



The American with Disabilities Act and the Search Process

The Americans with Disabilities Act (ADA) of 1990 was signed into law on July 26, 1990 and amended through the ADA Amendments Act of 2008 (ADAA). The Act gives civil rights protection to individuals with disabilities similar to those rights provided to individuals on the basis of race, color, religion, national origin and sex (Civil Rights Act of 1964). To be protected under the ADA, an employee or an applicant for employment must meet the definition of the term "disability," as stated in the law.

Under the ADA, an individual with a disability is a person who has:

- (1) a physical or mental impairment that substantially limits one or more major life activities;
- (2) a record of such an impairment; or
- (3) is regarded as having such an impairment.

The ADA makes it unlawful to discriminate in all employment practices such as: recruitment, hiring, promotion, training, lay-off, pay, firing, job assignments, leave, benefits, and all other employment related activities. Search committee members and search chairpersons must not discriminate against applicants with disabilities during the advertising, interviewing and hiring processes. The law prohibits using qualification standards, employment tests or other selection criteria that screen out an individual with a disability unless the qualification standard, test or other criteria, is shown to be job-related for the position.

Advertisements

Position advertisements are required to include a list of the position's "essential functions." As stated in the Equal Employment Opportunity Commission's rules and regulations (29 CFR, Part 1630, Equal Employment Opportunity for Individuals with Disabilities; Final Rule), the determination of which functions are essential can be critical to the determination of whether or not the individual with a disability is qualified.

A job's essential functions are those functions that must be performed by an individual unaided or with a reasonable accommodation. A job function may be determined as "essential" when one or more of the following apply:

- (1) The position exists primarily to perform the function(s) and the absence of the function(s) would alter the job;
- (2) The number of other employees among whom the performance of the job function(s) can be distributed is limited;
- (3) The function(s) requires a highly specialized skill, expertise or ability to perform the function(s).^{21 2.}

Secondary position functions may also be listed in the advertisement; however, selection criteria (minimum qualifications) must be based on the requirements needed to perform the essential functions.

Pre-employment Testing

Under the ADA, employers may use pre-employment tests as selection criteria. The tests must be administered to all applicants seeking similar employment. If the tests tend to screen out applicants with disabilities, the employer must demonstrate that the test is job related and consistent with business necessity.

The Office of Human Resources discontinued the administration of mandatory typing tests for all clerical positions effective October 1, 2008. Departments are discouraged from independently administering any pre-employment tests. Those departments desiring to administer pre-employment tests, i.e., computer software application, typing tests, etc., must seek prior approval in writing from Human Resources.

Interviewing

Pre-employment questions regarding the nature or severity of disabilities may not be asked during the interviews or throughout the search process. The following interviewing guidelines are adapted by permission from the authors of College and University Personnel Association ADA Compliance Manual for Higher Education; A Guide to Title I, 1992 (Chapter 6), and should be applied throughout the entire search process.

These are examples of questions that **CANNOT** be asked in interviews or during reference checks.

1. DO NOT ask questions about whether the individual has a current disability or a past disability.
2. DO NOT ask whether the individual has any serious illness (such as AIDS), back problems, a history of mental illness or any other physical or mental condition.
3. If the individual has a disability that is obvious to the interviewer (such as an applicant that is missing a limb or uses a wheelchair),
4. DO NOT inquire how the individual became disabled or the prognosis for the applicant.
5. DO NOT ask questions about the nature or severity of the applicant's disability.
6. DO NOT comment in any way on the individual's physical condition except as described below.
7. DO NOT ask whether the individual wears a hearing aid or needs to wear glasses while on the job.
8. DO NOT ask questions about the applicant's past-on-the-job injuries.
9. DO NOT ask about the applicant's medical problems by requesting the applicant to identify if he or she has or has ever suffered from a list of ailments, such as: diabetes, ulcers, back problems, heart conditions, hearing problems, hepatitis, arthritis, migraines, visual problems
10. DO NOT ask whether the applicant has ever been treated for any mental condition.
11. DO NOT ask applicants to list any conditions or diseases for which they have been treated in the past.
12. DO NOT ask whether the individual has ever been hospitalized and, if so, for what condition.
13. DO NOT ask whether the individual has ever been treated by a psychiatrist or psychologist and, if so, for what condition.
14. DO NOT ask whether applicants have had a major illness in prior years, or whether they have any current illnesses.
15. DO NOT ask whether the applicant has ever been treated for drug addiction or alcoholism.
16. DO NOT ask how many days the applicant was absent from work last year because of illness.
17. DO NOT ask whether applicants are taking or have been taking any prescribed drugs.
18. DO NOT ask whether the applicant has a sexually transmitted disease, such as the HIV virus.
19. DO NOT ask whether an applicant has ever requested and/or received assistance or assistive devices in performing past jobs.
20. DO NOT inquire about an applicant's past or current need for or receipt of medical or disability benefits.
21. DO NOT ask about an applicant's past drug use or alcohol use.
22. DO NOT ask any questions regarding whether an applicant is or ever has been a drug addict or an alcoholic.
23. DO NOT ask whether the individual has ever filed a workers' compensation claim.

