The U.S. Equal Employment Opportunity Commission

EEOC NOTICE
Number 915.002
Date 10/10/95

1. SUBJECT: Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

2. PURPOSE: This document provides the EEOC's position under the Americans with Disabilities Act of 1990, on preemployment disability-related questions and medical examinations.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: ADA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

_____ _____

Date Gilbert F. Casellas
Chairman

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations

Introduction

Under the Americans with Disabilities Act of 1990 (the "ADA"),1 an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. This Enforcement Guidance explains these ADA provisions.2

Background

In the past, some employment applications and interviews requested information about an applicant's physical and/or mental condition. This information was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated.

For example, applicants may have been asked about their medical conditions at the same time that they were engaging in other parts of the application process, such as completing a written job application or having references checked. If an applicant was then rejected, s/he did not necessarily know whether s/he was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference.

As a result, Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.

The Statutory and Regulatory Framework

Under the law, an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant.3 This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may not ask disability-related questions or require a medical examination pre-offer even if it intends to look at the answers or results only at the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they may do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

* Employers may ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.

* Employers may ask about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses.

* Employers may ask applicants to describe or demonstrate how they would perform job tasks.

Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. If the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination.

If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity."4

In addition, if the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.5

Medical information must be kept confidential.6 The ADA contains narrow exceptions for disclosing specific, limited information to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA. Employers may also disclose medical information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws7 and may use the medical information for insurance purposes.8

The Pre-Offer Stage

What is a Disability-Related Question?

Definition: "Disability-Related Question" means a question that is likely to elicit information about a disability.

At the pre-offer stage, an employer cannot ask questions that are likely to elicit information about a disability. This includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are closely related to disability.9

On the other hand, if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not "disability-related."10

Below are some commonly asked questions about this area of the law.

* May an employer ask whether an applicant can perform the job?

  Yes. An employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."11

* May an employer ask applicants to describe or demonstrate how they would perform the job (including any needed reasonable accommodations)?

  Yes. An employer may ask applicants to describe how they would perform any or all job functions, as long as all applicants in the job category are asked to do this.

  Employers should remember that, if an applicant says that s/he will need a reasonable accommodation to do a job demonstration, the employer must either:

  * provide a reasonable accommodation that does not create an undue hardship; or

* allow the applicant to simply describe how s/he would perform the job function.

* May an employer ask a particular applicant to describe or demonstrate how s/he would perform the job, if other applicants aren't asked to do this?

When an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. An applicant's disability would be a "known disability" either because it is obvious (for example, the applicant uses a wheelchair), or because the applicant has voluntarily disclosed that s/he has a hidden disability.

* May an employer ask applicants whether they will need reasonable accommodation for the hiring process?

Yes. An employer may tell applicants what the hiring process involves (for example, an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

* May an employer ask an applicant for documentation of his/her disability when the applicant requests reasonable accommodation for the hiring process?

Yes. If the need for accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability if the applicant requests reasonable accommodation for the hiring process (such as a request for the employer to reformat an examination, or a request for an accommodation in connection with a job demonstration). The employer is entitled to know that the applicant has a covered disability and that s/he needs an accommodation.

So, the applicant may be required to provide documentation from an appropriate professional, such as a doctor or a rehabilitation counselor, concerning the applicant's disability and functional limitations.

* May an employer ask applicants whether they will need reasonable accommodation to perform the functions of the job?

In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have disabilities will need reasonable accommodations).

Example: An employment application may not ask, "Do you need reasonable accommodation to perform this job?"

Example: An employment application may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

Example: An applicant with no known disability is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need reasonable accommodation to perform this job?"

However, when an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions. Specifically, the employer may ask whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job.12 The employer could ask these questions if:

* the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability;

* the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or

* an applicant has voluntarily disclosed to the employer that s/he needs reasonable accommodation to perform the job.

Example: An individual with diabetes applying for a receptionist position voluntarily discloses that she will need periodic breaks to take medication. The employer may ask the applicant questions about the reasonable accommodation such as how often she will need breaks, and how long the breaks must be. Of course, the employer may not ask any questions about the underlying physical condition.

