



County Technical Assistance Service

Published on e-Li (<http://eli.ctas.tennessee.edu>)

February 21, 2019

Employment Discrimination

Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

The University of Tennessee
County Technical Assistance Service
226 Capitol Blvd. Suite 400
Nashville, TN. 37219
615-532-3555 phone
615-532-3699 fax
ctas@tennessee.edu
www.ctas.tennessee.edu

Table of Contents

Employment Discrimination	3
State and Federal Laws Prohibiting Employment Discrimination	3
Protected Classifications	3
Prohibited Discriminatory Practices.....	3
Preventing Discrimination in the Workplace	4
Disability Discrimination	5
Purpose of ADA	5
ADA Definitions.....	6
Reasonable Accommodation and Undue Hardship	8
Reasonable Accommodation Definition	8
Asking for an Accommodation.....	9
Providing Reasonable Accommodation	10
Undue Hardship	10
Medical Examinations under ADA	11
Disability-Related Inquiry.....	11
Medical Examinations Defined	12
Job-Related Medical Examinations	12
FAQ's about Medical Examinations under the ADA.....	13
Periodic Testing and Monitoring under the ADA.....	13
Safety Concerns	14
Drug and Alcohol Use	14
Insurance and Sick Leave.....	15
Technical Assistance.....	15
Race/Color Discrimination	16
Age Discrimination	16
National Origin Discrimination	17
Sex Discrimination.....	17
Sexual Harassment.....	17
Pregnancy Discrimination	18
Gender-Based Wage Discrimination.....	18
Religious Discrimination	18
Genetic Discrimination	19

Employment Discrimination

Reference Number: CTAS-170

“Discrimination” is treatment or consideration that is given on the basis of a class or category rather than on individual merit. Various forms of discrimination in the workplace are prohibited under both state and federal laws. These discrimination laws not only prohibit overt acts of discrimination but they also prohibit other forms of discrimination, including harassment if it is on the basis of something that is covered by the discrimination laws. The general framework of discrimination law is set out in the federal statutes; state laws are generally very similar and will not be discussed except where there is a significant difference. Not all discrimination is illegal, and not all bad behavior rises to the level of illegal harassment.

State and Federal Laws Prohibiting Employment Discrimination

Reference Number: CTAS-1047

The primary laws that prohibit discrimination in the workplace are:

1. Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex or national origin;
 - (a) The Pregnancy Discrimination Act (PDA) is an amendment to Title VII that prohibits employment discrimination on the basis of pregnancy, childbirth or related medical conditions;
 - (b) The Equal Pay Act of 1963 (EPA) is an amendment to the Fair Labor Standards Act (FLSA) that protects men and women who perform substantially equal work in the same establishment from gender-based wage discrimination;
2. The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from age-based discrimination; and
3. Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employment discrimination against qualified individuals with disabilities.
4. Title II of the Genetic Information Discrimination Act of 2008 (GINA) prohibits employment discrimination based on genetic information.

The Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices and policies.

The Tennessee Human Rights Act, T.C.A. § 4-21-101 *et seq.*, also prohibits employment discrimination on the basis of race, creed, color, religion, sex, age and national origin. The state laws are very similar to the federal laws discussed above.

Protected Classifications

Reference Number: CTAS-1048

Discrimination in the workplace is illegal if it is on the basis of any of the following:

- Race
- Color
- Religion
- Sex (this classification includes all forms of gender-based discrimination, including sexual harassment, pregnancy discrimination and gender-based wage discrimination)
- National Origin
- Age
- Disability

The laws protect all employees and applicants for employment from discrimination when it is based on any of these classifications.

Prohibited Discriminatory Practices

Reference Number: CTAS-1049

It is illegal to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment or classification of employees;
- Transfer, promotion, layoff or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans and disability leave; and
- Other terms and conditions of employment.

The laws not only prohibit intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion or sex. This is sometimes referred to as “disparate impact.”

Discriminatory practices also include:

1. Harassment on the basis of race, color, religion, sex, national origin, age or disability (e.g., sexual harassment is a form of discrimination on the basis of sex);
2. Retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices;
3. Employment decisions that are based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group or individuals with disabilities; and
4. Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin or an individual with a disability.

Preventing Discrimination in the Workplace

Reference Number: CTAS-1050

One of the best ways for an employer to eliminate discrimination from the workplace is to examine the criteria he or she uses for making employment decisions to ensure that they are *job related* and *consistent with business necessity*. Making sure the criteria used are based on the actual requirements of the job and the needs of the workplace, and evaluating employees on their individual abilities and accomplishments using these criteria, will go a long way toward eliminating discrimination from the workplace.

Employers should take steps to stop discriminatory practices in the workplace before they occur. Making all employees aware of the laws prohibiting discrimination is an important step. Employers are required to post notices advising employees of their rights under these laws. The notices must be placed in an area that is readily accessible to all employees, and accommodations should be made for persons who have visual or other disabilities that affect their ability to read the notices. EEOC Posters are available free of charge by calling the Equal Employment Opportunity Commission’s Publications Distribution Center at 1-800-669-3362. [Posters are also available through the EEOC website.](#)

For additional information concerning the laws that prohibit discrimination in employment, see [Federal Laws Prohibiting Job Discrimination Questions and Answers](#), a publication of the United States Equal Opportunity Commission. These and many other useful EEOC publications are available from the [EEOC’s Web site](#) or from the nearest EEOC office:

Nashville Area Office
50 Vantage Way
Suite 202
Nashville, TN 37228
Phone: (615) 736-5820
TTY: (615) 736-5870

Memphis District Office
1407 Union Avenue
Suite 521
Memphis, TN 38104
Phone: (901) 544-0115
TTY: (901) 544-0112

Disability Discrimination

Reference Number: CTAS-169

The federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, prohibits discrimination against persons with disabilities in employment under Title I, and mandates their full participation in services and activities offered by local governments under Title II.

