

Employee Medical Exams and Disability-Related Inquiries under the ADA: Guidance for Employers Regarding Current Employees

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 was developed for Cornell University by Sheila D. Duston, an attorney/mediator practicing in the Washington, D.C. metropolitan area.

Cornell University was funded in the early 1990's by the U.S. Department of Education National Institute on Disability and Rehabilitation Research as a National Materials Development Project on the employment provisions (Title I) of the ADA (Grant #H133D10155). These updates, and the development of new brochures, have been funded by Cornell's Program on Employment and Disability, the Pacific Disability and Business Technical Assistance Center, and other supporters.

Cornell University currently serves as the training and co-management division of the Northeast Disability and Business Technical Assistance Center. Cornell is also conducting employment policy and practices research, examining private and federal sector employer responses to disability civil rights legislation. This research has been funded by the U.S. Department of Education National Institute on Disability and Rehabilitation Research (Grant #H133A70005) and the Presidential Task Force on Employment of Adults with Disabilities.

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/surveyresults.html.

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 (TDD), 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.

Overview

When does the ADA impact an employer's ability to require medical exams or make disability-related inquiries?

The Americans with Disabilities Act of 1990 (the "ADA") applies to all employers with 15 or more employees. The ADA divides the employment relationship into three distinct phases: pre-offer, post-offer and during employment, and sets forth what an employer can do at each of these stages. The focus of this brochure is on what the employer can do during the employment phase; that is, after an employee is on board and working.

Can an employer require an employee to have a medical exam or make disability-related inquiries?

An employer may require a medical exam or make a disability-related inquiry of an employee as long as the inquiry or exam is job-related and consistent with business necessity. Any medical information obtained from a disability-related inquiry or exam, as well as any medical information voluntarily disclosed by an employee, must be treated as a confidential medical record.

Do the ADA's provisions on medical exams and disability-related inquiries apply to all employees?

Yes. The ADA's restrictions on inquiries and exams apply to all employees of covered employers, not just those with disabilities. While other ADA protections are limited to those individuals who can show they are qualified individuals with disabilities, the language of the ADA is clear that employers are not permitted to ask questions or conduct medical examinations of any employee unless there is a legitimate purpose for doing so. Based on this language, the U.S. Equal Employment Opportunity Commission (EEOC) has taken the position that any employee has the right to challenge a disability-related inquiry or medical exam that is not job-related and consistent with business necessity.

What about temporary employees?

As a general rule, an individual is an employee if an entity controls the means and manner of his/her work performance. Oftentimes, a temporary employee is both an employee of the employment agency and the employer to which s/he is assigned. As employers, the employment agency and the temporary employer could ask disability-related questions and require medical examinations only if they are job-related and consistent with business necessity.

Disability-Related Inquiries and Medical Exams

What exactly is a disability-related inquiry?

A disability-related inquiry is a question (or series of questions) that is likely to elicit information about disability. This would include direct questions about disability, such as whether a person has or has ever had a disability, how they became disabled, or details about the nature or severity of their disability. In addition, questions about genetic information, prior workers' compensation history, past or current prescription medications, or a broad inquiry about medical impairments (e.g., "tell me about every medical problem you have"), would also be restricted because they are likely to yield information about disability. Restrictions on this type of inquiry apply both to questions asked of the person and questions asked of any other third party, such as a co-worker or doctor. Note that questions about illegal drug use or whether someone has been drinking are not disability-related inquiries.

Does this mean I shouldn't even ask "How are you?"

Asking generally about an employee's well being is permitted. For example, it is perfectly fine to ask an employee who looks tired or ill whether s/he is feeling okay or to ask how an employee is doing following a divorce or loss of a loved one. Likewise, it is permissible to ask about nondisability-related impairments (e.g., "how did you break your wrist?"), or to inquire how a pregnant employee is feeling or when her baby is due. It is also okay to simply ask a person if s/he can do the job. Moreover, if the employee raises disability-related issues, it would be acceptable for the employer to discuss the matter with him/her.