Example: An applicant with a severe visual impairment applies for a job involving computer work. The employer may ask whether he will need reasonable accommodation to perform the functions of the job. If the applicant answers "no," the employer may not ask additional questions about reasonable accommodation (although, of course, the employer could ask the applicant to describe or demonstrate performance). If the applicant says that he will need accommodation, the employer may ask questions about the type of required accommodation such as, "What will you need?" If the applicant says he needs software that increases the size of text on the computer screen, the employer may ask questions such as, "Who makes that software?" "Do you need a particular brand?" or "Is that software compatible with our computers?" However, the employer may not ask questions about the applicant's underlying condition. In addition, the employer may not ask reasonable accommodation questions that are unrelated to job functions such as, "Will you need reasonable accommodation to get to the cafeteria?"

An employer may only ask about reasonable accommodation that is needed now or in the near future. An applicant is not required to disclose reasonable accommodations that may be needed in the more distant future.

* May an employer ask whether an applicant can meet the employer's attendance requirements?

Yes. An employer may state its attendance requirements and ask whether an applicant can meet them. An employer also may ask about an applicant's prior attendance record (for example, how many days the applicant was absent from his/her last job). These questions are not likely to elicit information about a disability because there may be many reasons unrelated to disability why someone cannot meet attendance requirements or was frequently absent from a previous job (for example, an applicant may have had day-care problems).

An employer also may ask questions designed to detect whether an applicant abused his/her leave because these questions are not likely to elicit information about a disability.

Example: An employer may ask an applicant, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?"

However, at the pre-offer stage, an employer may not ask how many days an applicant was sick, because these questions relate directly to the severity of an individual's impairments. Therefore, these questions are likely to elicit information about a disability.

* May an employer ask applicants about their certifications and licenses?

Yes. An employer may ask an applicant at the pre-offer stage whether s/he has certifications or licenses required for any job duties. An employer also may ask an applicant whether s/he intends to get a particular job-related certification or license, or why s/he does not have the certification or license. These questions are not likely to elicit information about an applicant's disability because there may be a number of reasons unrelated to disability why someone does not have -- or does not intend to get -- a certification/license.

* May an employer ask applicants about their arrest or conviction records?

Yes. Questions about an applicant's arrest or conviction records are not likely to elicit information about disability because there are many reasons unrelated to disability why someone may have an arrest/conviction record.13

* May an employer ask questions about an applicant's impairments?

Yes, if the particular question is not likely to elicit information about whether the applicant has a disability. It is important to remember that not all impairments will be disabilities; an impairment is a disability only if it substantially limits a major life activity. So, an employer may ask an applicant with a broken leg how she broke her leg. Since a broken leg normally is a temporary condition which does not rise to the level of a disability, this question is not likely to disclose whether the applicant has a disability. But, such questions as "Do you expect the leg to heal normally?" or "Do you break bones easily?" would be disability-related. Certainly, an employer may not ask a broad question about impairments that is likely to elicit information about disability, such as, "What impairments do you have?"

* May an employer ask whether applicants can perform major life activities, such as standing, lifting, walking, etc.?

Questions about whether an applicant can perform major life activities are almost always disability-related because they are likely to elicit information about a disability. For example, if an applicant cannot stand or walk, it is likely to be a result of a disability. So, these questions are prohibited at the pre-offer stage unless they are specifically about the ability to perform job functions.

* May an employer ask applicants about their workers' compensation history?

No. An employer may not ask applicants about job-related injuries or workers' compensation history. These questions relate directly to the severity of an applicant's impairments. Therefore, these questions are likely to elicit information about disability.

* May an employer ask applicants about their current illegal use of drugs?

Yes. An employer may ask applicants about current illegal use of drugs14 because an individual who currently illegally uses drugs is not protected under the ADA (when the employer acts on the basis of the drug use).15

* May an employer ask applicants about their lawful drug use?

No, if the question is likely to elicit information about disability. Employers should know that many questions about current or prior lawful drug use are likely to elicit information about a disability, and are therefore impermissible at the pre-offer stage. For example, questions like, "What medications are you currently taking?" or "Have you ever taken AZT?" certainly elicit information about whether an applicant has a disability.

However, some innocuous questions about lawful drug use are not

likely to elicit information about disability.

Example: During her interview, an applicant volunteers to the interviewer that she is coughing and wheezing because her allergies are acting up as a result of pollen in the air. The interviewer, who also has allergies, tells the applicant that he finds "Lemebreathe" (an over-the-counter antihistamine) to be effective, and asks the applicant if she has tried it. There are many reasons why someone might have tried "Lemebreathe" which have nothing to do with disability. Therefore, this question is not likely to elicit information about a disability.

