

# Arizona Center for Disability Law

Protection and Advocacy System for Arizona

## The Americans with Disabilities Act (ADA) and Confidentiality of Medical Information

### A Self-Advocacy Guide

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Funding for this document is provided by the United States Department of Health and Human Services, Administration on Developmental Disabilities and Community Mental Health Services and the United States Department of Education, Rehabilitation Services Administration.

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 Americans with Disabilities Act (ADA) and Confidentiality of Medical Information

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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 subchapters 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 state or county medical services and substance abuse clinics.
- Title III prohibits discrimination in access and enjoyment of public accommodation and commercial facilities, such as hotels, motels, restaurants, professional offices, lawyers' offices, convention centers, stores, banks, museums, parks, schools, recreation facilities, and substance abuse clinics.
- Title IV requires accessibility of telecommunication services to people who are deaf or hearing impaired.
- Title V prohibits retaliation and coercion against individuals for opposing or participating in an investigation of illegal acts or practices under the ADA

### **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 has been designated by the Governor's Office as the state's protection and advocacy (P&A) system to provide 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 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 when faced with a legal dispute regarding discrimination on the basis of a disability. This guide is not a substitute for legal advice. This guide is meant to provide information and examples about employment protections under the ADA.

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

Often, people with disabilities do not have an equal opportunity to work or advance in their employment. People with disabilities may be restricted in employment opportunities by many different kinds of barriers. For example, some are excluded because of rigid work schedules or leave policies. In some cases, people are denied opportunities 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 ADA to discriminate against applicants and employees with disabilities. The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the employment protections of the ADA. 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 or with the Arizona Civil Rights Division (ACRD) within the time limits set out by the ADA. See the Center's guide, *How to Enforce Employment Rights under the ADA*, for more information about the requirements for filing a charge and the time limits. 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 you with information about how the ADA applies to medical examinations in an employment situation. The Center offers the following guides about employment rights under the ADA. To read these guides, visit the Center's website, [www.azdisabilitylaw.org](http://www.azdisabilitylaw.org), or contact the Center for a copy:

- *An Overview of the Employment Protections of the ADA*
- *The ADA and the Job Applicant*
- *The ADA and Reasonable Accommodations*
- *How to Enforce Employment Rights under the ADA*
- *Drug & Alcohol Testing Under the Americans with Disabilities Act (ADA)*
- *The ADA and Medical Examinations*
- *The ADA and Confidentiality of Medical Information*
- *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 must 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 with or without reasonable accommodation; and
- the employer *discriminates* against an applicant or employee *on the basis of disability*.

## **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, a private attorney, or consult the local ordinances for your community.

**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 has 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. The U.S. Government can still file lawsuits against state employers under the ADA.
- Examples of state and local employers include: public universities, police and fire departments, public libraries, public museums, public parks and recreation facilities, and social welfare offices.

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

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, the ADA does not apply. However, the Rehabilitation Act of 1973 is another anti-discrimination law that offers employment protections for people with disabilities who work for or seek employment with federal employers. 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 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 relationships |                           | * sleeping                |

(2) **a history of a substantially limiting impairment, or**

(3) **being regarded as having a substantially limiting impairment.**

Persons who are currently illegally using drugs are generally not protected under the ADA if the reason for the adverse employment action is related to the illegal use of drugs.

A person is qualified under the ADA if s/he has all of the skills, education, and experience required by the employer 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*.

## **8. Scope of this Guide**

The information in this guide applies to the employment protections of the ADA specifically related to confidentiality of medical information disclosed to employers. This guide covers what an employer must do when the employer receives your medical records because of your employment. Also available from the Center are two guides to answer your questions about job applications and medical examinations: *The ADA and the Job Applicant* and *The ADA and Medical Examinations*.

This guide, however, does *not* cover confidentiality of medical records by social service agencies, medical facilities, educational facilities, or professional licensing agencies. If you believe that other agencies have unlawfully released confidential medical records, you should consult a private attorney. In the Appendix of this guide is a list of the resources for obtaining a referral to an attorney.

This guide also does *not* cover employment laws other than the ADA. It is possible that individuals may have other legal claims for violations of other federal or state laws related to confidentiality of medical records. You should contact a private attorney specializing in employment law to determine if you have other claims and the deadlines for making those claims. If you need assistance locating an attorney, ask for a copy of the Center's Employment Attorney Referral List.