Title I of the ADA prohibits employers from discriminating against a qualified individual with a disability in all aspects of employment, including job applications, hiring, advancement, discharge, compensation, training, and any other terms, conditions or privileges of employment. 42 U.S.C. § 12112(a). Local governments must make reasonable accommodations for known physical or mental limitations of an otherwise qualified individual unless to do so would result in an undue hardship. A local government cannot exclude people with disabilities from job opportunities unless they are unable to perform the essential functions of the job with reasonable accommodations. The employer cannot prefer or select a qualified person without a disability over an equally qualified person with a disability merely because the disabled person will require an accommodation.

The basic rule of Title II of the ADA is that no person is to be excluded from participation in or denied the benefits of the programs, services or activities of local governments on the basis of a disability, nor be subjected to discrimination by local governments. Government services and activities covered under Title II include education, highways and roads, law enforcement, parks, courts, personnel, voting, taxpaying, deed recording, motor vehicle registration, public meetings and public transportation.

Counties are required to have an ADA coordinator and grievance procedures in place to deal with complaints of violations of the ADA. Counties were required to conduct a self-evaluation and make necessary structural changes in existing structures in accordance with detailed accessibility guidelines by specified deadlines; ADA accessibility guidelines also apply for any new construction.

[EEOC Facts about the Americans with Disabilities Act](#)

Purpose of ADA

Reference Number: CTAS-2012

The ADA applies to individuals with disabilities that substantially limit one or more major life activity. The ADA covers people who—

- Are deaf, blind or use a wheelchair,
- Have physical conditions such as epilepsy, diabetes, HIV infection, or severe forms of arthritis, hypertension, or carpal tunnel syndrome, and
- Have mental impairments such as depression, bipolar disorder, and mental retardation.

The following conditions are NOT covered under the ADA:

- Environmental, cultural, and economic disadvantages
- Homosexuality and bisexuality
- Pregnancy
- Physical characteristics
- Common personality traits
- Normal deviations in height, weight or strength

The purpose of Title I of the Americans with Disabilities Act is to ensure that employers provide reasonable accommodations to individuals with disabilities thereby protecting their employment rights. Rights are protected during the application process, hiring, firing, wages, training, promotions and all other aspects of employment. Employers covered by the ADA must ensure that people with disabilities—

- Have an equal opportunity to apply for and work in jobs for which they are qualified.
- Have an equal opportunity for promotions.
- Have equal access to benefits.
- Are not harassed because of their disability.

Title I of the ADA applies to private employers with 15 or more employees, State and local governments, employment agencies and labor unions. When the ADA went into effect, the Equal Employment Opportunity Commission (EEOC) was tasked with issuing regulations and enforcing Title I of the ADA. The EEOC advised employers that when determining an employee's impairment, the decision should be made without considering steps taken to mitigate the disability.

However, in 1999 The Supreme Court ruled in three cases, known as *The Sutton Trilogy*, that individuals should be evaluated in their mitigated state. Essentially the Supreme Court ruled that if a person is taking measures to correct or mitigate the physical or mental impairment, the effects of those measures must be taken into account when judging whether the person is disabled. Because of the Supreme Court rulings, the EEOC rescinded the parts of its Title I regulations dealing with mitigating measures and revised its *Technical Assistance Manual on Title I*.

As a result of the Supreme Court rulings, some individuals were punished for taking steps to mitigate their disabilities or impairments. The Amendments Act of 2008 overturns the *Sutton* cases and all lower court opinions based on the *Sutton* precedent. Under the Amendments Act, the original definition of disability in the ADA remains the same, but the definition is to be interpreted broadly and not consider mitigating measures when making the disability determination.

The Rehabilitation Act of 1973 prohibits discrimination of individuals with disabilities by recipients of federal funding. Part of the Americans with Disabilities Act is based on Section 504 of the Rehabilitation Act. In the Amendments Act, Congress included an amendment to the Rehabilitation Act whereby the term "disability" in the Rehabilitation Act now has the same meaning as in the ADA act.

ADA Definitions

Reference Number: CTAS-2013

Individual with a Disability

Under the ADA, an individual with a disability is a person who—

1. has a physical or mental impairment that substantially limits one or more major life activities,
2. has a record of such impairment, or
3. is regarded as having such an impairment.

42 U.S.C. § 12102(1).

Persons who are related or have a known association with a disabled person are also protected under Title I. The ADA prohibits discrimination based on an assumption that a relationship with a disabled person will affect job performance. 29 C.F.R. § 1630.8.

While this definition of disability remains the same under the Amendments Act, the Act provides clarification on what is considered a "major life activity" and what is meant by "regarded as having an impairment."

Major Life Activities

The original ADA did not offer guidance as to what constitutes a major life activity. The EEOC issued a list in their enforcement guidance that the following life activities should be considered major: walking, seeing, speaking, hearing, breathing, learning, performing manual tasks, caring for oneself, working, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, and sleeping.

