

PRE- EMPLOYMENT SCREENING CONSIDERATIONS AND THE ADA

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*This publication is taken from a more
extensive review of the topic entitled
"Employment Screening, Medical
Examination, Health Insurance and
the ADA," which is currently
available from your Regional
Disability and Business Technical
Assistance Center at 1-800-949-
4232, or from LRP Publications
(specify Product #31015.
SCREENING, 38 pp., \$16), PO Box
980, Horsham, PA 19044-0980,
phone 1-800-341-7874, Fax 1-215-
784-9639.*

**Program on Employment and Disability
New York State School of Industrial
and Labor Relations
CORNELL UNIVERSITY**

Will the ADA Change the Way in Which I Recruit New Employees?

The Americans With Disabilities Act is a federal statute that requires employers to focus on the ABILITIES of applicants rather than on their DISABILITIES.

The ADA protects persons who have a disability, who have a record of disability, who are perceived as having a disability (whether they do or not), or have a relationship or association with persons who have a disability.

The following areas of your recruitment and selection process could be affected:

- Advertising
- Applications
- Descriptions
- Interviews
- Testing
- Medical Exams

The recruitment process begins with letting people know that a job is available. Because of the way in which the job is advertised, persons with disabilities may never have an opportunity to know about the job.

How Can I Make Sure That Persons with Disabilities Know About the Job?

Post or advertise the information in locations that are accessible to persons with mobility impairments.

Large print on job notices posted at worksites or in employment offices may help a visually handicapped person to be aware of the job.

A job advertisement containing a phone number (whether or not an address is also given), should be made accessible to persons with hearing impairments by providing a TDD number (telecommunications device for the deaf).

If the advertisement indicates that the applicant should apply in person, make sure that there is access for those with mobility impairments, such as handicapped parking spaces, ramps, and elevators if the interviews are not held on the first floor.

What Questions Can I Ask on My Job Application?

The job application is a pre-employment inquiry under the Act. Its purpose is to gather information on the skills, abilities, training, credentials, and references of the applicant. It also serves to identify where an applicant can be reached. It cannot be used to elicit information about whether an applicant is an individual with a disability or as to the nature or severity of such disability.

Questions seeking information on the applicant's prior or current illnesses, medication, medical treatment, substance abuse, disabilities, injuries, or Workers' Compensation claims are prohibited, as are all inquiries into the applicant's family medical problems.

Also prohibited are questions so closely related to a disability that the individual's response is likely to elicit information about a disability.

Will I Have to Change My Job Descriptions?

Under the ADA, a person is considered a qualified individual with a disability if s/he can perform the essential functions of the job with or without reasonable accommodation.

Although the ADA does not require an employer to have job descriptions, they can be used as evidence of the essential functions of the job. Be sure that your descriptions are up-to-date and that they differentiate between the essential and the marginal job duties. Non-essential functions are those which are not absolutely necessary for the job, although they might be convenient for the employer.

Pre-Employment Screening Considerations

How Should I Interview Job Applicants?

The purpose of the interview is to investigate the ability, education, skill, work experience, licenses or certifications of the applicant which are necessary to do the job.

Questions about whether an applicant is an individual with a disability, or as to the nature or severity of such disability, are prohibited.

The best technique is to describe the job in detail so that the applicant has a reasonable understanding of what is expected, and ask the applicant whether s/he can perform the job functions with or without reasonable accommodation. An employer can also ask applicants to describe or demonstrate how, with or without reasonable accommodation, they will be able to perform the job functions, as long as all applicants in the job category are asked to do this.

Interviews must be held in an accessible place. Is there an entry which can be used by those with mobility problems? Is parking available near the entry? Are ramps and/or elevators available?

If I Can See That the Applicant has a Disability, Can I Mention It?

If you reasonably believe that an applicant will not be able to perform a job function because of a known disability, you may ask that particular applicant to describe or demonstrate how s/he would perform the function. When an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the job, either because the applicant has an obvious disability or because of voluntary disclosures by the applicant, the employer may ask whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job.

Does the ADA Prohibit Job Testing?

No. The ADA requires only that tests which screen out persons with disabilities be job related and consistent with business necessity. However, tests which measure aptitude, physical agility, intelligence and specific skills are not considered to be "medical examinations," under the ADA and are not subject to the additional special rules which govern medical examinations.

Make sure that any tests you do use are designed to test the essential functions of the job, and that they are accurate predictors of successful performance on the job. If the tests you use screen out persons with disabilities, they must be job related and consistent with business necessity.

Does the "Reasonable Accommodation" Standard Apply to Job Testing?

Employers have an obligation to provide persons with disabilities reasonable accommodation to enable them to take the test. The place where the tests are held must be accessible. Persons with disabilities must be given reasonable accommodation to enable them to take the test.

For example, a person with dyslexia should be given an opportunity to take an oral test instead of a written test unless the ability to read is the skill the written test is designed to measure. Persons with disabilities might need a longer time to complete the test. If the job does not require hearing, but the test does, you should have a sign language interpreter or other appropriate accommodation for a deaf applicant. This does not mean that you have to employ a sign language interpreter at all times. Your job advertisement can indicate that applicants requiring reasonable accommodation notify you in advance so that you can make the appropriate arrangements.