## **B. Commonly-asked Questions about Confidentiality of Medical Information under the ADA**

### **1. In what situations might an employer lawfully obtain medical records?**

An employer cannot request medical records of you as an applicant *before* it makes a job offer. However, an employer may require that you pass a medical exam after making you a job offer if the employer asks every other prospective employee in that job category to pass a medical examination. Employers can either obtain or create medical records as part of the employment medical examination. An employer may also do follow up medical testing or discover medical information during the medical examination. For example, during the medical examination you report to the doctor that you have a history of back problems. This job requires lifting so the doctor asks to do a follow up X-ray and tests of your back. These are additional medical records that now exist because of your employment offer.

If you are a current employee, an employer can also request that you get a medical examination, request medical records (with your permission) or ask medical questions if the employer needs the information because of your specific job. For example, employers may ask for medical documentation:

- to prove you need a requested accommodation;
- to check if you are fit for duty after a long period of inability to do your job;
- to check you after an exposure to a chemical in the work environment; and

- to make sure you are safe to perform your duties after a poor and unexplained safety performance.

Bill, Mike, and Pam were just hired on the same day as movers for Pima Movers. Pima Movers may request *all* of their complete medical records before they start work to see whether any of them has ever had a condition (such as a back injury) that would affect job performance or safety. If Pima Movers only asks Bill (who voluntarily told Pima Movers that he has epilepsy) for his medical records and not Mike or Pam, that would be unlawful under the ADA.

## 2. What is a protected medical record under the ADA?

The ADA is a rather new law. The courts are still figuring out the law and what its protections mean. At this time, there are certain areas where the courts have already interpreted the ADA to either provide protection or not provide protection. There are also situations where it is not clear whether courts will agree that the ADA protects medical records.

| <b>Medical information clearly covered by the ADA's confidentiality protections.</b>                                        | <b>Medical information that may be covered by the ADA's confidentiality protections.</b>                                                                             | <b>Medical information not covered by the ADA's confidentiality protections.</b>                                                                                               |
|-----------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Medical information from a medical examination by the employer or for the employer after a job offer and during employment. | Any other medical information obtained by employer.                                                                                                                  | The results of a test to determine whether someone uses illegal drugs is not covered by the ADA.                                                                               |
| Medical information voluntarily disclosed during the hiring process.                                                        | If an employer learns of medical information during the course of employment in any other way, that information may be subject to the same rules of confidentiality. | However, all information obtained in the test other than whether the individual uses illegal drugs (such as lawful prescription drug use) is still subject to confidentiality. |
| Information about disability provided for affirmative action.                                                               | However, if the medical information is voluntarily disclosed by the employee, without an                                                                             | Keep in mind that Arizona law provides more protection. See question #15 in this guide.                                                                                        |
| Medical information disclosed to obtain an ADA accommodation during hiring or employment.                                   |                                                                                                                                                                      |                                                                                                                                                                                |

|                                                                                                      |                                                                                                                 |  |
|------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|--|
| <p>Medical information disclosed as part of an employer's voluntary health and wellness program.</p> | <p>inquiry or examination prompted by the employer, that information is likely not protected under the ADA.</p> |  |
|------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|--|

Jake is applying for a job as a waiter. During an interview, his potential employer asks him whether he is comfortable carrying a tray for long periods of time. Jake says he can as long as he is able to sit down every now and then because of his severe asthma. Jake's potential employer is required to keep the fact that Jake has severe asthma confidential even if Jake does not end up getting the job.

Alvin is offered a job as a construction worker. Before being allowed to start work, the building company requires all of its new hires, including Alvin, to undergo a medical examination. Alvin has HIV and is concerned that his fellow employees may learn about this information after his medical examination. Alvin's employer must keep this information secret/confidential.

Eric's employer sets up a medical program where all employees can receive health care. To participate in this program, each employee must have their medical records transferred to the employer. The employer must keep all medical records confidential.

Jamie is applying for a job as a secretary. Her potential boss improperly asks Jamie whether she has any disabilities he should know about. Jamie does not know this question is improper and tells him that she is diabetic. Even though Jamie's potential boss obtained this medical information in violation of the ADA and not as part of a lawful inquiry, the employer will be required to keep this information confidential.

MEGA Radio asks all of its employees and applicants to voluntarily fill out affirmative action surveys. In reviewing the affirmative action surveys, MEGA radio learns medical information about employees and applicants. The Equal Employment Opportunity Commission takes the position that disability information revealed on an Affirmative Action form must be kept confidential. See the answer to Question # 11 of this guide.