The Amendments Act legislates the EEOC's list with some additions. The Act includes the following two non-exhaustive lists of major life activities:

In General--Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A).

Major Bodily Functions--Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. §12102 (2)(B).

Even though the Amendments Act lists various major bodily functions as major life activities, there is still a determination of what constitutes "substantially limited".

Substantial Limitation

An individual is covered under the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activity. "Substantially limits" is a measurement of the severity of the disability. The original ADA did not define substantial limitation and it was left up to the EEOC to define by regulation. In section 902.4(1) of the Definition of Disability, the EEOC defined substantial limitation as inability to perform a major life activity or significant restriction as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person.

While the Amendments do not define "substantially limits", they do state that the definition of disability should be interpreted broadly and that the question of whether an individual's impairment is a disability should not require extensive analysis. The Act rejects the Supreme Court ruling in *The Sutton Trilogy* that the terms "substantially" and "major" need to be interpreted strictly.

42 U.S.C. § 12102(4).

Episodic or Remission

There have been various rulings by the courts that impairments that are episodic or in remission may not always be disabilities. The new Rules of Construction Regarding the Definition of Disability state that the definition of disability shall be construed in accordance with the following:

- A. The definition of disability in the Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- B. The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- C. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

42 U.S.C. §12102(4)(D)

This means that under the Amendments Act, individuals that have an episodic disability, such as epilepsy, or individuals that are in remission can argue that they have an actual disability because when active the disability substantially limits a major life activity.

Mitigating Measures

When the EEOC first issued guidance documents for enforcing Title I of the ADA, they advised employers not to consider medical treatments or devices used to mitigate an impairment when determining if an impairment should be considered a disability under the ADA. The Supreme Court then ruled in *The Sutton Trilogy* that individuals should be evaluated in their mitigated state so the EEOC changed their enforcement guidelines. The Amendments Act overturns *The Sutton Trilogy* and includes the original EEOC regulations requiring employers not to consider mitigating measures when deciding whether or not an impairment should be considered a disability under the ADA.

The only exemption to the definition of mitigating measures is ordinary glasses and contact lenses. 42 U.S.C. § 12102(4)(E)(ii). They were exempted because of the number of people that would be protected and entitled to reasonable accommodation.

Aside from this exemption, under 42 U.S.C. § 12102(4)(i) when an employer is deciding if an employee is entitled to a workplace accommodation, they must make this decision without regard to the following mitigating measures:

- medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxilliary aids or services; or
- learned behavioral or adaptive neurological modifications.

Regarded As

The third prong of the ADA's definition of disability states that an individual with a disability is a person who is "regarded as" having such an impairment. The original ADA did not explain what "regarded as" meant so there were conflicting opinions from the courts and the EEOC.

The Amendments Act provides that an individual is regarded as having a disability if that person has been subjected to discrimination based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. The "regarded as" provision does not apply to impairments that are transitory and minor. Transitory impairments are those with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3).

Employers do not need to believe that a major life activity is substantially limited. Individuals are protected whether they have an actual or perceived impairment, even if the impairment would not limit a major life activity. However, the Act also states that only individuals with actual disabilities are entitled to workplace accommodations.

The Amendments Act clarifies that while an individual who is regarded as having a disability is protected from discrimination under the ADA, such a person is not entitled to reasonable accommodations unless the person actually has a disability.

Essential Functions

Employers must also determine the essential functions of a job. Essential functions are the basic job duties that an employee who holds the job must be able to perform. 29 C.F.R. § 1630.2(n)(1). A qualified individual with a disability is a person who satisfies the skill, experience, education, and other job-related requirements of the position and who, with or without a reasonable accommodation, can perform the essential functions of the position. When determining if a job duty is essential, consider—

- if the position exists to perform that function,
- the number of other employees that can perform the function, and
- the degree of skill required to perform the function.

29 C.F.R. § 1630.2(n)(2)

It is important to have job descriptions that detail the essential functions of every job. The EEOC will consider the job descriptions evidence of essential functions as well as—

- the employer's judgement as to which functions are essential,
- the work experience of past and present employees in the job,
- the time spent performing the job task,
- the consequences if an employee does not perform the task, and
- the collective bargaining agreement (if applicable).

29 C.F.R. § 1630.2(n)(3)

Additional definitions can be found on the following pages:

[Reasonable Accommodation Definition](#)

[Medical Examinations Defined](#)

Reasonable Accommodation and Undue Hardship

Reference Number: CTAS-2018

A qualified individual with a disability is a person who has the skills and education to perform the essential functions of a job with or without reasonable accommodations as long as the reasonable accommodations do not present an undue hardship to the employer. 42 U.S.C. § 12111(8)

"Reasonable accommodation" and "undue hardship" are two key terms in the ADA. Employers should know when to ask if a reasonable accommodation is needed. After explaining the hiring process, an employer may ask all the applicants if they will need a reasonable accommodation to assist them in completing the application process.

During the hiring process and before a job offer is extended, an employer should not ask an applicant if a reasonable accommodation is needed to perform essential job functions unless the employer knows that the applicant has a disability. An employer may know about a disability because it's obvious or the applicant may have voluntarily disclosed the information.

When an applicant is hired, the employer may ask if a reasonable accommodation is needed to perform the job but all new employees in the same job category must be asked this question.

