

## **The ADA and the Job Applicant: Recruitment, Applications and Interviews**

### A Self-Advocacy Guide

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Federal and state law can change at any time. If there is any question about the continued validity of any information in the handbook, contact the Arizona Center for Disability Law or an attorney in your community.

The purpose of this guide is to provide general information to individuals regarding their rights and protections under the law. It is not intended as a substitute for legal advice. You may wish to contact the Arizona Center for Disability Law or consult with a lawyer in your community if you require further information.

- This guide is available in alternative formats upon request.

# THE ADA AND THE JOB APPLICANT: RECRUITMENT, APPLICATIONS AND INTERVIEWS

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## **A. Introduction To The Americans With Disabilities Act (ADA) And This Guide**

### **1. What the ADA Covers**

On July 26, 1990 the ADA was passed by Congress. The ADA provides major civil rights protections to individuals with disabilities. The intent of this federal law is to reduce barriers to persons with disabilities and provide equal opportunity in employment, public accommodations, public services, transportation, and telecommunications. The various titles of the ADA affect many aspects of the lives of people with disabilities.

- Title I makes it unlawful to discriminate against qualified people with disabilities in employment.
- Title II makes it unlawful for state and local governments and their agencies to discriminate in programs and services, including public transportation.
- Title III prohibits discrimination in access and enjoyment of public facilities, such as hotels, motels, restaurants, professional offices, lawyers' offices, convention centers, stores, banks, museums, parks, schools, and recreation facilities.
- Title IV requires accessibility of telecommunication services to hearing impaired persons and other individuals with disabilities.

### **2. How the Arizona Center for Disability Law Assists People with Disabilities**

If you believe you have been discriminated against on the basis of a disability in employment or access to public services, public accommodations, public transportation or telecommunication services, staff at the Arizona Center for Disability Law can provide you with information about the ADA and enforcing your rights under the ADA. The Arizona Center for Disability Law is a non-profit, public interest law firm providing free advocacy, information and referral services, legal research, community legal education, and, in selected cases, legal representation to individuals with disabilities and advocacy organizations throughout Arizona. The Center is the designated protection and advocacy (P&A) system providing services for

Arizonans with a wide range of physical and mental disabilities. Assistance is provided for disability-related issues in established priority areas.

Information about the eligibility requirements and priorities are available from the Center upon request. Assistance is provided according to program eligibility requirements, priorities and staff availability.

### **3. This Guide is not a Substitute for Legal Advice**

The Arizona Center for Disability Law recommends that persons obtain professional legal advice to resolve a legal dispute regarding discrimination on the basis of a disability. This guide is not a substitute for legal assistance. This guide is meant to provide people with disabilities with information and examples about employment protections under the ADA.

### **4. Why the ADA Includes Employment Protections**

Oftentimes, people with disabilities do not have an equal opportunity to work or advance in their employment. People with disabilities are often restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that either make it difficult or impossible to get into and around a workplace or to use work equipment at the site. Some are excluded because they communicate differently than their co-workers. Still others are excluded because of rigid work schedules which do not permit flexibility for people with special needs because of a disability.

In other cases, people are not denied opportunities because of actual barriers, but because of prejudice. These are the barriers in other people's minds: fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or lack of acceptance by co-workers and customers.

Congress enacted the ADA to eliminate these barriers to equal opportunity in employment. The ADA makes it unlawful for an employer covered by the law to discriminate against applicants and employees with disabilities. The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing this law. People with disabilities also have the right to bring private lawsuits against employers who discriminate against them if they first file a charge of discrimination with the EEOC within the time limits set out by the ADA. See the Center's guide, *How to Enforce Employment Rights Under the Americans With Disabilities Act*, for more information about the requirements for filing a charge. However, the

U.S. Supreme Court recently ruled that private individuals may not sue state employers for money damages under the ADA. Individuals may still file charges of discrimination with the EEOC against their state employer for other relief, such as court orders to stop discrimination. The U.S. Government can still file lawsuits against states for violating the ADA.

This guide will provide the user with information about when the ADA applies to an employment situation. The list of guides available through the Center about employment rights under the ADA include:

- *An Overview of the Employment Protections of the ADA*
- *The ADA and the Job Applicant*
- *The ADA and Reasonable Accommodations*
- *Drug and Alcohol Testing Under the Americans With Disabilities Act (ADA)*
- *How to Enforce Employment Rights Under the Americans With Disabilities Act*
- *The Americans With Disabilities Act (ADA) and Medical Examinations*
- *The ADA and Confidentiality of Medical Records*
- *The ADA and Disability-Related Harassment*

## **5. When the Employment Protections of the ADA Apply**

The ADA does not cover every employment situation between an applicant or employee and an employer. For the ADA to apply to an employment situation, each of the following has to be true:

- the employer is a ***covered employer***;
- the employee or applicant has a ***disability*** according to the ADA;
- the employee or applicant is ***qualified*** to perform the job; and
- the employer ***discriminates*** against an applicant or employee ***on the basis of disability***.

The terms "covered employer" and "disability" are discussed below.

## **6. Employers Covered By the Employment Protections of the ADA**

- **The ADA applies to private employers with 15 or more employees.**
  - Includes employment agencies and labor unions.
  - Includes a location or facility of a business with less than 15 employees whose total number of employees for the company in all locations and

facilities combined equals 15 or more.

Other local laws may apply to persons with disabilities who are employed by smaller businesses. For more information contact the Arizona Center for Disability Law or a private attorney.

- **The ADA applies to state and local governments.**

- Includes all state and local governmental agencies, departments and entities regardless of their size or number of employees. Although the ADA applies to state employers, the U.S. Supreme Court recently ruled that employees (and applicants) cannot sue state employers in court for money damages. Individuals can still file charges of discrimination with the EEOC against their state employer. Individuals can still sue to require state employers to take action or stop discriminatory action. The U.S. Government can still file lawsuits against state employers under the ADA.
- Examples of state or local employers include: public schools, public universities, police and fire departments, public libraries, public museums, public parks and recreation facilities, and social welfare offices. (The U.S. Supreme Court decision discussed above does not apply to local government agencies, such as cities and counties.)