When you say "medical exam," does this mean a head-to-toes check-up by the doctor?

A medical exam would include a complete physical; but the term, as used in the ADA, also includes a number of other more limited exams or procedures. In general, a medical exam is a procedure or test that seeks information about an individual's physical or mental health. Various factors can make a test medical, including: whether a medical professional conducts or interprets the test, whether the test is designed to reveal an impairment or physical or mental health generally, whether the test measures the ability to perform a task versus physiological response to performing the task; or whether the test is invasive, uses medical equipment, or is conducted in a medical setting. Sometimes one of these factors is enough to make a procedure medical. Sometimes a combination of factors will be relevant.

In general, medical examinations would include the following:

- full or partial (e.g., back only) physical exam by a doctor or other medical professional
- vision tests conducted and analyzed by an ophthalmologist or an optometrist
- blood, urine, and breath tests to check for alcohol use
- blood, urine, saliva, and hair analyses to detect disease or genetic markers
- blood pressure and cholesterol screening
- nerve conduction tests
- range of motion tests that measure muscle strength and function
- pulmonary function tests
- psychological tests designed to measure a mental disorder or impairment
- diagnostic procedures such as x-rays, CAT scans, and MRIs.

What are some common employment tests that are not considered medical exams?

There are a number of tests and procedures given by employers that are not considered medical, including:

- tests to determine the illegal use of drugs
- physical agility tests, which measure an employee's ability to perform actual or simulated job tasks
- physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include a medical component such as measuring heart rate or blood pressure
- tests that measure an ability to read labels or distinguish objects as part of a demonstration of the ability to do actual job functions
- psychological tests that measure personality traits such as honesty, preferences, or habits
- polygraph examinations

How should an employer treat an employee who applies for a new job within the company?

The EEOC has taken the position that an employer should treat an employee who applies for a new job just like an outside applicant for the job. This means that the employer cannot ask disability-related questions or require a medical exam before making a conditional offer of the new position.

A current supervisor who has medical information about the employee should not disclose that information to the person conducting interviews for the new job or to the new supervisor.

Once a conditional offer is made, the employer may require a medical exam or ask disability-related questions as long as it does so for all entering employees in the same job category. If the job offer is subsequently withdrawn because of medical information, the employer must show that the reason for doing so was job-related and consistent with business necessity.

An individual is not an applicant where s/he is noncompetitively entitled to another position with the same employer (e.g., because of seniority or satisfactory performance in his/her present position). An individual who is temporarily assigned to another position and then returns to his/her regular job is also not an applicant. Since these individuals are considered to be employees, the employer can only ask disability-related questions or require medical exams that are job-related and consistent with business necessity.

Job-Related and Consistent with Business Necessity

What does “job-related and consistent with business necessity” mean?

The EEOC takes the position that a disability-related inquiry or medical exam of an employee may be “job-related and consistent with business necessity” when an employer has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to do essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. This standard may be met if an employer knows about a particular employee’s medical condition, has observed performance problems, and can reasonably attribute the problems to the medical condition. The standard may also be met when the employer has been given reliable information by a credible third party that the person has a medical condition or the employer has observed symptoms that indicate the person may have a medical condition that will impair the ability to do essential functions or will pose a direct threat.

Example: A fork lift driver’s job is to transport and stack pallets weighing several hundred to a thousand pounds in a storage warehouse with numerous workers on the floor. After an impeccable ten year work record, the fork lift driver crashes into a wall of stacked pallets, narrowly missing a co-worker. The employee explains that he felt dizzy and became disoriented, and that this has happened a few other times, although never at work. The employer believes that the employee may pose a direct threat and sends him for a medical examination to determine if he is fit to perform his job. The employer provides the doctor with a description of the job to help ensure an accurate determination. This

examination would be considered job-related and consistent with business necessity.