Reasonable Accommodation Definition

Reference Number: CTAS-2019

A reasonable accommodation is making an adjustment to a job or work environment that enables a qualified employee with a disability to perform the essential job functions. It may also be necessary for an employer to make a reasonable accommodation so that a qualified applicant can participate in the application process. Reasonable accommodations help ensure that qualified individuals with disabilities have rights and privileges equal to those of nondisabled employees. Included in these rights are equal access to information communicated in the work place and access to training programs. 29 C.F.R. § 1630.2(o).

A reasonable accommodation will remove a workplace barrier for an individual with a disability. Workplace barriers include physical objects as well as policies and procedures.

Many disabilities are not obvious and even when a disability is obvious, the individual may not need a reasonable accommodation to perform essential job functions. Reasonable accommodations are provided on an individual basis. An employer's obligation to provide a reasonable accommodation applies only to known physical or mental disabilities. An employer should inquire about the need for a reasonable accommodation when—

- The employer knows the employee has a disability.
- The employer suspects a disability is the cause of unsatisfactory job performance.
- The employer knows a disability prevents the employee from requesting a reasonable accommodation.

If the employee with the disability states that a reasonable accommodation is not needed, the employer has fulfilled its obligation.

When a request for a reasonable accommodation is made, it is up to the employer to determine the appropriate accommodation. There are three categories of reasonable accommodations—

1. Modifications or adjustments to the job application process.
2. Modifications or adjustments to the work environment so an individual with a disability can perform the essential functions of a job.
3. Modifications or adjustments to the work environment so an individual with a disability can enjoy equal benefits and privileges.

42 U.S.C. § 12111(9)(A).

The following are examples of reasonable accommodations:

1. Job restructuring (shifting minor responsibilities to others, altering when/how a task is performed).
2. Making existing facilities regularly used by employees readily accessible.
3. Providing additional unpaid leave, when it is not an undue hardship. Paid leave is not required, and an employer is not required to grant leave when it can make another accommodation that will allow the employee to keep working, such as a temporary transfer to another position.
4. Modified or part-time schedule.
5. Modifying workplace policy.
6. Re-assignment to a vacant position – The employee must be qualified for the position. The employer is not required to create a new job or bump an employee out of a position. The employer does not have to offer a promotion. The re-assignment should be to a position that has equal pay and status, but if a comparable position is not vacant the employer may assign the employee to a vacant position with lower pay if the employee meets the job qualifications.

42 U.S.C. § 12111(9)(B).

An employer can not require an employee with a disability to accept a reasonable accommodation if the accommodation is not requested or needed. However, if an employee with a disability turns down an accommodation needed to perform the essential functions of the job, they may be considered not qualified for the job.

Examples of things that are not considered reasonable accommodations include—

1. Elimination of a primary job responsibility (an "essential function" of the position).
2. Lowering production standards (but an employer may be required to make accommodations to allow disabled employees to meet the standards).
3. Providing personal use items such as wheelchairs, eyeglasses, hearing aids or similar devices.

Asking for an Accommodation

Reference Number: CTAS-2020

Employers generally only have to provide a reasonable accommodation when one is requested by a qualified individual with a disability. Individuals with disabilities may request a reasonable accommodation at any time during the employment process, including the application process. The request is generally a statement in plain English. It does not have to include the terms "ADA" or "reasonable accommodation". While the request does not have to be in writing, employers may prefer receiving something in writing to document the request. Family members, friends, and counselors may request an accommodation for an individual with a disability.

Once a request is made, the employer may want confirmation that the individual's medical condition meets the ADA's definition of disability. An employer is entitled to ask for medical documentation of the disability and its limitations if the disability is not obvious. If the medical condition does not meet the ADA's definition of disability, then a reasonable accommodation is not required.

[Employers can use this form to request medical documentation.](#)

After receiving the request for reasonable accommodation and verifying that the condition meets the definition of disability, usually the employer and the individual with the disability discuss possible reasonable accommodations to try to determine what accommodation might work best. During this conversation it is important for the individual with the disability to describe the problems posed by the workplace barrier.

If the employer does not receive sufficient information, an explanation as to what additional information is needed should be provided to the individual with the disability. The employer should limit requests for information to the disability in question.

Providing Reasonable Accommodation

Reference Number: CTAS-2021

The ADA does not require employers to have specific procedures to provide a reasonable accommodation but generally written procedures are helpful. The Amendments Act added a provision to the ADA stating that an accommodation is not required if altering the policies, practices or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods and services.

When implementing reasonable accommodations it is important to—

- Develop a realistic time frame that promptly responds to the request.
- Keep lines of communication open.
- Use outside resources if necessary.
- Explain to the individual with the disability the reasonable accommodation and why it was chosen.

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective (i.e., it removes the workplace barrier at issue). The employer may suggest alternative accommodations and the employer may choose the less expensive alternative or the one that is easier to provide. The employer is not required to give the employee the accommodation that the individual wants. Similarly, the employee is not required to accept the accommodation offered by the employer; however, as long as the accommodation offered by the employer is reasonable and effective, the employer has fulfilled his or her obligation to provide a reasonable accommodation. 29 C.F.R. § 1630.9(d).

It is not necessary to contact the EEOC about requested accommodations. However, if you have difficulty identifying an appropriate accommodation you may contact the EEOC or State and local vocational rehabilitation agencies and disability agencies for assistance.

Examples of reasonable accommodations for visual disabilities include—

- An external computer screen magnifier
- An accessible Web site
- Software that will read information on the computer screen
- Written materials in accessible format such as Braille or large print
- Use of guide dog in the workplace

[Click here for more information on accommodating vision impairments under the ADA.](#)

An employer should not disclose to other employees that an employee is receiving a reasonable accommodation. The ADA prohibits disclosure of medical information and telling employees that a co-worker is receiving a reasonable accommodation discloses that the co-worker has a disability.