Applicants should not be disqualified from a job they have the ability to perform because a disability prevents them from taking the test as it is presented. When the employer's failure to make reasonable accommodation negatively affects test results, persons who really are qualified can be excluded. This is what the ADA was designed to prohibit.

Remember, you are testing the applicant's ability to perform the job, you are not testing the applicant's ability to take a test.

Test results cannot be used to exclude an individual with a disability unless: (1) the tested skill is necessary to perform an essential function of the position and (2) there is no reasonable accommodation that can be made available to enable the individual to perform that essential function or (3) providing the necessary accommodation would cause undue hardship.

Are There Special Rules for Medical Examinations?

Yes. MEDICAL EXAMINATIONS ARE PROHIBITED UNTIL AFTER YOU HAVE MADE A JOB OFFER TO THE APPLICANT. There are no exceptions.

Employment can be conditioned on the results of an applicant's post-offer medical examination.

NOTE: if you require medical examinations, you must require medical examinations of all entering employees, or all entering employees in the same job category for a certain position. You cannot give an examination to some and not to others.

Can I Disclose Information Gathered on a Medical Examination?

All medical information, without exception, about applicants or employees **MUST BE KEPT CONFIDENTIAL.**

Pre-Employment Screening Considerations

Keeping medical information confidential means keeping it in a separate medical file, not in the applicant's or employee's personnel folder.

Can I Share the Medical Information with Anyone?

Medical information about applicants or employees may be shared with supervisors if the applicant is hired and requires accommodation such as modification of job duties or restriction of hours. It may be shared with safety or first aid personnel if the condition is one which might require emergency medical treatment. Medical information must be shared with government officials investigating compliance with the ADA. Since the ADA does not preempt state Workers' Compensation laws, the employer is free to submit information to those offices or to second injury funds without violating the ADA. Employers may also use the information for insurance purposes when it is necessary to administer a health insurance plan.

Is Drug Testing Prohibited?

The ADA neither requires nor prohibits drug testing. Testing for illegal use of drugs is NOT considered to be a "medical examination., You may test applicants prior to making an offer of employment. It is best to test all applicants (or all applicants for a certain position) and not just those who "look., as if they take drugs. The ADA protects those who are "perceived., as having a disability, as well as those who actually have one.

Drug testing does not have to be related either to job duties or business necessity. If you do test for drugs be sure that the procedures you use conform to applicable federal, state and local law. The ADA considers that a positive drug test is indicative of current drug use. An individual currently engaging in the illegal use of drugs is not a protected individual under the ADA

when the employer acts on the basis of such use.

Are Physical Agility Tests Considered to be "Medical Examinations"?

No. Physical agility tests, in which an applicant demonstrates the ability to perform actual or simulated job tasks, are not medical examinations under the ADA. Thus, they can be given before an offer of employment is made. Note, however, that these tests are still subject to other parts of the ADA. Thus, if a test screens out an applicant on the basis of disability, the employer must be prepared to demonstrate that the test is job related and consistent with business necessity. Requiring employees to continue to meet physical criteria established for the job can help in making this showing.

What About Safety Concerns?

The ADA does not compel an employer to hire a person who would be a direct threat to his or her own health or safety, or to the health and safety of others at the worksite.

Before you decide not to hire someone because you think s/he poses a direct threat, you must first determine that the individual poses a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. This determination must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The specific risk posed by the individual should be identified. The determination of whether an individual poses a direct threat should be based on the following factors:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and

4. the imminence of the potential harm.

Your assessment of a direct threat to health or safety must be based upon a reasonable judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Resources

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

Equal Employment Opportunity Commission, 1801 L Street, NW, Washington, DC 20507, Technical Assistance - (800) 669-4000 (Voice) (800) 669-6820 (TTY) Publications - (800) 669-EEOC (Voice) (800) 800-3302 (TTY).

For Further Information Contact:

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

Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, you should be aware that NIDRR is not responsible for enforcement of the ADA. The information, material, and/or technical assistance is intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

In addition to serving as a National Materials Development Project on the Employment Provisions of the Americans with Disabilities Act of 1990, *the Program on Employment and Disability* also serves as the training division of the Northeast Disability and Business Technical Assistance center. This publication is one of a series edited by Susanne M. Bruyere, Ph.D., C.R.C., Director of the ILR Program on Employment and Disability at Cornell University.

OTHER TITLES IN THIS *IMPLEMENTING THE ADA* SERIES ARE:

A Human Resource Perspective on Implementing the ADA
Pre-Employment Screening Considerations and the ADA
Pre-Employment Testing and the ADA
Reasonable Accommodations Under the ADA
Health Benefit Plans and the ADA
The ADA and Injured Workers
The ADA and Collective Bargaining Issues
The ADA and Personnel Training
The ADA and Total Quality Management
Cultural Diversity and the ADA

These and other informational brochures can be accessed on the World Wide Web at:

www.ilr.cornell.edu/ped/ada

For further information about publications such as these, contact the ILR Program on Employment and Disability, Cornell University, 102 ILR Extension Division, Ithaca, NY 14853-3901; or at 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

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