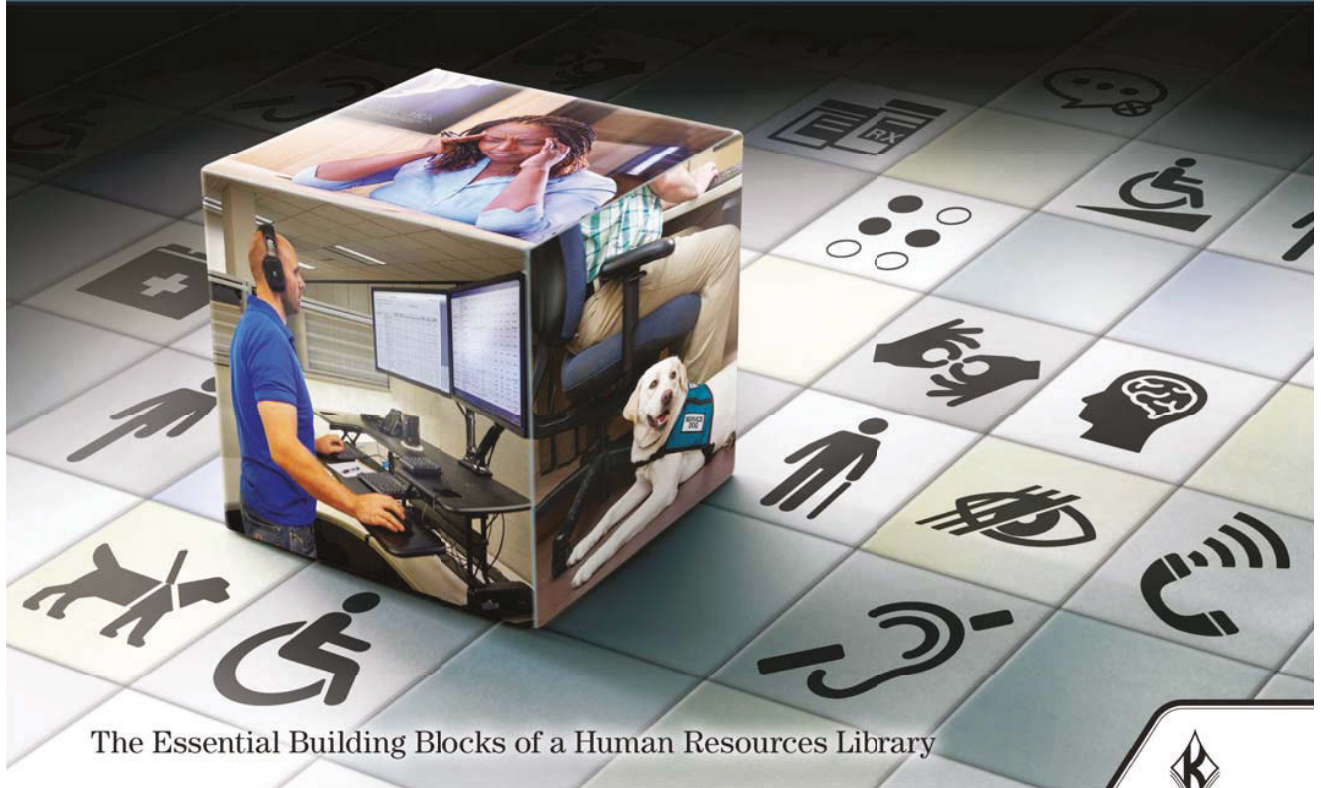


EMPLOYER'S GUIDE TO ADA

Navigating reasonable accommodations
and the Americans with Disabilities Act



The Essential Building Blocks of a Human Resources Library



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Employer's Guide to the ADA

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Employer's Guide to the ADA

Introduction

Like the workplace itself, workplace laws continue to evolve. The workforce is aging, medial issues are on the rise, and employees are becoming more savvy about their rights. These and other considerations can fall under the requirements of the employment provisions of the Americans with Disabilities Act (ADA). This publication is designed to help you navigate the often-murky waters of the ADA. It takes you beyond the statute and regulations, and provides you with easy-to-read information to help ensure you are informing your employees of their rights, while keeping your company out of the courtroom.

This manual is divided into seven major sections, each focusing on a particular aspect of your obligations.

Introduction: Gives you an overview of the law, its history, its purpose, and basic premises. While some readers prefer to focus only on what needs to be done in relation to a specific current situation, some prefer to understand the bigger picture — why employers need to take certain actions.