Undue Hardship

Reference Number: CTAS-2022

Employers are not required to implement any reasonable accommodation that would present an undue hardship on the business. Undue hardship means that the accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature of operation of the business. Factors to be considered include the cost of the accommodation, the size and financial resources of the

employer, and the nature and structure of the employer's business. An employer is not required to lower production standards or eliminate essential job functions to implement a reasonable accommodation. 42 U.S.C. § 12111(10).

If an employer is part of a larger organization, the structure and assets of the larger organization would be considered when determining if an accommodation is an undue hardship. Larger employers are usually expected to make accommodations that require greater effort and expense than would be required of a smaller employer.

Employers should look for outside funding when reasonable accommodations are costly. Vocational rehabilitation agencies may provide funds and the cost of providing accommodations can be offset by state and federal tax credits or deductions. Also, the individual with the disability should be given the opportunity to provide the accommodation or help pay for an accommodation that creates an undue hardship on an employer.

Employers are liable for contractual relationships. 29 C.F.R. § 1630.6.

Under Title III of the ADA, if your business is a place of public accommodation then you must provide accessibility to the general public. Title III also requires places of public accommodation and commercial facilities to provide accessibility during new construction or renovation.

Medical Examinations under ADA

Reference Number: CTAS-2023

Prior to the passage of the ADA, employers sometimes used medical information to exclude applicants from jobs. Sometimes employers used medical information to discriminate against disabled individuals. The ADA was passed to protect the right of disabled applicants and employees to be judged on merit alone but also to protect the right of employers to ensure job tasks are performed correctly and efficiently.

If an applicant for a job is disabled, an employer may be tempted to ask the applicant to participate in a medical examination. Employers are prohibited from asking any disability related questions or requiring a medical examination prior to making a job offer even if the questions relate to the job. 29 C.F.R. § 1630.13 (a). Under the ADA, an employer may not ask on a job application or in an interview whether or not the applicant is disabled. Suggested interview topics include education, training, and skills needed for the position. An employer may ask the applicant if he/she can perform specific job functions as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or demonstrate how, with or without reasonable accommodation, they would perform a job function. 42 U.S.C. § 12112(d)(2).

Do not ask about any physical or mental disability or how the person was disabled, any medication used by the applicant, or the applicant's worker's compensation history.

Job offers can be conditioned upon a physical examination, but only if such an examination is required of all applicants for similar jobs, and only if it is job related and consistent with the employer's business needs. 42 U.S.C. §12112(d)(3). After an applicant is hired, all required medical examinations must be job related. 42 U.S.C. §12112(d)(4)(A). The employer must require medical evaluations of all new employees in the same job category. If an applicant is not hired because of a disability found during the medical evaluation, the employer must show that the reasons for not hiring the person are job related and necessary and that there is no reasonable accommodation applicable to the situation. Voluntary health screenings and medical examinations that are part of an employee health program are acceptable. 42 U.S.C. § 12112(d)(4)(B). The results of all medical examinations are confidential.

Adhering to these ADA requirements should prevent an employer from basing a hiring decision on assumptions about a disability.

Disability-Related Inquiry

Reference Number: CTAS-2024

A disability-related inquiry is a question or series of questions that result in information about a disability. Questions to avoid include—

- Asking if the person has or ever had a disability.
- Asking a person how he/she became disabled and the severity of the disability.

- Asking a person to provide medical documentation about a disability.
- Asking co-workers, family members or friends about an employee's disability.
- Asking about genetic information.
- Asking about worker's compensation claims.
- Asking about drugs and medications currently being taken or taken in the past.
- Asking broad questions about impairments that result in information about a disability.

Any question that does not elicit information about a disability is not prohibited under the ADA. Questions such as—

- Asking about an employee's well being, a cold, a divorce, etc.
- Asking about nondisability-related impairments.
- Asking an employee if he/she can perform the job functions.
- Asking an employee if he/she has been drinking or has been using drugs.
- Asking for contacts/phone numbers in case of a medical emergency.
- Asking a pregnant employee when the baby is due....make sure the employee is pregnant before asking this question.

Medical Examinations Defined

Reference Number: CTAS-2025

A medical examination is any procedure or test that seeks information about a person's health. The guidance on Pre-employment Questions and Medical Examinations lists the following seven factors that can be used to determine if a test is a medical examination.

- Is the test administered by a health care professional?
- Is the test analyzed/interpreted by a health care professional?
- Is the test designed to reveal a physical impairment?
- Is the test invasive?
- Does the test measure employee's performance of a task or the physiological responses to performing the task?
- Is the test normally given in a medical setting?
- Is medical equipment used for the test?

Medical examinations include—

- Vision tests,
- Tests to check for genetic markers,
- Blood pressure screening and cholesterol testing,
- Nerve conduction tests,
- Range-of-motion tests,
- Pulmonary function tests,
- Tests to check for mental disorder or impairment and
- Diagnostic procedures.

Under the ADA the following tests are NOT considered medical examinations:

- Drug tests.
- Physical agility and fitness tests.
- Reading tests to demonstrate the ability to perform job functions.
- Psychological tests that measure personality traits.
- Polygraph examinations.

