

# Americans with Disabilities Act

## Disability Inquiries

### *To Ask or Not to Ask*

#### Title I – Employment with Emphasis on Inquiries Concerning Reasonable Accommodation

*Presented by the Southwest ADA Center*

*New Mexico ADA Coordinator's Council Sept. 2016*



**PRESENTER:**

Julie Ballinger,  
Southwest ADA Center Regional Affiliate  
505.797.8612 / [julieb4@flash.net](mailto:julieb4@flash.net)

The information herein is intended solely as informal guidance and is neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.



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A Program of TIRR Memorial Hermann  
1-800-949-4232



- **The Southwest ADA Center is the Leading Resource On**
  - ADA & ADAAA
  - Other disability related laws such as IDEA
- **Serves a wide range of audiences** including
  - employers
  - businesses
  - government agencies
  - WIA Workforce System
  - schools
  - people with disabilities
- **Expert staff** are available to provide **training, publications** and respond to your **inquiries**.
- Hot Line: 1-800-949-4232
- Web Site: [www.southwestADA.org](http://www.southwestADA.org)
- Check out the Archived **Webinars** and **Podcasts**!





# QUESTIONS? Ask Anytime



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# Training Overview

- Covered Entities
- Who Is Protected? – ADA Amendments Act
- Disability Inquiries - During Employment
- Disability Inquiries - Application (Pre Offer)
- Disability Inquiries - Post-Offer / Pre-Employ (Brief Overview)
- Resources

**Note:** Not covering medical examinations

## **Not about getting through the whole PowerPoint**

- Is designed to have extensive info for future reference



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# The ADA

“This Act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so hard: independence, freedom of choice, control of their lives, and the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”

*President George Bush at the Signing  
of the American with Disabilities Act of 1990*



# Public vs. Private Employer

- Private Employers = ADA Title I
  - 15 or more employees (also check your state/city law)
- Government Employers = ADA & Rehab Act Sec. 504
  - Covered regardless of number of employees
  - Obligations under 504 are essentially the same as the ADA:
    - require formalized documentation of compliance efforts
    - appointment of a 504/ADA Coordinator
    - establishment of grievance procedures to address disability-related complaints, including those of employees
    - Widely publicize the grievance procedures throughout the institution
- Also covered
  - Employment agencies
  - labor organizations
  - joint labor management committees



# Definition of Disability - ADA Amendments Act

Signed September 25, 2008 / Enacted January 1, 2009

Regulations Published March 11, 2011 / Regulations Effective May 24, 2011

**Negates US Supreme Court Rulings that narrowed the definition of disability**

The ADAAA retains without amendment the existing definition of the term “disability” **but** clarifies the key words and phrases in the definition.

**The term “disability” means, with respect to an individual**

↗ **who has a physical or mental impairment that *substantially limits* one or more major life activities; or**

↗ **has a record of such an impairment; or**

↗ **is regarded as having such an impairment-even if he or she does not, in fact, have such an impairment (actual or perceived)**

↗ **Also covered** are individuals who are discriminated against due to their association with a person with a disability.



# Actual Disability

- The definition of disability = broader coverage & major life activities now includes bodily functions.
- “Substantially limits” to be interpreted consistently with the ADAAA (rejects “prevent or severely restrict” = too demanding)
- Substantially limits = only one major life activity has to be limited
- Episodic or in-remission impairment covered if substantially limits a major life activity when active
- Eliminates ‘mitigating measures’ test
  - Only mitigating measures that can be considered = ordinary eyeglasses or contact lenses = fully correct visual acuity or refractive error
    - No discrimination on the basis of uncorrected vision in determining qualification standards/selection criteria -- unless job related & consistent with business necessity.
- Individuals who are otherwise qualified and **can prove discrimination** are entitled to relief.





