

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations

Introduction

Under the Americans with Disabilities Act of 1990 (the "ADA"),¹ an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. This Enforcement Guidance explains these ADA provisions.²

Background

In the past, some employment applications and interviews requested information about an applicant's physical and/or mental condition. This information was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated.

For example, applicants may have been asked about their medical conditions at the same time that they were engaging in other parts of the application process, such as completing a written job application or having references checked. If an applicant was then rejected, s/he did not necessarily know whether s/he was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.

As a result, Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.

The Statutory and Regulatory Framework

Under the law, an employer may not ask disability-related questions and may not conduct medical examinations until *after* it makes a conditional job offer to the

¹ Codified as amended at 42 U.S.C. §§ 12101-17, 12201-13 (Supp. V 1994).

² The analysis in this guidance also applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 791(g) (West Supp. 1994). In addition, the analysis applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C.A. §§ 793(d), 794(d) (West Supp. 1994).

applicant.³ This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may not ask disability-related questions or require a medical examination, *even if* the employer intends to shield itself from the answers to the questions or the results of the examination until the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they *may* do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

- Employers *may* ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.
- Employers *may* ask about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses.
- Employers *may* ask applicants to describe or demonstrate how they would perform job tasks.

Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. If the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination.

If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity."⁴

In addition, if the individual is screened out for safety reasons, the employer must

³ 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a),(b).

⁴ 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10.

demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.⁵

⁵ 42 U.S.C. § 12113(b); See 29 C.F.R. pt. 1630 app. § 1630.2(r).

The Pre-Offer Stage

What is a Disability-Related Question?

Definition: "Disability-Related Question" means a question that is *likely to elicit* information about a disability.

At the pre-offer stage, an employer cannot ask questions that are *likely to elicit* information about a disability. Of course, this includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are *closely related* to disability.

On the other hand, if there are many possible answers to a question and only one of those possible answers would contain disability-related information, that question is not "disability-related."⁶

Below are some commonly asked questions about this area of the law.

- **May an employer ask whether an applicant can perform the job ?**

Yes, an employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."

- **May an employer ask applicants to describe or demonstrate how they would perform the job (including any needed reasonable accommodations)?**

Yes, an employer may ask applicants to describe how they would perform any or all job functions, as long as all applicants in the job category are asked to do this.

Employers should remember that, if an applicant says that s/he will need a reasonable accommodation to do a job demonstration, the employer must either:

⁶ Sometimes, applicants disclose disability-related information in responding to an otherwise lawful pre-offer question. Although the employer has not asked an unlawful question, it still cannot refuse to hire an applicant based on disability unless the reason is "job-related and consistent with business necessity."

- provide a reasonable accommodation that does not create an undue hardship; or

- allow the applicant to simply describe how s/he would perform the job function.

- **May an employer ask a particular applicant to describe or demonstrate how s/he would perform the job** , if other applicants aren't asked to do this?

When an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. An applicant's disability would be a "known disability" either because it is obvious (for example, the applicant uses a wheelchair), or because the applicant has voluntarily disclosed that s/he has a hidden disability.

- **May an employer ask applicants whether they will need reasonable accommodation for the hiring process ?**

Yes, an employer may tell applicants what the hiring process involves (for example, an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

- **May an employer ask an applicant for documentation of his/her disability when the applicant requests reasonable accommodation for the hiring process?**

Yes, if the need for accommodation is not obvious, an employer may ask an applicant for *reasonable* documentation about his/her disability if the applicant requests reasonable accommodation for the hiring process (such as a request for the employer to reformat an examination, or a request for an accommodation in connection with a job demonstration). The employer is entitled to know that the applicant has a covered disability and that s/he needs an accommodation.

So, the applicant may be required to provide documentation from an appropriate professional, such as a doctor or a rehabilitation counsellor, concerning the applicant's disability and functional limitations.

- **May an employer ask applicants whether they will need reasonable accommodation for the job itself?**

In general, an employer may not ask isolated questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have disabilities will need reasonable accommodations).

Example: An employment application may not ask, "Do you need reasonable accommodation to perform this job?"

Example: An employment application may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

Example: An applicant, with no known disability, is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need reasonable accommodation to perform this job?"