Cody is required to undergo a drug test before he is allowed to work as a pizza delivery person. Cody tests positive for cocaine use. Cody's employer is not required to keep this information confidential according to the ADA guidelines. But, if during the drug testing it is discovered that Cody has asthma, the employer must keep that information confidential. Arizona law, however, offers greater protection than the ADA and requires that the results of the drug test be kept confidential. See the answer to Question #15 of this guide for more information about Arizona law.

### **3. Is an employer required to keep all medical records of employees and applicants confidential?**

Yes. The Americans with Disabilities Act (ADA) requires employers to keep protected medical records confidential. See Question #2 for more information about what records are protected. This is to protect employees' privacy about their medical condition except where it is necessary to disclose information.

### **4. When is an employer allowed to disclose a medical record to others?**

Under the ADA, there are a few times when an employer is allowed to disclose an otherwise confidential medical record. In the following situations, an employer can disclose medical information.

- Supervisors who need to know because the medical information relates to job assignments or accommodations.

Leslie is employed as a waitress at the Delicious Eats Diner. Leslie has diabetes and needs to be able to take short breaks when needed to check her glucose level and if necessary take insulin. Leslie's employer has disclosed to the floor supervisor to give Leslie breaks when necessary to check her glucose level and take insulin. This is proper because Leslie's supervisor needs to know this information when granting breaks. Her supervisor must keep the information confidential and cannot tell co-workers.

Maria is a supervisor and has accepted a project that requires using an exotic new wood stain that contains flower pollen. The manufacturer of the wood stain recommends that people with asthma should not apply the stain because it could make them very ill. Maria is allowed to ask Michelle and Ed if they have asthma or ask the company doctor to check the medical records to see if they have asthma before assigning them to this project.

- Safety personnel may be told if the disability might require emergency treatment while at work because of the disability.

Karen is a junior high school teacher who has epilepsy. Karen's medical condition may require emergency treatment and it is important that medical personnel at the school are informed. Karen's employer may also tell a paramedic that Karen has epilepsy if she has seizures that do not end in a few minutes.

Marcos is a lawyer who has a hearing impairment. Marcos works for a large corporation as an in-house attorney to answer legal questions of other employees. Marcos' medical condition would not require emergency treatment and therefore it would not be proper for Marcos' employer to disclose this information to an in-house nurse.

- Government officials checking for ADA compliance reviews.

Jason owns Tiny's Bar and Grill. Mary works for the EEOC and has been assigned to investigate a complaint concerning Tiny's refusal to provide accommodations for six employees with disabilities. Upon Mary's request, Jason gives Mary all the medical information he has accumulated about his employees with disabilities. Jason's actions are proper because Mary is conducting a government inquiry about whether Tiny's complies with ADA regulations.

- Administration of Insurance Programs

Seymour owns a hair salon called Seymour's Place. Seymour wants to provide a health insurance program for his employees. As a condition of assessing the risks, the insurance company requires Seymour to disclose all of his employees' medical information to ACME Health when he sets up the program. Seymour's actions are appropriate because it is necessary to disclose confidential medical information when setting up a health insurance program for the insurance company to assess risks and set a premium.

- Employers may give information to state workers' compensation offices, state

second injury funds, and workers' compensation insurance carriers in accordance with state workers' compensation laws.

Absent from this list of exceptions is co-workers. **This means employers can not disclose medical information to co-workers about another co-worker's disability.**

Hans works as a salesperson at a retail store. He suffers from a psychiatric disability which requires certain medications to keep him stable. When Hans does not take his medication, he becomes depressed and irritable. One day at work, Hans forgets to take his medication and becomes abrasive with a few co-workers. One of the co-workers, Jon, complains to the employer about Hans' behavior. The employer tells Jon about Hans' psychiatric disability and tells Jon to be patient with him. The employer has violated the ADA because co-workers are *not* on the list of exceptions for release or sharing of medical records.

