

AMERICANS WITH DISABILITIES

FREQUENTLY ASKED QUESTIONS

Guidance for Employment Considerations

Q: 1 *Is my business or organization required to comply with Title I of the ADA?*

The federal Americans with Disabilities Act of 1990, as amended (ADA), prohibits discrimination against individuals with disabilities and provides protection for such individuals in all aspects of public life, including employment, state and local government services, places of public accommodation, and telecommunications. The ADA is divided into five separate titles, each of which provides protections to individuals with disabilities in a different context. Title I of the ADA applies in the employment context. Generally, Title I of the ADA applies to employers with 15 or more employees. However, even if you do not have 15 or more employees, you should be aware that you may be covered under other antidiscrimination laws that provide protection to individuals with disabilities; for example, South Dakota's prohibition on employer discrimination against individuals with disabilities applies to all employers, regardless of size.

Q: 2 *Who is protected by the ADA?*

Title I of the ADA provides protections to "qualified individuals with disabilities." Title I of the ADA contains several definitions that further clarify who constitutes a "qualified individual with a disability" under the ADA. However, in general, an individual will be protected under Title I of the ADA if he or she (1) either has a physical or mental impairment that substantially limits one or more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment; and (2) meets all requisite skill, experience, education, and other job-related requirements and can perform the essential functions of the job either with or without reasonable accommodation.

Q: 3 *What protections does the ADA provide?*

Title I of the ADA provides two main protections to qualified individuals with disabilities. First, it prohibits covered employers from discriminating against qualified individuals with disabilities on the basis of such disabilities in all aspects of employment. This includes, but is not limited to, the following:

- recruitment, advertising, and job application procedures;
- hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- rates of pay or any other form of compensation and changes in compensation;
- job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- leaves of absence, sick leave, or any other leave;
- fringe benefits available by virtue of employment, whether or not administered by the covered entity;
- selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
- activities sponsored by a covered entity, including social and recreational programs; and
- any other terms, conditions, or privileges of employment.

Second, it requires covered employers to provide reasonable accommodations to qualified individuals with disabilities unless such accommodations would impose an undue hardship upon the employer. Under Title I of the ADA, "reasonable accommodation" generally means any modification or adjustment made to a job or work environment to allow a qualified employee or applicant with a disability to perform the essential functions of the job or to enjoy equal benefits and privileges of employment.

Q: 4 *What is considered undue hardship for an employer?*

An undue hardship exists if the provision of an accommodation would cause *significant* difficulty or expense based on consideration of a variety of factors. Determinations of undue hardship should be made on a case-by-case basis and should be made only after the employer has engaged in the interactive process and considered all possible forms of reasonable accommodation.

Q: 5 *How does the ADA impact job descriptions?*

To be protected by the ADA, an individual with a disability has to be able to perform the essential functions of the job, with or without reasonable accommodation. Employers are not required to eliminate essential functions of a job as a form of accommodation. Therefore, it is important that employers accurately define essential job functions for each position. A written job description can help employers in determining whether applicants and employees are qualified for the job and can help employers identify potential accommodations.

Q: 6 *When is a job function an “essential function”?*

Under the ADA, the term essential function means the fundamental job duties of the employment position the individual with a disability holds or desires. A job duty may be considered essential if the job exists to perform that function, there are a limited number of employees to whom the particular job function is distributed, or the job function is highly specialized such that the individual hired is hired for his or her expertise or ability to perform the particular function. Other considerations to be taken into account when determining whether a job function is essential are the time spent performing the function, whether redistribution or removal of the function is possible without fundamentally altering the position, etc.

Q: 7 *Does the ADA impact my use of qualification standards in hiring?*

To be protected under Title I of the ADA, an individual must be a “qualified” individual with a disability. To be considered “qualified,” the individual with a disability must meet all requisite skill, experience, education, and other job-related requirements and be able to perform the essential functions of the job either with or without reasonable accommodation. However, Title I of the ADA makes it unlawful for a covered employer to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria is shown to be job related for the position in question and is consistent with business necessity. This rule is in place to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job, with or without reasonable accommodation.

Qualification standards include all requirements pertaining to personal and professional attributes, such as the skill, experience, education, physical, medical, safety and other requirements a covered employer requires an individual to meet in order to be eligible for the position held or desired, such as the following:

- education and work experience requirements;
- physical and mental requirements;
- safety requirements;
- paper and pencil tests;
- physical or psychological tests;
- interview questions; and
- rating systems.

Q: 8 *What reasonable accommodations should I consider during the hiring process?*

Employers should take steps to include and accommodate qualified individuals with disabilities throughout all stages of employment, including recruitment, application, and hiring. Applicants may request accommodations

or employers may tell applicants what the hiring process involves and ask whether the applicant will need a reasonable accommodation. Examples of reasonable accommodations that could be provided during the hiring process include:

- providing written materials in accessible formats, such as large print, braille, or audiotape;
- providing readers or sign language interpreters;
- ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations;
- providing or modifying equipment or devices; or
- adjusting or modifying application policies and procedures.

Q: 9 *Can I inquire about an applicant's disability or require a medical examination as part of the pre-employment process?*

An employer's ability to require medical exams or make disability-related inquiries (such as asking an applicant whether he or she is disabled, asking how he or she became disabled, asking about the nature or severity of a disability or for documentation related to the disability, or asking any other question that is likely to elicit information about a disability) is dependent on the stage of the employment relationship. Employers *may not* make disability-related inquiries or require a medical exam prior to offering the applicant a job. However, employers *may* ask about an applicant's ability to perform job-related functions and may ask the applicant to demonstrate how he or she would perform job-related functions with or without accommodation. For example, an employer may identify the physical requirements of a job, such as lifting a certain amount of weight, and ask the applicant if he or she can perform this function and how.

Employers have the greatest discretion in requiring medical examinations at the post-offer, pre-commencement of employment stage. After an employer has extended an offer of employment and prior to the commencement of employment, an employer may require an individual to participate in a medical examination or make inquiries that may reveal the existence of a disability as long as:

- All entering employees are subject to the exam or inquiry regardless of disability;
- Information obtained about the medical condition of the applicant is collected and maintained on separate forms and in separate medical files and is treated as confidential; and
- The results of the exam or inquiry are used only in accordance with the ADA.

Even though employers have broad discretion in requiring medical examinations or making disability-related inquiries at the post-offer pre-employment stage, employers should avoid obtaining unnecessary information regarding employees and should only pursue information that may impact the individual's ability to perform his or her job. This is because if an employer uses the results of medical examinations or inquiries conducted post-offer, pre-commencement of employment to screen out an individual with a disability as a result of such examination or inquiry, "the exclusionary criteria must be job-related and consistent with business necessity."

For additional questions about the ADA, visit ada.gov, Askearn.org, askjan.org, or contact an attorney. Also see the separate FAQ document pertaining to ADA considerations during employment.