

Pre-Employment Screening Considerations and the ADA

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. It has been updated by Sheila D. Duston, an attorney/mediator practicing in the Washington, D.C. metropolitan area, from the original, which was written by Marjorie E. Karowe, Attorney, Schenectady, New York.

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The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org

How Does the ADA Impact the Way in Which I Recruit Employees?

The Americans with Disabilities Act (ADA) is a federal statute that requires employers to focus on the ABILITIES of applicants rather than on their DISABILITIES. Title I of the ADA protects qualified individuals who have a disability, who have a record of disability or who are regarded as having a disability (whether they do or not) from discrimination in employment on the basis of disability. This includes the requirement that employers provide reasonable accommodation to qualified employees or applicants for employment except when the accommodation would cause an undue hardship. The ADA also prohibits discrimination against qualified individuals who have a relationship or association with a person with a known disability.

The ADA applies to all aspects of the employment relationship, including the recruitment and selection process. You should be aware of the ADA's impact on each of the following areas:

- Advertising
- Applications
- Job Descriptions
- Interviews
- Testing
- Medical Exams

How Can I Make Sure That Persons with Disabilities Know About the Job and Can Apply?

The recruitment process begins with letting people know that a job is available. There are a number of general steps that employers can take to help ensure that their advertising and application process are accessible to people with disabilities. While an employer is not obligated to provide written information in various formats in advance, the information should be made available in an accessible format on request.

Job information should be posted or advertised in locations that are accessible to persons with mobility disabilities. Similarly, large print on job notices posted at work sites or in employment offices may help a person with a visual disability to become aware of the job. A job advertisement should include a TTY (telecommunications device for the deaf) phone number (whether or not an address is also given).

If the advertisement indicates that the applicant should apply in person, employers should make sure that there is access for those with mobility disabilities, such as accessible parking spaces and ramps, and elevators if the interviews are not held on the first floor. If applicants are provided a table or desk, or are asked to use a computer, to fill out an application, these areas should also be accessible to an individual using a wheelchair.

While the ADA does not require employers to affirmatively target individuals with disabilities, many employers choose to inform state agencies or private organizations that work with persons with disabilities about available job openings because it helps their company find qualified new employees.

How Do I Know If an Applicant Needs a Reasonable Accommodation for the Application and Hiring Process?

An employer may include information in the advertisement or on the application form inviting applicants with disabilities to notify them of any reasonable accommodations that they need for the application process. Individuals with certain disabilities may need assistance filling out a paper application or completing a computerized application that requires typing or information be read off the screen. An employer also may tell applicants what the hiring process involves (for example, interview, timed written test, or job demonstration) and may ask applicants whether they will need a reasonable accommodation for this process. If the disability is not obvious, the employer may require the applicant to provide reasonable documentation from an appropriate professional showing that the individual has a covered disability and needs an accommodation.

What Questions Can I Ask on the Job Application?

The purpose of a job application is to gather information on the skills, abilities, training, credentials, and references of the applicant and questions relating to any of these areas are permissible under the ADA. An employer may ask whether applicants can perform any or all job functions. If a disability is obvious or if the applicant indicates that s/he may be unable to perform a specific job function, the employer may ask whether the applicants can perform the job functions "with or without reasonable accommodation." An employer also may ask applicants whether they can meet the attendance requirements.

A job application should not contain disability-related questions that are likely to elicit information about a disability, including inquiries about prior or current illnesses, medication, medical treatment, disabilities, injuries, or workers' compensation claims. An application also should not ask whether an individual needs a reasonable accommodation to perform the functions of the job since the question by itself is likely to elicit information about disability.

Will I Have to Change My Job Descriptions?

Under the ADA, a person is considered a qualified individual with a disability if s/he meets all the educational and experience requirements for the position and can perform the essential functions of the job with or without reasonable accommodation. Although the ADA does not require an employer to have job descriptions, they can be used as evidence of the essential functions of the job. Be sure that your

job descriptions are up-to-date and that they differentiate between the essential and the marginal job duties. Marginal functions are those which are not absolutely necessary for the job, although they might be convenient for the employer.

How Should I Interview Job Applicants?

The purpose of the interview is to meet the applicant and learn more about his/her education, credentials, skills and work experience in order to determine whether s/he can do the job. Questions about whether an applicant is an individual with a disability, or as to the nature or severity of such disability, are prohibited.

A good approach is to describe the job in detail so that the applicant has a reasonable understanding of what is expected, and then ask the applicant whether s/he can perform the job with or without reasonable accommodation. An employer can also ask applicants to describe or demonstrate how, with or without reasonable accommodation, they will be able to perform any or all job functions, as long as all applicants in the job category are asked to do this.

Any necessary reasonable accommodations requested by the individual for the interview (for example, an accessible location for a person with a mobility disability or a sign language interpreter for a deaf applicant) should be provided unless it would impose an undue hardship.

If an Applicant has an Obvious Disability, Can I Mention It?

If an employer could reasonably believe that an applicant will not be able to perform a job function because of either an obvious disability or a hidden disability that the person has voluntarily disclosed, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. Similarly, if the employer reasonably believes that the person will need a reasonable accommodation to perform the job, either because the applicant has an obvious disability or because of voluntary disclosures by the applicant, the employer may ask whether s/he needs a reasonable accommodation and what type of accommodation would be needed.