## **5. What safeguards must an employer take with an employee's or applicant's medical records?**

The Equal Employment Opportunity Commission requires employers to take steps to ensure that medical records and information collected about employees and applicants is kept confidential. The employer must maintain the medical records of **all** employees and applicants in a separate file from ordinary personnel records such as application, W-2 forms, and other basic information. Only a few people who file should have access to these medical records. The file cabinets with employees' medical information should be locked. Those who fall into the categories listed as exceptions to the confidentiality rule may have limited access to medical information. In this day and age of computers, faxes, e-mail etc., employers should also take steps to ensure confidentiality of protected medical records that are electronically maintained or transmitted. Access to electronic records should also be limited in the same fashion as paper records.

| Examples of Records That Must Be Maintained In Separate Medical Files                                                                                                                                                                                                                                               | Examples of Records That May Be Kept In Regular Personnel Files                                                                                                                                                                                                                                                                                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Post-offer medical examination</p> <p>Written request for disability-related accommodation</p> <p>Medical documentation supporting accommodation request</p> <p>Drug screen that reports lawful prescription use</p> <p>Fitness for duty exam</p> <p>Information on Affirmative Action Form about disability</p> | <p>Employment application*</p> <p>Resume*</p> <p>Reference letters*</p> <p>Wage withholding form</p> <p>Personnel Evaluations*</p> <p>Disciplinary Warnings*</p> <p>Employee Awards or Honors</p> <p>Results of pre-employment tests (e.g., typing tests)</p> <p>Letters of appreciation</p> <p>Background investigations*</p> <p>Information about job termination*</p> |

*\* If any of these records contain information about a disability or medical condition, the records or that portion of the record must be kept in the separate medical files.*

Tai is a carpenter for DFE Construction Company and was injured on the job. She cannot work as a result of her injuries and has applied for Worker's Compensation. DFE Construction receives some information about the permanent impairment caused by the work-related injury. This information should not appear in Tai's regular human resource records, but in a separate medical file.

**6. Must an employer keep an employee's medical records confidential after s/he leaves the job?**

Yes. A former employee has the same ADA protections regarding medical records as a current employee. Under the ADA, an employer must keep an employee's medical records confidential even after the employment ends. This confidentiality obligation does not end

because the employee leaves the job. However, as stated in the question, there are exceptions to this rule. Of those exceptions, only the following may apply to a former employee:

1. Government officials investigating compliance with the ADA;
2. State workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws; or
3. Insurance companies where the company requires a medical examination to provide health or life insurance for employees. (This exception will only apply if the former employer continued receiving insurance benefits.)

**Managers and supervisors would not need to know about a former employee's limitations.**

Usha worked at Bright Idea, a software company, as a software programmer. Due to the great market for high tech professionals, Usha's skills for programming were in high demand. Usha was contacted by a recruiter from a competing software company. The recruiter offered Usha a position as a programmer with the competing company paying her 25% more than Bright Idea was paying her. Usha accepted the position but is worried that Bright Idea may release her medical records, which would reveal the fact that she is an individual with epilepsy. Bright Idea may not lawfully release the medical records of a former employee to another inquiring company. In fact, even if Bright Idea had terminated Usha, Bright Idea would still not be able to lawfully release her medical records.

## **7. Must an employer keep an applicant's medical records confidential if the employer does not hire the applicant?**

Yes. The confidentiality protections of the ADA apply to applicants as well as employees. An employer may make a job offer to an applicant conditioned upon passing a physical examination. The applicant may not pass the exam and the job offer might be withdrawn. However, the employer must still keep that medical exam in a separate file and not disclose the information unless authorized by the ADA. There may be other ways in which an employer obtains information about an applicant's disability or medical condition. For example, an applicant may request an accommodation during the hiring process and provide documentation of the disability. In all cases, the employer must keep the medical information confidential.

**8. If an individual takes a drug test and discloses medical information, must the employer keep that confidential?**

Yes. According to the ADA, the employer must treat any medical information (except information regarding illegal use of drugs) obtained during a drug test in the *exact same manner* as described in the answer to Question #2. So the employer cannot disclose this medical information to anyone except those that fall into the exceptions listed in the answer to Question #4.

Arizona state law, however, treats the results of a drug test as confidential information that may only be shared with the employee/applicant, employer, and a third party chosen by the employer to receive and evaluate test results (usually a testing service or lab). Both the ADA and Arizona law make it unlawful for employers to use drug tests to check for conditions other than drug or alcohol abuse.

Carlos is an aircraft mechanic at GHI Aviation in Tucson. GHI Aviation must periodically test all of its employees for illegal drug use. Carlos takes the test and his heart medication is detected. According to the ADA, this information must be kept in Carlos' separate medical file and cannot be shown to anyone except the three groups listed above.

