

Medical and Disability-Related Inquiries

What Is Permissible Under the ADA?

By: Jonathan A. Wexler, Esq.

In July, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing the Americans with Disabilities Act (ADA), issued policy guidance on disability-related inquiries and medical examinations during the employment relationship.

This document and the EEOC's 1995 guidance on preemployment inquiries help define those inquiries that employers may make of applicants and employees in connection with their medical conditions and disabilities:

Inquiries at the Recruiting and Hiring Stage

A disability-related inquiry is one that is likely to elicit information about a disability, including, obviously, a direct question as to whether an individual has a disability. An employer covered by the ADA (i.e., one with 15 or more employees) is not permitted to make a disability-related inquiry, or require a medical examination, before a job offer has been made to an applicant.

Pre-offer, recruitment-stage inquiries should generally be aimed at determining whether an applicant is able to perform the job in question. Thus, an employer may describe the job and ask whether the applicant can perform the functions of the job "with or without reasonable accommodation." However, the employer should not ask the applicant to specify whether he or she needs an accommodation to do the job unless the disability is obvious or the applicant reveals that he or she has a nonapparent disability or states that he or she has a need for an accommodation.

Applicants may be asked to describe how they would perform certain job functions, if all applicants for that job are asked to do so. In addition, individuals who have an obvious disability (e.g., use of a wheelchair) or those who voluntarily reveal that they have a disability may be asked to demonstrate how they would perform tasks the job requires.

Employers may inquire whether an applicant will be able to meet the company's attendance requirements and may ask about the individual's attendance record at previous employment. However, an applicant should not be asked how many sick days he or she used at another job or about his or her workers' compensation history.

Because current use of illegal drugs is not a protected disability, an employer is permitted to ask applicants about current illegal drug use. An employer can also inquire as to prior drug use, as long as the questions do not elicit information about past drug addiction, which—unlike casual drug use—is a protected disability. However, an employer should avoid questions about current use of lawful drugs, in that the answers may reveal the existence of a disability (e.g., AZT or Prozac). Questions about drinking habits, including whether an individual was ever convicted of driving while intoxicated, are permissible, as long as they do not seek information about alcoholism, which is a protected disability.

After a bona fide job offer is made, employers are permitted to make disability-related inquiries and require medical examinations, which do not have to be related to the job in question, as long as those requirements are imposed on all

individuals in the same job category regardless of disability. Also, medical information must be kept confidential (i.e., shared with only those company officials with a business need for the information) and maintained separately from the individual's personnel file. However, if an individual is denied a job because of the results, the exclusionary criteria must be job-related and consistent with business necessity.

Disability-Related Inquiries and Medical Examinations of Employees

The ADA expressly prohibits an employer from making disability-related inquiries or requiring medical examinations of current employees unless the inquiry or examination is job-related and consistent with business necessity. This may be the case: 1) when an employer reasonably believes that an employee's ability to perform essential job functions may be impaired by a medical condition or where performance problems appear to be attributable to a medical condition; 2) where an employee may pose a "direct threat" (i.e., a significant risk to the health or safety of others) because of his or her medical condition; and 3) when an employer makes a request for a reasonable accommodation. An employer may also act upon reliable information provided about an employee by co-workers or others.

When an employee requests an accommodation, the employer may request medical documentation as to the nature of the employee's impairment (showing that the employee has an ADA disability), the ways in which the impairment limits the employee's ability to perform the job, and in what way the employee's limitation may be accommodated.

An employer may not generally seek the employee's entire medical history,

however, as that information likely goes beyond what the company will need to respond to the accommodation request. If the medical documentation is insufficient, the employer may require the employee to be seen by a medical professional of the company's choice; that professional must limit his or her examination and inquiries to determining the way in which the employee's impairment may be accommodated.

An employer may also require a medical examination of an employee who may pose a direct threat. Such an assessment must be based on an individualized assessment of whether the employee can perform the functions of the job safely. For example, if an employer observes that an employee who operates machinery is falling asleep on the job or otherwise having difficulty working, and such behavior has the potential to expose others to danger, the employer may have the employee examined for the purpose of determining whether the employee indeed poses a threat in light of his condition.

An employer is permitted to require medical documentation to support an employee's use of sick leave. However, where an employee's leave is pursuant to the Family and Medical Leave Act, that law dictates the extent of medical documentation obtainable by an employer. Assuming that company policy requires a doctor's note from all employees who take sick leave (regardless of disability status), an employer may request a medical certificate justifying the use of sick leave. An employer may also require medical documentation in connection with an employee's return from sick leave, to the extent of determining that the condition that gave rise to the leave will not prevent the employee from performing his or her job. ▀