- **The ADA does NOT apply to the federal government.**

The ADA does apply to employees of the U.S. Senate. However, generally if a person with a disability works or applies for a job with the federal government, a federal agency, or a fully owned U.S. Government corporation, then the ADA does not apply. However, the Rehabilitation Act of 1973 is another anti-discrimination law that offers employment protections for people with disabilities. For example, employees and applicants of the U.S. Department of Labor and civilian employees of the U.S. Department of Army are covered by the Rehabilitation Act. For more information about the Rehabilitation Act, contact the Arizona Center for Disability Law, an Equal Employment Opportunity Counselor (EEO) for the federal agency, or a private attorney.

- **Title I (Employment) of the ADA does NOT apply to Indian Tribes.**

However, tribes may have their own affirmative action or anti-discrimination laws

which may address discrimination on the basis of disability. Some tribes have adopted tribal laws or entered into agreements to abide by federal discrimination laws similar to the ADA. Contact a tribal legal office for more information about the tribal laws or agreements that may apply.

## **7. Applicants or Employees With a Disability**

The ADA protects qualified individuals with a disability. Disability is defined under the ADA as:

- (1) **a physical or mental impairment that substantially limits an individual in the ability to perform major life activities, such as:**
  - seeing
  - hearing
  - walking
  - working
  - learning
  - thinking
  - reading
  - lifting
  - concentrating
  - reproduction
  - performing manual tasks
  - interacting with others
  - engaging in sexual relations
- (2) **a history of a substantially limiting impairment, or**
- (3) **being regarded as having a substantially limiting impairment.**

However, persons who are currently illegally using drugs are generally not protected under the ADA. A person is qualified under the ADA if s/he has all of the skills, education, and experience required for the position and is able to perform the essential functions of the job with or without reasonable accommodations. For more information about what these special terms mean, see the Center's guide, *An Overview of the Employment Protections of the ADA*.

## **B. Recruitment And Hiring Practices**

The Americans With Disabilities Act (ADA) is unique among most civil rights laws because it makes it unlawful for employers to ask applicants about their disability before making a job offer except in a few limited situations. If an employer asks disability-related questions before offering the person a job, the employer has violated the ADA. The applicant may not have to show that the employer used the information to discriminate against that applicant for the employer to prove a violation of the ADA. Merely asking a disability-related question is a violation.

The ADA was created to give people with disabilities an equal employment opportunity in all areas of employment, including hiring decisions. Prior to the ADA, employers often asked questions about disabilities in applications and interviews. If the applicant revealed information about his/her disability and was rejected, s/he would not know if it was because of the disability or for some other reason, such as not enough experience.

Congress created a system where employers must make their hiring decisions in two steps. First, the employer must select the most qualified candidate and offer the position without consideration of information about the disability. Then, after a job offer is made, an employer may make some inquiries about disability. These provisions of the ADA provide the greatest protection to people who have "hidden" disabilities or a history of a disability.

Congress intended for the ADA to improve employment opportunities among people with disabilities. Non-discriminatory hiring and recruitment practices are necessary if more people with disabilities are to join the workforce. Employers must also take other steps to make sure their hiring procedures do not discriminate against people with disabilities. Employers must recruit people using non-discriminatory advertisements and job announcements, provide applicants reasonable accommodations in the application and testing stage, and use tests that accurately measure the ability of an applicant to perform the job. This guide explains these requirements related to applications and interviews in greater detail in the sections that follow.

## **C. Questions: Illegal Or Legal?**

To know whether an employer may lawfully ask a specific question, you must know (1) whether the question is disability-related and (2) during which stage was the question asked. This is because the ADA creates rules for employers about asking disability-related questions.

### **(1) Whether the Question is Disability-Related**

#### **(a) Disability-Related Questions**

First, it is important to know whether a question is a disability-related question. A disability-related question is one that tends to seek information about the following:

- whether the person has a disability;
- the type of disability; and
- the severity of the disability.

These are examples of disability-related questions:

**Do you have AIDS? (Substitute asthma, depression or any physical or mental impairment or condition.)**

Do you have a disability that would interfere with your ability to perform the job?  
(Substitute other words such as condition or impairment.)

**How many days were you sick last year?**

Have you ever filed for worker's compensation?

**Have you ever been injured on the job?**

How much alcohol do you drink each week?

**Have you ever been treated for alcohol problems?**

Have you ever been treated for mental health problems?

**What prescription drugs are you currently taking?**

Have you ever been hospitalized? If so, for what condition?

**Have you ever been treated by a psychiatrist or psychologist? For what condition(s)?**

Have you had a major illness in the last 5 years?

**Have you ever been treated for drug addiction?**

These are examples of disability-related questions, but there may be other disability-related questions. Keep in mind that the definition of a disability-related question is one that the employer should reasonably believe would cause the applicant or employee to provide information about the nature, existence, or severity of a disability.

**(b) Lawful Questions about Abilities to Perform the Job**

Questions about the ability to perform the job are *not* disability-related questions. Congress did not intend to tie an employer's hands so that s/he could not ask questions to determine if an applicant is qualified for the position. An employer may lawfully ask questions about the ability of an applicant to perform the job with or without reasonable accommodations.

The EEOC, in the Enforcement Guidance on Pre-Employment Inquiries and Medical Examinations, lists the following as examples of questions an employer may ask applicants:

Can you perform the functions of the job with or without reasonable accommodation(s)?\*

**Describe/demonstrate with or without reasonable accommodations how you would perform the job duties\***

Can you meet the attendance requirements of the job **with or without reasonable accommodations?\***

**How many days did you take leave last year?**

Do you illegally use drugs?

**Do you have the required licenses or certificates for the job?**

\*Without the words "with or without reasonable accommodations," these lawful questions would probably become unlawful. The ADA requires an employer not to discriminate against an otherwise qualified individual who needs a reasonable accommodation in the workplace.