# 3 Employment Stages

## Disability Inquiries

1. Application (Pre Offer)
2. Post-Offer / Pre-Employment
3. During Employment

## Confidentiality Requirements

Disability/medical info separate from personnel file



# Important Technical Assistance Guidance

from EEOC that I will be referencing

- **Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act**  
[www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html)
- **Pre-employment Disability-Related Questions and Medical Examinations**  
[www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html)
- **Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act**  
[www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)
- **The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities**  
[www.eeoc.gov/facts/performance-conduct.html](http://www.eeoc.gov/facts/performance-conduct.html)



# Important Technical Assistance Guidance from EEOC that I will be referencing

- ***ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations***
  - [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html)
- ***EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act***
  - [www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)



# Disability Inquiries

## During Employment



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# Disability inquiries can be made when:

- It is **Job Related and Consistent with Business Necessity**
- An employer “has a **reasonable belief**, based on **objective evidence** that:
  - **1.** an employee’s **ability to perform** essential job functions will be impaired by a medical condition
  - **2.** an employee will pose a **direct threat** due to a medical condition



**In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries.**

**When an employer:**

- ✓ knows about a particular employee's medical condition (or is given **reliable information** by a credible third party), has observed **performance problems**, and reasonably can attribute the problems to the medical condition.
- ✓ observes symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a **direct threat**.



# Example

For the past two months, Sally, a tax auditor for a State agency, has done at least a third fewer audits than the other employees in her Division. She also has made numerous mistakes in her work. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.



# Based on Sally's explanation

- the agency has a reasonable belief that her ability to perform the essential functions of her job will be impaired because of a medical condition.
- Sally's supervisor may make disability-related inquiries such as asking about
  - taking a new medication
  - how long the medication's side effects are expected to last
  - providing documentation from her health care provider explaining the effects of the medication on Sally's ability to perform her job

**NOTE:** Remember, a **Reasonable Accommodation** may need to be provided, barring undue hardship, in order for Sally to do her job.





# Example

A crane operator works at construction sites hoisting concrete panels weighing several tons. During a break, the crane operator becomes light-headed, has to sit down abruptly, and has some difficulty catching his breath. When the supervisor asks if he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.



# The employer has a reasonable belief, based on objective evidence

- that the employee will pose a **direct threat** and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job.
- **NOTE:** Remember, **Reasonable Accommodations** should be explored to see if the direct threat, if it exists, can be lowered to a non-existent or acceptable level.



# Reasonable Accommodations (RA) and Disability Inquiries

- The employer is entitled to know that an employee has a covered disability that requires a reasonable accommodation
- When the **disability** or the **need for the accommodation is not known or obvious**
- Ask an employee for reasonable documentation about disability and its functional limitations as it relates to the reasonable accommodation



# RA Example

An employee requests a RA of having her office florescence lights replaced with lighting that is more natural because the florescence lighting gives her migraine headaches, especially when the lights flicker. This employee makes it clear that sun light would be the best solution, so she wants to be moved to an office with windows.



# Not obvious and how barrier will be removed

- Because this employee's disability (migraines) is not readily obvious, as well as how the requested RA is related to her disability, the employer may make disability-related inquiries and require the employee to provide, from her **appropriate** health care provider, disability documentation and how the RA request will remove the workplace barrier.



# What documentation may an employer require from an employee who requests RA?

An employer may require an employee to provide documentation that sufficiently substantiates:

- that an ADA disability **exists**
- the **need** for the reasonable accommodation

Do NOT ask for unrelated documentation!

An employer cannot ask for an employee's complete medical records because they are likely to contain **information unrelated** to the disability at issue and the need for accommodation.



# In other words - only want to know:

1. If the employee is protected under the ADA
2. When the manifestations or symptoms of the medical condition/disability come into contact with the job's essential function(s) WHAT barriers are created?
  - a. What is the duration of the impairment?
  - b. What **specific** disability symptoms are involved?
  - c. What essential functions are involved?
  - d. What are the particular barriers that are created?
  - e. What barrier removal (RA) solutions can be implemented?



## AVIOD wide scope questions such as:

- When the employee acquired the condition and how long s/he has had the condition.
- Detail explanations of the medical condition / documentation.
- Medical treatment details.
- Limitations concerning physical or psychological functions that are **not** relevant to the RA request.
- Personality or social issues that are **not** relevant to the RA request.
- Other medical issues that are **not** related to the specific workplace barrier removal (RA) need.





