Frequently Asked Questions (FAQ) About Disability Disclosure Under the Americans With Disabilities Act as Amended (ADAAA)

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Introduction

Issues surrounding the disclosure of disability-related and medical information under the ADA are difficult for employers, employees, and job seekers. The Equal Employment Opportunity Commission (EEOC) is the government agency that issues employment regulations under the ADA. EEOC Guidance and ADA case law form the basis for this FAQ. A Resource List is provided at the end for your convenience. However, this resource material is intended as a guide and is not legal advice. For specific legal advice, an attorney should be consulted.

ADA Disability Disclosure Frequently Asked Questions (FAQ)

1. **Question:** When may an employer request disability related information?

   Answer: The EEOC has divided the employment process into three stages. The amount of disability-related information that an employer may request depends on which stage of the employment process is involved. The three employment stages are:

   A. **Pre-Employment:** An employer may not request any disability-related information or give any medical examinations prior to making a job offer to the applicant. Any question that may elicit disability-related information is prohibited. Therefore, information about the following may not be requested during this stage: medical conditions, history, or treatment; prescription medications; past sick leave; Worker's Compensation history; whether an individual receives Social Security benefits, or whether a reasonable accommodation is needed. In addition, an employer may not administer medical tests to job applicants, including personality tests.

   B. **After a Conditional Job Offer is Made:** A "conditional job offer" is a ob offer that is conditioned on the applicant successfully meeting the reasonable and legitimate physical and medical requirements of the job. Once an employer makes a job offer to a job applicant, the employer may require medical

examinations before hiring and may ask wide-ranging questions that involve disability-related information. However, the information must be requested of every applicant for that position. If an employer uses this information to disqualify a job candidate, the reasons behind the disqualification must not be discriminatory and must be "job-related" and "consistent with business necessity."

C. **Once An Employee is on the Job:** Once an individual is on the job, the employer may only seek disability-related information if there is a "reasonable basis" for the employer to think that the employee: is unqualified to do the job; needs a reasonable accommodation; or poses a direct threat to the health or safety of the employee or others.

2. **Question:** **Must** an individual with a disability disclose a disability when applying for a job or on the job?

Answer: An individual does not have to disclose a disability to an employer unless they have an immediate need for a "reasonable accommodation" under the ADA during the interview, application process, or while on the job. However, as noted above, after receiving a "conditional job offer" and in other limited situations, individuals may lawfully be asked disability-related questions. An applicant or employee should comply with an employer's lawful information requests promptly and accurately.

3. **Question:** **Should** an individual with a disability disclose the disability when applying for a job, after accepting the job, while on the job, or never?

Answer: That is a more difficult question and depends on the situation. Generally, the only situation where an individual is legally required to disclose a disability is when they are seeking a reasonable accommodation under the ADA. In almost all other situations, the decision to disclose is voluntary and a disability does not have to be disclosed unless a reasonable accommodation is needed. Due to the fact that there are still many prejudices and stereotypes connected with disabilities, many people choose not to disclose their disabilities unless necessary. It is important to remember that people with apparent disabilities are in a different situation than people with hidden disabilities.

However, there may be situations when disclosing a disability may be beneficial such as when the prospective employer will see the disability as a positive factor for hiring. For this reason, an individual should research the company before disclosing. Employers who may look positively on a disability include organizations that serve persons with disabilities, companies that receive federal grants, or companies that have a policy for hiring persons with disabilities. When in doubt about an employer's reaction to the disclosure, it is usually best not to disclose unless a reasonable accommodation is needed.

4. **Question:** If an employer notices that a job applicant or employee has a disability, what is the employer allowed to say regarding the disability, if anything?

   Answer: When an employer notices that an individual has a disability and reasonably believes that the individual will need reasonable accommodations to apply for or to safely perform the essential functions of a job, the employer may ask certain limited questions. Specifically, the employer may ask whether the applicant would need reasonable accommodations, and if so, what type of accommodations would be needed. However, the employer may not ask questions that are either unrelated to the functions of the job or relate to the applicant's underlying condition apart from the need for an accommodation.

5. **Question:** If a job applicant or employee chooses to disclose a disability to an employer, what may the employer ask about the applicant's disability?

   Answer: Once an employer knows about an individual's disability, if the employer reasonably believes that an applicant may need a reasonable accommodation, the employer may ask whether an accommodation is needed, and if so, what type of accommodation will be needed. The employer's questions must focus on the reasonable accommodation, not the applicant's underlying condition. The employer's questions may not address reasonable accommodations unrelated to job functions. Any employer inquiry must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

6. **Question:** May an employer ever inquire whether an accommodation is needed even if one is not requested?

   Answer: If an employer is aware of a disability and a reasonable basis exists to believe that an accommodation is needed, (for example, if the employees work performance has been inadequate), an employer may inquire whether a reasonable accommodation is needed. Further, an employer may have a legal duty to investigate accommodations even if the employee does not request one. Employers are never required to accommodate a disability that they do not know about. For this reason, and because of the many legal liability issues connected to medical information, many employers prefer to limit the amount of medical information that is required.