Example: Several months ago, a supervisor overheard two employees talking about another co-worker, who had told them about having a serious heart condition that necessitates the use of medication and frequent doctor’s visits. The individual comes to work every day and successfully performs her duties as a computer programmer. In this case, the employer does not have a reasonable belief that the computer programmer’s ability to perform her essential job functions are impaired or that she-poses a direct threat due to a medical condition. The employer may not make disability-related inquiries or require a medical examination.

Are disability-related inquiries or medical exams following a request for reasonable accommodation job-related and consistent with business necessity?

When an employee requests reasonable accommodation and the disability or need for accommodation is not obvious, it is job-related and consistent with business necessity for the employer to ask an employee for reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation.

An employer may require an employee to provide documentation that is sufficient to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested. Documentation is sufficient if it (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and (2) substantiates why the requested accommodation is needed to enable the employee to perform essential job functions.

Note that an employer cannot ask for unrelated documentation. The practical consequence of this is that an employer generally cannot ask for complete medical records because they would contain unrelated information.

Example: A secretary with no known disability asks for an ergonomic chair because of back pain. The employer may ask the employee to provide documentation from her treating physician that: (1) describes the nature, severity, and duration of the impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits her ability to perform the activity or activities; and (2) substantiates why the ergonomic chair is needed. If the employee fails to provide the documentation, the employer would not be required to provide the chair.

Practical Dos and Don'ts Regarding Disability-Related Inquiries and Medical Examinations

May an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice when the employee requests a reasonable accommodation?

The EEOC has taken the position that the ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his/her treating physician (or other medical professional) to substantiate an ADA disability and the need for accommodation. However, the employee should first be given the chance to provide the missing information.

The EEOC's position, which limits when an employer may require an exam by the employer's doctor, could be subject to challenge. While the employee has the initial burden of making a showing to support the request for reasonable accommodation, it could be argued that the employer has fairly broad rights to require a second opinion or seek further information whenever it believes additional inquiry is warranted. However, consistent with its position, the EEOC has specifically noted that as long as the employer's request for additional information or another medical exam is based on a good faith belief that the information it has gotten so far is insufficient, such request would not be considered a form of retaliation and the employer would not be liable for violating the ADA.

The EEOC's recommendation that the employer should also consider getting the employee's permission to consult directly with the employee's doctor before requiring the employee to go to the employer's doctor is a good, cost effective approach. As a practical matter, the employer may want to have its doctor consult directly with the employee's physician.

Any medical examination conducted by the employer's health care professional must be job-related and consistent with business necessity. Specifically it must be limited to determining the existence of an ADA disability and the functional limitations that require a reasonable accommodation.

May an employer require that an employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice?

Yes. The EEOC has stated that an employer may have an employee, who it believes poses a direct threat, examined by

a healthcare professional of its choosing who has expertise in the employee's specific condition and can provide medical information that allows the employer to determine the effects of the condition on the employee's ability to do his job. The exam would be limited to determining whether the employee can perform his job without posing a direct threat, with or without reasonable accommodation. In most circumstances, the employer could not request complete medical records because they would contain unrelated information.

The employer should be very cautious about relying solely on its medical provider's conclusion if it conflicts with the opinion of the employee's treating physician. In evaluating both opinions, the employer may find it helpful to consider: (1) the medical expertise of each health care professional; (2) what kind of information was provided to each medical professional regarding the job's essential functions and the work environment; (3) whether an opinion is based on speculation or current, objectively verifiable information about the risks associated with a particular condition; and (4) whether the medical opinion is contradicted by information known or observed by the employer (e.g., information about the employee's actual experience in the current or previous job(s)). Remember that it is ultimately the employer who is responsible for the final decision, not the doctor.

Who pays when the employee is sent to the employer's health care professional?

The EEOC has taken the position that if an employer requires an employee to go to a health care provider of the employer's choice, the employer must pay all costs associated with the visit(s).

What about requiring all employees to report their prescription medications?