# Disability inquiries should be as narrow as possible!

An employer does NOT need to know medical information that is NOT relevant to the employment situation at hand.

Again, only need to know:

1. If the employee protected under the ADA
2. When the manifestations or symptoms of the medical condition/disability come into contact with the job's essential function(s) WHAT barriers are created?

An employer does not even necessarily have to know the medical condition / disability diagnosis label.



# Leave Inquiries

EEOC New Publication (covers all leave aspects)

*Employer-Provided Leave and the Americans with Disabilities Act*

[www.eeoc.gov/eeoc/publications/ada-leave.cfm](http://www.eeoc.gov/eeoc/publications/ada-leave.cfm)

NOTE: Can an employer request an employee to provide a **doctor's note or other explanation** to substantiate his/her use of sick leave?

- Yes. An employer is entitled to know why an employee is requesting sick leave and may ask an employee to justify use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so.
- Be careful of how detailed the information you request is.



# Employees applying for a new job with the same employer (e.g. State of NM = different State Agencies = 1 employer)

- An **employee** who **applies** for a **new job** with the **same employer** must be **treated** as an **applicant**.
- The employer is **prohibited** from asking **disability-related questions** before making the individual a conditional offer.
- The employee is **NOT** a “new” applicant where s/he is:
  - noncompetitively entitled to another position with the same employer.
  - temporarily assigned to another position and then returns to his/her regular job.



# Disability Inquiries

## Application / Interview Process



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# What can NOT be asked?

- Inquiries about disability on job applications
- Disability-related questions (and no medical examinations)
- Can't ask a third party questions that **can't** directly ask the applicant
- **Prohibited question** examples:
  - Have you ever had or been treated for any of the following conditions/diseases?
  - Have you ever been hospitalized?
  - Have you ever been treated by a psychiatrist?
  - Is there any health-related reason you may not be able to perform the job for which you are applying?
  - How many days were you absent from work because of illness last year?
  - Have you been treated for drug addiction or alcoholism?
  - Are you taking medications?
  - Have you ever filed for worker's comp?



# What can be asked?

- An applicant's **ability to perform** specific job functions (essential & marginal functions)
  - May ask whether applicants can perform any or all job functions, can include “with or with out reasonable accommodation”
    - Yes or No answer
    - As long as **all applicants** in the job category are asked this
  - Note: Cannot exclude from the job based on inability to do marginal functions due to disability
- About **non-medical qualifications and skills**
  - education, work history, past job performance, required certifications, other job related issues, etc.
- Can meet the job **attendance requirements**
  - Can ask about attendance record (but **not** about specific sick leave usage)



# What can be asked?

- If applicant has the **certifications or licenses** required
  - or why the applicant does not have the certifications or licenses or if it is intended to get the certifications or licenses
- **Arrest or conviction** records/history
  - See EEOC “Policy Guidance on the Consideration of Arrest Records in Employment Decision under Title VII of the Civil Rights Act”
- **Current illegal drug** use
- **Physical/mental function ONLY** if ability is specifically directly related to perform the job function(s)
  - Remember able to perform essential job functions with reasonable accommodation, if needed.



# What can be asked?

- **Describe or demonstrate** how to perform any or all job functions, as long as **all applicants** in the job category are asked to do this.
  - If demonstrate functions – must provide needed reasonable accommodations to do so (barring an undue hardship)
- What if an applicant needs a **RA during the application** process?
  - May ask for reasonable documentation of disability if the need is not obvious.





# Disability Inquiry Exceptions

- When an employer reasonably believes that an **applicant will not be able** to do the job (or parts of the job) because of a **known disability**
- May ask that **particular applicant** to describe or demonstrate how s/he would perform the function(s) with or without reasonable accommodations.
- “Known disability” is because it is **obvious** or the applicant has **voluntarily disclosed**.



