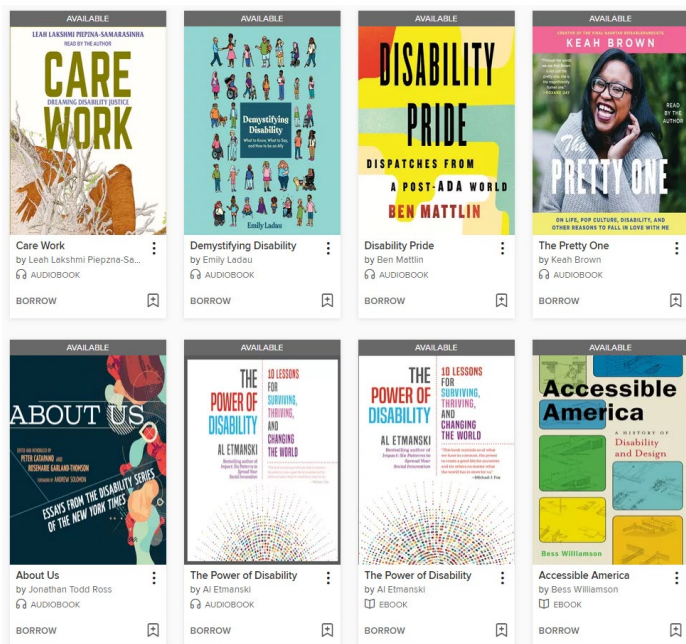
### Public Accommodation

- Modify policies, practices, and procedures to permit the use of a service animal.
- Analyze room setups and ensure accessibility to areas where services are made available to the public, such as hearing rooms and classrooms.
- For events and classes, ask in advance whether members need accommodations, and follow up.
- Address ADA compliance obligations in contracts with hotels and event spaces.
- Review your website for accessibility and devise a plan to address deficiencies.
- Post an [accessibility statement](#) on the association website.
- Work with web vendors to assess and address website accessibility issues in compliance with WCAG 2.1 standards.

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## ADA AND DISABILITIES EBOOK COLLECTION

The NAR Library & Archives has compiled a collection of eBooks about [ADA compliance](#) as well as personal stories to help you expand your ability to see the world from a different viewpoint and the experience of individuals with disabilities. Share this [valuable collection](#) with your board members and remind them that they have access to these books through NAR's eBook collection, and many more.



To access these eBooks and the entire NAR library collection, log in to NAR's [eBooks site](#) using your NAR Member ID. Be sure to select "National Association of REALTORS®" as your primary

## EPL TIP

**An employee who has taken 12 weeks of FMLA leave isn't ready to return to work and has asked for more time off. What should we do?**

Taking leave under the Family Medical Leave Act (FMLA) is an important right for covered employees. Generally, FMLA leave is due to a medical condition. When an employee asks for additional time off, there are three steps an employer should take.

First, determine whether the ADA applies to the additional leave request. If there is any question whether the request for additional time off is a request for a reasonable accommodation, it is a best practice for the employer to initiate the accommodation discussion.

Second, evaluate whether the employee has a qualifying disability. Keep in mind that the ADA requires employers to construe the term "disability" broadly, and the employer still has the right to request information about the employee's medical condition.

Third, and most importantly, evaluate whether additional time off is a reasonable accommodation. Focus on whether there is a plausible explanation that leave for a certain amount of time will likely enable the employee to return to work. An indefinite leave of absence is not a reasonable accommodation. Also consider whether the employee may return to work with an accommodation other than additional time off.

Clear communication and patience are essential. In addition, the employer must be cognizant of any state laws that may apply.

*This employment practices tip, and dozens more, are available to you on the [EPL Assist™ website](#). Be sure to take advantage of this [valuable benefit](#), which provides policy templates, sample documents, risk management resources, and advice and counsel on common employment law issues facing associations.*

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## CRAFTING A DISABILITY ACCOMMODATION POLICY

At a minimum, an employment accommodation policy should:

1. Explain what a reasonable accommodation is and provide examples of possible accommodations.
2. Identify what an employee must do to request an accommodation, including who to contact and what paperwork they will need to complete.
3. Explain how the employer will evaluate requested accommodations and how the employer will interact with the employee and their health care provider throughout the process.
4. Set clear expectations, such as cooperating with the employer during the evaluation process.

Finally, ensure that other workplace policies, such as an attendance policy, are consistent with the accommodation policy.

*The NAR Insurance Program provides professional liability and limited patent coverage to all eligible associations, affiliates, and MLSs.*

## COVERAGE CORNER

ADDRESSING COMMON POLICY QUESTIONS

**Q:** *Are we covered for alleged acts of discrimination outside of an employment context?*

**A:** Yes. NAR's professional liability policy covers "Discrimination Liability" other than Employment Practices Liability, and extends "to any violation of any municipal, State or Federal fair housing or civil rights law, regulation or ordinance including Title III of the Americans with Disabilities Act."

**Have coverage questions?**

Check out these [Professional Liability Policy FAQs](#).



## RISK MANAGEMENT WEBINAR

### ANTITRUST FOR ASSOCIATIONS

JUNE 22 | 2:00 PM CT

**REGISTER NOW!**