

Americans with Disabilities Act & Employment

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ADA & ADAAA



- Congress intended the Americans with Disabilities Act (ADA) of 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”
- Subsequent Supreme Court and lower court decisions eliminated protection for many individuals whom Congress intended to protect.
- In passing the ADA Amendments Act of 2008 (ADAAA) Congress intended to restore the original purpose of the ADA by focusing on the discrimination at issue instead of the individual’s disability

Title I of the Americans with Disabilities Act



**Title I prohibits certain employers
from discriminating against
qualified individuals with
disabilities.**

Who Is Protected?



Title I of the ADA makes it unlawful to discriminate in employment against a qualified individual with a disability

- Protects:
 - Both applicants and employees
 - Part-time, probationary & temporary employees

Covered Entities

Includes:

- Private employers
- State and local governments
- Employment agencies
- Labor unions

Excludes:

- Employers with <15 employees
- Executive Branch
- Private Membership Clubs
- Native American Reservations
- Churches & Parochial Schools

Title I Covers:

All
employment
practices,
including:

- Recruitment, advertising
- Application process
- Hiring
- Compensation, promotion & advancement
- Training, terms, conditions & privileges of employment, leave & fringe benefits
- Tenure, layoff & firing

Who Enforces?



- The Equal Employment Opportunity Commission and the Dept. of Justice
 - EEOC receives all charges and investigates
 - EEOC conciliates findings of discrimination
 - If private employer, EEOC files suit or issues “right to sue” letter
 - If public employer, EEOC finds cause to believe discrimination occurred,
 - Matter is unresolved, forwarded to DOJ

Definition Of Disability



- A physical or mental impairment that substantially limits one or more of the major life activities (“actual disability”)
- Has a record of such an impairment (“record of”)
- Is regarded as having such an impairment (“regarded as”)

Mitigating Measures



- Whether an impairment substantially limits a major life activity made without regard to the ameliorative effects of mitigating measures.
 - example, eye glasses, insulin for diabetes, medications
- The determination of whether an impairment is substantially limiting cannot consider the effects of these "mitigating measures" on the impairment.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Qualified Individual



- “Qualified individuals” with disabilities
 - A person who meets legitimate skills, experiences, education, or other job requirements
 - Able to perform the *essential functions of the job* with or without a reasonable accommodation

Who is not Qualified?



- Current users of illegal drugs or abusers of prescription drugs
- This does not include past conduct, meaning that persons who currently do not use drugs illegally, or in process of rehabilitation, may be protected.
- Past and current alcoholism is protected

Protected Conditions



- Can hold an applicant/employee to same standards for employment and behavior as others, even if performance/behavior problems related to alcoholism
- If the same behavior/performance is NOT tolerated from non-alcoholics

Qualification Standards



- Permitted, but if an individual fails to meet a qualification standard due to a disability, employer must be able to show that the standard is job related and consistent with business necessity.
 - e.g. CDL, licenses

Job Descriptions



- **Ensure:**
 - **Comprehensive**
 - **Accurate**
 - **Up-to-date**
 - **Include collective bargaining agreement terms**

What is a Reasonable Accommodation?



- A modification that will enable a qualified individual with a disability to perform the essential functions
- An accommodation is “reasonable” if it appears “feasible”
- Must be effective

What is an Essential Function?



- Employees are required to perform the function
- Tasks may be essential when there are a limited number of other employees available to perform the function or the function is highly specialized
- Employers' judgment is important

Identifying Essential Functions



- Written job description is useful
- Focus should be on the results to be accomplished
- Consider consequences of not performing function

Categories of Reasonable Accommodations



- **Modifications or adjustments to a job application process**
- **Modifications or adjustments to enable individual to perform the essential functions of the job**
- **Modifications to ensure equal benefits of employment**

Types of Reasonable Accommodations



- Equipment
- Assistance
- Job restructuring
- Modify how functions are done
- Modify work schedule, including leave
- Reassignment to a vacant position

Obligation To Make a Reasonable Accommodation



- Only to known limitations
- Obligation of the individual to ask, unless: disability obvious or the employer is aware
- Employer may request documentary proof

When is a Reasonable Accommodation Required?



