Complying with the Americans with Disabilities Act When Hiring New Employees



The Americans with Disabilities Act has very strict rules about what you can and cannot do during the hiring process.

Of all the anti-discrimination laws, none confuses employers more than the Americans with Disabilities Act (ADA), especially when it comes to hiring. Employers want to make sure that the person they hire can actually perform the job, but often aren't sure how to explore this issue without running afoul of the law.

One way to ensure that you stay within the rules is to attach to the application a job description with specific information about the job duties. Or describe these things to the applicant during the job interview. Then ask the applicant if there is anything that would prevent them from performing the job functions. This approach gives the applicant the opportunity to tell you which job functions he or she can and cannot do. It also gives the applicant the opportunity to voluntarily raise with you any needs he or she might have in order to perform any of the essential job functions.

Some other rules to keep in mind:

- If you have no reason to believe that the applicant has a disability, you cannot ask them if they will need an accommodation (meaning special help or equipment) from you to perform the job.
- If you do have reason to believe that the applicant has a disability (for example, the disability is obvious or the applicant has told you about the disability), you can ask them if they will need an accommodation to perform the job.

If you still feel a little lost about which questions are legal and which aren't, see the Job Interview Questions That You Can and Can't Ask Under the ADA below.

JOB INTERVIEW QUESTIONS YOU MAY NOT ASK:

- Are you taking any prescription medications?

- Do you have any physical defects that may prohibit you from any life activities?
- Do you suffer from any medical conditions that may prohibit you from performing the functions of this position?
- Have you ever been placed in the hospital? If yes, for what reason?
- Have you ever been treated for a mental illness?
- Have you ever been treated for any medical illnesses or diseases?
- Have you ever been treated for substance abuse?
- Have you filed a workers' compensation claim within the past five years?
- Have you had a major illness in the past three to five years?

JOB INTERVIEW QUESTIONS YOU MAY ASK:

- Can you perform all of the job functions outlined in the job description, which you have just reviewed?
- How would you perform the functions of this position?
- Do you currently use illegal drugs.
- Do you have any professional licenses and/or certifications. If yes, what are they?

You should ask all of the applicants the above questions, not just the individuals that have a visible disability, or someone who has voluntarily disclosed that he or she has a disability.

Note:

The Americans with Disabilities Act Amendments Act of 2008 makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term "substantially limits"; expands the definition of "major life activities" by including two non-exhaustive lists:
- the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
- the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions);
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability";
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is

transitory and minor;
- provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of “disability” should be interpreted broadly.