However, when an employer could reasonably believe that an applicant will need reasonable accommodation to perform job functions, the employer may ask that applicant whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed.⁷ For example, the employer could ask these questions if:

- the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability;
- the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer;
- an applicant has voluntarily disclosed to the employer that s/he

⁷ It should be remembered that sometimes, an employer might lawfully ask questions about the need for reasonable accommodation on the job, and then fail to extend a job offer. It is possible that, in such a case, the rejected applicant might claim that the refusal to hire was based on the need for accommodation. Under these facts, the EEOC will consider the employer's pre-offer questions as evidence that the employer *knew* about the need for reasonable accommodation, and will carefully scrutinize whether the need to provide accommodation was the reason for rejecting the applicant.

needs reasonable accommodation to perform the job; or

- an applicant has otherwise disclosed information as part of the application process that would lead the employer to reasonably believe the applicant will need reasonable accommodation to perform the job.

Example: An applicant with diabetes voluntarily discloses that she will need periodic breaks to take medication. The employer may ask the applicant questions about the reasonable accommodation, such as how often s/he will need breaks, and how long the breaks must be.

- **May an employer ask whether an applicant can meet the employer's attendance requirements ?**

Yes, an employer may state its attendance requirements and ask whether an applicant can meet them. An employer also may ask about an applicant's prior attendance record (for example, how many days the applicant was absent from his/her last job). These questions are not likely to elicit information about a disability because there may be many reasons unrelated to disability why someone cannot meet attendance requirements or was frequently absent from a previous job (for example, an applicant may have day-care problems).

An employer also may ask questions designed to detect whether an applicant abused his/her leave because these questions are not likely to elicit information about a disability.

Example: An employer may ask an applicant, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?"

However, at the pre-offer stage, an employer may not ask how many days an applicant was *sick*, because these questions relate directly to the *severity of an individual's impairments*. Therefore, these questions are likely to elicit information about a disability.

- **May an employer ask applicants about their certifications and licenses ?**

Yes, an employer may ask an applicant at the pre-offer stage whether s/he has certifications or licenses required for any job duties. An employer also

may ask an applicant whether s/he intends to get a particular job-related certification or license, or why s/he does not have the certification or license. These questions are not likely to elicit information about an applicant's disability because there may be a number of reasons unrelated to disability why someone does not have -- or does not intend to get -- a certification/license.

- **May an employer ask applicants about their arrest or conviction records ?**

Yes, questions about an applicant's arrest or conviction records are not likely to elicit information about disability because there are many reasons unrelated to disability why someone may have an arrest/conviction record.⁸

- **May an employer ask questions about an applicant's impairments ?**

That depends on whether the particular question is likely to elicit information about whether the applicant has a disability. It is important to remember that not all impairments will be disabilities; an impairment is a disability *only* if it substantially limits a major life activity. So, an employer may certainly ask an applicant with a broken leg how she broke her leg. This is not likely to disclose whether the applicant has a disability. But, it *would* be disability-related if the employer asked questions about the prognosis of the leg, such as "How extensive was the break?" or "Do you expect the leg to heal normally?" Certainly, an employer may not ask a broad question about impairments that is likely to elicit information about disability, such as, "What impairments do you have?"

⁸ However, investigators should be aware that Title VII of the Civil Rights Act of 1964, as amended, applies to such questions and that nothing in this Enforcement Guidance relieves an employer of its obligations to comply with Title VII. The Commission has previously provided guidance for investigators to follow concerning an employer's use of arrest/conviction records. See Policy Guidance No. N-915-061 (9/7/90) ("Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)"); EEOC Compliance Manual, Vol. II, Appendices 604-A ("Conviction Records") and 604-B ("Conviction Records - Statistics").

- May an employer ask **whether applicants can perform major life activities**, such as standing, lifting, walking, etc.?

Most of the time, questions about whether an applicant can perform major life activities *are* disability-related because they are likely to elicit information about a disability. For example, if an applicant cannot stand or walk, it is likely to be a result of a disability. So, these questions are prohibited at the pre-offer stage *unless* they are specifically about the ability to perform job functions.

- May an employer ask applicants about their **workers' compensation history**?

No, an employer may not ask applicants about job-related injuries or workers' compensation history. These questions relate directly to the *severity of an applicant's impairments*. Therefore, these questions are likely to elicit information about disability.

- May an employer ask applicants about their **current illegal drug use**?

Yes, an employer may ask applicants about current illegal drug use⁹ because an individual who currently illegally uses drugs is not protected under the ADA (when the employer acts on the basis of the drug use).¹⁰

- May an employer ask applicants about their **lawful drug use**?

That depends on whether the particular question is likely to elicit information about disability. Employers should know that many questions about current or prior lawful drug use *are* likely to elicit information about a disability, and are therefore impermissible at the pre-offer stage. For example, questions like, "What medications are you currently taking?" or "Have you ever taken AZT?" certainly elicit information about whether an applicant has a disability.