Under the ADA, current supervisors may not pass on medical information about employees interviewing in a different department or for a different job. Current employees who apply for a new job within the same organization should be treated the same as other applicants for the job.

Job-Related Medical Examinations

Reference Number: CTAS-2026

Employers may request an employee complete a medical examination when the examination is job-related and consistent with business necessity. 29 C.F.R. § 1630.10(a). The employer must have a reasonable belief that the employee's ability to perform their job is being impaired by a medical condition or that the employee poses a direct threat due to a medical condition.

A medical examination is also considered job-related and consistent with business necessity when—

- It is a follow-up to a request for a reasonable accommodation or
- It is a periodic medical examination.

It is important that an employer's belief that a medical condition is affecting an employee's ability to perform essential job functions be based on objective evidence. The Amendments Act added a provision that employers cannot screen out an applicant because of uncorrected vision unless it is job-related and consistent with business necessity. 29 C.F.R. § 1630.10(b).

When considering the reliability of information learned from another person, employers should consider—

- The relationship of the person providing the information to the employee in question.
- The seriousness of the medical condition.
- The motivation of the person providing the information.
- How the person learned the information.
- Any other evidence that may affect the reliability of the information.

FAQ's about Medical Examinations under the ADA

Reference Number: CTAS-2027

1. What happens if an employee refuses to participate in a requested medical examination?

It depends on why the employee was asked to participate in a medical examination. If the employee's job performance is suffering and a medical condition is suspected but the employee refuses the exam, discipline should focus on the employee's performance in accordance with company policy.

2. What happens if an employee requests a reasonable accommodation but provides insufficient documentation from his/her doctor to substantiate the ADA disability?

The employer should explain why the information is insufficient and give the employee a chance to provide the missing information. The employer can contact the employee's doctor (with the employee's consent) to obtain the missing information. As a last resort, the employer can require the employee go to a health care provider of the employer's choice.

Documentation may be insufficient when—

- The health care professional does not have the expertise to analyze the employee's condition.
 - The documentation does not specify the limitations due to the disability.
 - Any other factors that indicate the information is fraudulent.
- Employers are not required to provide a reasonable accommodation until they have sufficient documentation.

3. What happens if an employer believes an employee is a direct threat to other employees and to the organization?

Because the employer is responsible for assessing whether or not an employee poses a direct threat, the employer can have the employee examined by its own health care provider. The health care provider selected should have an expertise in the employee's suspected problem and should be able to provide current information.

Periodic Testing and Monitoring under the ADA

Reference Number: CTAS-2031

Periodic medical monitoring is sometimes required for job positions that deal with public safety. For example, police officers and firefighters may be required to pass an annual medical examination. This is the exception to the rule; in most cases employers can not require periodic medical monitoring.

An employer may require an employee who has completed alcohol rehabilitation to be periodically tested for alcohol if the employer has reasonable belief that the employee will pose a direct threat without testing.

Employee Assistance Program (EAP) counselors may ask employees about physical and mental conditions if the EAP counselor does not work for the employee's employer. EAP counselors must keep confidential any information revealed by employees. EAP counselors have no power over employment decisions.

There are other federal laws that require an employer to make disability-related inquiries and that may require employees to complete a medical evaluation. Compliance with these laws does not violate the ADA.

Disability-related inquiries and medical examinations that are part of a voluntary wellness program do not violate the ADA. A wellness program is voluntary if employers do not require participation and do not penalize employees for not participating.

For affirmative action purposes, employers may ask employees to voluntarily self-identify as persons with disabilities.

Safety Concerns

Reference Number: CTAS-2028

Employers can impose qualification standards intended to exclude individuals with a disability that pose a direct threat (either health or safety) to themselves or others if a reasonable accommodation can not be found. A direct threat is a significant risk of substantial harm. Before asking medical questions or arranging for a medical examination, make sure that poor job performance is being caused by a disability. If job functions are not being performed correctly, the reason may not be medical and the problem should be handled in accordance with company performance policies.

You can not refuse to hire or fire an employee because of a slightly increased or speculative risk of harm to himself or others. Under the ADA employers must make individualized decisions based on factual evidence, not assumptions or generalizations, ignorance, fear, patronizing attitudes, or stereotypes. By doing so the needs of the people with disabilities are balanced against the interests of employers in providing a safe workplace.

An employer should—

- Assess the individual's ability to safely perform the essential functions of the job based on objective evidence and medical judgement.
- Consider the duration of the risk, severity of potential harm, and the probability that harm will occur.

Do not base the decision on generalizations or unfounded fears. The harm must be serious and likely to occur and there must be no reasonable accommodation to reduce the risk.

29 C.F.R. § 1630.2(r)

Emergency Procedures under the ADA

The ADA does not prevent employers from obtaining and using employee medical information for an emergency evacuation plan. There are three different times an employer may obtain this information.

1. An employer can ask all new hires if they will require assistance during an emergency.
2. An employer can periodically ask all employees to self-identify whether they will need assistance.
3. An employer can ask an employee with a known disability if assistance is required.

An employer can ask individuals to describe what kind of assistance is required in case of an evacuation. Employees should inform their employer if a special medication, equipment, or device is needed. Employees need only share information necessary for an emergency evacuation; in most cases it won't be necessary to share details about the employee's medical condition.

Information acquired for emergency purposes is kept confidential. The ADA allows that the information may be shared with first aid and safety personnel. In the case of an emergency evacuation plan, the information should be shared with anyone who needs the information to fulfill their responsibilities under the plan.