* May an employer ask applicants about their lawful drug use if the employer is administering a test for illegal use of drugs?

Yes, if an applicant tests positive for illegal drug use. In that case, the employer may validate the test results by asking about lawful drug use or possible explanations for the positive result other than the illegal use of drugs.

Example: If an applicant tests positive for use of a controlled substance, the employer may lawfully ask questions such as, "What medications have you taken that might have resulted in this positive test result? Are you taking this medication under a lawful prescription?"

* May an employer ask applicants about their prior illegal drug use?

Yes, provided that the particular question is not likely to elicit information about a disability. It is important to remember that past addiction to illegal drugs or controlled substances is a covered disability under the ADA (as long as the person is not a current illegal drug user), but past casual use is not a covered disability. Therefore, the question is fine as long as it does not go to past drug addiction.

Example: An employer may ask, "Have you ever used illegal drugs?" "When is the last time you used illegal drugs?" or "Have you used illegal drugs in the last six months?" These questions are not likely to tell the employer anything about whether the applicant was addicted to drugs.

However, questions that ask how much the applicant used drugs in the past are likely to elicit information about whether the applicant was a past drug addict. These questions are therefore impermissible at the pre-offer stage.

Example: At the pre-offer stage, an employer may not ask an applicant questions such as, "How often did you use illegal drugs in the past?" "Have you ever been addicted to drugs?" "Have you ever been treated for drug addiction?" or "Have you ever been treated for drug abuse?"

* May an employer ask applicants about their drinking habits?

Yes, unless the particular question is likely to elicit information about alcoholism, which is a disability. An employer may ask an applicant whether s/he drinks alcohol, or whether s/he has been arrested for driving under the influence because these questions do not reveal whether someone has alcoholism. However, questions asking how much alcohol an applicant drinks or whether s/he has participated in an alcohol rehabilitation program are likely to elicit information about whether the applicant has alcoholism.

* May an employer ask applicants to "self-identify" as individuals with disabilities for purposes of the employer's affirmative action program?

Yes. An employer may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if:

* the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); or

* the employer is voluntarily using the information to benefit individuals with disabilities.

Employers should remember that state or local laws sometimes permit or encourage affirmative action. In those cases, an employer may invite voluntary self-identification only if the employer uses the information to benefit individuals with disabilities.

* Are there any special steps an employer should take if it asks applicants to "self-identify" for purposes of the employer's affirmative action program?

Yes. If the employer invites applicants to voluntarily self-identify in connection with providing affirmative action, the employer must do the following:

* state clearly on any written questionnaire, or state clearly orally (if no written questionnaire is used), that the information requested is used solely in connection with its affirmative action obligations or efforts; and

* state clearly that the information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

In order to ensure that the self-identification information is kept confidential, the information must be on a form that is kept separate from the application.

* May an employer ask third parties questions it could not ask the applicant directly?

No. An employer may not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any questions that it could not directly ask the applicant.

What is a Medical Examination?

Definition: A "Medical Examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

At the pre-offer stage, an employer cannot require examinations that seek information about physical or mental impairments or health. It is not always easy to determine whether something is a medical examination. The following factors are helpful in determining whether a procedure or test is medical:

* Is it administered by a health care professional or someone trained by a health care professional?

* Are the results interpreted by a health care professional or someone trained by a health care professional?

* Is it designed to reveal an impairment or physical or mental health?

* Is the employer trying to determine the applicant's physical or mental health or impairments?

* Is it invasive (for example, does it require the drawing of blood, urine or breath)?

* Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?

* Is it normally given in a medical setting (for example, a health care professional's office)?

* Is medical equipment used?

In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a medical examination. In some cases, one factor may be enough to determine that a procedure or test is medical.

Example: An employer requires applicants to lift a thirty pound box and carry it twenty feet. This is not a medical examination; it is just a test of whether the applicant can perform this task. But, if the employer takes the applicant's blood pressure or heart rate after the lifting and carrying, the test would be a medical

examination because it is measuring the applicant's physiological response to lifting and carrying, as opposed to the applicant's ability to lift and carry.

Example: A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, this test is a medical examination.