**(c) Questions In Which the Answer Reveals Information About a Disability**

The answers to some questions may reveal information that the applicant has a disability. However, a question is not illegal simply because a person gives information about a disability in the answer. The question must *tend to elicit information about a disability* to be illegal during the interview or application process. Some questions may unintentionally result in answers that include information about a disability.

Ana fills out an application where she is asked to list all of her jobs and the dates of employment. During an interview, the employer asks her why there is a 2 year gap in her employment. Ana states that she was undergoing treatment for a medical condition which has since improved. The question is not illegal. Ana is not obligated at this stage to reveal any additional information about the medical condition or treatment.

In the previous example, the question is not a disability-related question because there are many reasons an applicant may have a gap in employment. Some reasons for gaps in employment other than disability include taking parental leave, continuing education, and travel. However, once an employee provides information about a disability in an application, resume, or interview, the employer is generally **not** permitted to follow up with disability-related questions.

Raul completes an application that asks for the name of schools attended. He attended a special school for students with disabilities. The employer asks during the interview why he was placed at that school. The question on the application is legal but the follow-up question by the interviewer is probably unlawful.<sup>1</sup>

**(d) Specific Inquiries**

There are some special situations in which it is not always apparent

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<sup>1</sup>For schools to comply with the confidentiality requirements of the ADA, transcripts and other requests for records for employment should have references to disability and special education removed prior to sending them to employers. If an individual is requesting his/her records from the school, s/he should inquire whether the school will be routinely removing references to disability prior to sending the records.

whether the question is disability-related. The following discussion outlines lawful and unlawful questions for each of these special circumstances.

### ***Affirmative Action<sup>2</sup> Voluntary Self-Identification***

The ADA does not prohibit affirmative action programs on behalf of people with disabilities. Employers are permitted to ask applicants to voluntarily identify themselves as a person with a disability prior to an offer of employment if the employer actually provides an affirmative action program for people with disabilities. Employers who are required by federal, state, or local law to undertake affirmative action programs and employers who voluntarily create affirmative action programs may ask applicants to identify whether they have a disability.

For example, a governmental entity such as the University of Arizona, Cochise Community College, Maricopa County, or the City of Flagstaff would be able to ask an applicant to voluntarily identify whether s/he has a disability.

If an employer is permitted under the ADA to invite applicants to identify whether they have a disability, then the employer must take several steps to make sure that the applicant is protected from discrimination. The employer must let the applicant know that:

- the information will be used only for the affirmative action program;
- an applicant will not be rejected solely because s/he did not fill out the form;
- self-identification is totally voluntary; and
- the information will be kept confidential.

To inform the applicant about the above information the employer must use clear language. If the self-identification is on a form, then the form must contain clear, understandable language and be in large enough print to be conspicuous. The self-identification should be done on a separate form and apart from the application or on a sheet that is either torn or separated from the application. The information should not be sent to the individual who is making the selection of the applicant.

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<sup>2</sup>Affirmative action programs are programs required by federal law that are designed to correct past discrimination against protected groups, positive steps employers must take to eliminate and prevent discrimination. To take these steps, employers usually must keep statistics on people who apply and are hired.

If the self-identification is done verbally, the employer must still use clear, understandable language.

### *Lifestyle Questions*

The ADA probably does not prohibit an employer from asking some questions about an applicant's lifestyle, such as eating habits, exercise habits, and weight of applicants, hobbies and sports. Although an employer might be able to safely ask an applicant if s/he eats three meals a day, the employer could not ask whether the individual needs to eat snacks throughout the day to maintain his/her energy. The latter question is more likely to obtain information about a disability, such as diabetes. If the first question did result in an applicant providing information about a disability, then the employer must not ask additional questions about the disability. Certain questions about weight may be illegal. In some situations, obesity may be a disability. For example, morbid obesity (being overweight by at least 1-1/2 times normal body weight) is a disability. Persons who are obese because of an underlying medical condition might also be protected as an individual with a disability.

### *Questions about Alcohol Abuse*

Employers may ask whether an individual drinks alcohol, but cannot lawfully ask questions about how much alcohol an applicant drinks or other questions that are likely to bring out information about alcoholism.

Other **disability-related** questions likely to bring out information related to alcohol use:

Do you drink every day?

**Do you drink only with others or also alone?**

Have you ever been hospitalized in an alcohol rehabilitation program?

**Are you an alcoholic?**

Does drinking alcohol interfere with your ability to perform your daily activities?

### *Questions about Drug Use*

A question about the current illegal use of drugs is permitted although it may reveal information about a drug addiction. Drug addiction is a disability according to many medical professionals, however, a person who currently illegally uses drugs is not protected by the ADA.

Questions about past drug addiction probably violate the ADA. The reason is that a person is protected by the ADA if s/he has a history of a drug addiction, has successfully completed a rehabilitation program, or is currently not misusing drugs.

Questions about the legal use of prescription drugs are prohibited during the application stage. If an employer asks an applicant about prescription drugs, the employer is likely to learn about an applicant's disability. For example, prescription drug use might reveal to an employer that an applicant has a psychiatric disability, diabetes, epilepsy, heart disease, cancer, or is HIV-positive.

The ADA does not prohibit drug tests to test for the current illegal use of drugs. If an applicant tests positive for drugs, then an employer may ask follow-up questions to determine if there are other reasons that a person may have tested positive. For example, a person may have tested positive for a controlled substance although the positive result is for a drug that was prescribed by a physician. An employer may ask if there are other medications that the individual takes that may have resulted in the positive test result. Following a positive drug test, questions regarding prescription drug use are not illegal. Asked at any time before a job offer, such questions violate the ADA.

The following are illegal questions when asked prior to a job offer:

**Have you ever illegally used drugs?**

How often did you use illegal drugs in the past?

**Have you ever been treated for drug addiction?**

Have you ever been treated for drug abuse?