Drug and Alcohol Use

Reference Number: CTAS-2029

Current users of illegal drugs (including illegal use of prescription drugs) and alcohol are not covered by the ADA. 42 U.S.C. § 12114(a). Tests for drug and alcohol usage are not subject to the ADA restrictions on medical exams. The ADA does not exclude—

- Individuals who are completing or have completed a rehabilitation program and are no longer using drugs.
- Individuals who are "believed" to be using drugs.

42 U.S.C. § 12114(b).

The ADA protects recovering addicts from discrimination on the basis of their status as an addict and a reasonable accommodation for an addict may include time off for treatment.

Under the ADA, recovering alcoholics and drug addicts are held to the same job performance standards as all other employees.

For additional information about drug testing, see [Governmental Employee Drug Testing-The Constitutional Issues](#).

Insurance and Sick Leave

Reference Number: CTAS-2030

Insurance

Employers are not required to provide to individuals with disabilities additional insurance other than similar coverage provided to non-disabled individuals. If health insurance coverage is limited to a certain number of treatments per year and an employee with a disability needs more treatments, under the ADA the employer is not required to pay for the additional treatments. Also under the ADA, an employer is not required to change insurance coverage if the current plan excludes or limits coverage for a new employee's pre-existing condition. 29 C.F.R. § 1630.5.

Sick Leave

Under the ADA an employer may—

- Request a doctor's note to justify an employee's use of sick leave.
- Request periodic updates when an employee is on extended leave because of a medical condition and has not specified a return date or has requested additional days of leave.
- Make a disability-related inquiry or require a medical examination when an employee who has been on extended leave for a medical condition comes back to work if the employer has a reasonable belief that the employee's present skill level is impaired by the medical condition.

Technical Assistance

Reference Number: CTAS-2039

Technical assistance is the dissemination of information to assist the public, including individuals protected by the ADA and entities covered by the ADA. Information may be disseminated by using—

- Audio visual materials,
- Pamphlets,
- Manuals,
- Electronic bulletin boards,
- Checklists, and
- Training.

To help educate and raise public awareness of the ADA, the Department provides—

Factsheets and pamphlets in different accessible formats,
Speakers for workshops, seminars, classes, and conferences,
An ADA telephone information line, and
Access to ADA documents through an electronic bulletin board.

Available factsheets and pamphlets include—

[Facts About the Americans with Disabilities Act](#)

[The ADA: Questions and Answers](#)

[The ADA: Your Responsibilities as an Employer](#)

[The Americans with Disabilities Act: A Primer for Small Business](#)

[Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#)

[Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act \(ADA\)](#)

[Questions and Answers: Enforcement Guidance On Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act \(ADA\)](#)

[Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures](#)

For additional information, contact—

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights Section, NYA
Washington, D.C. 20530

(800) 514-0301 (Voice)

(800) 514-0383 (TTY)

www.ada.gov

Race/Color Discrimination

Reference Number: CTAS-1051

In addition to discrimination based directly on race or color, Title VII prohibits employment decisions based on stereotypes or assumptions about abilities, traits or the performance of individuals of certain racial groups. Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Title VII prohibits discrimination on the basis of immutable characteristics associated with race, such as skin color, hair texture or certain facial features, even though not all members of the same race share the same characteristic. Title VII also prohibits discrimination on the basis of a condition that predominantly affects one race, unless the practice is job related and consistent with business necessity.

Minority employees cannot be segregated by physically isolating them from other employees or from customer contact. It also is illegal to exclude minorities from certain positions, or to group or categorize employees or jobs so that certain jobs are generally held by minorities.

Coding applications or resumes to indicate an applicant's race can be evidence of discrimination if minorities are excluded from employment or from certain positions. Also, requesting information that discloses or tends to indicate an applicant's race suggests that race will be unlawfully used in hiring decisions.

[EEOC Facts about Race/Color Discrimination](#)

Age Discrimination

Reference Number: CTAS-1052

Both the federal Age Discrimination in Employment Act (ADEA) and the Tennessee Human Rights Act, T.C.A. § 4-21-101 *et seq.*, protect individuals who are age 40 and older from employment discrimination based on age.^[1] It is unlawful to include age preferences, limitations, or specifications in job notices or advertisements, except in those very rare circumstances where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the essence of the business. The ADEA applies to states and local governments regardless of the number of employees they may have.^[2]

These laws also prohibit forced retirement of employees on the basis of age unless a specific exemption applies (law enforcement and firefighters are exempt and may be compelled to retire after the age of 65). The law does not, however, prohibit a plan permitting individuals to elect early retirement at a specified age, nor is it unlawful for a plan to require early retirement for reasons other than age.

The ADEA does not specifically prohibit asking an applicant's age or date of birth, but such requests are closely scrutinized to ensure they are for a lawful purpose and not for a purpose prohibited under the ADEA.

EEOC Facts about Age Discrimination

[1] The U. S. Supreme Court has held that the ADEA did not abrogate states' 11th Amendment immunity and therefore employees cannot bring suit against state employers under the ADEA unless the state has waived its sovereign immunity; the opinion also appears to include local governments within the protection of the 11th Amendment. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000). However, in a 2001 case concerning the Americans with Disabilities Act, the Supreme Court directly addressed whether 11th Amendment immunity extends to cities and counties and found that it does not. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Ernst v. Rising*, 427 F.3d 351 (6th Cir 2005); *Johnson v. Southwest Tennessee Community College*, 2010 WL 1417739 (W.D. Tenn. 2010). Further, Tennessee law states that the intent of Tennessee's Human Rights Act is to "provide for execution within Tennessee of the policies embodied in the federal Civil Rights Act of 1962, 1968, and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, as amended." T.C.A. § 4-21-101(a)(1).