Arizona allows a third party (a testing service), chosen by the employer, to see the results besides Carlos and GHI.

**9. If an employee is granted a reasonable accommodation, can information about the accommodation lawfully be disclosed?**

No. An employer cannot disclose information about an employee's reasonable accommodation to other co-workers because this usually amounts to a disclosure that the employee has a disability. A statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because generally only individuals with disabilities are entitled to reasonable accommodations. However, under the exceptions to the confidentiality rule, an employer may tell a supervisor about necessary accommodations. An employer faced with a co-worker that asks about why "special treatment" is being offered to another worker should say the law permits different treatment and requires confidentiality.

An employee at Sanderson's market, complains to the Sandersons that Yusef, a fellow employee, is the only bagger who does not assist the customers out to their cars in the sweltering Tucson heat. Under the ADA, Sanderson's is NOT able to disclose to the complaining employee that the reason Yusef is not required to assist customers to their cars is because Yusef has severe asthma and helping customers with their groceries requires him to overly exert himself. However, Sanderson could include information in the employee handbook that indicates that Sanderson's is an Equal Employment Opportunity Employer and that Sanderson's provides accommodations as necessary.

**10. When can an employer lawfully tell emergency medical providers about an employee's medical conditions?**

An employer may reveal an employee's medical condition only if the emergency medical providers need to know that information to treat the person with the condition. Employees' medical conditions may not be revealed to "protect" the medical providers. Medical providers are required to take universal precautions. Employers should also train medical personnel or co-workers who may need to respond to medical emergencies about universal precautions.

Jane has HIV and is a hostess at the restaurant, The Famished Hunter. One day at work, Jane steps on a slick spot on the floor and she falls and hits her head. She is bleeding. Her employer may *not* lawfully inform emergency medical providers that Jane is HIV positive. Emergency medical providers always take precautions to protect themselves against infection.

Jill is a waitress at the Famished Hunter. Jill has diabetes and must take insulin to control her blood sugar. One day at work Jill goes into shock because her insulin level is too high. Her employer *should* tell emergency medical providers that the employee is diabetic so that they can treat Jill effectively. This is information that will help Jill.

**11. If an employer has an affirmative action program and lawfully asks an employee about his or her disability as part of this program, must the employer keep the information confidential?**

Yes. Although no court has decided this issue, the EEOC takes the position that employers are required to keep all medical information obtained from an applicant or employer confidential, with the few exceptions given in the answer to Question #4.

Employers are allowed to ask applicants to voluntarily identify themselves as a person with a disability prior to a job offer in two situations. First, if federal, state, or local

laws require the employer to have an affirmative action program. Second, if the employer has voluntarily created an affirmative action program. If the employer is allowed to ask questions for affirmative action purposes, the employer must let the applicant know that:

- (1) the information will only be used for the affirmative action program;
- (2) the applicant will not be rejected if he chooses not to fill out the form;
- (3) filling out the form is totally voluntary; and
- (4) the information will be kept confidential.

John has a bi-polar disorder. He takes his medication and keeps his condition under control. There is no reason that anyone would think John is on medication or has a medical condition. One day, John's employer asks all employees to fill out an affirmative action inquiry. John fills out the affirmative action inquiry. He answered that he has a mental disability, bi-polar disorder. Except for releasing the information to the EEOC, John's employer absolutely must lawfully keep John's medical information confidential, including keeping the information in a locked file cabinet, separate from other employee records.

## **12. Can an employer require an applicant to waive the right to confidential treatment of medical records at work?**

No. The law is unsettled whether an applicant (or employee) can voluntarily waive any of her ADA rights, including the right to confidential treatment of medical records. However, the EEOC has taken the position that if an applicant can waive (or give up) a right under the ADA, the waiver must be voluntary. This means that an employer cannot require an applicant to sign an authorization on a job application in which the applicant agrees to release medical records to the employer. Requiring a waiver as a condition of applying is not voluntary. Similarly, an employer cannot lawfully require an applicant to release *any and all records* because *any and all records* may include medical records. Also, the EEOC has taken the position that an employer cannot require an applicant to sign a release that would protect any third parties, such as former employers, from lawsuits against them for providing confidential medical or disability information to other interested employers.

Keep in mind that an employer can do a background check on applicants and require that applicants agree to the background check, but the background check cannot include requesting medical information about the applicant.