This type of broad inquiry would not generally be permissible. The EEOC has stated that in a few narrow exceptions, such as requiring policemen to report medications that could impact their ability to handle a firearm, or requiring pilots to report medications that would impact on their ability to fly, the inquiry would be job-related and consistent with business necessity.

An argument could also be made that in other jobs where safety is an issue, for example, certain construction, manufacturing, and driving jobs, it may be job-related and consistent with business necessity to require employees to report medications that would impair their performance. Note, however, that this appears to be a broader approach than the EEOC's stated position.

What if the employee refuses to answer a disability-related question or submit to a medical exam?

The action the employer may take depends on its reason for making the inquiry or requiring the exam. If the requested medical exam relates to performance problems on the job, any discipline that the employer decides to impose should focus on the employee's performance problems. Thus, the employer may discipline the employee for past and future performance problems in accordance with a uniformly applied policy.

If the employee refuses to answer a disability-related question or submit to a medical exam after requesting a reasonable accommodation, and the disability and need for an accommodation is not obvious, the employer could refuse to provide the accommodation. If the requested accommodation was leave, the employer could deny the leave and refuse to excuse absences.

Many courts would also construe the employee's failure to cooperate as a failure to engage in the ADA's interactive process to determine an effective reasonable accommodation, and would likely reject any later ADA claim made on this basis.

How can employers make sure that employees can safely perform physical agility or fitness tests?

Employers that require physical agility or physical fitness tests may ask an employee to have a doctor certify that s/he can safely perform the test. The employer would be entitled to a note which simply states that the person can safely perform the test or, alternatively, an explanation of why the person cannot perform the test. An employer could not ask for complete medical records or any other medical information going beyond the individual's ability to safely perform the test.

Leave Issues

The following three questions assume that the employee has used sick, annual, or some other type of leave due to a medical condition, but has not taken leave under the Family and Medical Leave Act of 1994 (FMLA).

What about requiring doctor's notes regarding the use of sick leave?

An employer may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so under similar circumstances.

Can the employer request periodic updates when an employee is on extended leave?

Yes. If the employee's leave request did not specify an exact or reasonably specific return date, or if additional leave is being requested, the employer may require the employee to provide periodic updates on his condition and possible date of return. Note, however, that when the employer has granted a fixed amount of leave and no additional leave has been requested, the EEOC has taken the position that it would not be permissible to ask for periodic updates. An employer may always call an employee on extended leave to express concern for their health or check on their progress.

Are return-to-work releases or exams allowed?

When an employee has been on leave, the employer may request a "return to work" release from the employee's treating physician or may require a "return to work" exam if the employer has a reasonable belief that an employee's present ability to perform essential job functions is impaired by a medical condition or that s/he poses a direct threat due to a medical condition. Usually, only inquiries or medical exams related to the condition for which the person took leave would be warranted.

Example: An attorney breaks his leg skiing and is on leave for four weeks. He returns to work on crutches. The employer does not have a reasonable belief that the attorney will be unable to perform the essential functions of his job or pose a direct threat because of the injury. The employer could not make disability-related inquiries or require a medical exam, but could ask the person how they were doing or express concern.

Example: As the result of problems with his medication, an employee with a known psychiatric disability threatens several colleagues and is disciplined. Shortly afterwards, he is hospitalized for six weeks for treatment related to his condition. Two days after his release, he returns to work with a note that states on the "he is cleared to return to work." Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, the employer may ask the employee for additional documentation regarding his medication or treatment or request that he submit to a medical examination.

What about requests for leave under the FMLA?

The FMLA, enforced by the Department of Labor, sets forth its own requirements for employers and employees in regard to leave. The EEOC has stated that when an employee

requests leave under the FMLA for a serious health condition, employers will not violate the ADA by asking for the information in the FMLA certification form. The FMLA only requests information relating to the particular serious health condition, as defined in the FMLA, for which the employee is seeking leave. An employer is entitled to know why an employee is requesting time off from work under the FMLA. If inquiries are precisely tailored in this manner, they would be job-related and consistent with business necessity under the ADA.