Below are some commonly asked questions about the ADA's restrictions on pre-offer medical examinations.

* May an employer require applicants to take physical agility tests?

Yes. A physical agility test, in which an applicant demonstrates the ability to perform actual or simulated job tasks, is not a medical examination under the ADA.16

Example: A police department tests police officer applicants' ability to run through an obstacle course designed to simulate a suspect chase in an urban setting. This is not a medical examination.

* May an employer require applicants to take physical fitness tests?

Yes. A physical fitness test, in which an applicant's performance of physical tasks -- such as running or lifting -- is measured, is not a medical examination.17

However, if an employer measures an applicant's physiological or biological responses to performance, the test would be medical.

Example: A messenger service tests applicants' ability to run one mile in 15 minutes. At the end of the run, the employer takes the applicants' blood pressure and heart rate. Measuring the applicant's physiological responses makes this a medical examination.

* May an employer ask an applicant to provide medical certification that s/he can safely perform a physical agility or physical fitness test?

Yes. Although an employer cannot ask disability-related questions, it may give the applicant a description of the agility or fitness test and ask the applicant to have a private physician simply state whether s/he can safely perform the test.

* May an employer ask an applicant to assume liability for injuries incurred in performing a physical agility or physical fitness test?

Yes. An employer may ask an applicant to assume responsibility and release the employer of liability for injuries incurred in performing a physical agility or fitness test.

* May an employer give psychological examinations to applicants?

Yes, unless the particular examination is medical. This determination would be based on some of the factors listed above, such as the purpose of the test and the intent of the employer in giving the test. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment (for example, those listed in the American Psychiatric Association's most recent Diagnostic and Statistical Manual of Mental Disorders (DSM)).

Example: An employer gives applicants the RUOK Test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions). This test is medical.

On the other hand, if a test is designed and used to measure only things such as honesty, tastes, and habits, it is not medical.

Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer, is not a medical examination.

* May an employer give polygraph examinations to applicants?

Although most employers are prohibited by federal and state laws from giving polygraph examinations, some employers are not prohibited from giving these examinations. Under the ADA, polygraph examinations are not medical examinations.18 Many times, however, polygraph examinations contain disability-related questions, such as questions about what lawful medications the applicant is taking. Employers cannot ask disability-related questions as part of a pre-offer examination, even if the examination is not itself "medical."

* May an employer give vision tests to applicants?

Yes, unless the particular test is medical. Evaluating someone's ability to read labels or distinguish objects as part of a demonstration of the person's ability to do the job is not a medical examination. However, an ophthalmologist's or optometrist's analysis of someone's vision is medical. Similarly, requiring an individual to read an eye chart would be a medical examination.

* May an employer give applicants tests to determine illegal use of controlled substances?

Yes. The ADA specifically states that, for purposes of the ADA, tests to determine the current illegal use of controlled substances are not considered medical examinations.

* May an employer give alcohol tests to applicants?

No. Tests to determine whether and/or how much alcohol an individual has consumed are medical, and there is no statutory exemption.

The Post-Offer Stage

After giving a job offer to an applicant, an employer may ask disability-related questions and perform medical examinations. The job offer may be conditioned on the results of post-offer disability-related questions or medical examinations.

At the "post-offer" stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job.19

If an employer asks post-offer disability-related questions, or requires post-offer medical examinations, it must make sure that it follows certain procedures:

* all entering employees in the same job category must be subjected to the examination/inquiry, regardless of disability;20 and

* medical information obtained must be kept confidential.21

Below are some commonly asked questions about the post-offer stage.

* What is considered a real job offer?

Since an employer can ask disability-related questions and require medical examinations after a job offer, it is important that the job offer be real. A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. Of course, there are times when an employer cannot reasonably obtain and evaluate all non-medical information at the pre-offer stage. If an employer can show that is the case, the offer would still be considered a real offer.

Example: It may be too costly for a law enforcement employer wishing to administer a polygraph examination to administer a pre-

offer examination asking non-disability-related questions, and a post-offer examination asking disability-related questions. In this case, the employer may be able to demonstrate that it could not reasonably obtain and evaluate the non-medical polygraph information at the pre-offer stage.

Example: An applicant might state that his current employer should not be asked for a reference check until the potential employer makes a conditional job offer. In this case, the potential employer could not reasonably obtain and evaluate the non-medical information from the reference at the pre-offer stage.