- Job application process
- To perform the essential functions
- Ensure equal benefits on the job
- Equal opportunity to attend training, if offered

Reasonable Accommodations



- Employee need not mention the ADA or use the phrase “reasonable accommodation”
- Employer can suggest a reasonable accommodation if employee’s disability is obvious or has been previously disclosed

Reasonable Accommodations (cont'd)



- An employer is not obligated to agree automatically to a reasonable accommodation request
- A request for a reasonable accommodation is the first step in an informal, interactive process, between the employee and the employer

The Undue Hardship



- No reasonable accommodation is required if it would impose an undue hardship on the business
- Actions requiring “significant difficulty or expense” in relation to the size of the employer and available resources

Direct Threat



- Employers may require that an individual not pose a “direct threat” to the health or safety of the individual or others
- Must show:
 - Significant risk of substantial harm
 - Identify the specific risk
 - Likelihood the potential harm will occur
 - Assessment of risk is based on objective medical evidence (cannot be speculative)

Individualized Assessments



- Consider:
 - Nature and severity of potential risk/harm
 - Likelihood of potential harm
 - Imminence of harm
 - Duration of risk
- Base decisions on the above facts

When Can An Employer Inquire About a Disability?



- Before an offer of employment? No

But:

- An employer may ask questions about an applicant's ability to perform specific job functions.
- An employer may conduct a post-offer medical exam or ask health-related questions, if all candidates who receive the same conditional job offer are required to take the same medical exam and/or respond to the same inquiries.

What Is A Medical Examination?



- Administered by a health care professional
- Results interpreted by a health care professional
- Designed to reveal physical or mental health impairments
- Invasive (e.g. the drawing of blood, urine or breath)
- Measure task performance or physiological responses to task
- Given in a medical setting
- Use of medical equipment

What is not a Medical Examination?



- Physical agility test to assess performance of actual or simulated job tasks
- Take physical fitness tests to measure performance of physical tasks -- such as running or lifting
- Non-medical psychological exam (e.g., personality test)
- Polygraph examinations
- Tests for illegal use of drugs are not medical exams

Permissible Inquiries

Pre-offer



- Can ask about an applicant's qualifications and skills:
 - Ability to perform specific job functions
 - (e.g., climb a ladder).
 - Education, work history, and required certifications and licenses.
 - Describe or show how they would perform job tasks.

Permissible Inquiries

Pre-offer



- Can ask if applicant will need reasonable accommodation:
 - Voluntarily discloses a hidden disability
 - Voluntarily discloses to the employer that s/he needs reasonable accommodation to perform the job.
 - Has an obvious disability

Permissible Inquiries

Post-offer



- After making a conditional offer and before an applicant starts:
 - Employer may conduct a medical inquiry and/or exam or ask questions, if all applicants are required to respond to the same medical inquiries and/or take the same medical exam

Permissible Inquiries

Employees



- Only if an employee is having difficulty with job duties
 - Inquiries or medical exams must be *job-related* and *consistent with business necessity*

Confidentiality



- All medical information (including worker's comp. and injury reports) must be obtained on separate forms and kept in separate medical files, which should be locked.
- Medical professionals may provide information to employers

Confidentiality Exceptions



- Those entitled to access:
 - Supervisors/managers who need to know about necessary restrictions on the work or duties of the employee;
 - Govt. officials (investigating ADA compliance);
 - First aid/safety personnel;
 - In accordance with Worker's comp. laws (insurance carriers and workers comp offices)
 - For insurance purposes (i.e., if necessary to administer a health insurance plan)

Genetic Information Non-Discrimination Act



GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition.

Basic Rules Related to Employment



Title II of GINA

- Prohibits use of genetic information to discriminate in employment
- Restricts employers and other entities covered by GINA from requesting, requiring, or purchasing genetic information
- Requires that covered entities keep genetic information confidential, subject to limited exceptions

Resources

U.S. Department of Justice
Disability Rights Section

www.ada.gov

eugenia.esch@usdoj.gov



Equal Employment
Opportunity Commission

- <http://www.eeoc.gov/laws/types/disability.cfm>
- <http://www.eeoc.gov/policy/docs/preemp.html>
- <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>
- <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>