**NOTE: Questions about conviction for drug-related offenses and recent use of illegal drugs may be permitted under the ADA. For more information about this area of the ADA, see the Center's guide, *The ADA and Drug Testing*.**

### ***Need for Reasonable Accommodations***

In general, an employer cannot lawfully ask an applicant whether s/he needs an accommodation to do the job before making a job offer. Asking about the need for an accommodation is a disability-related question. Although applicants may need an employer to be flexible for a variety of reasons, such as child care responsibilities, care of aging parents, or education, the term *accommodation* has commonly come to mean workplace modifications for people with disabilities. If asked about accommodations, most people with disabilities would

likely disclose information about his/her disability to explain the need for an accommodation. An employer could use the question to screen out people with disabilities who need accommodations in violation of the ADA.

The EEOC indicates in its Enforcement Guidance on Pre-Employment Inquiries that an employer may ask an applicant questions about reasonable accommodations if:

- the applicant has an obvious disability and the employer reasonably believes the applicant will need an accommodation;
- the applicant voluntarily discloses a hidden disability and the employer believes an accommodation will be needed; or
- the applicant tells the employer s/he will need an accommodation.

Although EEOC indicates that the employer may ask about the type of accommodation needed, the employer may not ask about the underlying disability. Because the law is new, it is too soon to tell whether courts will agree with the EEOC on its interpretation. If asked questions about accommodations prior to a job offer, contact the Center for more information.

#### ***Requests to Demonstrate/Describe Performance of Job-Related Duties***

Generally, an employer may ask an applicant to show or describe how s/he would perform a job-related task because this request is more about the ability to perform the duties of a job rather than a disability-related inquiry. An employer may lawfully request applicants to show how they would perform certain job duties or skills if the employer makes the request of all applicants, not just applicants with a known disability.

Rebecca and James both apply for an office assistant position where the assistant must type, do filing, and proofread manuscripts. Rebecca has a visual impairment. It would not violate the ADA for the employer to ask both Rebecca and James to do a typing test to test for speed and accuracy and to give them a sample document to proofread.

There is one exception to this requirement to ask everyone entering the same job. If the employer knows the applicant has a disability that would likely interfere with performance of the job duty, the employer may ask only the applicant with a disability to do the demonstration.

Oscar and Albert both apply for a position as a service repair technician for washers and dryers. They both are required to supply information about their training and experience in repair. However, Oscar has paralysis in one arm. The employer also wants him to demonstrate while in the shop how he would be able to use some of the tools that generally require two hands to use. Since using the tools is related to the specific and essential job function, it is probably lawful for the employer to ask only Oscar to do this demonstration.

If an applicant needs an accommodation to demonstrate the job skill, the employer must provide the accommodation. If providing the accommodation for the demonstration would be an undue hardship, the employer must allow the applicant to describe how s/he would do the task with the accommodation.

### ***Attendance Requirements***

An employer may give an applicant information about the attendance requirements of the job and ask the applicant if s/he believes s/he can meet those attendance requirements. An employer may even ask the applicant how many days of leave the person took at the last job or during the last year. The employer may also ask other questions to determine if the applicant has a pattern of abusing leave. The following questions have been determined by the EEOC to be questions about the ability to perform job duties rather than disability-related questions.

Can you meet these attendance requirements with or without reasonable accommodation?  
**How many days were you absent from work last year?**  
Did you have any unauthorized absences from your job last year?  
**How many Mondays or Fridays were you on leave last year?**

### ***Job Opportunity Credit Act***

There is a federal law that permits employers to earn tax credits for hiring people in targeted groups. One of the targeted groups is people who have received vocational rehabilitation services. The purpose of the law is to offer dollar for dollar Federal tax credit of up to \$2,400 to employers who hire people in these targeted groups. Employers may lawfully screen applicants to find out if hiring the applicant might result in receiving the tax credit. However, unless the

screening is done properly it will result in an unlawful disability-related question. The following screening procedure on an application or requested prior to an offer of employment probably violates the ADA for the reasons stated following this example.

We are asking that all applicants help our Company participate in a Federal Program by answering the following questions. Please check the “Yes” or “No” box for each questions.

1. Have you ever worked for this company before? Yes  No
2. Have you received Aid to Families with Dependent Children (AFDC) anytime in the last year and one half, for at least nine months in a row? Yes  No
3. Has any family member living in your household received Aid to Families with Dependent Children (AFDC) anytime in the last year and one half, for at least nine months in a row? Yes  No
4. Are you a veteran living with a family member who received food stamps anytime in the last fifteen months, for at least three months in a row? Yes  No
5. Are you a veteran living with a family member who received Aid to Families with Dependent Children (AFDC) anytime in the last twenty-one months, for at least nine months in a row? Yes  No
6. Have you been convicted for or released from prison for a felony in the last twelve months? Yes  No
7. Are you 18 - 24 years of age? (If yes, please enter your zip code\_\_\_\_\_)
- 8. Have you been helped by a Vocational Rehabilitation Agency? Yes  No**
9. Are you 18 - 24 years of age and have received food stamps for at least three months in the last five months? Yes  No
10. Are you 18 - 24 years of age and living with a family member who received food stamps for the last six months? Yes  No

Only people with disabilities are helped by a vocational rehabilitation agency, so asking people to identify that they have received these services is a disability-related question. If you are required to do this screening as it is above, you should contact the staff at the Arizona Center for Disability Law or a private attorney for further legal advice.

The next screening is lawful because an applicant can check off whether s/he can answer yes to any of the questions, and does not have to identify which question is being answered. This is the lawful way to screen applicants to determine if hiring them would fall under the Work Opportunity Tax Credit.

We are asking that all applicants help our Company participate in a Federal Program by answering the following questions. Please check Yes if any of these questions apply to you and “No” if you answered “no” to all of these questions.

Yes  No

1. Have you ever worked for this company before?
2. Have you received Aid to Families with Dependent Children (AFDC) anytime in the last year and one half, for at least nine months in a row?
3. Has any family member living in your household received Aid to Families with Dependent Children (AFDC) anytime in the last year and one half, for at least nine months in a row?
4. Are you a veteran living with a family member who received food stamps anytime in the last fifteen months, for at least three months in a row?
5. Are you a veteran living with a family member who received Aid to Families with Dependent Children (AFDC) anytime in the last twenty-one months, for at least nine months in a row?
6. Have you been convicted for or released from prison for a felony in the last twelve months?
7. Are you 18 - 24 years of age? (If yes, please enter your zip code\_\_\_\_\_)
- 8. Have you been helped by a Vocational Rehabilitation Agency?**
9. Are you 18 - 24 years of age and have received food stamps for at least three months in the last five months?
10. Are you 18 - 24 years of age and living with a family member who received food stamps for the last six months?