Relationship of the ADA to other laws: The ADA does not exist in a vacuum. Other laws need to be considered. These include the Family and Medical Leave Act, the Health Insurance Portability and Accountability Act, and the Genetic Information Nondiscrimination Act, to name a few.

Definition of a disability: So much depends upon this particular definition, that an entire chapter is devoted to it. The definition is broken down into its individual terms so you can be better prepared to know whether an employee or applicant might have a disability and when to even pose the question.

Reasonable accommodation: Since the law requires employers to provide reasonable accommodations, this chapter breaks it down for you. There is no one-size-fits-all accommodation for any given situation, so you are generally expected to engage an interactive process with the employee to identify one.

Hiring considerations: From crafting job descriptions to pre-employment testing right before a job candidate begins work, this chapter has you covered. It includes information on the differences between pre-offer and post-offer medical questions, exams, and much more.

Employment considerations: Once an individual is an employee, some ADA processes and rules change, such as those regarding medical questions and exams. This chapter touches on subjects such as compensation, benefits, leave, and workplace policies.

Training: While the ADA does not specifically mandate training for those who interact with employees and could risk discriminating on the basis of a disability, providing such training can decrease the risk. In almost every enforcement action the Equal Employment Opportunity Commission has successfully charged, a training element is included in the employer's obligations. Therefore, you can train now, or train later (after spending valuable resources trying to defend your actions).

Enforcement: This chapter provides information on what to expect, should you be involved in an enforcement action. It covers charges, investigations, mediation, and statistics. The statistics alone provide a picture of trends in disability discrimination, so you will better know which issues deserve your attention.

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To Illustrate

Dana's coworkers complain to management about her frequently passing gas. After verifying the problem, Jeremiah from HR requests a meeting with Dana. Despite the difficult conversation, Dana says she's aware of the problem, but didn't realize its extent. Dana indicates that she has a gastrointestinal disorder that has flared up recently, and that's causing the gas.

Jeremiah recognizes the situation as falling under the ADA, and let's Dana know that he wants to help resolve the issue. Dana takes Jeremiah up on his offer and the two of them begin discussing effective reasonable accommodations, with Jeremiah asking if Dana has any ideas. She indicates that due to scheduling issues, she is not provided enough time to eat, which aggravates her disorder, so perhaps allowing her more time could resolve the issue.

Employee Medical Inquiries and Exams

The ADA's requirements concerning medical examinations and inquiries of employees are more stringent than those affecting applicants who are being evaluated for employment after a conditional job offer. In order for a medical exam or inquiry to be made of an employee, it must be job related and consistent with business necessity. The need for the exam may be triggered by some evidence of problems related to job performance or safety, or an exam may be necessary to determine whether individuals in physically demanding jobs continue to be fit for duty.



Cross Reference

For information on what is considered a medical exam, see the Hiring Considerations chapter.

Once an employee is on the job, his or her actual performance is the best measure of ability to do the job. When a need arises to question the ability of an employee to do the essential functions of his or her job or to question whether the person can do the job without posing a direct threat due to a medical condition, it may be job related and consistent with business necessity for you to make disability-related inquiries or require a medical examination.

Generally, this means you have a reasonable belief, based on objective evidence, that a particular employee is unable to perform an essential function or will pose a "direct threat" because of a medical condition. The scope and manner of any inquiries or medical examinations must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat.

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During a meeting with his supervisor, an employee articulated several incidents of alleged discrimination over the course of his employment. He also became agitated and banged his hand on the table, saying that someone was “going to pay for this.”

The outburst caused concern for his supervisor who brought it up to her manager. The discussion eventually involved the HR manager, who was concerned as the outburst sounded like a threat. It was eventually decided that the employee talk to an independent consulting psychologist, who noted that there was a possibility the employee was delusional. The psychologist, in turn, suggested that the employee see a psychiatrist, who recommended the employee undergo a personality test before being allowed to return to work. This was made a condition of employment.

The employee took the test and was cleared for work. He, however, sued, arguing that the test violated the ADA as it was not job related and consistent with business necessity; that the employer had no evidence that he was a threat. The employer disagreed.

Bottom line: The court held that because of the supporting concern of the people who were involved, including a psychologist and psychiatrist, the evaluation was job related because an employee’s ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. The employee’s outburst suggested that he may have been unstable and possibly posed a danger to others.