# Disability Inquiry Exceptions:

## Reasonable Accommodations

- **Employer reasonably believes that an RA to perform essential functions will be needed**
- May ask if RA is needed and what type of RA
- May ask these questions if the employer reasonably believes:
  1. the applicant will need RA because of an obvious disability
  2. the applicant will need RA because of a hidden disability that the applicant has voluntarily disclosed

OR

3. An applicant has voluntarily disclosed that s/he needs RA to perform the job



# Example

- An employer may ask an applicant, who is a wheelchair user, who applies for a job as a Plumber to **explain or to demonstrate** how, with or without RA, she would be able to transport herself and her tools down the basement stairs in private homes and businesses.
  - **Can not ask** why she uses a wheelchair or about any underlying medical condition
- If the applicant says that she will need RA, the employer may ask questions about the type of required RA such as,  
“**What will you need?**”

**NOTE:** If the known disability of an applicant **will not interfere** with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category.



# Just Remember

- Asking **too many questions** at this point **can pose some risk** to the employer because it may lead to raising the inference that a job denial is due to the need to provide reasonable accommodation.
- If such questions have been asked, the job is denied, and an enforcement action is brought by the applicant , **the employer must show that the accommodation is, indeed, an undue hardship**
  - including showing that no cheaper or more easily-implemented RA is available, and there are no alternative sources of funding or articulate another legitimate reason for the denial.



# It Depends...

Will the particular question elicit information about disability?

- **Can ask about drinking habits?**

- May ask whether the applicant drinks alcohol because that does not reveal alcoholism
- But asking how much alcohol is likely to elicit disability information

- **Can ask about lawful drug use?**

- Innocuous questions about lawful drug use are not likely to elicit disability information
- But most questions like “What medications are you taking?” or Have you ever taken Anticonvulsants?” will elicit disability information.
- Testing for illegal use of drugs – if tested positive - then may ask about lawful drug use to explain the positive results



# It Depends...

Will the particular question elicit information about disability?

- **Can ask about prior illegal drug use?**
  - Past illegal drug addiction is an ADA disability
  - Past casual use is not ADA covered
- **Example:** Have you ever used illegal drugs? When is the last time you used? These questions are not likely to tell the employer anything about drug addiction.
- **Example:** How often did you use in the past? Have you ever been addicted to drugs? Have you ever been treated for drug addiction or abuse? These questions are likely to indicate past drug addiction.



# Affirmative Action Programs

- Can ask applicants to voluntarily “self-identify” as having a disability – **but only if**:
- Undertaking affirmative action because of a **federal, state, or local law** (including a veterans preference law) that requires Affirmative Action
- Employer is voluntarily using the information to **benefit** individual with disabilities



# Affirmative Action:

## Steps an Employer Must Take

- **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
- 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.**





# Disability Inquiries

## Post-Offer Pre-Employment Process



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# What can be asked?

- An employer **can ask disability-related questions** and do medical examinations.
- Can ask about
  - workers' comp history
  - Prior sick leave usage
  - Illnesses/diseases
  - General physical and mental health
  - Reasonable Accommodation needs
    - Can require med. documentation of disability if not obvious
- **Note:** Disability-related questions and medical examinations do NOT have to be related to the job. **BUT BE CAREFUL!!**
- All disability related info must be kept in a **separate file** from the regular personnel file



# Must follow certain procedures

- All entering employees in the same job category must be subjected to the same examination/inquiry
- Medical information obtained must be kept confidential
- After an employer has obtained basic medical information from all individuals who have been given a conditional offer in a job category, it may ask specific individuals for more medical info as long as these examinations are medically related to the initial medical exam finding.
- Medical information may be given to and used by appropriate decision-makers involved in the hiring process and to determine reasonable accommodation.



# Must keep medical information on applicants or employees confidential

## EXCEPTIONS

- **Supervisors and managers** may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- **First aid and safety personnel** may be told if the disability might require emergency treatment;
- **Government officials** investigating compliance with the ADA must be given relevant information when requested;
- May give information to **state workers' compensation** offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws;
- May use the information for **insurance** purposes.