### **13. What is a violation of the confidentiality protections of the ADA?**

Any actual disclosure of medical information about an applicant, employee or former employee by an employer to a third party not mentioned in the exceptions in the answer to Question #4 is a violation of the confidentiality protections of the ADA. Although it has yet to be decided by a court, it is possible that if an employer does not have a system for maintaining confidentiality of medical information, that failure alone may be a violation of the ADA. For example, if the employer keeps confidential medical information about employees and applicants on its computers and there is access to that information by co-workers that *may* be enough to prove a violation.

Justin works as a customer service representative for a large internet company. He was required to undergo a medical examination before he started his job. During the medical examination, Justin disclosed to the doctor that he is HIV+. Upon learning of Justin's condition through the medical records, the employer immediately notified all of the supervisors in the building that Justin had HIV. This is a direct violation of the confidentiality required by the ADA. Justin's supervisors should not have been informed of the disease because Justin did not require any special accommodations.

### **14. Who can challenge a violation of the confidentiality protections of the ADA?**

In most ADA cases, a person bringing a lawsuit needs to prove that s/he is a qualified individual with a disability. A disability means a physical or mental impairment that substantially limits an individual in the ability to perform major life activities. However, for the ADA protections related to confidentiality of medical information from medical examinations and disability questions, a person does not need to prove that s/he is a qualified individual with a disability. Any applicant, employee, or past employee may challenge a violation of the confidentiality provisions of the ADA. (This is the rule that courts must follow in Arizona, but is not the rule applied by courts in all other states.)

Mitch worked as a dancer for a performance group for eight years. When Mitch was hired, he disclosed to his employer that he suffered from a learning disability and that he required more time to learn dance routines. One day, Mitch quit his job and decided that he wanted to go to work for another performance group. Mitch's employer was unhappy about the decision, so he called a friend who worked for the other performance group and told him about Mitch's learning disability. The employer has violated the ADA because this type of disclosure is not covered by the exceptions to the disclosure rule. And even though Mitch no longer works for his previous employer, the employer is still bound by the confidentiality requirements of the ADA.

**15. In addition to the ADA, do you have any other protections about confidential treatment of medical records other than the ADA?**

Yes. Arizona state law also requires health care providers to treat medical records as confidential records. In general, all medical records are confidential and can only be released if the patient agrees in writing for the medical records to be released. This means that your employer cannot lawfully have access to your medical records unless you sign a written release of information to your medical provider and ask for your records to be sent to your employer. If your medical records are disclosed without your written authorization, you may have a legal claim against your health care provider and may be able to file a complaint with the appropriate licensing board. For more information about complaints with licensing boards, you should call the board that licenses that health care provider. For more information about whether your rights have been violated by a health care provider and any deadlines you have for bringing a claim, you should consult a private attorney. See Section D of this guide which provides information about finding an attorney.

**Drug Testing.** In Arizona, there is a law that relates to drug testing by employers. If an employer requires a drug test, the employer can only test for unlawful drugs or alcohol. Under Arizona law the employee has a right to see the results of his or her own test. Arizona law provides that the only people who have a right to see the results of the test are the applicant or employee, the employer and the lab or individual handling the drug test. If an employee thinks that he or she was wrongly fired because of a drug test and sues the employer, the test results are, however, admissible in the forum used, such as court, an arbitration or mediation.

Hannah works for DataCorp as a data processor. She has lupus. She takes several different medications to keep the lupus under control. DataCorp requires all employees to take a drug test once a year. Because of the medication Hannah must take, she is noted as having “failed” the drug test. The test failure which includes a questionnaire where she listed new medication is put in her personnel file. If DataCorp fires Hannah, DataCorp has broken the law. Why? First, DataCorp must keep Hannah’s drug results confidential. Second, Hannah’s boss must give her an opportunity to provide a lawful prescription. Third, DataCorp may not fire Hannah because she takes a lawfully prescribed medication that does not interfere with her ability to do her job. Even if DataCorp does not fire Hannah, but keeps her drug test results in her personnel file rather than in a medical file, DataCorp has violated the ADA’s confidentiality protections.

**HIV Information.** Release of confidential HIV information without an authorization specifying that the disclosure is permitted by the individual violates Arizona law. A person who has been subjected to the unauthorized release of confidential HIV information to others may have a private right of action and can file a lawsuit. Release of the information may also under some conditions result in a misdemeanor and create liability for civil fines. For more information about improper disclosure of HIV information, you should consult a private attorney.