Owusu-Ansah v. Coca-Cola Company, No. 11-13663, 11th Circuit Court of Appeals, May 8, 2013.

You must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee’s performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.

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Q: When may we ask an employee if a medical condition may be affecting her ability to do her job?

A: You may ask questions or require an employee to have a medical examination only when you have a legitimate reason to believe that a medical condition may be affecting the employee's ability to do the job, or to do it safely. Sometimes you will be able to ask for medical information because you know that the person has a medical condition that is not obvious and reasonably believe that the condition itself, its treatment, and/or side effects are causing the employee's performance problems. At other times, you may ask for medical information when you have observed symptoms, such as fatigue or difficulties with memory or concentration, or have received reliable information from someone else (e.g., a family member or co-worker), indicating that the employee may have a medical condition that is causing performance problems.

On the other hand, when you do not have a reason to believe that a medical condition is causing an employee's poor job performance, you may not ask for medical information but should handle the matter as a performance problem. Poor job performance, however, is often unrelated to a medical condition and should be handled in accordance with your existing employment policies.

You also may ask an employee about a condition when you have a reason to believe that the employee may pose a "direct threat" (i.e., a significant risk of substantial harm) to himself or others. You should make sure that your safety concerns are based on objective evidence and not general assumptions.

If an employee requests an accommodation (and the impairment or need for accommodation is not obvious), you may request sufficient medical documentation to help you determine whether the employee meets the ADA's definition of disability and needs the requested accommodation because of the disability.



Cross Reference

For information on sufficient documentation, see the Reasonable Accommodation chapter, under "Gathering Information" found under "Interactive Process."

Instead of asking for more or updated documentation, employers sometimes might want an employee to undergo further medical exams. Such mandates may be done only in certain situations; the exams still need to be job related and consistent with business necessity.

Employment Considerations



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Coworkers of Julius began complaining about his behavior, which included situations in which Julius snapped and screamed at them, gave blank stares and intimidating looks, ranted, constantly mumbled to himself, repeatedly banged drawers in his office, and had mood swings. In light of this, Julius was put on administrative leave and required to submit to a fitness-for-duty exam. An occupational medicine specialist concluded that Julius could perform the job's essential functions without posing a threat to himself or others. The doctor did indicate, however, that Julius displayed some hypomania and could be bipolar, so he recommended that he be reevaluated in about six weeks. After the reevaluation, Julius was referred to a psychologist, whom Julius retained for treatment.

Julius returned to work, but his unusual behavior continued, and coworkers continued to have concerns, including that Julius could become violent. The company retained a psychiatrist to evaluate Julius' mental health, and the two met twice. The psychiatrist concluded that Julius was fit for duty, but had suspicions that he might have a personality disorder based on coworker input. The coworker complaints continued and Julius was again placed on leave. After another exam, the psychiatrist declared Julius unfit due to his paranoid thinking and highly disruptive behavior.

Julius filed suit, claiming that the employer had violated the ADA by forcing him to attend unnecessary medical examinations, particularly the last two with the psychiatrist.

The court found that the exams were job related and consistent with business necessity, as preventing employees from endangering their coworkers is a business necessity. The coworker comments and responses (including a call to the police) suggested that Julius suffered from a personality disorder, which led to his paranoid behavior, which is a risk factor for violence.

Bottom line: In siding with the employer, the court ruled that exams — even multiple exams — concerning a worker's psychiatric health may be permissible if they reflect concern for the safety of other employees and the public at large. Employers, however, bear the quite high burden of establishing what medical exams are consistent with business necessity.

Painter v. IL DOT, Seventh Circuit Court of Appeals, No. 13 C 3002, December 6, 2017

You may require employees to periodically or annually recertify the ongoing need for accommodation, and request updated/new medical information only under limited circumstances. Remember, under the ADA, employers may not ask disability-related questions of employees unless those questions are job related and consistent with business necessity.

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A medical inquiry or examination is job related and consistent with business necessity when:

- You have a reasonable belief, based on objective evidence, that a particular employee's ability to perform essential job functions will be impaired by a medical condition,
- You have a reasonable belief, based on objective evidence, that an employee will pose a direct threat due to a medical condition,
- An employee asks for a reasonable accommodation and the employee's disability or need for accommodation is not known or obvious, or
- When mandated for in positions that affect public safety, such as police and fire fighters.