24. DO NOT ask whether the individual has ever received an award of workers' compensation benefits.
25. DO NOT ask whether an individual has ever been found to be disabled.
26. DO NOT ask whether the individual has a spouse, children or other friends with disabilities.
27. DO NOT ask about problems the individual has had because of a disability.
28. DO NOT ask questions of applicants with disabilities that you do not ask of other applicants, except as described below.
29. DO NOT ask whether the individual has any disabilities or impairments that may affect performance in the position.
30. DO NOT ask whether the applicant has any physical defects that preclude the applicant from performing certain kinds of work, or ask the applicant to describe such defects or specific work limitations.

These are questions you may ask in interviews or during reference checks if they are asked of all persons applying for a particular category of job, regardless of disability.

1. YOU MAY ask whether the individual needs any reasonable accommodations or assistance during the hiring or interviewing process.
2. YOU MAY ask about the individual's ability to perform essential job functions.
3. YOU MAY give the individual a copy of the job description that identifies all essential functions and ask whether the individual is able to perform all of those essential functions with or without a reasonable accommodation. (ETSU Note: It is not however permissible to ask anything else that relates to reasonable accommodation except in situations described in "Final ADA Guidance on Interviews", see below)
4. YOU MAY describe the job and ask whether the individual can perform those functions.
5. YOU MAY ask about current use of illegal drugs or current alcohol use.
6. YOU MAY state the institution's standards and expectations and ask if the individual can meet those standards.
For example:
 - a. YOU MAY state the drug policy;
 - b. YOU MAY state the standards against on-the-job alcohol consumption;
 - c. YOU MAY state the smoking policy;
 - d. YOU MAY state the standards for attendance, including the availability or lack of availability of leave for newly hired employees;
7. YOU MAY state the expectations for a particular position.
8. YOU MAY ask questions about any of the qualifications that are required for the position, including: Education; Experience; Licenses; Training; Basic reading and writing skills; mathematical skills; and other minimum qualification standards determined to be defensible that do not expressly relate to physical or mental conditions.
9. YOU MAY ask about the individual's attendance at prior jobs, if the question is limited to days off or number of days late for any reason, and is not limited to days missed due to illness.
10. YOU MAY ask whether the individual has ever been involved in an accident on-the-job that injured co-workers or members of the public.
11. YOU MAY ask about an individual's accident record, especially accidents involving injury to property (such as traffic accident history for persons who will do driving) if you avoid questions about the individual's own injuries.
12. YOU MAY ask an individual how he or she could perform tasks, and with what accommodations, if the applicant indicates that he or she can perform the tasks with an accommodation.
13. YOU MAY ask an individual to voluntarily disclose whether he or she has a disability.

Questions You May Ask

1. If the individual has an obvious disability or another disability known to you that you believe may interfere with or prevent the individual from being able to perform the essential functions of the job:

a. YOU MAY ask the individual to explain or demonstrate how he or she can perform the essential functions of the job, with or without a reasonable accommodation.

b. If an applicant has a known or obvious disability that would not interfere with or prevent performance of the job, you CANNOT ask or require the applicant to demonstrate performance of a job function, unless all applicants for those positions are required to do so.