## (2) During Which Hiring Stage is the Question Asked

The ADA limits when an employer can ask disability-related questions. Whether a disability-related question is permitted depends upon the stage of hiring. There are three stages of employment:

- before an **applicant** is offered a job;
- after an **applicant** is offered a job but before s/he begins working; and
- after an **employee** has begun working.

### (a) Stage 1: Before the Conditional Job Offer

An employer must provide an equal opportunity for an individual with a disability to participate in the job application process and to be considered for a job. An employer must not ask disability-related questions prior to making a job offer. A disability-related question at this stage is illegal whether it appears on an application form, is asked in a job interview, is discovered during a background or reference check. It is illegal whether the employer asks or has someone else ask on the employer's behalf.

■ ***Applications***

In an employment application form an employer may ask questions to determine whether an applicant can perform specific job functions with or without accommodations. These questions should focus on the applicant's ability to perform the job, not on the applicant's disability.

There will be times when an applicant may need an accommodation in the application process. A reasonable accommodation is any change in the way the work is done or other modification that permits the individual with a disability to have an equal opportunity to compete with other applicants. If an applicant needs an accommodation during the application stage, generally the employer may ask for medical documentation about the existence of a disability and the need for an accommodation. See the Appendix of this guide for a form and a sample letter documenting disability.

Examples of accommodations that may be needed for an application include:

- a reader for a person who is blind;
- building accessibility for a person with mobility impairments; or
- assistance in filling out an application for individuals with visual or learning disabilities or mental retardation.

■ ***The Job Interview***

An interviewer is prohibited from asking questions about a disability, but may obtain more specific information about the ability to perform job tasks and about any needed accommodations. The job interview should focus on the ability of an applicant to perform the job, not on the individual's disability. The employer must provide an accommodation, if needed, to enable an applicant to have equal opportunity in the interview process.

- Even if an applicant has an obvious disability, such as using a wheelchair, service animal, or having a prosthesis, or volunteering information about a disability, the interviewer may not ask disability-related questions. According to the EEOC, an employer, however, may ask a person if s/he needs an accommodation under the circumstances described on pages 13-14 of this guide.

- The interviewer may give an applicant a copy of a detailed job description, then ask whether the applicant can perform these functions with or without a reasonable accommodation.

Samuel applies for a job as a limousine driver. Samuel has a diagnosis of a psychiatric disability and takes medication for his condition. Samuel voluntarily discloses this information during the interview. The interviewer asks if the disability would affect his driving, how long he has had the disability, and what medication he takes. These questions asked during the interview violated the ADA. The interviewer could have asked Samuel if he had a valid chauffeur's license, his accident history, and whether he has made claims on his auto insurance for collisions to learn whether Samuel could perform the job.

Sherilyn applies for a position as a mailroom clerk. The employer tells her that she would be responsible for receiving incoming mail and packages, sorting the mail, taking the mail in a cart to many offices in the buildings, lifting boxes of supplies up to 50 pounds, and climbing a ladder to place the boxes on storage shelves up to 6 feet in height. The employer then asks Sherilyn if she can perform these duties with or without a reasonable accommodation. This is a lawful question.

■ ***Background and Reference Checks***

It is like the Golden Rule for the ADA: an employer may **not** ask a disability-related question of others that the employer could not directly ask the applicant. Before making a job offer, an employer (and anyone on the employer's behalf) may **not** ask disability-related questions about a job applicant from a previous employer, family member, or other source.

During an interview Grace tells the interviewer that she took one year off between her last job and the job for which she is currently applying. The interviewer asks her why she took a year off between jobs. Grace tells the interviewer it was to get treatment for a medical condition that has improved. The office manager does not ask any further questions about the medical condition. However, the office manager does call the last employer for a routine check of Grace's references. During the reference check, the interviewer also asks Grace's former employer what was the nature of the medical condition that caused Grace to leave her employment. The interviewer violated the ADA when he asked this question during the reference check.

**Waivers on Job Applications.** Many job applications contain the following waiver:

*I give you, the employer, the right to investigate all information given and to secure additional information if necessary. I understand that an investigative consumer report may be made whereby information is obtained through personal interviews with third parties such as family members, business associates, financial sources, friends, neighbors, or others with whom I am acquainted. I understand that this inquiry includes information as to my character, general reputation, and personal characteristics, whichever may be applicable. In accordance with the law, I hereby release from all liability or responsibility all companies, or corporations furnishing this information.*

Waivers such as the one above probably violate the ADA because it means that an employer could ask disability-related questions to third parties which they could not ask the employee. A release such as the one above unlawfully requires people with disabilities to waive their right to bring a claim against a former employer that provides confidential medical information in violation of the ADA. It is unclear whether this type of release would be upheld by a court, but the release does have the effect of discouraging people with disabilities from bringing claims against former employers. **If you have been required to sign such a waiver or are being denied an opportunity to apply for a position because you did not sign this type of waiver, you may wish to contact the staff at the Arizona Center for Disability Law or a private attorney for legal advice.**

■ **Testing**

The ADA does not prohibit an employer from giving applicants tests to determine who has the necessary skills to perform a specific job. However, the employer must give those tests in a non-discriminatory manner and provide accommodations to people who need them to perform the tests. For more information about testing prior to an offer of employment, contact the Center staff.

**(b) Stage 2: After a Job Offer and Before the Applicant Begins Working<sup>3</sup>**

An employer may ask disability-related questions during the second stage after an applicant has been offered a job, but before the applicant begins working. The employer

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<sup>3</sup>This is the stage that an employee should request an accommodation from their employer if s/he believes an accommodation will be necessary to perform the essential functions of the job. See the Center's guide, *The ADA and Reasonable Accommodations*, for more information about requesting accommodations.

does not have to justify why the disability-related questions are being asked. However, for the disability-related question to be lawful an employer must ask the question of all employees entering that same job category and keep confidential any information about disability that the employee provides.