However, some innocuous questions about lawful drug use are not likely to elicit information about disability.

⁹ "Drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812). 29 C.F.R. § 1630.3(a)(1).

¹⁰ 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

Example: During her interview, an applicant volunteers to the interviewer that she is coughing and wheezing because her allergies are acting up as a result of pollen in the air. The interviewer, who also has allergies, tells the applicant that he finds "Lemebreathe" (an over-the-counter antihistamine) to be effective, and asks the applicant if she has tried it. There are many reasons why someone might have tried "Lemebreathe" which have nothing to do with disability. Therefore, this question is not likely to elicit information about a disability.

- May an employer ask applicants about their **lawful drug use** if the employer is administering a test for illegal use of drugs?

Yes, *if* an applicant tests positive for illegal drug use. In that case, the employer may validate the test results by asking about lawful drug use or possible explanations for the positive result other than the illegal use of drugs.

Example: If an applicant tests positive for use of a controlled substance, the employer may lawfully ask questions such as, "What medications have you taken that might have resulted in this positive test result? Are you taking this medication under a lawful prescription?"

- May an employer ask applicants about their **prior illegal drug use**?

That depends on whether the particular question is likely to elicit information about a disability. It is important to remember that past illegal drug *addiction* is a covered disability under the ADA (as long as the person is not a current illegal drug user), but past *casual* use is not a covered disability. Therefore, whether the question is likely to elicit information about a disability depends on whether it goes to past drug *addiction*.

Example: An employer may ask, "Have you ever used illegal drugs?" "When is the last time you used illegal drugs?" or "Have you used illegal drugs in the last six months?" These questions are not likely to tell the employer anything about whether the applicant was addicted to drugs.

However, questions that ask how much the applicant used drugs in the past *are* likely to elicit information about whether the applicant was a past drug addict. These questions are therefore impermissible at the pre-offer stage.

Example: At the pre-offer stage, an employer may not ask an applicant

questions such as, "How often did you use illegal drugs in the past?" "Have you ever been addicted to drugs?" "Have you ever been treated for drug addiction?" or "Have you ever been treated for drug abuse?"

- May an employer ask applicants about their **drinking habits** ?

That depends on whether the particular question is likely to elicit information about alcoholism, which is a disability. An employer may certainly ask an applicant whether s/he drinks alcohol because that does not reveal whether someone has alcoholism. However, questions asking *how much* alcohol an applicant drinks *are* likely to elicit information about whether the applicant has alcoholism.

- May an employer ask applicants to "**self-identify**" as individuals with disabilities for purposes of the **employer's affirmative action program** ?

Yes, under certain circumstances. An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program *if*:

- the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); *or*

- the employer is *voluntarily* using the information to benefit individuals with disabilities.

Employers should remember that state or local laws sometimes permit or encourage affirmative action. In those cases, an employer may invite voluntary self-identification *only* if the employer uses the information to benefit individuals with disabilities.

- Are there any **special steps an employer should take** if it asks applicants to "**self-identify**" for purposes of the **employer's affirmative action program** ?

Yes. If the employer invites applicants to voluntarily self-identify in connection with providing affirmative action, the employer *must* do the following:

- state clearly on any written questionnaire, or state clearly orally (if no written questionnaire is used), that the information requested is used solely in connection with its affirmative action obligations or efforts; and
- state clearly that the information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separate from the application.

●**May an employer ask **third parties questions it could not ask the applicant directly?****

No. An employer may not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any questions that it could not directly ask the applicant.

What is a Medical Examination?

Definition: A "Medical Examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

At the pre-offer stage, an employer cannot require examinations that seek information about physical or mental impairments or health. It is not always easy to determine whether something is a *medical* examination. The following factors are helpful in determining whether a procedure or test is *medical*:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?
- Is the employer trying to determine the applicant's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure an applicant's performance of a task, *or* does it measure the applicant's physiological responses to performing the task?
- Is it normally given in a medical setting (for example, a health care professional's office)?
- Is medical equipment used?

In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a *medical* examination. In some cases, one factor may be enough to determine that a procedure or test is medical.

Example: An employer requires applicants to lift a thirty pound box and carry it twenty feet. This is not a medical examination; it is just a test of whether the applicant can perform this task. But, if the employer takes the applicant's blood pressure or heart rate after the lifting and carrying, the test *would* be a medical examination because it is measuring the applicant's physiological response to lifting and carrying, as opposed to the applicant's