For example, if an employee who has a long-term or permanent medical impairment has been accommodated for some time and there is no change in either the medical impairment, limitations, need for accommodation, ability to perform job duties, or the employer's ability to accommodate, then asking questions about the continuing need for accommodation, or requesting updated/new medical documentation, will not meet the job-related-and-consistent-with-business-necessity standard.

When you do not have sufficient disability-related information, or there is a significant change that will impact the provision of reasonable accommodation, then it can be appropriate to request information from employees about their ongoing need for accommodation. The following situations are examples of when it may be appropriate to request disability-related information to recertify the ongoing need for accommodation:

- When the original medical documentation/request for accommodation indicates that the employee's medical impairment/limitations/need for accommodation will change (e.g., employee has MS and medical documentation indicates that symptoms, limitations, and need for accommodation may change due to the nature of the medical impairment)
- When no duration for the need for accommodation was provided in the original medical documentation/request for accommodation (e.g., request to modify schedule does not indicate for how many days, weeks, months, etc.)
- When the duration of the need for accommodation was provided in the original medical documentation/request for accommodation but is nearing expiration, and it is apparent/known that the employee still requires accommodation (e.g., employee temporarily accommodated with modified duty but impairment did not heal as expected and individual still has limitations affecting performance of job duties)
- When there is a change in an employee's medical impairment, limitations, ability to perform job duties/meet standards, or employer's ability to accommodate, etc. (e.g., employee accommodated with intermittent leave for chronic medical impairment is using substantially more leave than indicated in original medical documentation)
- When accommodations are being monitored for effectiveness and the employee indicates a need for a change in accommodation or that there is a change in medical impairment/limitations (e.g., when checking-in with an employee about equipment that was provided due to low vision, the employee notes that her vision loss has progressed and an alternative accommodation is needed).

Consider whether you merely need confirmation that accommodation is still needed for the reason it was originally granted. For example, if the initial request for accommodation did not indicate a duration for the need for accommodation, you may request that the employee obtain a note from their healthcare provider that confirms the accommodation is still needed, and for what duration. You could ask if the need for accommodation is long-term, permanent, or temporary, and the anticipated duration.

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When there is a change in your ability to provide a specific accommodation, it makes sense to re-engage in the interactive process when it is determined that a particular accommodation must be discontinued because it is no longer reasonable or poses an undue hardship. Whether or not updated medical information can be requested will depend on the facts of the situation and if the information is necessary to determine

1. If accommodation is still needed, and
2. If alternative accommodations will be effective based on the employee's impairment, limitations, and impact on job performance/ability to meet standards.

If updated medical information will not impact the next steps of the accommodation process, then it probably is not needed. Instead, focus on identifying an alternative reasonable accommodation. You already know what impairment exists, the employee's limitations, etc. The change is related to the your inability to continue the accommodation.

In all situations, you may simply request confirmation that an accommodation is still needed, without requesting updated medical information.

In order to determine if accommodations are still needed and effective without asking disability-related questions, periodically check on the ongoing effectiveness of accommodations. An effective way to monitor accommodations is to encourage open and ongoing communication. Employees who are receiving accommodations should be encouraged to communicate with you when there are changes or problems with an accommodation, and be informed about who to contact for accommodation assistance.

In some situations, other federal laws might apply. For example, the U.S. Department of Transportation (DOT) requires drivers of commercial vehicles to get medical exams every two years. When another federal law has such requirements, the medical exams are considered to be job related and consistent with business necessity. When the DOT rules were updated, one company began testing a class of employees.

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Based on DOT guidance, a trucking company required all commercial drivers with a body mass index (BMI) over 35 to be subject to an in-lab sleep apnea test. Those who were recommended by a physician were also to take the tests. The DOT guidance indicated that obstructive sleep apnea causes daytime sleepiness, making drivers more likely to have accidents. One driver, Shaun, had a DOT physical that showed he had a BMI over 35. As such, the company told him he needed to undergo the test. Shaun refused, providing a doctor's note indicating that the test was not medically necessary for Shaun. In response, the company stopped assigning Shaun driving duties.