A construction company requires all people who are hired as laborers to answer questions about the existence or history of back or knee impairments, but does not ask people who are hired for the office and sales work to answer the same questions. The employer has not violated the ADA.

If a job offer is withdrawn by an employer after a new employee discloses information about a disability, the employer must be able to show:

- that the reason the job offer was withdrawn was **job-related**<sup>4</sup> and **consistent with business necessity**<sup>5</sup> and the person could not be accommodated;

Josefina applies for a position in a supermarket. She is hired and assigned to work as a clerk at the bakery counter. Prior to beginning work, she is asked to demonstrate that she can lift 50 pounds because all store clerks are required to be able to lift this weight without assistance. She is unable to lift 50 pounds without assistance because she has arthritis. The job offer is withdrawn. Lifting 50 pounds is rarely required for clerks who work at the bakery counter because they ring up sales and get bakery goods for the customers. Occasionally, boxes need to be moved that weigh about 50 pounds, but there is always more than one person working in the bakery to help lift the boxes. Withdrawing the job offer because Josefina cannot lift 50 pounds violates the ADA because the test is not job-related to the bakery clerk position and Josefina can be easily accommodated.

- OR the new employee would be a direct safety threat<sup>6</sup> to others and the threat could not be reduced by reasonable accommodation.

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<sup>4</sup>Job-related means related to the specific job.

<sup>5</sup>Business necessity means a person must be excluded because of a disability that makes him/her unable to perform the essential functions of the job even with the provision of accommodations.

<sup>6</sup>Direct safety threat means that hiring the person with the disability would pose a significant and specific risk to the health or safety of others. The risk must be a current risk and not be remote or speculative. The risk must be based on objective data or facts. The risk must be one that cannot be eliminated or reduced to an acceptable range by reasonable accommodation.

(c) **Stage 3: After An Employee Begins Work**

During the third stage after an employee begins work, an employer cannot ask an employee a disability-related question unless it is **job-related**<sup>7</sup> and **consistent with business necessity**.<sup>8</sup> This is different than the second stage. Once an employee has begun working, the employer must justify why s/he is asking a disability-related question. The following are examples of why an employer might need to ask disability-related questions.

- ▶ The employee asks for an accommodation. Sometimes an employee may not need an accommodation when s/he begins working for an employer. However, circumstances may change. The employee's disability may worsen or the employee's job duties may change. An employer may request documentation of a disability and the need for an accommodation when the employee requests the accommodation, if the disability and need for an accommodation are not apparent.

Maxine works for a law firm as a paralegal. In her job she does a lot of work revising forms for clients with information about their situation. Most of her work is done using a computer. Maxine has a visual impairment which is worsening. She previously was able to do her work by placing her magnifier used for reading in front of her computer screen. She now needs a large screen for her computer and software that magnifies the print. When she asks for the large size screen, her employer may ask her for a statement from her optometrist or ophthalmologist and information about the amount the screen should be magnified.

- ▶ The employer notices that the employee is having difficulty performing his/her job duties and believes that the difficulty may be due to the need for a disability-related accommodation. An employer may ask an employee if s/he needs an accommodation to perform the essential functions of the job even if the employee has not requested the accommodation.

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<sup>7</sup>See footnote #4 for the meaning of job-related.

<sup>8</sup>See footnote #5 for the meaning of business necessity.

Roy is a teacher at a high school. He is hospitalized for depression. He asked for use of sick leave during the hospitalization. When Roy returned to his teaching duties, the principal noticed that frequently Roy was absent and had used all of his accrued leave. The principal told Roy that his absences were becoming excessive and wanted to know if the absences were related to his disability. Roy told her the absences were related to his disability. They discussed various options for accommodations, such as a reduced work schedule for one semester or use of unpaid leave for further recuperation. The principal's discussion of the need for an accommodation did not violate the ADA.

- ▶ Other laws require medical examinations, screening, and monitoring.

Alex works in a lab where he may have been exposed to a hazardous material. A safety law requires that he be monitored at regular intervals to make sure that he did not suffer any exposure or ill effects from exposure. This is required by the company's safety program and federal safety standards, so the employer has not violated Alex's rights under the ADA by doing the medical monitoring.

Doris drives a truck for a trucking company on interstate, long hauls. She must keep a current certification. The United States Department of Transportation requires drivers to get a periodic medical examination. Doris' employer does not violate the ADA by asking disability-related inquiries during the medical history portion of the medical examination.

- ▶ The employee is not performing his/her job safely and the employer believes the problems with the performance are related to a disability or the need for an accommodation because of the disability.
- ▶ The employer has a voluntary wellness program.  
If an employer has a wellness program that is truly voluntary, does not use the information obtained in the wellness program to discriminate, and maintains confidentiality of information collected in the wellness program, making disability-related inquiries would not violate the ADA.

## **D. The Employer's Responsibility To Keep Disability-Related Information Confidential**

An employer who asks disability-related questions or requires medical examinations after an offer of employment will obtain information about disabilities obtained through these examinations and questions. The employer is required by the ADA to treat this information confidentially. The medical information must be kept separate from other personnel records and access must be limited.

To satisfy these requirements, an employer must keep medical information about disabilities in a locked, separate file apart from the personnel records. Only specific people must be given access to the medical records. Medical information may be shared only in the following circumstances:

- ✓ supervisors or managers who must be informed about work limitations or the need for accommodations;
- ✓ first aid or safety personnel who might be required to give emergency treatment or to develop emergency evacuation procedures; and
- ✓ government officials investigating whether an employer is following the ADA or other state and federal laws, insurance companies for provision of benefits, or worker's compensation offices for benefits.