Does the ADA Prohibit Job Testing?

No. The ADA only prohibits employment tests that screen out individuals on the basis of disability, when it cannot be shown that the test is job-related for the position in question and consistent with business necessity. The ADA's goal is to make sure that individuals with disabilities are not excluded from jobs that they can do. The ADA thus requires a close fit between selection criteria, including job tests, and the applicant's (or employee's) ability to do the job.

Tests which measure aptitude, skills, physical fitness, the ability to do actual or simulated job tasks, and any other non-

medical factors can be given to applicants at any time during the pre-employment process since such tests are not considered to be “medical examinations” under the ADA. You should make sure that any tests you use are designed to test the essential functions of the job and that they are accurate predictors of successful performance on the job. In addition, a job test relating to an essential function cannot be used to exclude an individual with disability if s/he can pass the test with a reasonable accommodation.

How Does Reasonable Accommodation Apply to Job Testing?

The reasonable accommodation requirement applies to testing. The ADA protects people with disabilities from being excluded from jobs that they actually can do because a disability prevents them from taking a test or negatively influences the results. The ADA requires that tests be given to people who have impaired sensory, speaking or manual skills (including the abilities to see, hear, and process information) in a manner that does not require the use of the impaired skill unless the test is designed to measure that skill.

For example, a person with dyslexia should be given an opportunity to take a test orally unless reading is the skill being tested. Providing extra time to complete a test may be a reasonable accommodation as long as speed is not the skill being tested. In addition, an accessible test site for a mobility-impaired applicant would need to be provided upon request. As always, the employer need not provide an accommodation that will impose an undue hardship.

It is a good idea to inform applicants in advance about tests that will be administered so that they have an opportunity to request any needed accommodations ahead of time. Occasionally, an individual may not realize that s/he will need an accommodation until the test is given. For example, a person with a visual impairment who can usually read printed material finds that she cannot read the test because of an unusually low color contrast between the ink and the paper. In this situation, the employer could provide the test in a higher contrast format at that time, reschedule the test, or make any other effective accommodation that would not impose an undue hardship.

Are There Special Rules for Medical Examinations?

Yes. Medical examinations or disability-related questions such as a medical questionnaire are prohibited until after you have made a conditional job offer to the applicant. A medical exam is defined as a procedure or test that seeks information about an individual’s physical or mental impairments or health.

Employment can be conditioned on the results of post-offer medical exams or disability-related questions. If medical exams or disability-related questions are required, they must be

required of all entering employees in the same job category. You cannot require exams or make inquiries of some applicants and not others.

Can I Disclose Information from a Medical Examination?

All information obtained from post-offer medical examinations and inquiries must be collected and maintained on separate forms, in separate medical files and must be treated as a confidential medical record. Medical information must not be placed in an individual’s personnel file.

The employer should take steps to guarantee the security of the employee’s medical information, including:

- keeping the information in a medical file in a separate, locked cabinet, apart from the location of personnel files; and
- designating a specific person or persons to have access to the medical file.

Can I Share the Medical Information with Anyone?

An employer must keep medical information on applicants or employees confidential, with the following limited exceptions:

- supervisors and managers may be told about necessary job restrictions and accommodations;
- first aid and safety personnel may be told if the disability might require emergency treatment;
- government officials investigating the ADA must be given relevant information on request;
- employers may give information to state workers’ compensation offices, state second injury funds or workers’ compensation insurance carriers in accordance with state workers’ compensation laws; and
- employers may use the information for insurance purposes.

Medical information may be given to and used by decision-makers involved in the hiring process so that they can make employment decisions consistent with the ADA. In addition, the employer can use the information to determine reasonable accommodations for the individual.

Is Drug Testing Prohibited?

The ADA neither requires nor prohibits drug testing. A test for the illegal use of drugs is not considered to be a medical examination and can be given prior to a job offer or at any other time. An individual currently engaging in the illegal use of drugs is not a protected individual under the ADA. The ADA considers a positive drug test to be indicative of current drug use.

Drug testing does not have to be related either to job duties or business necessity. If you are going to require drug tests of applicants, it is advisable to test all applicants, or all applicants for a certain job category. Also be sure that the procedures you use conform to applicable federal, state and local law.

What About Safety Concerns?

The ADA does not compel an employer to hire a person who would be a direct threat to the health and safety of others at the work site. Before you decide not to hire someone because you think s/he poses a direct threat, you must first determine that the individual poses a significant risk (i.e., a high probability) of substantial harm to the health and safety of others that cannot be reduced or eliminated by reasonable accommodation.

This determination must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The specific risk posed by the individual should be identified. The determination of whether an individual poses a direct threat should be based on the following factors:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

Your assessment of a direct threat to health or safety must be based upon a reasonable judgment that relies on the most current medical knowledge and/or on the best objective evidence.

Resources

ADA Regional Disability and Business Technical Assistance Center Hotline,
(800) 949-4232 (voice/TTY).

Job Accommodation Network,
918 Chestnut Ridge Road, Suite 1,
Morgantown, WV 26506-6080,
(800) ADA-WORK (voice/TTY).

U.S. Equal Employment Opportunity Commission, 1801 L Street, NW,
Washington, DC 20507, (800) 669-4000 (voice), (800) 800-3302 (TTY),
or (800) 666-EEOC (publications).

Disclaimer

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Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, you should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at:
<http://www.eeoc.gov>