7. **Question:** How should an individual disclose their disability when requesting a reasonable accommodation?

   Answer: According to the EEOC, there are no "magic words" that must be used as part of a reasonable accommodation request. The EEOC states than when individuals decide to request an accommodation, they must let their employer know that they need a change at work for a reason related to a medical condition. The request need not be in writing, although that is usually recommended for the benefit of both the employer and the individual with a disability. An employer is allowed to ask for a restricted amount of disability-related information as it relates to the accommodation request. This

information must be specifically limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. Employers are not entitled to seek a General Release of Information in response to an accommodation request.

If an individual's disability is not obvious or known to the employer, the employer may require documentation of the individual's disability and their need for a reasonable accommodation. For this reason, employees often find it helpful to submit the accommodation request with a brief doctor's report outlining the employee's disability and how the requested accommodation will enable them to do the essential functions of the job. To view a sample accommodation request letter, please visit: http://www.equipforequality.org/resourcecenter/employment_sampleaccomodationletter.doc.

8. **Question:** What happens if an individual initially decides not to disclose a disability, but discovers later that they will need an accommodation?

   Answer: An individual with a disability may request a reasonable accommodation at any time during the application process or during employment. The ADA does not prevent an employee with a disability from requesting a reasonable accommodation because they did not ask for one when applying for a job or after receiving a job offer. However, it may be in an employee's best interest to request a reasonable accommodation before performance suffers or other problems occur.

9. **Question:** If an employee has more than one disability, what should be disclosed?

   Answer: An employee is only required to disclose a disability if the disability requires a reasonable accommodation. Therefore, an employee need not disclose any disability unrelated to a request for a reasonable accommodation.

10. **Question:** How can an employer determine whether an individual is able to perform the essential functions of a job?

    Answer: An employer may ask an individual to describe or demonstrate how they would perform the essential job functions if this is done for all applicants of that position. In addition, an employer may ask this if the employer is aware of a disability, (for example if a person uses a wheelchair or has an apparent disability), and has a reasonable basis to believe that an accommodation is needed to allow the individual to perform the essential job functions or to remove or lessen a risk to the health or safety of the individual or others.

    An employer may ask whether a job applicant can do the essential job functions **with or without** a reasonable accommodation. Both individuals with and without disabilities can answer this question without revealing disability information. However, in general, an employer cannot ask whether an accommodation is needed.

11. **Question:** What are the confidentiality requirements for medical information in the possession of the employer?

Answer: Under the ADA, employers must keep all information concerning the medical condition or history of their applicants or employees confidential. The information must be collected on a separate form and kept in a separate medical file, apart from an employee's personnel file. Only staff that needs to know the medical information, usually direct supervisors and managers, should know this information. If co-workers inquire as to why a colleague seems to have accommodations, a different work schedule, or what is perceived as preferential treatment, the employer may only explain that they are acting for legitimate business reasons or to comply with federal law. Laws other than the ADA may have confidentiality requirements as well. Some of these laws are: The federal Health Insurance Portability and Accountability Act (HIPAA), Illinois AIDS Confidentiality Act, and Illinois Mental Health and Developmental Disabilities Confidentiality Act.

12. **Question:** May an employer disclose an employee's disability-related information for emergency evacuation procedures, for affirmative action purposes, or for federal reporting requirements without violating the ADA or other confidentiality requirements?

Answer: Although employers are generally required to keep an employee's medical information confidential, there are limited exceptions. An employer may tell first aid and safety personnel about an employee's disability if the disability might require emergency treatment. In addition, employers must provide relevant information when government officials are investigating compliance with the ADA. Finally, an employer may invite applicants to voluntarily self-identify themselves as individuals with disabilities for purposes of the employer's affirmative action program. However, the decision to self-identify must be voluntary, and an employer must keep the information disclosed confidential by keeping it on a separate form apart from the application.

Some Resource Information

1. **The Equal Employment Opportunity Commission (EEOC),** www.eeoc.gov, is the government agency that issues employment regulations under the ADA. The EEOC has provided ADA guidance in several documents including:

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

2. **The Job Accommodation Network (JAN)** has developed an employment guide for job seekers as well as job candidates entering the workforce. JAN is a free service of the Office

of Disability Employment Policy of the U.S. Department of Labor. The new on-line tool, ***Finding a Job that is Right for You: A Practical Approach to Looking for a Job as a Person with Disability***, can be found at: http://www.jan.wvu.edu/job/. The guide includes a four-step process with easy-to-use information, tools, and resources on subjects encountered when job seeking. Subjects include disclosing a disability, requesting an accommodation, and career exploration designed to help people with disabilities find a job that is a good fit for them.

QUESTIONS?

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