**Mental Health Records.** All information and records obtained during evaluation, examination or treatment for voluntary or involuntary commitment of individuals are confidential records and are not public records. There are only limited exceptions when these records can be disclosed to others. One of those exceptions is when an individual gives his/her written consent for disclosure.

Anna is diagnosed with depression. Two years ago, she tried to kill herself. Now she takes medication and sees a therapist and feels like her depression is pretty much under control. She works for Super Shopper as a salesperson and now is seeking a promotion as an assistant manager. Super Shopper has no right to Anna’s mental health records because she has not asked for an accommodation and has not been on a leave of absence for mental health treatment. Super Shopper may ask Anna if she can perform the “essential functions” of assistant manager, but they may not ask if Anna has any mental health issues, or any history of hospitalization due to mental health problems.

## C. Sources of Additional Information about Privacy of Medical Records

[www.eeoc.gov](http://www.eeoc.gov)

EEOC's home page that contains guidance and law about ADA's confidentiality protections

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

Georgetown University  
Institute for Health Care  
Research and Policy

## D. Resources for Legal Services

### Lawyer Referral Service for Maricopa County

Maricopa County Bar Association

Phoenix, AZ

(602) 257-4434

<http://www.maricopabar.org>

Provides referrals to attorneys practicing in the area of your legal problem for a reduced rate for the initial consultation.

### Maricopa County Superior Court

Self Service Center

(602) 506-7353 (24-hour information line; follow prompts to Self Service Center)

<http://www.superiorcourt.maricopa.gov> (follow "Self Service Center" link)

Maintains a list of lawyers and mediators willing to advise self-represented individuals on a per-hour, non-retainer basis.

(3 locations)

1. Downtown Phoenix, AZ  
101 W. Jefferson, 1<sup>st</sup> Floor
2. Mesa, AZ  
222 E. Javelina Avenue, 1<sup>st</sup> Floor
3. Surprise, AZ  
14264 W. Tierra Buena Lane

**Lawyers Referral Service for Pima County**

Pima County Bar Association

Tucson, AZ

(520) 623-4625

[http://www.pimacountybar.org/public\\_resources.htm](http://www.pimacountybar.org/public_resources.htm)

Provides referrals to attorneys practicing in the area of your legal problem for a reduced rate for the initial consultation.

**Also available from the Center is an attorney referral list for Tucson and Phoenix and some surrounding communities. Please call and request an attorney referral list if you would like one.**

## Indigent Services

| Office                                                                     | Telephone Number                        |
|----------------------------------------------------------------------------|-----------------------------------------|
| <b>Southern Arizona Legal Aid (SALA) - Tucson Office<br/>Pima County</b>   | <b>(520) 623-9461 or (800) 248-6789</b> |
| <b>SALA – Bisbee Office<br/>Cochise, Graham, and Greenlee Counties</b>     | <b>(800) 231-7106</b>                   |
| <b>SALA – Casa Grande Office<br/>Pinal County</b>                          | <b>(520) 316-8076</b>                   |
| <b>SALA – Lakeside Office<br/>Gila, Navajo, and Apache Counties</b>        | <b>(928) 537-8383 or (800) 658-7958</b> |
| <b>SALA – Nogales Office<br/>Santa Cruz County</b>                         | <b>(520) 287-9441</b>                   |
| <b>Community Legal Services - Maricopa County Volunteer Lawyer Program</b> | <b>(602) 258-3434</b>                   |
| <b>Community Legal Services - Mesa Office</b>                              | <b>(480) 833-1442</b>                   |
| <b>Community Legal Services - Mohave County</b>                            | <b>(928) 681-1177 or (800) 255-9031</b> |
| <b>Community Legal Services – Prescott<br/>Yavapai County</b>              | <b>(928) 445-9240</b>                   |
| <b>Community Legal Services – Yuma<br/>Yuma and La Paz Counties</b>        | <b>(928) 782-7511</b>                   |
| <b>White Mountain Apache Legal Services – Whiteriver</b>                   | <b>(928) 338-4845 or (866) 312-2291</b> |
| <b>DNA People’s Legal Services - Flagstaff</b>                             | <b>(928) 774-0653</b>                   |
| <b>DNA People’s Legal Services - Tuba City</b>                             | <b>(928) 283-5265</b>                   |
| <b>DNA People’s Legal Services - Window Rock</b>                           | <b>(928) 871-4151</b>                   |