Inquiries You Must Make During the Hiring Process

If the individual indicates that he or she has a disability and may require a reasonable accommodation during the application and hiring process; or at the pre-offer stage, an otherwise qualified individual indicates that he or she may require a reasonable accommodation to perform essential job functions:

YOU MUST inquire about the types of accommodations the individual believes may be necessary.

YOU MUST make inquiries with the individual and, if necessary, with others, as to the nature and costs of the accommodations that may be necessary.

If the individual has an obvious disability or a disability known to you that you believe will interfere with the applicant's ability to complete the pre-employment procedures, including pre-employment testing,

YOU MUST raise that concern with the individual and inquire whether the individual will require any reasonable accommodation during the hiring process.

Final ADA Guidance on Interviews

Final guidance regarding pre-employment interviews was issued by the Equal Employment Opportunity Commission on October 10, 1995. Two preemployment questions may be asked by employers to applicants:

1. Will you need a reasonable accommodation to perform the functions of the job?
2. What type of accommodation will be needed?

Important: These two pre-employment questions may only be asked if the employer becomes aware of the possible need for an accommodation under one of the following circumstances:

1. The applicant enters the interview and has an obvious disability. Obvious disabilities are considered to be mobility, visual, hearing, speech and amputees.
2. The applicant voluntarily discloses during the interview that they have a hidden disability.
3. The applicant voluntarily discloses that he/she needs reasonable accommodation during the interviews.

Reasonable Accommodation

An applicant is considered a "qualified individual with a disability" if the applicant can perform the essential functions of the position with or without reasonable accommodation. An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

Standards for determining whether an accommodation to an otherwise qualified disabled applicant or employee is "reasonable" or imposes an "undue hardship" are adopted from the principles and considerations outlined in the College and University Personnel Association ADA Compliance Manual for Higher Education: A Guide to Title I, 1992 (Chapters 9 and 10).

For the accommodation to be "reasonable":

- a. It must be effective.
- b. It reduces barriers to employment related to the person's disability.
- c. It need not be the best accommodation available, as long as it is an effective accommodation.
- d. It is not primarily for personal use.
- e. An accommodation which exceeds ADA's requirements will not set an adverse precedent. It is made with respect to the known limitations of an otherwise qualified individual with a disability.

Some examples of "reasonable" accommodations:

- i. Reassigning a disabled employee to a vacant position.
- ii. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.
- iii. Allowing part-time or modified work schedules.
- iv. Acquiring or modifying equipment or service.

For the accommodation to impose an "undue hardship":

- i. The cost of providing the accommodation would have a significant impact on the financial resources of the institution.
- ii. The accommodation would fundamentally alter the way the job is performed and have a detrimental effect on the operation of the university in that it would substantially disrupt the provision of services.
- iii. The cost of providing the accommodation would jeopardize the institution's ability to continue to provide essential services and academic programs to students and employees.

Some examples of accommodation which would impose an "undue hardship" to the university:

- i. Providing the accommodation would render an economic blow resulting in the layoff of other employees.
- ii. ii. Providing the accommodation would result in the closure of essential academic programs or services for students and employees.
- iii. iii. Providing the accommodation would necessitate reallocating essential functions of the position to other employees.

The following steps will be taken to ensure adequate documentation of any decisions regarding refusal to hire or promote due to undue hardship:

- 1) The supervisor will submit through supervisory channels to the Office of Human Resources a detailed statement of justification for the decision regarding refusal to hire or promote due to undue hardship. It will include, as a minimum, the following information:
 - a. Job description (including essential functions of the position).
 - b. Description of the disability.
 - c. Type of accommodation requested by the employee/applicant.
- 2) Estimated cost of the requested accommodation.
- 3) Description of any non-cost effects of the requested accommodation.
- 4) Justification of why the accommodation should not be provided.

- 5) Impact on financial resources, programs, and services if the requested accommodation is provided.
- 6) Alternative accommodation proposed, if any, and whether it would be effective.
- 7) The Office of Human Resources will review justification and consult with the supervisor, the
- 8) Affirmative Action Officer, the employee/applicant, and other university officials as appropriate.
- 9) A written recommendation on the supervisor's request will be submitted to the Chief Operating Officer and/or the President, as appropriate, for final decision.