[2] *Mount Lemmon Fire District v. Guido*, 139 S. Ct. 22 (2018).

National Origin Discrimination

Reference Number: CTAS-1053

Title VII prohibits employment discrimination on the basis of national origin (as well as race, color, religion and sex). It is unlawful to discriminate against any employee or applicant because of birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group.

"English Only" rules violate Title VII unless an employer can show that requiring employees to speak English on the job at all times is critical for conducting business, and the employees must be told when they must speak English and the consequences for violating the rule.

Requiring applicants to be fluent in English may violate Title VII if the rule is adopted to exclude individuals of a particular national origin and it is not related to job performance. An employer must show a legitimate non-discriminatory reason for the denial of employment opportunity because of an individual's accent or manner of speaking. Investigations focus on whether the accent or manner of speaking have a detrimental effect on job performance.

Harassment on the basis of national origin also is a violation of Title VII. Employers can be liable for harassment by agents and supervisors even if the acts were unauthorized or expressly forbidden; under certain circumstances, the employer may be liable for workplace harassment by non-employees.

Under federal law, employees must provide to their employers the information required on **I-9 forms**, and employers must verify the employee's eligibility to work in the United States. Employers cannot discriminate by having only certain groups provide this information – *all* employees are required to prove that they are legally authorized to work in the United States.

EEOC National Origin Discrimination

Sex Discrimination

Reference Number: CTAS-1054

Discrimination based on gender in any aspect of employment is prohibited. This includes sex discrimination, sexual harassment, gender-based wage discrimination, and discrimination based on pregnancy or related medical conditions.

Sexual Harassment

Reference Number: CTAS-1055

Sexual harassment is a form of sex discrimination prohibited under Title VII. According to the EEOC, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hos-

tile or offensive work environment. Sexual harassment can occur in a variety of circumstances. The victim does not have to be of the opposite sex. The victim does not have to be the person harassed but can be anyone who is affected by the offensive conduct. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee.

Pregnancy Discrimination

Reference Number: CTAS-1056

The Pregnancy Discrimination Act (PDA) is an amendment to Title VII that declares discrimination on the basis of pregnancy, childbirth or related medical conditions to be unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated the same as other applicants or employees with similar conditions, abilities or limitations. An employer cannot refuse to hire a pregnant applicant as long as she is able to perform the major functions of the job, and the employer cannot refuse to hire the person because of the prejudices of the employer or those of clients, customers or co-workers.

Pregnancy cannot be singled out for special procedures. The pregnant employee must be treated the same as any other employee in a similar situation. For example, if the employer requires a doctor's statement prior to granting sick leave, the employer may require a pregnant employee to provide a doctor's statement if the employee requests sick leave.

If a pregnant employee is temporarily unable to perform her job, the employer must treat her the same as any other temporarily disabled employee (e.g., modified tasks, alternative assignments, disability leave, or leave without pay, if the employer provides these benefits to other workers who are temporarily disabled).

Pregnant employees must be permitted to work as long as they are able to perform their jobs. Employers cannot make pre-determined rules requiring employees to remain off work a specified period of time either before or following childbirth. Employers must hold open a job for pregnancy-related absences for as long as the employer would for employees with other kinds of temporary disabilities.

Health insurance must cover pregnancy-related conditions on the same basis as other medical conditions. No increased or additional deductible can be imposed. Also, pregnancy-related benefits cannot be limited to married employees.

[EEOC Facts about Pregnancy Discrimination](#)

Gender-Based Wage Discrimination

Reference Number: CTAS-1057

The Equal Pay Act (29 U.S.C. § 206(d)) is an amendment to the federal Fair Labor Standards Act that prohibits discrimination on the basis of gender in the payment of wages or benefits, where men and women perform work of similar skill, effort and responsibility for the same employer under similar working conditions.

Note that a violation of the Equal Pay Act can be found where a different wage was paid to a person who worked in the same position before or after a person of the opposite sex.

Religious Discrimination

Reference Number: CTAS-1058

Title VII prohibits discrimination on the basis of religion, and it also requires employers to reasonably accommodate the religious practices of an employee or applicant, unless to do so would create an undue hardship on the employer. Flexible scheduling, voluntary swaps, job reassignments and lateral transfers are examples of accommodation.

Employers cannot schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can show that it would create an undue hardship.

An employer can claim undue hardship if allowing the accommodation would result in more than ordinary administrative costs. Like all other forms of discrimination, harassment based on religion also is prohibited.

[EEOC Facts About Religious Discrimination](#)

Genetic Discrimination

Reference Number: CTAS-2184

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) took effect on November 21, 2009. Under Title II of GINA it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

Genetic information for an individual or a family includes the following—

- Information about genetic tests and diseases or disorders
- Individual's request for, or receipt of, genetic services
- Participation in clinical research that includes genetic services
- Genetic information of a fetus or a legally held embryo

An employer may never use genetic information to make any employment decision including hiring, firing, pay, job assignments, promotions, layoffs, training and fringe benefits. Genetic information is not relevant to an individual's current ability to work. The [EEOC website](#) contains additional information on GINA.

Source URL: <http://eli.ctas.tennessee.edu/reference/employment-discrimination>

