

ADA and the Job Interview

The Americans With Disabilities Act of 1990 (the "ADA") generally prohibits discrimination against any "qualified individual with a disability" in the workplace. Covered employers include those with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Covered employers are not allowed to discriminate in regard to job applications and hiring as well as other aspects of employment such as advancement, discharge, compensation and training.

Generally, qualified individuals with disabilities must be provided "reasonable accommodation" by their employers to the extent such accommodation is required to allow the disabled employee to perform the essential functions of the job. "Reasonable accommodation" may include modification of the employer's physical facilities or equipment (example: lower a control panel to permit a worker in a wheelchair to operate a machine), job restructuring (example: incidental typing, which is not an essential job function for a file clerk with cerebral palsy, is assigned to another employee) or providing personal assistance for employees with disabilities (example: assigned readers for workers with impaired vision). "Reasonable accommodation" does not include any accommodation that for financial or other reasons would impose an "undue hardship" on the employer. The exact meaning of these terms (reasonable accommodation and undue hardship) is not spelled out in the statute. The Equal Employment Opportunity Commission ("EEOC"), the agency charged with providing guidelines for ADA compliance and enforcing the penalty provisions of the statute, envisions an informal discussion between employer and disabled employee to determine an appropriate

"reasonable accommodation." At the same time, the employer is prohibited by the ADA from asking certain questions about an employee's physical and mental limitations. For many employers, ADA compliance is particularly troublesome in the application and hiring process, where concerns relating to an applicant with an obvious disability will arise. How can an employer deal with disabled applicants without at the same time violating specific ADA prohibitions?

To assist employers, the EEOC has recently issued "Enforcement Guidance on Pre-Employment Inquiries under the ADA" that specifies how employers are supposed to deal with the requirements of the ADA during the hiring process. Generally, employers can ask about an applicant's ability to perform specific job functions, but until an applicant has been given a job offer, no disability-related questions can be asked. Consequently, an employer may make the following inquiries of a job applicant:

An employer can ask if the applicant can satisfy certain physical requirements for the job, such as the ability to lift a certain amount of weight or the ability to climb ladders.

Employers can ask about qualifications for the job, such as education, work history and required certificates and licenses.

Employers can also request applicants to demonstrate how they would perform certain job functions.

If an applicant has an obvious disability that affects his ability to perform job functions (for example, the applicant uses a wheelchair) or the applicant

voluntarily discloses a disability during the hiring process, the employer may then ask if the applicant needs reasonable accommodation to perform the job. If the answer is "yes," the employer may then ask about the type of accommodation that may be required, but not the underlying physical condition. If the answer is "no," then no further inquiry can be made.

An employer may ask an applicant whether the applicant can meet the employer's attendance requirements, and may ask about the applicant's prior attendance record (for example, how many days was the applicant absent during the applicant's last job). An employer may not ask how many days the applicant was "sick."

An employer can ask an applicant about current illegal drug use (not an ADA disability), but generally cannot ask about lawful (prescription) drug use, which may relate to a disability.

An employer can ask about prior illegal drug use to solicit information about "casual" drug use (not an ADA disability) but cannot inquire about past addiction to illegal drugs or controlled substances (an ADA disability that is protected).

An employer can ask an applicant about drinking habits so long as the questions do not request information about alcoholism, a protected ADA disability. For example, an employer can ask if the applicant drinks alcohol, or whether the applicant has ever been arrested for driving under

the influence. The employer cannot ask how much the applicant drinks or whether the applicant is an alcoholic or has been treated for alcoholism.

An employer may give psychological examinations to applicants (for example, to measure an applicant's honesty), but examinations that tend to identify medical disorders or impairments (for example, anxiety or depression) are prohibited.

The EEOC's enforcement guidance states that the following inquiries generally may not be addressed to job applicants:

An employer should not ask an applicant if the applicant has a particular disease or condition, such as AIDS. In addition, employers should not ask a question that might disclose information about disabilities unless it relates to an essential job function (example: Do not ask whether an applicant has a driver's license for general information purposes. Ask that question only if driving is an essential job function.).

An employer should not ask an applicant about prescription drug use.

An employer should not ask an applicant if the applicant needs reasonable accommodation to perform a job. Exception: when the applicant's disability is apparent or voluntarily disclosed.

An employer should not ask an applicant about the applicant's workers' compensation history.

An employer should not ask about an applicant's "addiction" to drugs.

An employer should not ask if an applicant is an "alcoholic."

An employer should not ask how many days an applicant was "sick."

An employer should not ask if an applicant has ever been treated for mental health problems.

And finally, an employer may not ask third parties (for example, former employers or state agencies) for any information about an applicant that cannot be requested directly from the applicant.

Employers should carefully consider the EEOC enforcement guidance. Employment application forms should be reviewed to remove or reword impermissible questions. Job interviews should be conducted in compliance with the enforcement guidance, which may require briefing supervisors and other employees who conduct those interviews. Finally, the EEOC enforcement guidance covers other matters (for example, medical examinations) which may be a part of the job application process. The above summary does not address these and other matters that may have to be considered with respect to any particular applicant.

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