* Do offers have to be limited to current vacancies?

No. An employer may give offers to fill current vacancies or reasonably anticipated openings.

* May an employer give offers that exceed the number of vacancies or reasonably anticipated openings?

Yes. The offers will still be considered real if the employer can demonstrate that it needs to give more offers in order to actually fill vacancies or reasonably anticipated openings. For example, an employer may demonstrate that a certain percentage of the offerees will likely be disqualified or will withdraw from the pool.

Example: A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available positions because about half of the offers will likely be revoked based on post-offer medical tests and/or security checks, and because some applicants may voluntarily withdraw from consideration.

Of course, an employer must comply with the ADA when taking people out of the pool to fill actual vacancies. The employer must notify an individual (orally or in writing) if his/her placement into an actual vacancy is in any way adversely affected by the results of a post-offer medical examination or disability-related question.

If an individual alleges that disability has affected his/her placement into an actual vacancy, the EEOC will carefully scrutinize whether disability was a reason for any adverse action. If disability was a reason, the EEOC will determine whether the action was job-related and consistent with business necessity.

* After an employer has obtained basic medical information from all individuals who have been given conditional offers in a job category, may it ask specific individuals for more medical information?

Yes, if the follow-up examinations or questions are medically related to the previously obtained medical information.22

Example: At the post-offer stage, an employer asks new hires whether they have had back injuries, and learns that some of the individuals have had such injuries. The employer may give medical examinations designed to diagnose back impairments to persons who stated that they had prior back injuries, as long as these examinations are medically related to those injuries.

* At the post-offer stage, may an employer ask all individuals whether they need reasonable accommodation to perform the job?

Yes.

* If, at the post-offer stage, someone requests reasonable accommodation to perform the job, may the employer ask him/her for documentation of his/her disability?

Yes. If someone requests reasonable accommodation so s/he will be able to perform a job and the need for the accommodation is not obvious, the employer may require reasonable documentation of the individual's entitlement to reasonable accommodation. So, the employer may require documentation showing that the individual has a covered disability, and stating his/her functional limitations.

Example: An entering employee states that she will need a 15-minute break every two hours to eat a snack in order to maintain her blood sugar level. The employer may ask her to provide documentation from her doctor showing that: (1) she has an impairment that substantially limits a major life activity; and (2) she actually needs the requested breaks because of the impairment.

Confidentiality

An employer must keep any medical information on applicants or employees confidential, with the following limited exceptions:

* supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;

* first aid and safety personnel may be told if the disability might require emergency treatment;

* government officials investigating compliance with the ADA must be given relevant information on request;23

* employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws;24 and

* employers may use the information for insurance purposes.25

Below are some commonly asked questions about the ADA's confidentiality requirements.

* May medical information be given to decision-makers involved in the hiring process?

Yes. Medical information may be given to -- and used by -- appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA. In addition, the employer may use the information to determine reasonable accommodations for the individual. For example, the employer may share the information with a third party, such as a health care professional, to determine whether a reasonable accommodation is possible for a particular individual. The information certainly must be kept confidential.

Of course, the employer may only share the medical information with individuals involved in the hiring process (or in implementing an affirmative action program) who need to know the information. For example, in some cases, a number of people may be involved in evaluating an applicant. Some individuals may simply be responsible for evaluating an applicant's references; these individuals may have no need to know an applicant's medical condition and therefore should not have access to the medical information.

* Can an individual voluntarily disclose his/her own medical information to persons beyond those to whom an employer can disclose such information?

Yes, as long as it's really voluntary. The employer cannot request, persuade, coerce, or otherwise pressure the individual to get him/her to disclose medical information.

* Does the employer's confidentiality obligation extend to medical information that an individual voluntarily tells the employer?

Yes. For example, if an applicant voluntarily discloses bipolar disorder and the need for reasonable accommodation, the employer may not disclose the condition or the applicant's need for accommodation to the applicant's references.

* Can medical information be kept in an employee's regular personnel file?

No. Medical information must be collected and maintained on separate forms and in separate medical files.26 An employer should not place any medical-related material in an employee's non-medical personnel file. If an employer wants to put a document in a personnel file, and that document happens to contain some medical information, the employer must simply remove the medical information from the document before putting it in the personnel file.

* Does the confidentiality obligation end when the person is no longer an applicant or employee?