Periodic Monitoring

May employers require periodic medical examinations of employees in positions affecting public safety?

Yes. In limited circumstances, periodic medical examinations and other monitoring of employees in public safety positions, (e.g., fire fighters and policemen) that are narrowly tailored to address specific job-related concerns may be job-related and consistent with business necessity.

Example: A fire department could require its firefighters (but not the firehouse administrative staff) to have a comprehensive visual exam every two years and have an annual electrocardiogram because it is concerned that certain visual disorders and heart problems will affect their ability to do their job without posing a direct threat.

If an employer decides to terminate or take other adverse action against an employee with a disability based on the results of a medical exam, it must demonstrate that the employee is unable to perform his/her essential functions, or in fact, poses a direct threat that cannot be reduced or eliminated by reasonable accommodation. The employer could conduct additional medical testing after discovering the condition in order to make this determination.

May an employer require an employee, who has been off from work in a alcohol rehabilitation program, to submit to periodic alcohol testing when she returns to work?

Yes, but only if the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat in the absence of periodic testing. This would require an individualized assessment and could not be based on general assumptions. The employer would need to consider the safety risks associated with the position, the consequences of the employee's inability or impaired ability to perform job functions, and how recently the event(s) occurred that cause the employer to believe that the employee would pose a direct threat. At some point, when the employee has repeatedly tested negative for alcohol,

continued testing may not be job-related and consistent with business necessity because the employer no longer has a reasonable belief that the employee will pose a direct threat.

Example: A bus driver informs his supervisor that he has a history of alcoholism and after many years of sobriety has started drinking a couple of glasses of wine at night to deal with family stress. He requests and is granted leave to enter a rehabilitation program. After four months, he is cleared to return to work. Given the safety risks associated with his position, his short period of employment, and his recent completion of rehab, the employer can show that it would be job-related and consistent with business necessity to subject the driver to frequent periodic alcohol tests following his return to work.

Employers may also conduct periodic alcohol testing based on a "last chance" agreement related to disciplinary actions involving employee use of alcohol. This type of agreement typically provides that, as a condition of continued employment, employees must enter into a rehabilitation program and submit to periodic alcohol testing.

Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

What may an EAP counselor ask?

An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about their medical conditions as long as s/he does not act on behalf of the employer, is obligated to shield the information from decisionmakers, and has no power to affect employment decisions. Many employers contract with outside EAP contractors so that employees are not concerned about confidentiality.

May an employer make disability-related inquiries that are required by another federal law?

Yes. An employer may make disability-related inquiries or require medical exams that are mandated or necessitated by another federal law or regulation. For example, federal safety regulations require interstate truck drivers to undergo medical examinations at least once every two years. Pilots and flight attendants must also meet federal medical requirements. Other federal laws requiring medical exams include the Occupational Safety and Health Act (OSHA), the Federal Mine Health and Safety Act and other federal statutes requiring the periodic monitoring of employees exposed to toxic or hazardous substances.

May an employer make disability-related inquiries or conduct medical examinations that are part of a voluntary wellness program?

Yes. The ADA allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories—that are part of an employee health program, without having to show that they are job-related and consistent with business necessity, as long as these medical records are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. A voluntary wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

What about exams related to workers' compensation injuries?

State workers' compensation statutes typically allow employers to investigate and contest employees' claims for work-related injuries. The EEOC has stated that the ADA does not prohibit an employer or its agent (for example, workers' compensation carriers) from asking disability-related questions or requiring medical exams that are necessary to determine the extent of its workers' compensation liability. However, such inquiries or exams must be limited in scope to the occupational injury and its impact on the individual, and may not be required more often than is necessary to determine the person's initial or continued eligibility for workers' compensation benefits.

May an employer ask employees to voluntarily self-identify as persons with disabilities for affirmative action purposes?