## **E. Strategies for the Pre-Employment Phase**

1. *Handling the Illegal Question on an Application.* An applicant should take along the list in the Appendix of this guide that contains examples of unlawful questions when s/he applies for jobs. Some employers will not let copies of their application leave the building. The applicant should be prepared for this policy and take a small pad of paper to places where s/he applies. The illegal question should be written onto the sheet exactly as it appears on the application. List the date, the business, and the address where the application was used.

If an application contains an illegal question, the applicant has several choices: answer the question, refuse to answer the question by leaving it blank, or not apply until steps are taken to have the questions removed from the application. If an applicant chooses to answer a disability-related question and is not selected for the position, s/he may still file a charge of discrimination against the employer for using disability-related questions on their application.

If the applicant leaves the question blank, s/he may continue with the hiring process, but it is quite possible that the application will not be considered if it is incomplete or that the employer will ask the applicant for missing information during the job interview. Once again, if the applicant is not considered for the position, s/he may file a charge of discrimination against the employer for including disability-related questions.

If the applicant chooses not to apply, s/he can seek the assistance of the Center staff or a private attorney to contact the employer and notify them that their application contains unlawful questions and request that those questions be removed. This step can be done without giving the name of the applicant that brought the unlawful question to the Center's attention. If the employer agrees, the applicant can return and apply. If the employer refuses, the applicant may still file a charge of discrimination under the ADA.

Although it may seem that there are advantages to answering the question and filing if not selected, there is a down side to this alternative. It means that the applicant has provided information about their disability to the employer. This disclosure may have been very unnecessary, particularly in the case of a person who will not need an accommodation. In that situation, disclosure about one's disability is not required. Generally, it is not recommended to answer disability-related questions on an application because an applicant does not know if the employer will use the information to discriminate, but the applicant can choose to answer a disability-related question. If s/he is not selected, s/he can file a charge of discrimination regarding the use of the question.

2. Handling the Illegal Question in the Interview. If an applicant is asked an illegal question during an interview, s/he can either refuse to answer and tell the employer the question is not permitted under the ADA, or answer. If s/he is not selected, the applicant can file a charge of discrimination. (The applicant could probably file a charge even if s/he was selected, but this will probably make the new employment relationship very adversarial. The other approach would be to ask the Center to write the employer requesting the unlawful questions be removed without identifying who brought it to the Center's attention.)

3. Disclosure. Keep in mind that a person is not required to voluntarily disclose that s/he has a disability before an employer offers him/her a job. The ADA was designed so that employers could not lawfully ask questions about a disability and use the information to screen out people with disabilities. Therefore, it is not generally recommended disclosing information

about a hidden disability before a job offer is made, even on an affirmative action self-identification form. Obviously, the applicant who has a hidden disability or a history of a disability benefits the greatest from the ADA protections about disability-related inquiries because the ADA cannot prevent an employer from noting that a person has an obvious disability.

A person with an obvious disability may choose to tell the employer about his/her disability because s/he fears that the employer will see the disability and make a decision based on inaccurate information about the disability. An applicant may want to correct any myths the employer may have about the condition by telling the employer the facts about the disability. If an applicant chooses to talk about his/her disability, the ADA makes the applicant in control of how much to tell. This is because it is unlawful for an employer to legally ask follow-up disability-related questions before a job offer is made. An employer who has a good faith belief that the applicant may need an accommodation, however, may lawfully ask about the accommodations that may be needed. The applicant who wishes to educate the employer about his/her disability may wish to think of ways how the disability will make them a valuable employee, such as the ability to overcome obstacles or approach a task with creativity. Keep in mind that an individual with an obvious disability is not required to discuss the disability. For more information about strategies in the job search, see the Appendix of this guide.

4. *Disclosure for accommodations.* If a person needs an accommodation to perform the essential functions of the job for which s/he is applying, s/he should request the accommodation after the job offer but before s/he begins working. If a person needs an accommodation for the application or interview, s/he should ask for the accommodation at the time s/he applies.

5. *Disability documentation.* Because an employer is entitled to request disability documentation, it is better to be prepared and have the documentation ready to give to the employer at the time that the accommodation is requested. If the employer does not request documentation, then the employee does not need to provide it. If, on the other hand, your medical professional who is providing the documentation will charge you for the time preparing the documentation, it may be preferable to wait until it is requested. Use the form and sample for requesting accommodations in the Appendix to explain to your physician or other professional the information which is necessary for documentation

6. *Confirming the accommodation.* It is helpful to confirm in writing that the

employer has agreed to provide an accommodation and the nature of the accommodation. Sometimes, accommodations are provided informally and, later, an employer decides to not provide the accommodation. Confirming the accommodation helps create a written record that the accommodation was provided by the employer.

7. Emergency care. If an applicant knows s/he may need emergency care because of a disability, s/he should discuss emergency procedures after a job has been offered but before s/he begins working. The employer may request disability documentation regarding emergency medical procedures. It is better to have the documentation ready to present when you discuss the matter.

## F. Appendix

### Optional Form to Use as A Guide When Seeking Documentation of Disability/Accommodation

The documentation should include:

- the date of the documentation
- the nature of the impairment
- how the impairment substantially limits at least one major life activity. Examples of major life activities include, but are not limited to:
  - hearing
  - seeing
  - lifting
  - working (a wide class of jobs, not just a single job)
  - performing manual tasks  
(do not include "working" unless no other activity is substantially limited)
  - walking
  - standing
  - learning
- a statement that the person needs an accommodation because of his/her disability
- the type of accommodation needed or recommended (optional)

The documentation may be provided by a:

- |                            |  |
|----------------------------|--|
| • doctor                   | • independent living specialist  |
| • psychologist             | • other professional with knowledge of disability and functional limitations |
| • rehabilitation counselor | • physical therapist   |
| • occupational therapist   |  |

\_\_\_\_\_ has the following physical/mental impairment:  
\_\_\_\_\_. The impairment causes functional limitations in the major life activity(ies) of \_\_\_\_\_. S/he is impaired in the areas in the following ways:  
\_\_\_\_\_.

S/he is a qualified individual with a disability. As a result s/he needs an accommodation(s) in the workplace because of his/her disability. I recommend the following accommodation(s).  
\_\_\_\_\_  
\_\_\_\_\_

Please keep this medical documentation confidential as required by the employment provisions of the Americans with Disabilities Act.