# RESOURCES



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- **The Southwest ADA Center is the Leading Resource On**
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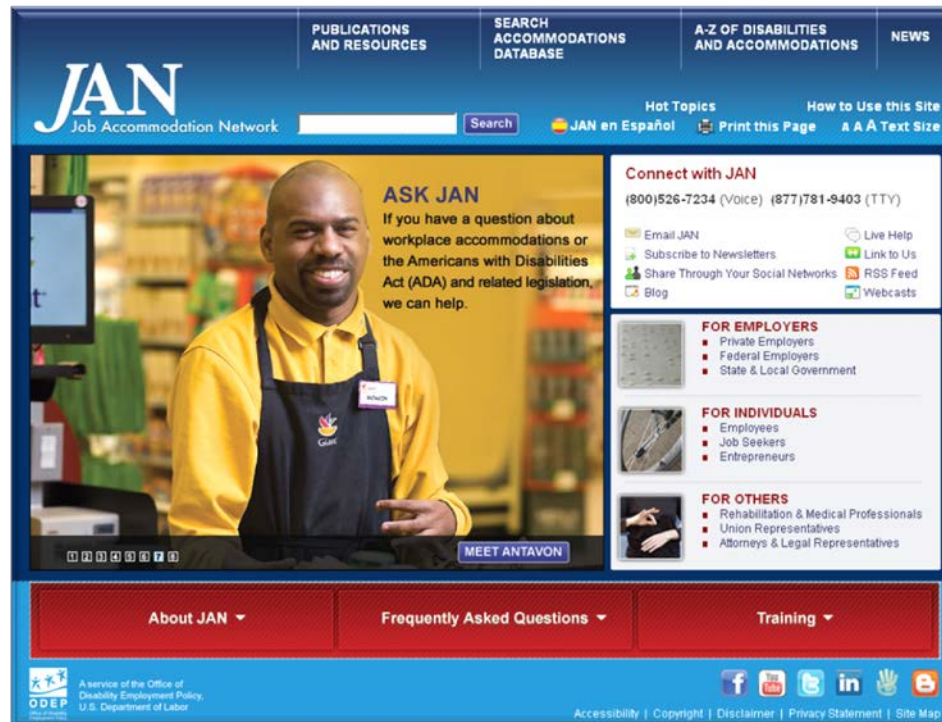


# Job Accommodation Network

800-526-7234 (V/TTY)

<http://askjan.org>

A free consulting service designed to increase the employability of people with disabilities



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# Cornell University Employment and Disability Institute (EDI)

- Since 1968, researchers and practitioners at the Cornell ILR School with expertise in disability have helped companies, labor organizations, government agencies, schools, and communities throughout the United States and abroad to accommodate and integrate individuals with disabilities.
- The EDI team consults with policy makers, disability advocates, and rehabilitation program professionals.
- EDI provides technical assistance, training, and research in the following topic areas:
  - [ADA, Accommodation & Accessible IT](#), [Community Inclusion](#), [Disability Benefits and Work](#), [Disability Employment Research](#), [Disability Statistics Research](#), [Educational Achievement & Transition](#), [International Disability Research](#), and [Workforce Development](#)
- <http://www.ilr.cornell.edu/edi/>
- 607-255-7727 (VOICE)
- 607-255-2891 (TDD)





# US Department of Labor's Office of Disability Employment Policy

- ODEP is an extensive and rich source on employment and disability.
- [www.dol.gov/odep](http://www.dol.gov/odep)
- 1-866-487-2365 (VOICE)
- 1-877-889-5627 (TDD)



# Equal Employment Opportunity Commission

- The EEOC provides access to Federal employment laws and regulations. The EEOC has publications on the Americans with Disabilities Act which include their policy guidance on various portions of the Act, fact sheets, Q&As, best practices, and other information.
- [www.eeoc.gov](http://www.eeoc.gov)
- [www.eeoc.gov/laws/types/disability.cfm](http://www.eeoc.gov/laws/types/disability.cfm)
- 1-800-669-6820 (TTD)



# ADA Case Law Database

- The ADA Case Law Database is a comprehensive search tool that provides information pertaining to significant rulings under the Employment (Title I), Local and State Government (Title II) and Places of Public Accommodations (Title III) provisions of the Americans with Disabilities Act (ADA).
- The database is a unique research tool specially designed to search by a variety of variables including but not limited to disability type, discrimination issue, jurisdiction and remedy.
- <http://www.adacaselaw.org/>