Yes. An employer may ask employees to voluntarily self-identify as individuals with disabilities when the employer is:

- undertaking affirmative action because of a federal, state or local law (including a veteran's preference law) that requires affirmative action for individuals with disabilities; or
- voluntarily using the information to benefit individuals with disabilities.

The EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations sets forth some other detailed requirements for employers who invite employees to self-identify in either of these situations.

Resources

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

For additional information on the topics discussed in this brochure, employers and employees are encouraged to consult the following EEOC documents:

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations

EEOC Enforcement Guidance: Workers' Compensation and the ADA

EEOC Technical Assistance Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964.

U.S. Equal Employment Opportunity Commission
1801 L Street, N.W., Washington, D.C. 20507;
1-800-669-4000 (voice), 1-800-669-6820 (TTY) to reach field offices; 1-800-669-EEOC (voice), 1-800-800-3302(TTY) for publications; web: www.eeoc.gov
(publications available online)

For additional information on the Family and Medical Leave Act, the Department of Labor should be contacted.

U.S. Department of Labor (National Office)
Employment Standards Administration
Wage and Hour Division
200 Constitution Ave., N.W.
Washington, D.C. 20210

Toll-free Wage-Hour Information and Help Line:
0-865-486-9243 (Available 8am-5pm in your time zone).
<http://www.dol.gov>

Disclaimer

This material was produced by the Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University, and funded by a grant from the National Institute on Disability and Rehabilitation Research (grant #H133D10155). The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Equal Employment Opportunity Commission or the publisher. The Commission's interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630) and its Technical Assistance Manual for Title I of the Act.

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Other Brochures on the ADA Produced by the Program on Employment and Disability

Available on-line at www.ilr.cornell.edu/ped/ada

Human Resource Issues Surrounding Implementation of the ADA

- The ADA and Collective Bargaining
- The ADA and Personnel Training
- The ADA and Total Quality Management
- The Americans with Disabilities Act of 1990 and Injured Workers
- Assistive Technology, Accommodations, and the Americans with Disabilities Act
- Definition of Disability under the ADA: A Practical Overview and Update
- Diversity and the ADA
- Employee Medical Exams and Disability-Related Inquiries under the ADA
- Health Benefit Plans and the ADA
- A Human Resource Perspective on Implementing the ADA
- Leave Rights under the FMLA and the ADA
- Mediation and Title I of the ADA
- Occupational Safety and Health and Disability Nondiscrimination
- Performance Management and Employees with Disabilities
- Pre-employment Screening Considerations and the ADA
- Pre-employment Testing and the ADA
- Reasonable Accommodation under the ADA
- The Role of Disability Management Programs in ADA Compliance

Reasonable Accommodation in the Implementation of the ADA

- Accommodating the Allergic Employee in the Workplace
- Assistive Technology, Accommodations, and the Americans with Disabilities Act
- Causes of Poor Indoor Air Quality and What You Can Do about It
- Employing and Accommodating Individuals with Histories of Alcohol and Drug Abuse
- Employing and Accommodating Individuals with Spinal Cord Injuries
- Employing and Accommodating Workers with Psychiatric Disabilities
- Employment Considerations for People Who Have Diabetes
- Working Effectively with Employees Who Have Epilepsy
- Working Effectively with Employees Who Have Sustained a Brain Injury
- Working Effectively with Individuals Who Are HIV-Positive
- Working Effectively with People Who Are Blind or Visually Impaired
- Working Effectively with People Who Are Deaf or Hard of Hearing
- Working Effectively with People with Attention Deficit Hyperactivity Disorder
- Working Effectively with People with Learning Disabilities
- Working Effectively with Persons Who Have Cognitive Disabilities
- Workplace Accommodations for Individuals with Arthritis
- Workplace Accommodations for People Living with Multiple Sclerosis
- Workplace Accommodations for Persons with Musculoskeletal Disorders
- Your Employees and Cancer –Working Together