No, an employer must keep medical information confidential even if someone is no longer an applicant (for example, s/he wasn't hired) or is no longer an employee.

* Is an employer required to remove from its personnel files medical information obtained before the ADA's effective date?

No.

NOTE: Index removed in ASCII version

1. Codified as amended at 42 U.S.C. §§ 12101-17, 12201-13 (Supp. V 1994).

2. The analysis in this guidance also applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 791(g) (West Supp. 1994). In addition, the analysis applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C.A. §§ 793(d), 794(d) (West Supp. 1994).

3. 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a),(b).

4. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.10, 1630.14(b)(3).

5. 42 U.S.C. § 12113(b); See 29 C.F.R. pt. 1630 app. § 1630.2(r).

6. 29 C.F.R. § 1630.14(b)(1)(i-iii).

7. See 42 U.S.C. § 12201(b); 29 C.F.R. pt. 1630 app. § 1630.14(b).

8. See 42 U.S.C. § 12201(c); 29 C.F.R. pt. 1630 app. § 1630.14(b). For example, an employer may submit medical information to the company's health insurance carrier if the information is needed to administer a health insurance plan in accordance with § 501(c) of the ADA.

9. Of course, an employer can always ask about an applicant's ability to perform the job.

10. Sometimes, applicants disclose disability-related information in responding to an otherwise lawful pre-offer question. Although the employer has not asked an unlawful question, it still cannot refuse to hire an applicant based on disability unless the reason is "job-related and consistent with business necessity."

11. However, an employer cannot ask a question in a manner that requires the individual to disclose the need for reasonable

accommodation. For example, as described later in this guidance, an employer may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

12. It should be noted that an employer might lawfully ask questions about the need for reasonable accommodation on the job and then fail to hire the applicant. The rejected applicant may then claim that the refusal to hire was based on the need for accommodation. Under these facts, the EEOC will consider the employer's pre-offer questions as evidence that the employer knew about the need for reasonable accommodation, and will carefully scrutinize whether the need to provide accommodation was a reason for rejecting the applicant.

13. However, investigators should be aware that Title VII of the Civil Rights Act of 1964, as amended, applies to such questions and that nothing in this Enforcement Guidance relieves an employer of its obligations to comply with Title VII. The Commission has previously provided guidance for investigators to follow concerning an employer's use of arrest/conviction records. See Policy Guidance No. N-915-061 (9/7/90) ("Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)"); EEOC Compliance Manual, Vol. II, Appendices 604-A ("Conviction Records") and 604-B ("Conviction Records - Statistics").

14. "Drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812). 29 C.F.R. § 1630.3(a)(1).

15. 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

16. Of course, an employer cannot use a test in violation of other federal civil rights statutes. For example, if a test has an adverse impact under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., it must be shown to be job-related and consistent with business necessity.

17. Although physical agility tests and physical fitness tests are not "medical" examinations, these tests are still subject to other parts of the ADA. For example, if a physical fitness test which requires applicants to run one mile in ten minutes screens out an applicant on the basis of disability, the employer must be prepared to demonstrate that the test is "job-related and consistent with business necessity."

18. A polygraph examination purportedly measures whether a person believes s/he is telling the truth in response to a particular inquiry. The examination does not measure health or impairments. Rather, it just measures relative changes in physiological responses of the test taker.

19. But, if an individual is screened out because of disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. § 12112(b); 29 C.F.R. §§ 1630.10, 1630.14(b)(3).

20. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b)(1),(2).

21. Id.

22. Once again, if an examination or inquiry screens out someone because of disability, the exclusionary criteria must be "job-related and consistent with business necessity." Where safety considerations are the reason, the individual can only be screened out because s/he poses a "direct threat."

23. 29 C.F.R. § 1630.14(b)(1)(i-iii).

24. See 42 U.S.C. § 12201(b); 29 C.F.R. pt. 1630 app. § 1630.14(b).

25. See 42 U.S.C. § 12201(c); 29 C.F.R. pt. 1630 app. § 1630.14(b). For example, an employer may submit medical information to the company's health insurance carrier if the information is needed to administer a health insurance plan in accordance with § 501(c) of the ADA.

26. A notation that an individual has taken sick leave or had a doctor's appointment is not confidential medical information. Of course, documentation of the individual's diagnosis or symptoms would be medical information.

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