\_\_\_\_\_  
Signature of Professional and  
Credentials

(Tear this sheet off and provide to the professional providing the documentation regarding disability.)

## Sample Use of Form for Documentation

January 15, 1998

Mr. Joe Employer  
ABC Company  
123 West Smith Street  
Tucson, AZ 85743

Dear Mr. Employer:

Joseph Jones has a physical impairment consisting of a spinal cord injury. He has paraplegia resulting in paralysis of his legs, but does have full use of his arms and hands. The physical impairment causes significant functional limitations in the major life activity of walking. He is unable to walk and uses a wheelchair. Joseph Jones is an individual with a disability according to the definition of the ADA.

As a result, he will need some accommodations in the workplace because of his disability. Generally, he will need an accessible worksite and ramp into the building where his worksite is located.

I am a vocational rehabilitation counselor who has worked with Mr. Jones. I would be able to offer you some specific recommendations on how to make his worksite accessible.

Call me at my office at 123-4567.

Sincerely,

Rebecca Smith,  
Vocational Counselor

## Optional Form to Use as A Guide When Requesting An Accommodation

The letter or memo to the employer should include:

- the date of the letter or memo;
- identify request for a workplace accommodation;
- the accommodation is needed because of a disability; and
- the type of accommodation(s) the employee/applicant thinks s/he needs to be able to perform the job;
- a copy of documentation from an appropriate professional regarding the disability and need for an accommodation.

The letter or memo may also include:

- any information the employer may need to get the accommodation;
- any resources for assistance in getting information about accommodations

I have the following condition: \_\_\_\_\_ which is a disability. I have also attached a letter from \_\_\_\_\_ (professional) regarding the existence of my disability and the need for workplace accommodations. Because of my disability, I will need an accommodation. I believe the following accommodations would be effective to enable me to perform my job. \_\_\_\_\_ (professional) agrees that these are necessary and effective accommodations.

[List accommodations requested.]

Please notify me by \_\_\_\_\_ (date) whether you will be providing these or other accommodations. If you need additional information about the request, please let me know.

---

Employee

(Use this sample to help in writing a letter or memo to an employer.)

### **Sample Uses of Form for Requesting Accommodation**

TO: Ann Supervisor  
FROM: Joe Employee  
RE: ADA Accommodation  
DATE: December 1, 1997

I have the following condition: bipolar disorder. I have also attached a letter from my therapist, Dr. Jane Psychiatrist, that confirms that I have a disability due to the bipolar condition and need an accommodation. Because of my disability, I will need a flexible schedule to be able to attend therapy appointments. I have group counseling one time per week which cannot be scheduled outside of work hours. I would like a flexible schedule on Tuesdays to be able to come in early so that I may leave by 3:30 p.m. for these appointments. Dr. Psychiatrist has included in her letter that this is a necessary accommodation.

Please notify me by December 15 whether you will be granting me this accommodation. If you need additional information about this request, please let me know.

## Unlawful Questions

Do you have AIDS?

(Substitute any disability in this blank, such as asthma, diabetes, mental illness.)

Do you have a disability that would interfere with your ability to perform the job?

(Substitute disability for other words such as condition, impairment, or defect and the question is also unlawful.)

How many days were you sick last year?

Have you ever filed for worker's compensation?

Have you ever been injured on the job?

How much alcohol do you drink each week?

Have you ever been treated for alcohol problems?

Have you ever been treated for mental health problems?

What prescription drugs are you currently taking?

Have you ever been treated for any of the following conditions or diseases? (Followed by a list of various conditions.)

List any conditions or diseases for which you have been treated in the past 3 years.

Have you ever been hospitalized? If so, for what condition?

Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?

Have you ever been treated for a mental health condition?

Have you had a major illness in the last 5 years?

How many days were you absent from work last year due to illness?

Have you ever been treated for drug addiction?

(Tear this sheet off and take with you when you apply for positions.)

## Lawful Questions

Can you perform the functions of the job with or without reasonable accommodation(s)?

Describe/demonstrate how you would perform the job duties.

Can you meet the attendance requirements of the job?

How many days did you take leave last year?

Do you illegally use drugs?

Do you have the required licenses for the job?

How much do you weigh?

## **Resources for Job Search Information and Strategies for People with Disabilities**

Web sites that provide information where people with disabilities can obtain information on jobs, employment strategies, and employment outlooks:

President's Committee on Employment of People with Disabilities: Job Links

<http://www.pcepd.gov/joblinks.htm>

America's Job Bank

<http://www.ajb.dni.us>

This site is produced by the public employment service. The Job Bank links State employment service offices, that according to the employment service, is the largest pool of active jobs anywhere.

CareerPath.com

<http://www.careerpath.com>

This site contains job listings from several of the leading newspapers in the United States, and employer Web sites. The site also has career resources including a resume database, and employer profiles.

RESNA URL

<http://www.resna.org>

RESNA has a job bank for rehabilitation and assistive technology related jobs. Professional associations post job openings on their Web pages in fields they support.

Occupational Outlook Handbook

<http://www.bls.gov/oco/>

The U.S. Bureau of Labor Statistics publishes information that includes job outlook information, job search methods and tips, and links to other sources of career information. The handbook also describes the nature of a particular occupation, training required, typical working conditions and the physical activities that are necessary to perform the task.

## JOB Access

[www.jobaccess.org](http://www.jobaccess.org)

The purpose of JOB access is to reduce discrimination in the hiring process and to bring together qualified potential employers with disabilities with employers who are seeking to fill positions. A primary goal of JOB access is to provide a mechanism to support people with disabilities to enhance their professional lives by providing career opportunities that were previously unavailable to them.

JOB Access is composed of a multimedia internet site where companies can record job descriptions and essential duties, and qualified persons with disabilities can search geographical and job categories, match their skills, post resumes online, establish links to gain corporate information, access resume samples and advice, and find out more information on the Americans with Disabilities Act (ADA) of 1990.