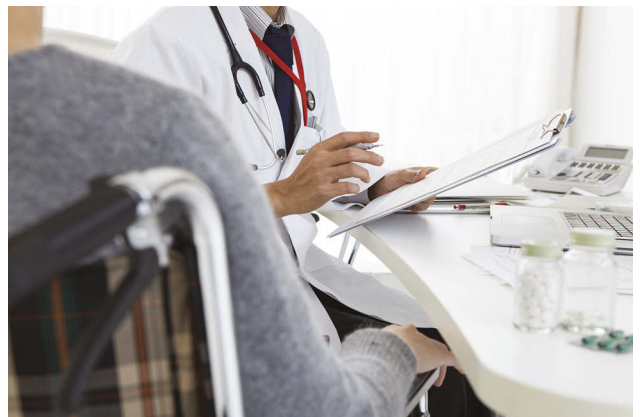
Shaun sued, arguing that the company failed to consider his individual characteristics before mandating the sleep study. The employer argued that a sleep study is the only way to confirm or rule out an obstructive sleep apnea diagnosis, and a high BMI puts people at risk for the condition. Treating individuals with the condition would decrease the risk of vehicle accidents.

Bottom line: The court found that the ADA does permit employers to require a class of employees to get medical exams. The company had reasons to believe Shaun had the condition that poses a public safety hazard. Therefore, it was reasonable to define the class of drivers with BMIs over 35 as those who would be subject to the exam.

Parker v. Crete Carrier Corporation, 8th Circuit Court of Appeals, No. 16-1371, October 12, 2016

The ADA does not specifically prohibit you from contacting an employee's health care provider to ask questions about employees' medical information. Sometimes it can be more efficient for you to contact an employee's healthcare provider directly to obtain what is needed to proceed in the interactive process. For example, when you have a clarifying question about an employee's restrictions or need to know more about the anticipated frequency of the need for intermittent leave, it may be more efficient to call the healthcare provider. In some situations, a healthcare provider will be able to quickly answer a few direct questions to help you process a request for accommodation or facilitate return to work.

Unfortunately, however, healthcare providers cannot not share patients' protected health information with employers who contact them directly without first having formal authorization to do so. The Health Insurance Portability and Accountability Act (HIPAA) privacy rule restricts the disclosure of protected health information by healthcare providers to anyone without patient consent, including employers. The HIPAA privacy rule sets the national standard for protecting individuals' medical records and other personal health information.



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When there is reason to contact a healthcare provider directly, you should confirm that the employee for whom information is needed has either signed a HIPAA authorization form available through the healthcare provider, or signed a document, such as an “authorization to release medical information,” evidencing express consent for the healthcare provider to disclose his or her private medical information to a party (the employer) named in the consent. Employer-drafted authorizations to release medical information need to be HIPAA compliant. The doctor might, however, want to use his or her own form. The following elements might be included in an authorization to release medical information for ADA purposes:

- Employee name for whom information is needed.
- Purpose for request to release medical information [e.g., to support a request for reasonable accommodation under ADA].
- Party [e.g., person(s) and/or organization] to whom express consent is given to receive protected health information.
- Description of information to be released by the healthcare provider and/or specific job-related medical questions relevant to the situation.
- Dates of healthcare service for which medical information may be released by the healthcare provider [e.g., from May 20XX through October 20XX].
- Authorization for verbal/electronic/fax communication about employee’s medical history and care.
- Date or event on which the authorization will expire.
- Statement regarding employee’s right to revoke consent at any time.

Additional elements may be required to meet HIPAA compliance.

You may ask that the employee allow such disclosure, but if the employee does not, you may have little recourse in obtaining the information.

Employment Considerations



To Illustrate

Marco, an employee with no history of performance or conduct problems, suddenly develops both. Over the course of several weeks, his work becomes sloppy and he repeatedly misses deadlines. He becomes withdrawn and surly, and in meetings, he is distracted and becomes belligerent when asked a question. When his supervisor starts asking him about his behavior, he responds with answers that make no sense.

Sadie, the company's HR director, thinks that the sudden, marked change in performance and conduct, the nonsensical answers, and the belligerent behavior all reasonably suggest that a medical condition may be the cause of the Marco's performance and conduct problems. She asks Marco medical questions (e.g., Are you ill? Have you seen a doctor? Is there a medical reason for the sudden, serious change in your behavior?). Sadie also may, as appropriate, require Marco to (1) go to an employee assistance program (EAP); (2) produce medical documentation that he is fit to continue working (including the ability to meet minimum performance requirements and exhibit appropriate behavior); and/or (3) undergo an appropriate medical examination related to the performance and conduct issues.

In a situation such as the one above, you may also take a number of actions while you await medical documentation on whether the employee is able to continue performing the job, include placing the employee on leave.

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